NOMOS
LV

Federalism and Subsidiarity

Edited by
James E. Fleming and Jacob T. Levy

FEDERALISM AND SUBSIDIARITY

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CONTENTS

PREFACE

This volume of *NOMOS*—the fifty-fifth in the series—emerged from papers and commentaries given at the annual meeting of the American Society for Political and Legal Philosophy (ASPLP) in Seattle on September 3–4, 2011, held in conjunction with the annual meeting of the American Political Science Association. Our topic, "Federalism and Subsidiarity," was selected by the Society's membership.

The conference consisted of three panels, corresponding to the first three parts of this volume: (1) "Federalism, Positive Benefits, and Negative Liberties"; (2) "Constitutions, Federalism, and Subsidiarity"; and (3) "The Entrenchment of Local and Provincial Autonomy, Integrity, and Participation." The volume includes revised versions of the principal papers delivered at that conference by Sotirios A. Barber, Steven G. Calabresi and Lucy D. Bickford, and Daniel Weinstock. It also includes essays that developed out of the original commentaries on those papers by Michael Blake, Ernest A. Young, Andreas Føllesdal, Jenna Bednar, Loren King, and Judith Resnik. For the published volume, we invited an additional author for each of the three panels, Ilya Somin, Vicki Jackson, and Jacob Levy. We are grateful to all of these authors for their insightful and timely contributions.

Thanks are also due to the editors and production team at New York University Press, and particularly to Ilene Kalish, Alexia Traganas, and Caelyn Cobb. On our own behalf and on behalf of the Society, we wish to express deep gratitude for the Press's ongoing support for the series and the tradition of interdisciplinary scholarship that it represents.

Finally, thanks to Courtney Gesualdi, Robert Hillenbrand, and Christopher Mercurio, Fleming's excellent research assistants at Boston University; Jennifer Ekblaw and Stefanie Weigmann, his

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James E. Fleming
Boston, June 2013

Jacob T. Levy
Montreal, June 2013

CONTRIBUTORS

SOTIRIOS A. BARBER
Professor of Political Science, University of Notre Dame

JENNA BEDNAR
Associate Professor of Political Science, University of Michigan

LUCY D. BICKFORD
JD, Northwestern University; Attorney at Schiff Hardin LLP

MICHAEL BLAKE
Professor of Philosophy and Public Affairs, University of Washington

STEVEN G. CALABRESI
Clayton J. and Henry R. Barber Professor of Law, Northwestern University

ANDREAS FØLLESDAL
Professor of Political Philosophy at the Norwegian Centre for Human Rights, University of Oslo

VICKI C. JACKSON
Thurgood Marshall Professor of Constitutional Law, Harvard University

LOREN KING
Associate Professor of Political Science, Wilfrid Laurier University

JACOB T. LEVY
Tomlinson Professor of Political Theory, Department of Political Science, McGill University

JUDITH RESNIK
Arthur Liman Professor of Law, Yale University

ILYA SOMIN
Professor of Law, George Mason University

DANIEL WEINSTOCK
Canada Research Chair in Ethics and Political Philosophy, University of Montreal

ERNEST A. YOUNG
Alston & Bird Professor of Law, Duke University

PART I

FEDERALISM, POSITIVE BENEFITS, AND NEGATIVE LIBERTIES

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1

DEFENDING DUAL FEDERALISM: A SELF-DEFEATING ACT

SOTIRIOS A. BARBER

Dual federalism is a doctrine of American constitutional law. Defending dual federalism is a self-defeating act because of what dual federalism is and what it means to defend it. Dual federalism is states' rights federalism. It holds that when national authorities exercise their constitutional powers they must respect the reserved powers of the states. Dual federalism is to be distinguished from national federalism, which comes in two forms, Marshallian federalism and process federalism. I concentrate on Marshallian federalism here, though I will conclude with a comment on process federalism.

Marshallian federalism holds that when the nation's government is pursuing authorized constitutional ends it may freely disregard the reserved powers of the states. John Marshall defended this position in his best reasoned opinion, *McCulloch v. Maryland* (1819).[1] Marshall's federalism seems to be favored by the Supremacy Clause of Article VI, which provides that the Constitution and national laws in pursuance of the Constitution shall be the supreme law of the land, anything in the constitutions or laws of the states to the contrary notwithstanding. We may not have to give the Supremacy Clause a nationalist reading, however. The Supremacy Clause seems to presuppose that a national law can be constitutional even if it conflicts with a state law, but maybe it means

that a national law that conflicts with a state law is presumptively unconstitutional for just that reason. This reformulated Supremacy Clause would provide that national laws can trump state laws only when achieving national ends (narrowly conceived) would be unlikely otherwise.[2] Such a clause would border on the unworkable, of course, for any conflict between state policies and the narrowest conception of national power can provoke an arguable states' rights claim, at least in domestic policy. But I ignore this difficulty to clear the way for my principal contention: Should there be a dual federalist as well as a national reading of the Supremacy Clause—or the Tenth Amendment, or the enumeration of powers, or the breadth of national powers, or the Framers' intentions, or the formation of the Union, or the nature of liberty, or any other matter material to the federalism debate, including the nature of the Constitution as a whole—if there is an interpretive choice of any description, dual federalism will (or should) lose the debate.

Marshall saw the Constitution chiefly as establishing, structuring, and empowering an instrument for pursuing public goods like national security and prosperity.[3] The Constitution for Marshall was chiefly a charter of positive benefits, not a charter of negative liberties. Dual federalism takes a different view; it sees the Constitution as a collection of restraints on the national government, one kind of restraint being "states' rights." Marshall's was a positive constitutionalism; dual federalism belongs to a tradition of negative constitutionalism. Marshall's positive constitutionalism makes more sense than negative constitutionalism because establishing a government to pursue good things makes sense while establishing a government mainly to prevent government from doing bad things makes no sense.[4] So there's a case for Marshallian federalism because there's a case for the positive constitutionalism to which Marshallian federalism belongs. My question here is whether there's a case for dual federalism. I deny this possibility for a simple reason: an argument for dual federalism would have to occur in a national forum, and the expectations of that forum make it impossible to defend dual federalism. A defense of dual federalism would have to be submitted to a national judge of some sort, like Congress or the Supreme Court.[5] It would also have to appeal to a controlling national good, like national prosperity or

democracy or liberty. Yet in principle, dual federalism denies the existence of both a controlling national good and an authoritative national judge.[6] That's why dual federalism is indefensible in a national forum.

1. An Axiom

But must dual federalism appeal to a national good of some sort? Might it appeal instead to an axiom of constitutional thought, like "the powers of the [national] government are limited, and . . . its limits are not to be transcended"?[7] Appeal to this axiom will fail dual federalism once one realizes that (1) because the national government is limited by norms regarding its ends, structures, and available means, the national government would be "limited" in important ways even if there were no states, and (2) the dual federalist notion of limited government conflicts with other constitutional ideas. One such idea, from *The Federalist* No. 45, is that "the real welfare of the great body of the people is the supreme object to be pursued . . . and no form of Government whatever, has any other value, than as it may be fitted for the attainment of this object."[8] This is what James Madison saw as the principle of the American Revolution, and he applied it to the federalism debate when he said: "Were the plan of the Convention adverse to the public happiness, my advice would be, reject the plan. Were the Union itself inconsistent with the public happiness, it would be, abolish the Union. In like manner as far as the sovereignty of the states cannot be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter."[9] Thus, the dual federalist view of "limited government" is an option to be weighed against competing options; it's not a conclusion compelled by constitutional language, logic, or history. The question is whether dual federalists can give a reason for their interpretation of "limited government," and once one asks this question, the logic of the forum takes over, and dual federalism loses before its argument even begins.

Before I show how this "logic of the forum" affects traditional claims for dual federalism, let me anticipate an objection: that I'm setting up a straw man.

2. The Recrudescence of State Sovereignty

Is it true that, in principle, dual federalism denies that a national agency should have final say in state-federal conflicts? Before the Civil War dual federalists insisted that the Constitution was originally a contract between separate and independent sovereign states and that the individual states retained the ultimate right to decide whether the national government had exceeded its powers. Dual federalists realized that to submit state-federal conflicts solely to the nation's agents would be to abandon the theory that the Constitution was a contract between separate and independent sovereigns who could nullify unconstitutional national acts and even withdraw from the Union. One might have thought that the Civil War had silenced the contract theory. But this hasn't happened. The states' rights bloc on the Rehnquist Court affirmed the contract theory and voided numerous national acts in the name of "state sovereignty."[10] One defender of the Reagan Revolution has located its roots in the Anti-Federalist denial that the population of the United States constitutes one political community.[11] At this writing, proposals to nullify a variety of national acts are pending in state legislatures in several sections of the country. And the governor of the nation's second-largest state has claimed its right to secede from the Union in protest of national policies, especially the Patient Protection and Affordable Care Act of 2010, "Obamacare" to its critics.

Maybe we shouldn't take this talk of nullification and secession seriously. After all, Reaganism and the Tea Party are national movements, not separatist movements. They confirm what Walter Berns said long ago about the states' rights debate: at bottom it's a debate about what the nation ought to be.[12] Some conservatives have acknowledged that they will need the power of the national government to achieve their own ends nationwide.[13] When it serves their purposes, conservatives can be expected to deny their opponent's rights to nullify and secede, just as their predecessors did. John C. Calhoun proved to be more of a pro-slavery nationalist than a states' righter when he all but denied abolitionist states a right to petition Congress to ban slavery in the territories and the nation's capital.[14] And South Carolina disregarded its own past when it blamed its secession partly on free states that had

effectively nullified the Fugitive Slave Act of 1850. So talk of states' rights fluctuates with prudential considerations, and for this reason few observers expect to see states acting on doctrines of nullification and secession anytime soon.

On the other hand, one can wonder about the difference between the states' nullifying congressional acts on their own and the Supreme Court doing it for them. If the federal courts can act on a premise of "states' sovereignty," why can't the alleged sovereigns do the same? Current talk of nullification and secession may thus be a case of principle asserting itself against power—the raw power that prevailed at Appomattox and installed a regime of national supremacy, including national judicial supremacy. Madison, Jefferson, and Calhoun all denied that federal judicial supremacy was consistent with the contract theory, and today's federal judiciary has embraced the contract theory. So maybe would-be nullifiers and secessionists have political morality on their side. This prospect should unsettle a people whose constitutional thought expresses its political morality. Maybe we should take the return to states' rights seriously after all.

The least we can say is that if Berns was right about the states' rights debate, dual federalism masks a substantive position. Calhoun didn't have to come out of a closet; he was clear about what he wanted the nation to be. Should we ask for candor on the part of today's states' righters? I raise this as an honest question. Maybe the states' rights debate masks issues the country can't handle in a direct and forthright way. An obvious example from the last century and a half of American history is the wisdom of the Civil War Amendments. Did the nation know what it was doing when it embraced all of its native born as its people and promised them a government that would "lift artificial weights from all shoulders; . . . clear the paths of laudable pursuit for all; [and] afford all an unfettered start and a fair chance in the race of life"?[15]

3. Liberty

The basic dual federalist claim is that states' rights exemptions from national power enhance liberty.[16] This claim can serve as a paradigm for states' rights arguments that flow from other goods, like democracy and experimentation with different means to the

general welfare. These claims occur in a context in which dual federalists respond to requests from others for reasons that justify dual federalism. These responses must appeal to general and impersonal goods, as distinguished from particular conceptions of those goods. The dual federalist can say "dual federalism enhances liberty." She can't say "dual federalism enhances Calhoun's conception of liberty," for Calhoun's view of liberty counts as a reason only among persons who believe him infallible. The same holds for any other conception of liberty, including conceptions of liberty that interlocutors recognize as local. "Dual federalism enhances South Carolina's view or the South's view or America's view of liberty"—none of these claims can count as a reason, for all these authorities could be wrong. (We can imagine the nation accepting Calhoun's view of liberty; we can't imagine an infallible constitution maker providing for constitutional amendments.) As it turns out, the forum demands an appeal not to any conception of liberty but to liberty itself—the real thing, or what available evidence indicates is the closest feasible approximation to the real thing.[17]

If the dual federalist submits reasons in good faith, therefore, she submits her conception of liberty to what she regards as a process (in court, the assembly, the journals, etc.) for discovering the truth about liberty. Because an honest submission to this process is a submission to its outcome, submitting parties indicate that the truth about liberty is more important to them than their initial conceptions of that good. The dual federalist who honestly submits her conception to a truth-seeking process does so because she is not altogether certain about her conception. If she felt her initial view to be true beyond question, she couldn't recognize a need to defend it, and she would attribute persistent disagreement either to hopeless ignorance or to bad faith. Defending her view of liberty in either case would make no sense. Of course, she might also want to stand by her initial position regardless of its truth because she valued a competing good, like her reputation for wisdom. In this case, however, she would value her undeserved reputation (an apparent good) only as a means to the presumably real goods that flowed to her because of her reputation, and by defending what she knew to be a false view of liberty she would act in bad faith. If she were submitting reasons in good faith, she would presuppose more than a local or partial conception of liberty, the good

in question, and she would assume that both she and her interlocutor valued membership in a community defined by the love of liberty itself.

Now suppose that the best conception of liberty justified dual federalism. This conception would have to be seen by both sides as more than local or regional or even national. The American view of liberty is no different from any other. It is valued only on the assumption that it is true or closer to the truth than its competitors. Since the value that justifies an institution also limits its conduct, dual federalists who justify their position in liberty's name would have to believe the states themselves restrained by the demands of liberty—liberty itself, liberty correctly understood, not liberty as the states might conceive it. Should she give this conclusion institutional form, our dual federalist would become a nationalist. Should she deny this conclusion institutional form, she would expose her insincerity. "Liberty" would be a pretext for her; she would value dual federalism for some other reason. Assume her sincerity, and our dual federalist could remain a dual federalist only if she believed that each of many states acting independently is more likely than one government representing all the states to approximate the one true or best understanding of liberty.

A more likely claim is that there is no such thing as liberty itself, only different conceptions of liberty. But this can't be a position within a debate about liberty, which assumes, perforce, that the interlocutors are talking about something, that they are testing different conceptions of the same thing. Were there no such thing as liberty itself, a defense of dual federalism in liberty's name would be nothing more than an assertion of dual federalism. It would not give a reason why anyone should agree. The only safe conclusion within assumptions that enable ordinary constitutional discourse is that in some seasons and respecting some matters some states display a genuine concern with liberty and others don't. Moreover, sometimes and in some respects some states may do a better job than even the national government. So a concern for enhancing liberty or promoting any other substantive good requires an authority to delegate or recall power as circumstances indicate. Authority to delegate and recall responsibility is constitutional authority, and how to exercise that authority is a question of policy. Malcolm Feeley and Edward Rubin have pointed out that

a concern for substantive results, like enhancing liberty, is best served by centralizing constitutional authority and decentralizing policy responsibility where and as circumstances indicate.[18]

Locating constitutional authority in one place, instead of thirteen or fifty, is necessary because the decision to delegate discretion or recall it must flow from one judgment regarding ends and means. Liberty is best served if the best feasible conception of liberty is served. Some authority has to judge among competing conceptions in particular situations. Liberty is best served also by the agent with the best plan and the best resources, and one authority must decide these questions too. Our question is whether this authority should be one institution or many. One institution is obviously superior to many because to be effective many institutions would have to concur in one conclusion or one consistent set of conclusions regarding means and ends. So if many, they must be unified and therefore one. Many-as-one in the American context signifies the United States in Congress assembled. If liberty is the end to be served, states' rights federalism is not the way to serve it. Constitutional authority should belong to Congress as a practical imperative, and we are left to hope that Congress is wise enough to centralize or decentralize responses to the nation's problems as contingencies demand.

4. Democracy

What's true for liberty as a basis for dual federalism is true of other goods. Consider democracy and assume arguendo that widespread participation in politics and government is a good thing. Also, suppose that people participate more in state and local politics than in national politics or that they would do so if state and local governments assumed some of the responsibilities now exercised by the national government. In this case, the argument would be that dual federalism enhances democracy. This argument presupposes one true or best understanding of democracy, namely, some form of participatory democracy; and since this conception justifies state power, it limits what the states can do in its name. Because no such limit would be effective without a national agency to enforce it, people serious about democracy would allow the national government to remedy state violations of democratic principles. Thus,

an appeal to democracy could not have justified letting Texas and other southern states define political parties as private associations so that they could exclude black voters from the Democratic primaries.[19] And a history that includes white primaries proves that the states can institute undemocratic practices. So a true love of democracy would move people to construe the Fourteenth and Fifteenth Amendments in a manner that permitted Congress and the Supreme Court to police the states' performance and devolve or resume responsibility as circumstances required.

Related to the argument from democracy is an argument that derives from a neo-Tocquevillian worry that tutelary government (the "welfare state") coupled with a global market and a deepening ethnic fragmentation may swamp individuals and communities with a sense of dependency and impotence. The present-day Tocquevillian prescription for recapturing respect for ourselves as "beings equally capable of exercising will and reason" involves relying less on coercive state power for public purposes and more on voluntary private contracts, privatized governmental services, self-governing industry and professional associations in lieu of regulatory bureaucracies, "the exercise of political rights as distinguished from the enjoyment of . . . entitlements," entrepreneurship as an antidote to monopoly, and, of course, restrained national power in favor of state and local power. Somehow this last policy is supposed to enhance citizen participation in local government, school citizens in the "habits of freedom," arouse personal ambition, and temper it "by affection for [one's] neighbors," as all of us allegedly see "when citizens vote to tax themselves to pay for a school that benefits the children of all, or most."[20]

This general position raises a numbing array of factual questions, like how a culture of equal rights could have emerged in the United States and whether it can survive without intrusive central power; how tax-supported public schools differ from other sorts of "entitlements"; how a regime can be committed to privatizing public services at the same time that it would temper personal ambition and school citizens in freedom through participation in local government; how a sense of oneself as a self-directed and reasoning being correlates with localist versus cosmopolitan senses of self; and how deregulation of business will promote "private associations" of workers, say, or deliberation among local citizens

faced with corporations that flee if they don't succeed in extorting tax subsidies and regulatory relief, or deliberation among politicians who owe their offices to legalized bribery, or citizenship in a consumer culture for which business is at least as responsible as government.

I am not concerned with these questions here, however. My point is that a Tocquevillian case for dual federalism is anything but a case for dual federalism. It is a case for transforming the states into instruments of Tocquevillian ends, most notably: active citizens with a sense of personal responsibility and freedom from a slavish materialism and the unintelligible forces "in whose existence men come to believe."[21] Tocquevillian ends are attitudinal ends, and attitudinal ends imply a government with power to shape the attitudes of its people, including power to influence their education and even their religion.[22] And since some states won't pursue Tocquevillian ends on their own (remember the white primaries), the case for Tocquevillian ends is a case for Tocqueville's centralized government and decentralized administration—discretion at the local level within a framework of national policy.[23] One such program was the Community Action Program of Lyndon Johnson's War on Poverty (the Economic Opportunity Act of 1964), which tried to bypass established local agencies and promote a sense of empowerment among the poor by involving them in neighborhood planning for job retraining, affordable housing, and preschool education (Head Start).[24] Beyond the Great Society, other Tocquevillian programs include the No Child Left Behind Act of 2001 and the charitable choice provisions of the Welfare Reform Act of 1996, which require state agencies that receive federal funds to open contract bidding to religious institutions that provide social services. Programs with these ambitions have little to do with leaving each state to its separate thing.

5. Subsidiarity

The principle of subsidiarity is a maxim of common sense that was formally announced as a principle of Catholic thought by Pius XI in 1931.[25] The principle holds that superior authority does injustice when it deprives lower authority of discretion that lower authority is competent to exercise. John Finnis explains that competence to

make a decision is a virtue, exercising that virtue is a good for the actor, and depriving a competent member of that good is wrong. Finnis adds that "subsidiarity" signifies assistance (as in "subsidy"), not subordination, and that "the principle is one of justice." This is a positive sense of justice that obligates governments and other "associations" to cultivate the ability of their members to choose and realize their commitments.[26]

Dual federalists who would enlist the principle of subsidiarity will face three obvious and connected problems. First, the principle presupposes a hierarchical order, not the dual sovereignty that dual federalism claims. If the principle applied in the federalism debate, therefore, it would apply in those policy areas that all sides acknowledged as areas of national supremacy. Our question would then be whether the principle could supply a reason for restraining Congress's pursuit of its ends in behalf of states' rights. An affirmative answer would yield the following rule: "Justice demands that when Congress acts within its competence, it should do all that it can to avoid interfering with the opportunities of the states to act within their competence or even potential competence."[27] To see what this might mean in practice, suppose Congress decided to establish a military academy pursuant to its power "to raise and support Armies." A state could claim that this decision exceeded Congress's power. The state could argue that even though a military academy falls comfortably within a reasonable interpretation of Congress's Article I responsibilities regarding the armed forces, the states have reserved the power to educate the nation's youth, and the Constitution requires that they should be presumed competent to educate the nation's officer corps. The states could concede that this would be an awkward and inefficient course, but they could also insist that it is morally the right course, the only way to avoid doing "an injustice and . . . a grave evil and disturbance of right order."[28]

Dual federalism's second problem would involve the Supremacy Clause. Should subsidiarity be a constitutional principle, national supremacy over the states would be freighted with contingency. A congressional enactment wouldn't displace a state action merely by virtue of a conflict between the two. Congress could displace a state's policy only after Congress had tried "to furnish help" to the states (like federal subsidies for state-operated military academies)

and the states had proved themselves unable to produce the results that Congress wanted. Such a rule would not be a logical absurdity, but it would unsettle the dual federalist's understanding of constitutional ends and national power. Should we accept subsidiarity as a constitutional principle, and should we keep in mind what counts as a reason in a national forum, we would have to agree that it is good for all Americans to take risks with national security and prosperity for the sake of giving some Americans the opportunity to succeed in helping all Americans. We would have to agree, in other words, that cultivating the intellectual, moral, and practical virtues of its people is government's most important duty, if not always its most urgent duty. Because this obligation would justify national deference to the states, it would constitute a duty that applied to the states as well. As the nation would be obligated to risk its security and plenty to cultivate the virtues of its member states, the member states themselves would have similar obligations toward their members—which, collectively, would be the people of the United States. This would hardly be grandfather's dual federalism.

Finally, the principle that Pius elaborated served a public purpose consistent with its concern for cultivating the people's virtues. Pius referred to a "principle of 'subsidiarity function,'" and the function was governmental in nature. By "let[ting] subordinate groups handle matters and concerns of lesser importance," Pius said, a state's "supreme authority" avoids "dissipat[ing] its efforts" to do "what it alone can do." The principle ensures a more "perfectly graduated . . . order . . . among the various associations" for the sake of "stronger social authority and effectiveness" and a "happier and more prosperous condition of the State."[29] Can we agree that this is far from dual federalism's emphasis on the rights of contracting parties? Of all the arguments for dual federalism, the argument from subsidiarity is the most clearly self-defeating.

6. After Dual Federalism

In sum: The states' rights debate is a national debate, conducted in a national forum. An admittedly local good can't count as a reason in that forum. The dual federalist who submits to the forum loses the debate before it begins because the good that would justify

dual federalism would be a nationally recognized good applied by a national agency as a restraint on the states.

This argument can't end the federalism debate, however, for it is a three-way debate, and it's not really about states' rights. The real issue in the federalism debate has a practical dimension and a theoretical dimension. The latter may have a solution; the former seems insoluble. The latter turns on whether there is some good that no one, in reason, can reject. The former is how an actual government can embody that good. I'll sketch an understanding of these issues in this conclusion. I'll do so more by way of assertion than argument, however, for my thesis here is the indefensibility of dual federalism, and having defended that thesis, the question is what's next: What should the federalism debate be about?

If Marshallian federalism ever does dispatch dual federalism, its rival will be process federalism, the second kind of national federalism. Marshallian federalism construes the powers of government as means to ends and grants supremacy to the nation when its powers conflict with those of the states. If powers are ends-oriented, superior powers imply superior ends, and Marshall's constitutionalism would commit the nation to a more or less specific way of life. The content of that commitment is the essential problem of American life, but we know that is a substantive commitment—an overarching and controlling view of the good life within which subordinate views must find a place as contributing views. Ends-oriented constitutionalists therefore face the burden of formulating a substantive theory of constitutional ends. One such theory is that of "the large commercial republic," which Martin Diamond derived from his reflections on *The Federalist* and which one can fairly attribute to Marshall himself.[30] Thinking about constitutional powers in Marshallian fashion and factoring in the Constitution's amendability, James Fleming and I have argued that the Constitution's fundamental commitment is not the large commercial republic but a specific human quality—a virtue, if you prefer—namely, a capacity for constructive constitutional change.[31]

If they could, process federalists would avoid these contentious matters. They hold that as long as the states are represented in the processes of national decision, the national government can do whatever it wants to do short of violating protected individual rights and structural principles associated with electoral

democracy and the separation of powers. To see the difference between Marshallian federalism and process federalism, consider the Partial Birth Abortion Act of 2003, which Congress enacted under the Commerce Clause. A (genuine) dual federalist would call the act an unconstitutional encroachment on the states' power over public morality. A Marshallian would call the act unconstitutional as a pretextual use of the commerce power. Seeing no federalism question at all, a process federalist would assess the act solely on its consistency with a right to abortion.[32] The Supreme Court officially adopted process federalism in 1985 over the strenuous protest of Justice Rehnquist and his allies.[33] But within a decade the Court abandoned process federalism and returned to dual federalism, which it was to extend beyond the Commerce Clause to other areas of constitutional law. The sad part of the current situation is that the weakest position intellectually (i.e., dual federalism) is the strongest position politically, and the nation is not debating what it should debate: the relative merits of Marshallian federalism and process federalism. In any event, if dual federalism has no argument whatever against Marshallian federalism, the contest between the two forms of national federalism will be too close to call.

This contest has several aspects that I can't go into here, most notably the claim that process federalism is the perfected form of Marshallian federalism. What I can do here is indicate where I think the debate will be at the end of a long day.[34] Process federalists and Marshallian federalists can be persuaded that the one undeniable good has something to do with practical reason.[35] But process constitutionalists and Marshallian constitutionalists will have different understandings of practical reason. Stephen Macedo sees constitutionalists committed to a culture of "public reasonableness," which he defines as a state of affairs where people value "a self-critical process of giving and demanding reasons, a process in which all substantive commitments are provisional and none beyond political challenge."[36] The Constitution favors a conception like Macedo's because the Preamble's ends must be understood as real goods about whose meaning and means the constituent authority can be wrong. (Article V implies the sovereign's fallibility.) The Marshallian orientation to real public goods will cause it to value the regime of public reasonableness because

a commitment to real goods by fallible actors implies commitment to a truth-seeking process.

If the process constitutionalist is to distinguish himself from the Marshallian, he will eventually substitute private goods for public goods. He will eventually claim that the only good anyone can really know is pleasure centered on the individual human body, this pleasure being an incommunicable and time-limited feeling which one either has or doesn't have and to which the distinction between real and apparent doesn't apply. (What appears pleasurable is pleasurable, and there's no debating "it feels good.") To one who holds this view, practical reason is a matter of self-serving and therefore essentially private calculation; a regime of public reasonableness seems good only to the extent that it contributes to his private pleasure. This person could not value public reasonableness as a political regime, for as a regime it would serve the good of many, and our self-serving individual places no lasting value on what serves the good of many. His limited power and dependence on others might give him a contingent reason for valuing a regime of public reasonableness, but unless he happened to take pleasure in deceiving others, he would abandon the pretense if he could and if he derived no pleasure from the goodwill of others. Dialogue with a Marshallian would expose all this and reduce the argument of our self-serving individual to a reason that the logic of the forum precludes, that reason being his private pleasure.

The Marshallian can win the debate not just because the forum prejudices the positions of her rivals. She can win by reflecting on her fallibility and looking beyond material goods (or the large commercial republic) to a good that she cannot in reason deny: knowledge of what to believe about the world and how to live in it. All the Marshallian has to do is prove to those who will listen that they can't help presupposing the existence of real and knowable goods, that their conceptions of these goods can be wrong, that no one wants merely apparent goods, and that therefore everyone who thinks about it will value the process through which knowledge of real goods is pursued. This process is science, in a broad sense that includes theology, ethics, and other branches of philosophy.[37]

I think I've reached this suggestion by following the Constitution, which, by its own terms, tells how fallible actors might pursue

real goods. So I'm not happy to end with a Socratic proposal that government that makes sense is government by the fully competent. I'm not upset because historicists will say that no one can start with a liberal constitution and end in a Socratic place. I'm upset because a Socratic ending is not a happy one. If I've reasoned correctly, the survival of liberal institutions depends on a relationship of mutual trust and support between a public-spirited and self-critical scientific elite and a popular mass immersed in private pursuits. This would be bad news because it's hard to imagine a stable and fully competent leadership community, and it's all but impossible to imagine a stable union of competent leaders and a mass of the self-serving. As a theoretical matter, Marshallian constitutionalism beats process constitutionalism; a constitutionalism of public purposes beats a constitutionalism of self-serving rights. As a practical matter, a process constitutionalism of rights beats Marshall's constitutionalism of ends. But by practical matter here I mean a matter of short-term political feasibility. Unable to defend itself, process constitutionalism will eventually fall, as it has fallen in our time, to dual federalism and the constitutionalism of apparent goods and indefensible rights.

NOTES

1. *McCulloch v. Maryland*, 17 U.S. 317 (1819).

2. The attitude that would put the burden on national laws in federalism cases would also insist on narrow readings of national powers.

3. Like other constitutional theorists of his era, and indeed the American Founding as a whole, Marshall fell short of an internally consistent view of the Constitution. The position I attribute to him here is that of his principal thrust, which was clearly nationalist and ends-oriented.

4. Sotirios A. Barber, *Welfare and the Constitution* (Princeton, NJ: Princeton University Press, 2003), 8–12, 22–29, 36–41.

5. See Walter Berns, "The Meaning of the Tenth Amendment," in *A Nation of States: Essays on the American Federal System*, ed. Robert Goldwin (Chicago: Rand McNally, 1963), 130–31.

6. Compare Malcolm Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: University of Michigan Press, 2008), 25–26.

7. The words are Marshall's. *McCulloch*, 17 U.S. at 421.

8. *The Federalist* No. 45, at 309 (James Madison), ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961).

9. Ibid.

10. For an endorsement of the contract theory by four members of the Rehnquist Court, see *U.S. Term Limits v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

11. William Schambra, "Progressive Liberalism and American 'Community,'" *Public Interest* 30 (Summer 1985): 31.

12. Berns, "The Meaning of the Tenth Amendment," 141–42.

13. See James Ceaser, "What Kind of Government Do We Have to Fear?," in *Politics at the Turn of the Century*, ed. Arthur M. Melzer, Jerry Weinberger, and M. Richard Zinman (Lanham, MD: Rowman and Littlefield, 2001), 76–83.

14. See James Read, *Majority Rule versus Consensus: The Political Thought of John C. Calhoun* (Lawrence: University Press of Kansas, 2009), 6, 8, 17–18, 83, 87–89, 97–106.

15. Abraham Lincoln, "Message to Congress in Special Session," July 4, 1861, in *Abraham Lincoln: His Speeches and Writings*, ed. Roy P. Basler (New York: Grosset and Dunlap, 1946), 604.

16. For this and other arguments for dual federalism, see Justice O'Connor's opinion for the Court in *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991). Feeley and Rubin call this "an extensive catalog of pseudofederalism arguments." *Federalism*, 22.

17. For the moral realist assumptions of everyday political discourse, see David Brink, *Moral Realism and the Foundation of Ethics* (Cambridge: Cambridge University Press, 1989), 23–24.

18. Feeley and Rubin, *Federalism*, 20–21.

19. *Smith v. Allright*, 321 U.S. 649 (1944).

20. Harvey C. Mansfield and Delba Winthrop, "Liberalism and Big Government: Tocqueville's Analysis," in *Politics at the Turn of the Century*, ed. Melzer, Weinberger, and Zinman, 110–14.

21. Ibid., 114.

22. See Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 278–82.

23. Ibid., 83–86.

24. David Stoloff, "The Short Unhappy History of Community Action Programs," in *The Great Society Reader: The Failure of American Liberalism*, ed. Marvin E. Gettleman and David Mermelstein (New York: Vintage Books, 1967), 231.

25. Pius XI, *Quadragesimo Anno* (1931), available in English at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

> As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

Ibid., No. 79.

26. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 146–47, 159.

27. Maryland proposed a version of this in *McCulloch*. She claimed that even when Congress is pursuing an authorized end, it can encroach on a state's prerogative only when failing to do so would nullify national power. Madison himself had argued for such a rule in his famous Report of 1800 on the Virginia Resolutions of 1799. Marshall rejected this rule in *McCulloch* because he held the pursuit of national ends too important to be burdened by a concern for avoiding conflicts with state policies, and he charged that Madison's rule would cripple Congress's ability to pursue its ends. Marshall's response to Maryland was in the spirit of what Madison said not in 1800 but in 1788, the year he authored *The Federalist* No. 45. Madison's position on both sides of the federalism debate is characteristic of the Founding generally.

28. Pius XI, *Quadragesimo Anno*, No. 79.

29. Ibid., No. 80.

30. See Martin Diamond, *The Founding of the Democratic Republic* (Belmont, CA: Wadsworth, 1981), 70–78; Robert Faulkner, *The Jurisprudence of John Marshall* (Princeton, NJ: Princeton University Press, 1968), 5–6, 20–33, 79–96.

31. Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007), 41–45.

32. Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University

of Chicago Press, 1980), 171–79; Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54 (1954): 553, 559.

33. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–51, 554 (1985).

34. For an analysis of the issues, see Sotirios A. Barber, *The Fallacies of States' Rights* (Cambridge, MA: Harvard University Press, 2013), ch. 7.

35. See Barber, *Welfare and the Constitution*, 61, 144–45. Because "choice" conventionally involves "reason," neither an individual nor a community can be said to choose to live without reason, though they can lose their capacity for reflection and choice in other ways, including their past mistakes.

36. Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2000), 11–12, 169–74, 177–87. For why the goodness of public reasonableness cannot be denied, see Barber, *Welfare and the Constitution*, 61–62.

37. Compare Thomas Pangle, *The Spirit of Modern Republicanism* (Chicago: University of Chicago Press, 1988), 4, 25–26, 55–57, 74–78, 124–27, 262–72. The process federalist could enter at this point and claim that in spite of herself the Marshallian ends by vindicating a process. But the Marshallian's process would be a process of discovery that makes sense only if one presupposes both the existence and the attractiveness of an end that is no one's exclusive property, namely, the truth about the world. This process might start as a process of self-serving calculation, but it would end either as a different process or with a different understanding of the self.

2

DEFENDING DUAL FEDERALISM: A BAD IDEA, BUT NOT SELF-DEFEATING

MICHAEL BLAKE

There are many ways to call a position mistaken. The most common is to say that the position shouldn't be held: the reasons given for that position are inadequate, perhaps, or the consequences of that position are bad. It's more powerful to say that a position *can't* be held: those who defend it are engaging in a performative contradiction, perhaps, or must assert contradictory propositions simultaneously. Sotirios Barber thinks dual federalism can't be held.[1] I think, in contrast, it shouldn't be held. On my view, dual federalism is unattractive, but its defects are at the level of substantive morality; those who defend it do not contradict themselves—they simply offer a less than attractive vision of the national community.[2] Barber's argument rests upon a particular view of what the function of a national forum must be—and what it means to engage with that forum. If we alter that a bit, and describe the national forum in a manner more harmonious with the views of (inter alia) the Tea Party, we arrive at a view that is merely wrong.

Why think that dual federalism is self-defeating? To use it in a national forum—in a federal court, say—is to make a statement about what is best for the nation. What we have done, then, is asserted that there is a national good, and that the forum is the best place for debates about the national good. Once this is done, though, the "logic of the forum" means that we have endorsed

some form of national federalism—and "dual federalism loses before its argument even begins."[3] To cite these values in this place is to put forward propositions about the nature of the national good, and to accept that the national context is the place for determinations of this good to be undertaken. The act of asserting dual federalism thus contradicts the content of the assertion; the act is a performative contradiction, as self-defeating as the act of saying "I am not speaking."[4] Barber also thinks, of course, that the federal forum in question is the *morally* right place for this discussion; we should have one forum, with one unified context for discussions of the national agenda. I agree with him on this substantive point. He wants in the present context, however, to emphasize a conceptual point: that those who disagree with national federalism are engaging in the task of giving reasons at the national level, and thereby committing themselves to thinking that the process of giving reasons at the national level is what ought to be done—which is to say, they have endorsed national federalism.

This is a powerful argument. If it works, it attributes contradictory positions to the dual federalist: he makes a statement against the national forum within the national forum, thereby simultaneously rejecting and relying upon a single thing. I do not, however, think that this apparent contradiction in action really traps the dual federalist in performative self-contradiction. To see this, distinguish between making a statement *about* a conversation, and making a statement as *part* of a conversation. The line between them is not always easy to draw; even the one who says that he doesn't want to speak is, in asserting this, engaging in speech. But we can readily distinguish between someone who speaks so as to end a conversation and one who speaks within the conversation taken as an ongoing project. I recall, in this context, walking down a street in Toronto and being confronted by a cult member eager to speak to me about his religion. I demurred, saying I was happy enough with my current plans for the day. The cult member seized on this and said—with perfect logic—that if happiness was my goal, why wouldn't I be willing to discuss with him the circumstances under which true happiness was attained? Perhaps I was deluded in my own ideas and could benefit from the chance to subject them to the fires of interpersonal justification and argument. My response, of course, was to keep walking; I had said my

piece at the start and intended my words to end the conversation, not begin it.

I don't want to make too much out of this brief interaction. In particular, I don't think we should make too much out of the fact that I walked away; I might, if I had felt charitable or bored, have continued to talk with the cultist and specified that only certain topics were appropriate for our continuing conversation. (I might, for example, have asked what he thought about the Leafs; I might have thought that our little two-person forum was a good one in which to discuss hockey, if not happiness.) I want only to assert that the following is true: I did not engage in any self-defeating action by citing my own happiness in refusing the cult member's invitation. The citation of happiness was not intended to start a discussion about happiness, but as a justification for my practice of *not having these discussions*; if I had been feeling more verbose, I might have said that my own history provides ample evidence that my life goes better without these discussions. I was not committed to the intersubjective set of me-plus-cult-member as a valuable discursive forum; I was, instead, fairly certain that I had the right ideas, or—at the very least—that my ideas would not be improved by confrontation with the cult member. I was, indeed, speaking *in* the forum of me-plus-cult-member only as a way of speaking *about* that forum, by noting that I wasn't interested in creating or sustaining that particular forum for those particular purposes. I was saying, instead: not this discussion; not with you; not today. I had reasons for this refusal, but I did not feel—then or now—that in making my refusal I was committing myself to continuing the conversation about these reasons. Nothing in my act of speech committed me to being deferential to that forum, or regarding it as the appropriate context for discussions of happiness. While there might well have been contexts in which the set of me-plus-cult-member would have had value, it did not have any value to me that afternoon; I was quite happy to reserve my rights to myself and walk on down the street.

I suspect, of course, that something like this pattern of ideas animates those people who hold dual federalism as a value in constitutional interpretation. These people do, as Barber has noted elsewhere, tend to cleave to negative constitutionalism and use the Tenth Amendment as a tool with which to reject much that Barber

(and I) regard as progressive and valuable in American life.[5] They treat the national political system of the federal congressional system with something like the jaundiced eye I cast upon the cult member. They are willing to speak *in* the federal court system, but only with a view toward saying to the institutions of national politics: not with you, not on this topic, not today. Barber thinks that these people are morally wrong to do this, and I agree; the purposes that are defended by dual federalists are generally purposes that have tended to work against the rights and interests of the most powerless and vulnerable members of society. This, however, is an argument about what sort of federalism we should have, where the *should* is a moral term denoting a substantive argument about what best serves the moral interests of persons. It does not pretend that the assertion of dual federalism is self-defeating; it merely says that it is morally pernicious.

An agent who insists upon dual federalism in a federal court, then, is not engaging in anything like a performative contradiction. He is simply saying, in the context of a particular national conversation, that he has no interest in having *that* conversation occur at *this* jurisdictional level. That he says so in a federal court system—a system dual federalists have traditionally used with great enthusiasm, as a means to curtail congressional power—does not change the character of his act. He is speaking, in the federal legal system, with a view toward stopping a particular sort of conversation within a particular sort of national institutional context.[6] He is, in other words, saying: not at the national level, not this topic, not now. He can offer a moral reason for this statement—perhaps, on his view, liberty is best defended if the sorts of topics considered by the federal political system are seriously limited. Citing this moral reason does not, however, commit him to the view that the federal judiciary—and, hence, the federal jurisdictional level—is the appropriate forum within which to discuss the concept of liberty. He is, instead, simply citing this moral view as a reason to *stop* the discussion. On Barber's view, the invocation of a moral concept like liberty is possible only if one accepts the need for this concept to be vetted and analyzed by the discursive community within which the concept is invoked—here, at the national level. But why should we accept this need? I did not feel the need to open my view of happiness to intersubjective review on the streets

of Toronto, and nothing in the logic of that forum would seem to require me to do so. Similarly, one who thinks of the federal government as—at best—a necessary evil might think that there are many occasions on which we should simply refuse to have certain discussions within that context, and rely on dual federalism as a means by which those discussions are prevented.[7] Barber would be, I think, quite right to think that this view of the federal judiciary is jaundiced, ahistorical, and frequently a cover for injustice. But none of that entails that it is self-defeating. Nothing in the "logic of the forum" prevents this view from being advanced; it is precisely what purposes that forum ought to have that is in dispute, and we cannot insist that the dual federalist must accept our view of the forum's purposes without begging the question. Giving a reason within a particular forum does not commit us to the view that I must regard that forum is the appropriate place within which reasons shall be evaluated. If I give you a reason to explain why I'm leaving, I have not thereby committed myself to staying, and having that reason vetted by our combined powers of reasoning. I've only given you a reason to explain why I won't be reasoning with you any more. You can accept or deny that reason, but I'm under no obligation to join with you in the deliberation.

The coherence of the dual federalist vision might be given more weight by moving from American federalism to the realm of international legal institutions. The United Nations, most prominently, has *some* aspects of a federal institution: it presumes the right to take certain decisions (notably over the declaration of war) out of the hands of member states, its pronouncements have some (disputed) legal force, it includes provisions for a deliberative body, and so on. It is not, of course, a "federalism" that exactly parallels that of the United States: the United Nations is not a state, it has no executive power except that granted by its member states, and its charter does not have anything akin to the Supremacy Clause of the American Constitution. Nevertheless, we might think that the relationship between the United Nations and the United States has some parallels to the relationship between the United States and, say, the State of Washington. In the international context, we sometimes face conflicts over whether a given issue might be dealt with at the international or domestic level; human rights, which represent substantive constraints on the ability of domestic states

to engage in some particular policies, are a frequent site for such conflicts. Member states frequently want to declare a given action to be a matter for domestic state sovereignty, while global activists (and some other member states) frequently want to employ international legal institutions to curtail this domestic sovereignty, through the creation of legal instruments restricting the domestic rights of states. In both the domestic and international cases, we therefore have occasion to question whether a given issue of political importance is best dealt with at a higher or lower jurisdictional level. Barber's view is, I think, that it must be at least open to the higher jurisdiction to deal with any particular issue; we cannot say that the cause of liberty requires us to exclude a particular issue from being dealt with by the federal government, because citing a moral value like liberty requires our being open to the examination of that value in the context in which it is cited. In the international context, though, this seems simply wrong, even for people like me who have no particular Tea Party affiliation; we can be dual international "federalists," without engaging in any self-defeating actions.

To see this, imagine that some states wish to propose that the defamation of religion should count as a violation of human rights. (This is not a fanciful example: the Organization of the Islamic Council has frequently proposed similar ideas, with mixed degrees of success.)[8] Imagine further that, if the proposal were successful, states like the United States would be legally bound to alter their domestic legal systems to institute punishment for speech defaming religions or religious believers.[9] My suspicion is that the United States would not take this well. It would, I think, insist within the global context—in speeches at the General Assembly, perhaps—that the United States must continue to regard its *own* traditions of free speech as a central part of its own self-understanding as a liberal democracy. As such, the United States would do something Barber suggests is self-defeating: it would cite a moral value as a reason to avoid deferring to the deliberative politics of a higher "federal" level. The United Nations might cite Barber in its response to the United States and say that the United States has—by citing the moral value of freedom of speech—committed itself to subjecting its views about freedom to the deliberative forums of the United Nations. The very logic of the forum, in this case, must

force the United States to submit its moral views on liberty to intersubjective analysis, with a view toward greater moral clarity about what liberty really demands. The United States, in response, might simply say what I said to the cult member: we are confident in our values and don't particularly think we need to subject ourselves to the task of convincing you. We cite these values to end our participation in this discussion; nothing in our action commits us to regarding this discussion as the appropriate forum within which these values might be understood.

The United Nations might, instead, cite Barber's defense of the proposition that legal controversies must ultimately be solved by a single agent, since "one institution is obviously superior to many" at the task of adjudicating disputes.[10] The American response, I think, would be to simply reject this proposition entirely. If the United States believes that its own conception of liberty is better than the account animating the other states of the United Nations, then it seems that the United States might do a better job of defending this conception within its own territory—rather than by delegating this authority to the United Nations.

Many of us are, I believe, somewhat persuaded that the United States might be right to say something like this. Even those of us opposed to the injudicious use of the Tenth Amendment at home might feel somewhat sympathetic to parallel ideas invoked before the global community. There seems to me something quite attractive in the idea that, on some subjects at least, the many can be wrong and the few can be quite right. If the United States is convinced that it has a better conception of liberty than the Organization of the Islamic Council, why shouldn't the United States simply rely upon its own ideas? Why shouldn't it be, in other words, something very much like a dual "federalist" in the international legal context?

At this point, I suspect Barber would want to draw some distinctions between the domestic Constitution and the charter of the United Nations. The latter, after all, was set up as a comparatively weak deliberative body and has to deal with an extraordinary amount of diversity; states differ wildly in economic development, political forms, cultural practices, and so on. It might therefore be a mistake to analogize too closely between the United Nations and the United States. All this I agree with; while I am sympathetic

to something like dual "federalism" in the international realm, my substantive view on domestic federalism is much more like Barber's. This, however, may end up supporting my main point. The reason Barber and I may accept something like dual "federalism" internationally—and reject it domestically—has nothing to do with the logic of federalism, but the specific circumstances and contexts within which the idea of dual federalism is defended. Insisting on sharply separated legal jurisdictions internationally seems a good response to the tremendous diversity of global cultural and political practices. The United States is perhaps obligated to listen attentively to the views of other societies, but it is under no obligation to defer to their collective deliberations. Doing the same domestically, however, seems to undervalue the nation as a collective project and tends to treat the states of the Union in a manner that is neither constitutionally nor morally defensible. All this means, however, that there is nothing self-defeating whatsoever in the activity of defending dual federalism. There are contexts within which dual federalism should be defended; there is nothing internally inconsistent about the action of insisting, within a federal forum, that a given issue should not be dealt with by the political institutions at that federal level. The United States does that within the United Nations, and it is not wrong to do so. What is wrong with those who defend dual federalism domestically is that they are defending it within the wrong context; they defend the notion of dual federalism in a context within which the opposing vision of federalism does a better job of preserving the moral values that animate the constitutional project.

What is true of the United Nations seems similarly true of other international systems in which powers and rights are distributed across a plurality of hierarchical levels. Take, for example, the European Union (EU). There is no single, uncontroversial vision either of what the EU is or of what it ought to be. On one vision, the EU is already something of a nascent state; it has an elected parliament, after all, and the European Court of Justice has asserted the supremacy of European law over that of subsidiary national legal systems.[11] On another vision, the EU is at most a system of coordination between national states; it is a weak and narrow set of institutions, with no role to play at all on a variety of important topics, including "taxation, social welfare provision,

defense, high foreign policy, policing, education, cultural policy, human rights, and small business policy."[12] There is similar controversy over what the EU ought to hope to become. The EU itself argues that increasing integration provides increasing benefits, in areas of life ranging from airport security to food safety.[13] Euroskeptics argue, in contrast, that increasing the power of European institutions relative to national institutions runs the risk of decreasing democratic legitimacy, with the ultimate risk of a bloated antidemocratic bureaucratic state.[14]

These arguments of analysts and academics, moreover, are mirrored in practice by arguments made by political agents. The ordinary life of any federal system is made up of controversy over which level is the one at which any given controversy ought to be dealt with. To take only one example: conflict has broken out over whether Germany and France ought to use their own legal systems to deal with the issue of undocumented migration, or whether the problem is better dealt with by the European Union as a coordinated body. More specifically, Germany and France have argued that they have the right to institute temporary border controls if—in the view of Germany or France—some other European state has been insufficiently attentive to the task of preventing undocumented migration. In a joint letter to Morten Bodskov, the Danish president of the EU Parliament, the French and German ministers of the interior asserted that this right is a "non-negotiable point."[15] Such threats have been, of course, received poorly in the European Parliament, with some members asserting that the only legitimate response to undocumented migration would be "arrived at through collective work."[16]

I do not want to take sides in this debate. (I am not, in fact, entirely sure which side I would want to take.) I am, though, entirely sure of this: the issue cannot be decided by considerations of the logic of the forum. Germany and France are, here, making a substantive claim, that they have a right—under some specified condition—to deal with some aspects of immigration through their own legal regimes. The European Parliament, in its turn, is making the contrary argument: the response to undocumented immigration should be a European response, coordinated and organized by European institutions. The two arguments cannot both be right. We cannot, though, think that the way to determine

which argument is best is by formal considerations of logic. From the fact that Germany and France announced their intentions in a letter to the Danish president of the European Union, we cannot infer that Germany and France are committed to the European Union as the proper site in which decisions about immigration must be decided. In fact, the purpose of this letter was to announce that some of these decisions will be made elsewhere; there is nothing more illogical about this than about my (spoken) announcement that I will not be speaking on a given topic. Far from being a performative contradiction, it seems as if the letter is—here—simply to reassert national control over some matter of controversy. A moral debate could—and should—be had about the quality of this announcement. The debate cannot, though, be short-circuited by considerations of logical form.

I think we see this in the case of Europe, and in the case of the United Nations, because we are genuinely concerned about the morality of the decisions discussed here; very few of us, I think, are committed to the proposition that the United Nations, or the European Union, is always the best site for any given matter of public importance. In the case of the United States, though, many of us do have exactly this moral view. As I have said, I have something like this view myself. The cases of Europe and the UN, though, make clear that we cannot think that our moral conclusions will be established as a matter of logic. We cannot run toward an argument of logic simply because it lends itself to conclusions we find attractive. The conclusions deserve, and require, their own moral support.[17]

All this, however, means that the disagreement between dual federalists and their opponents is a substantive one. The Tea Party and its allies are—by my lights—deeply mistaken as to the moral vision that undergirds the United States and its Constitution. I cannot, however, regard their chosen project as self-defeating. If we want to reject dual federalism, we cannot avoid the messy moral task of demonstrating its moral incapacity. I do not have time to begin that task here; Barber has done excellent work elsewhere in analyzing the ways in which dual federalism is likely to lead to injustice.[18] All I hope to have established in the present context is that the failure of dual federalism cannot be located within its performative logic. Those who defend dual federalism do not defeat themselves; it is, instead, up to the rest of us to defeat them.

NOTES

1. Sotirios A. Barber, "Defending Dual Federalism: A Self-Defeating Act," in this volume.

2. I should note at the outset that I am not a legal scholar; my concern in the present context is not with arguments relating to the history of constitutional interpretation—which are of course relevant to any understanding of dual federalism as a doctrine—but with Barber's argument that any defense of dual federalism defeats itself.

3. Barber, "Defending Dual Federalism." The concept of a performative contradiction is generally associated with Jürgen Habermas. See Habermas, *The Philosophical Discourse of Modernity* (Cambridge: Polity Press, 1987). The concept is elucidated nicely in Martin J. Matustik, "Habermas on Communicative Reason and Performative Contradiction," *New German Critique* 47 (1989): 143–72.

5. Sotirios A. Barber, *Welfare and the Constitution* (Princeton, NJ: Princeton University Press, 2003); Sotirios A. Barber, "Fallacies of Negative Constitutionalism," *Fordham Law Review* 75 (2006): 651.

6. I am grateful to James Fleming for urging me to be more precise on this point.

7. Barber elsewhere criticizes negative constitutionalism—a view on which the Constitution is intended to constrain the acts of government—as incoherent; why set up a system by means of a document whose only purpose is to constrain that system? Barber, "Fallacies of Negative Constitutionalism." I think this is right, but something like negative constitutionalism might emerge from the political conservative truism that government is a necessary evil. On this view, the existence of a government is indeed of great benefit to its citizens, but governments tend inexorably to increase in size, and doctrines like negative constitutionalism (and dual federalism) help to stave off this tendency. Again, though, I am not endorsing these positions but simply insisting upon their coherence.

8. See, for instance, G.A. Res. 62/154, 10, U.N. Doc. A/RES/62/154 (March 6, 2008) (combating defamation of religions).

9. I am ignoring, here, a large set of issues surrounding the legal force of General Assembly resolutions and other forms of international legal instruments.

10. Barber, "Defending Dual Federalism."

11. The European Union provides a good introduction to its institutions and rules at http://europa.eu.

12. Andrew Moravcsik, "Federalism in the European Union: Rhetoric and Reality," in *The Federal Vision: Legitimacy and Levels of Governance in the*

United States and the European Union, ed. Kalypso Nicolaidis and Robert Howse (Oxford: Oxford University Press, 2001), 163–64.

13. The EU provides a pamphlet defending its usefulness at ec.europa.eu/unitedkingdom/pdf/webversion.pdf.

14. See Larry Sidentop, *Democracy in Europe* (London: Penguin, 2000).

15. Nathalie Vandystadt, "Free Movement/Immigration: Paris and Berlin Share Common Vision of Schengen's Future," *Europolitics*, April 20, 2012.

16. Joseph Daul, EPP, France (quoted in Nathalie Vandystadt and Gaspard Sebag, "Schengen Area: Sarkozy's Comments Draw Fire in Parliament," *Europolitics Social*, April 16, 2012).

17. I am reminded, here, of a remark originally made by Ronald Fisher: that the best causes tend to attract to their support the worst arguments. For discussion of the quote, see A. W. F. Edwards, "Human Genetic Diversity: Lewontin's Fallacy," *Bioessays* 25 (2003): 801.

18. See Sotirios A. Barber, *The Fallacies of States' Rights* (Cambridge, MA: Harvard University Press, 2013); Barber, *Welfare and the Constitution*.

3

THE PUZZLING PERSISTENCE OF DUAL FEDERALISM

ERNEST A. YOUNG

It may seem strange that, more than sixty years after Edward Corwin famously lamented "The Passing of Dual Federalism,"[1] this essay is part of a panel organized under the title "Against Dual Federalism." Accusations that the Court was trying to revive federalism were commonplace in the early years of the Rehnquist Court's "federalist revival." I argued more than a decade ago that these charges were misplaced, and that the actual doctrines that the Court was articulating in cases like *United States v. Lopez*[2] and *Printz v. United States*[3] could not really fit into the rubric of dual federalism.[4] It is not that I'm surprised to find that my counsel has not been universally heeded; I have, after all, two teenage children. But I would think that by now the Court has made clear that it does not mean to impose particularly significant limits on the Commerce Clause,[5] much less to bring back the entire dual federalist regime. Dual federalism remains hardly less dead than it was the day after the Court decided *Wickard v. Filburn*[6]—a case that the Rehnquist Court repeatedly went out of its way to reaffirm and that the Roberts Court has not questioned.

Part of the problem is that not everyone means the same thing by "dual federalism." The legal literature on federalism uses the term to describe a particular model of allocating functions between the national government and the states, characterized by an

attempt to define separate and exclusive spheres for national and state action.[7] That model, I shall argue, is largely dead insofar as it operates as a check on national action; it survives, in a somewhat softer form, as a check on *state* action. But the latter aspect—dual federalism as a way of protecting *national* authority from incursions by the states—is not what generally concerns dual federalism's critics.

Those critics frequently equate "dual federalism" with *any* effort to impose constitutional federalism–based limitations on national authority. In the essay to which this commentary responds, for example, Sotirios Barber contrasts dual federalism with "Marshallian federalism," which he takes to be equivalent to the managerial "decentralization" model long advocated by Malcolm Feeley and Edward Rubin.[8] This sort of position objects not only to a "separate spheres" model but to *any* model of federalism featuring guarantees of state autonomy that are constitutionally entrenched. Conflating concepts in this way, however, tends not only to confuse discussion but also to obscure the reasons that some approaches to federalism fail while others have more staying power.

This essay considers two ways in which notions of dual federalism persist. The first is the tendency of commentators to insist that the Supreme Court is bent on reviving strict dual federalist limits on national power, even when what the Court actually says and does makes rather clear that it is not. This persistence, in other words, is in the minds of the Court's critics—including Professor Barber, in his essay for this book. The second mode of persistence, however, *is* reflected in the Court's rhetoric and doctrine. That is the use of dual federalist notions to limit *state* power, by defining distinct and exclusive spheres of *national* regulatory activity. In preemption cases, for example, courts have found state law more readily preempted when it intrudes on a sphere of uniquely national concern, such as foreign relations or immigration.

I contend that the Court's critics are right to condemn dual federalism, but wrong to think that the Court has revived dual federalist limits on national power. Properly defined, "dual federalism" connotes separate and exclusive spheres of state and federal authority; it thus exists in contrast to other models of federalism, such as "cooperative" federalism, "collective action" federalism,

and "process" federalism. All of these models may rely on principles of dual *sovereignty*—that is, the broader notion that guarantees of state autonomy vis-à-vis the center should be constitutionally entrenched. While the Rehnquist and Roberts Courts have revived this broader principle, they have not attempted to define a separate sphere of state authority that the national government cannot enter.

Dual federalism died in the middle of the twentieth century because the Court found itself unable to draw determinate lines to define the exclusive sphere of state authority into which national power might not enter. That problem applies equally, however, to attempts to define and police an exclusive sphere of *national* authority; it thus plagues the contemporary cases in which courts have sought to keep states out of "uniquely federal" fields like foreign affairs, national banking, or immigration. But the line-drawing problem is *not* inherent in all efforts to protect other forms of state sovereignty; I thus reject Professor Barber's more general critique of dual sovereignty in all its forms. If we are to keep faith with our constitutional commitments, then federalism is not optional. As Jenna Bednar and William Eskridge have written, "[c]onstitutional law must make some sense of federalism."[9]

1. Some Definitions

It will help to begin by defining some terms. Words like "dual federalism" are used in a variety of ways in the literature, and I do not mean to suggest that the definitions offered here are the only plausible ones. I do think that the conceptual distinctions drawn here matter, both theoretically and practically, and that whatever terms we happen to use, it will help to be more explicit about precisely what we mean.

"Dual Federalism" versus "Dual Sovereignty"

Alpheus Mason described "dual federalism" as contemplating "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional

line, defining their respective jurisdictions."[10] In his famous essay, Edward Corwin said that dual federalism entailed four "postulates":

> [1.] The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are "sovereign" and hence "equal"; 4. The relation of the two centers with each other is one of tension rather than collaboration.[11]

Although Professor Corwin's postulates are somewhat more elaborate than Mason's definition, both statements share a common theme: Article I's limits on Congress's powers and purposes (postulates 1 and 2) define separate "spheres" of sovereignty for the federal and state governments (postulate 3), neither of which permits intrusion or activity by the other level of government (postulate 4). It is this notion of separate "spheres" or "enclaves" that has set dual federalism apart from other approaches to federalism for later generations of commentators.[12]

I want to distinguish dual federalism from dual *sovereignty*, although I acknowledge that the two terms are often used interchangeably. While dual federalism refers to a particular relationship between national and state authorities, I use "dual sovereignty" more generally to describe the Federalists' great innovation in political theory, which accommodated the separate authority of the states to classical political theory's requirement of a single "sovereign" in every polity by lodging that ultimate sovereignty in the American people.[13] As Justice Souter has explained, "[T]he People possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit."[14] Dual sovereignty thus means that the federal and state governments are "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."[15]

There is, of course, much disagreement about the precise meaning of what Robert Cover and Alex Aleinikoff called "the lawyer's disease of sovereignty."[16] In our constitutional system, neither the national government nor the states possess the sort of unquestionable ultimate authority that the European theorists of the seventeenth and eighteenth centuries meant by "sovereignty."[17] The

Federalists thus used "dual sovereignty" as something of a debating point, co-opting the rhetoric of their opponents while advocating something completely different from the traditional unitary authority of the king in Parliament.[18] And "sovereignty" is an even more contested term in our contemporary political environment, constantly under threat from policy concerns that disrespect territorial boundaries, broad conceptions of individual rights against government, the proliferation of international law and institutions, and the rise of complex intergovernmental institutional arrangements that blur traditional jurisdictional lines.[19]

Nonetheless, "dual sovereignty" does capture an important truth about American federalism: although nonfederal regimes may make the political choice to decentralize certain functions, the "sovereignty" of the states and the federal government means that at least some elements of the American allocation of authority are enforceable as a matter of legal right. This, for Edward Rubin and Malcolm Feeley, is the key distinction between "federalism" and "decentralization."[20] What "dual sovereignty" means in practice is that the federal arrangement is constitutionally *entrenched*—that is, it cannot be changed without constitutional amendment, which is of course very difficult to do.[21]

This element of entrenchment is critical to a wide range of definitions of federalism in both law and political science. Jenna Bednar, for example, defines a federal system as one meeting "three structural criteria"—geopolitical division according territory to each state unit, independent electoral bases of authority for state and national governments, and "policy sovereignty" for each level of government over some issues.[22] Importantly, she presumes that each of these structural characteristics must be constitutionally entrenched.[23] And the Supreme Court, of course, has long maintained that " 'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' "[24]

Much of our federalism, of course, is *not* entrenched. As I have argued elsewhere, in many ways the most practically important boundaries between national and state authority are set by federal

statutes, agency regulations, or even defeasible judicial doctrines like the dormant Commerce Clause,[25] and perhaps it would be better if we spent more time talking about those arrangements and less time arguing about sovereignty.[26] But as will be apparent, it remains an important point of division in debates about federalism whether *any* element of the federal arrangement is not subject to change through ordinary law.

Professor Barber seems to mean something like dual sovereignty when he says "dual federalism." He says, for instance, that "[d]ual federalism . . . sees the Constitution as a collection of restraints on the national government, one kind of restraint being 'states' rights.' "[27] This is hardly the *only* thing that dual sovereignty means; as I have argued elsewhere, the point of state sovereignty is not simply to limit national power but also to preserve the states' ability to provide beneficial regulation and governmental services to their citizens.[28] But the key difference between dual sovereignty and the model of managerial decentralization proposed by Professors Feeley and Rubin is whether states do, in fact, have legally enforceable "rights" against the national authority. When Barber argues in favor of a national "authority to delegate and recall responsibility"[29] vis-à-vis the states, he is arguing not only against dual federalism but against dual sovereignty as well.

The key point for present purposes is that "dual sovereignty" is a broader term than "dual federalism"; the former holds that ultimate authority is split between two types of governments in our political system, while the latter describes a particular model for what that division of authority might look like. Defining separate and exclusive spheres of state and national authority is one way to maintain a regime of dual sovereignty, but as I discuss in the next section, there are others as well.[30] We might, for instance, focus on the institutional integrity of state governments themselves, or on the political mechanisms by which their interests are represented in the political process.

Professor Barber is thus right to argue that "the dual federalist view . . . is an option to be weighed against competing options; it's not a conclusion compelled by constitutional language, logic, or history."[31] But that is correct only in the limited sense in which I am using "dual federalism" here. That model is one among several that is consistent with "constitutional language, logic, [and]

history." But to the extent that Barber is using "dual federalism" in a broader sense—that is, to connote a commitment to some meaningful principle of state sovereignty and a "limited [national] government" vis-à-vis the states—that commitment is *not* constitutionally optional.[32] This is well-trod ground in the literature, and surely any assertion that the Constitution contains no such principle ought to grapple with the great weight of both jurisprudential and scholarly authority to the contrary.[33]

In rejecting any entrenched notion of dual sovereignty, Professor Barber relies on Madison's statement that "as far as the sovereignty of the states cannot be reconciled to the happiness of the people . . . let the former be sacrificed to the latter."[34] It is critical to remember, however, that Madison was arguing at a stage when the Constitution had not yet been adopted. After all, he said the same thing about the Constitution itself ("Were the plan of the Convention adverse to the public happiness, my advice would be, reject the plan.") and the Union ("Were the Union itself inconsistent with the public happiness, [my advice] would be, abolish the Union.").[35] The people having made their choice to adopt the set of institutional arrangements offered in the Philadelphia draft (including a significant measure of state sovereignty), one can no longer repair directly to the public welfare as a reason to reject state sovereignty without disregarding the binding force of the Constitution as law.[36]

This disagreement may simply reflect a difference (at least in emphasis) between my job, as a professor of law, and Professor Barber's, as a professor of political science. Law has a more limited scope than political science for arguments directly from general principles of public welfare. As Justice O'Connor observed in *New York v. United States*, "[o]ur task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution."[37] It is thus all well and good to argue that a system of nonentrenched decentralization would better pursue particularly national conceptions of liberty and other values, but lawyers and judges are limited by obligations of fidelity to the law that stand apart from these values.[38]

Alternatives to Dual Federalism

Dual federalism provided the model for our law of intergovernmental relations for roughly the first century and a half of our national existence. It died, for reasons I shall canvass shortly, in the New Deal revolution of 1937. And in truth, for much of the time since 1937 there has seemed to be little left of dual *sovereignty* either, as the Supreme Court has frequently seemed reluctant to enforce any constitutional limits on national authority. As I have already suggested, however, dual sovereignty–based limits can take a variety of forms that do not involve an attempt to define and police separate and exclusive spheres of state and national authority. I sketch some of those alternative models in this section. I begin, however, with the nationalist model that Professor Barber appears to advocate.

Managerial Decentralization or "Marshallian Federalism"

It is a little hard to know for sure what Professor Barber means by "Marshallian federalism." He offers a definition at the outset of his essay: "Marshallian federalism holds that when the nation's government is pursuing authorized constitutional ends it may freely disregard the reserved powers of the states."[39] But that formulation is perfectly consistent with "dual federalism" as it has been described in the literature and practiced by the Court; everything turns, of course, on what "constitutional ends" the national government is "authorized" to pursue. Dual federalism held that those ends are confined to a distinct sphere of governmental activity, but because that sphere is exclusive, the states could have no reserved powers to get in the way. If Barber's target is simply the notion that a state may interpose its own law to block the effect of a national law that falls within Congress's enumerated powers, then he is truly pushing on an open door.

It is clear from Professor Barber's discussion, I think, that he means something more restrictive than this. Throughout his essay, he decries the notion of enforceable "states' rights" and urges that the national authority should be able to pursue national ends—like liberty or democracy—by calibrating the allocation of power between national and state institutions as the circumstances

dictate.[40] The implicit assumption seems to be that the national government will always be "better" on issues of democracy than those of the states. While that is certainly *sometimes* true, it has not always been the case.[41] Recognizing this reality, Alexander Hamilton (not exactly a states' righter) emphasized the need for *both* state and national governments to serve as checks on one another:

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. . . . If [the people's] rights are invaded by either, they can make use of the other as the instrument of redress.[42]

Professor Barber, by contrast, would dispense with the states' checking function. His federalism, like Professors Rubin and Feeley's decentralization, "is a managerial concept," not a matter of constitutional principle; Barber's polity, like theirs, is "hierarchically organized and the leaders at the top or center have plenary power over the other members of the organization."[43] This view, whatever its merits, is the antithesis of dual sovereignty.

More fundamentally, Professors Rubin and Feeley have argued that "the point of federalism"—as opposed to decentralization—"is to allow normative disagreement amongst the subordinate units so that different units can subscribe to different value systems."[44] But it is the very possibility of legitimate normative disagreement that Professor Barber seems to reject:

> Locating constitutional authority in one place, instead of thirteen or fifty, is necessary because the decision to delegate discretion or recall it must flow from one judgment regarding ends and means. Liberty is best served if the best feasible conception of liberty is served. Some authority has to judge among competing conceptions in particular situations. . . . One institution is obviously superior to many because to be effective many institutions would have to concur in one conclusion or one consistent set of conclusions regarding means and ends.[45]

One wonders if the American political system is really set up to render such a unitary conception of the good, even if we disregard the states. Not only is Congress a "they," not an "it,"[46] with notoriously multifarious and discordant conceptions of the good, but

the national separation of powers envisions perpetual competition between legislative, executive, and judicial institutions that may each harbor its own conceptions of liberty, democracy, or good policy. In any event, when Barber argues that our constitutional structure entails "a substantive commitment—an overarching and controlling view of the good life within which subordinate views must find a place as contributing views,"[47] he plainly takes issue not only with the narrow model of "dual federalism" but with *any* model that envisions constitutional restraints on national authority vis-à-vis the states. That puts Barber squarely in the Rubin and Feeley camp.

Professor Barber describes his view as "Marshallian federalism," but the position he describes is plainly not John Marshall's federalism. Barber provides no evidence for his claim that "Marshall's constitutionalism would commit the nation to a more-or-less specific way of life."[48] Other students of Marshall have concluded that "a constitution . . . is made for people of fundamentally differing views."[49] More to the point, Chief Justice Marshall repeatedly insisted that the Constitution limits national power. In *McCulloch*, for example, Marshall warned that "[s]hould Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[50] And in *Gibbons*, Marshall went so far as to articulate not simply dual sovereignty but the "separate spheres" notion of dual federalism typical of his age:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.[51]

It is certainly true that the thrust of the Great Chief Justice's federalism decisions was to carve out a place for the fledgling

national government and rein in the centrifugal impulses of the states. But that hardly means that Marshall stood ready to abandon all constitutional constraints on national power, and one can readily imagine that he would be shocked at the extent of national authority today. It is no coincidence that Rubin and Feeley, upon whom Barber seems to pattern his position, bill their managerial concept of decentralization as a modern remedy for an outdated "neurosis." Certainly there is nothing traditional, let alone Marshallian, about it.

Cooperative (and Uncooperative) Federalism

Cooperative federalism eschews the separate spheres of dual federalism and embraces the reality that, in modern America, "virtually all governments are involved in virtually all functions. . . . [T]here is hardly any activity that does not involve the federal, state, and some local government in important responsibilities."[52] Philip Weiser has explained:

> In contrast to a dual federalism, cooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law. In particular, modern regulatory programs put in place across a variety of fields ranging from nearly all environmental programs to telecommunications regulation to health care . . . all embrace a unified federal structure that includes a role for state implementation.[53]

Under cooperative federalism, then, national authorities do not merely possess concurrent regulatory jurisdiction; the actual activity of each government is closely integrated with that of the other.[54]

Advocates of constitutional limitations on national authority have often regarded cooperative federalism with suspicion, seeing the subordinate role of state officials within federal regulatory schemes as reflecting a "concentration of political powers in the national government."[55] Larry Kramer has pointed out, however, that in a cooperative system, "[t]he federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process."[56] He concedes that this is "[n]ot necessarily an equal voice: because federal law is supreme and Congress holds the purse strings, the federal government is

bound to prevail if push comes to shove. But federal dependency on state administrators gives federal officials an incentive to see that push doesn't come to shove, or at least that this happens as seldom as possible, and that means taking state interests into account."[57] More recently, Jessica Bulman-Pozen and Heather Gerken have taken this insight and run with it to develop a model of "uncooperative federalism," which "occurs when states carrying out the Patriot Act refuse to enforce the portions they deem unconstitutional, when states implementing federal environmental law use that power to push federal authorities to take a new position, or when states relying on federal funds create welfare programs that erode the foundations of the very policies they are being asked to carry out."[58] This phenomenon, they note, occurs "in such varied arenas as immigration, healthcare, and education. In each of these fields, states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law."[59]

One may think of "uncooperative federalism" as a particular form of Morton Grodzins's general idea of "decentralization by mild chaos."[60] Despite the absence of clear lines demarcating state and national power, the reality of multiple power centers and the myriad opportunities to exert influence guarantee meaningful checks on central authority. Thus described, however, uncooperative federalism seems like a practical consequence of particular institutional forms of managerial decentralization, rather than an alternative model of dual sovereignty. Nonetheless, at least some approaches to cooperative federalism retain a place for sovereignty.

In particular, the anticommandeering doctrine imposes an important constitutional constraint on Congress's ability to enlist the states as implementers of federal law. That doctrine holds that Congress may not require the legislative and executive institutions of state government to enact legislation pursuant to federal directives, enforce the requirements of federal law, or otherwise serve as the instruments—as opposed to the objects—of federal regulation.[61] Because Congress may not simply command such implementation, it must secure the states' consent by making participation in the federal scheme attractive. Likewise, constitutional constraints on Congress's authority to condition grants of federal

monies on state acquiescence in federal mandates[62] ensure that states retain some enforceable rights against the national government even in cooperative federalism schemes. The presence of these constraints ensures that some aspects of the federal structure remain constitutionally entrenched, even within a cooperative federalism scheme.

Subsidiarity or Collective Action Federalism

A second model of dual sovereignty reasons from the underlying values that a federal system is meant to serve. Donald Regan has argued, for example, that "in thinking about whether the federal government has the power to do something or other, we should ask what special reason there is for the federal government to have that power. What reason is there to think the states are incapable or untrustworthy?"[63] Professor Regan's approach bears a strong family resemblance to the European Union's principle of "subsidiarity," under which "the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and therefore by reason of the scale or effects of the proposed action, be better achieved by the Community."[64] The Member States of the EU added subsidiarity to the EU's governing treaties as a result of fears that the original documents—which like the American Constitution relied on specific enumerations of the EU's powers—were insufficiently protective of Member State prerogatives.[65]

In this country, the most extended and thoughtful attempt to realize a subsidiarity-type approach to federalism is the recent work of Robert Cooter and my colleague Neil Siegel. Professors Cooter and Siegel read the Constitution's power grants to Congress in Article I, Section 8 as embodying a single coherent principle of "collective action federalism."[66] In their view, "the clauses of Section 8 . . . authoriz[e] Congress to tax, spend, and regulate when two or more states face collective action problems. Conversely, governmental activities that do not pose collective action problems for the states are 'internal to a state' or 'local.' "[67] Congress would therefore be able to legislate to solve a collective action problem whether or not the legislation regulated commercial activity; on the other hand, even regulation of buying and selling might fall outside Congress's power if it did not respond to some difficulty

preventing resolution of the problem through action by individual states.

The principal difficulty with subsidiarity-based approaches is that they tend to collapse the constitutional question ("What does the Constitution permit?") into the policy question ("What would it be desirable for Congress to do?"). As numerous commentators have noted, this makes subsidiarity inquiries particularly difficult for courts, which ordinarily depend for their legitimacy on the supposition that they simply enforce the law without second-guessing Congress's policy judgments—that they exercise "judgment," not "will," in Alexander Hamilton's memorable account.[68] This difficulty has bedeviled efforts to enforce subsidiarity as a constitutional principle in the European Union,[69] and commentators (including this one) have raised similar concerns with efforts to develop a similar approach on this side of the pond.[70]

One may also worry that this logic, taken too far, would leave precious little to the States. As Morton Grodzins pointed out long ago, "[I]nequities of state resources, disparities in educational facilities and results, the gap between actual and potential educational services, and, above all, the adverse national consequences that might follow long-term inadequacies of state-local control would almost certainly, if the choice had to be made, establish education as the exclusive concern of the national government."[71] One suspects that similar arguments could be made in almost any field if one's conception of a collective action problem is sufficiently broad. And to the extent that courts defer to legislative judgments in order to avoid crossing the line into policy making, they will be leaving the foxes in charge of the henhouse.[72]

The important point for present purposes, however, is that subsidiarity or collective action federalism represents a distinct model of dual sovereignty from dual federalism. It retains an aspect of sovereignty because, according to the model's proponents, the notion that some collective action problem must exist to justify national action is an interpretation of Article I, Section 8—that is, it is an entrenched part of the Constitution. National action without such a justification would thus be unconstitutional. And yet collective action problems—or their absence—may occur in virtually any area of regulatory concern. This approach thus does not yield the separate and exclusive spheres of regulatory activity

that characterized dual federalism.[73] Some aspects of criminal law, or environmental law, or any other field will raise collective action problems, while others may not. The justification for any given national endeavor must be judged on its own merits, regardless of the field in which it occurs.

Process Federalism

Process federalism has its unlikely origins in *Garcia v. San Antonio Metropolitan Transit Authority*[74]—a case that William Van Alstyne decried as the "second death of federalism."[75] Justice Blackmun's majority opinion in *Garcia* asserted that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.' "[76] Process federalism thus eschews the exclusive subject matter spheres of state and national authority that characterize dual federalism. Instead, it relies on the political and institutional structure of the national government itself to preserve the autonomy of the states.

As Professor Van Alstyne's memorable phrase suggests, *Garcia* was initially either lamented or hailed as the end of the line for state sovereignty.[77] Both friends and foes of constitutional limitations on national authority assumed that the abandonment of substantive limits really connoted an abandonment of any limits at all. This turned out not to be true, however. Just as John Hart Ely has shown that a process-based theory of individual rights can provide a powerful basis for judicial review,[78] so too process federalism has turned out to provide vigorous protection for state autonomy.[79] In both instances, process theory simply shifts the focus from the substantive character of governmental action to the institutional process by which the government acts.

Professor Ely's idea was that our system of government ordinarily safeguards individual liberties through the political process of democratic representation; courts play a supporting role, stepping in whenever there is reason to believe that the ordinary democratic process has become skewed (e.g., through restrictions on

political participation) or particular groups have been systematically excluded (e.g., racial minorities).[80] Process federalism similarly builds on Herbert Wechsler's insight (derived in turn from James Madison and John Marshall) that the first-line protection for federalism in our governmental system is the political representation of the states in Congress.[81] Building on Wechsler, other scholars have stressed the role of political parties as well as more particular institutional features, such as the role of state legislatures in redistricting for federal congressional districts.[82]

Other process federalists have emphasized the *procedural* protections that states derive from the many impediments to federal lawmaking. As Brad Clark has explained, "The lawmaking procedures prescribed by the Constitution safeguard federalism in an important respect simply by requiring the participation and assent of multiple actors. These procedures make federal law more difficult to adopt by creating a series of 'veto gates.' . . . [T]he imposition of cumbersome federal lawmaking procedures suggests that the Constitution reserves substantive lawmaking power to the states and the people both by limiting the powers assigned to the federal government and by rendering that government frequently incapable of exercising them."[83]

Supreme Court doctrine has reinforced these political and procedural safeguards of federalism in a variety of ways. Most important, the Court has constructed an array of "clear statement" rules of statutory construction, triggered whenever Congress acts in a way that implicates the prerogatives and/or autonomy of the states. These rules require a clear expression of Congress's intent before a federal statute may be construed to regulate the public functions of state governments,[84] impose financial liability on the states,[85] abrogate state sovereign immunity,[86] impose conditions on the grant of federal funds to state governments,[87] or preempt state law.[88] While these canons of statutory construction are not uncontroversial,[89] they are best understood as an extension of the underlying federalist constitutional principles.[90] They enhance the political safeguards of federalism by requiring proponents of federal laws affecting the states to put the states' defenders in Congress on notice; they enhance the procedural safeguards by adding an additional drafting hurdle that legislation implicating state autonomy must surmount. As a practical matter, it is fair to say that

the Court's clear statement cases have preserved a great deal more state autonomy than its largely symbolic efforts to police the substantive boundaries of the Commerce Clause.

Similarly, one can best understand the anticommandeering doctrine of *New York* and *Printz*[91] as a tool of process federalism. Federal commandeering—that is, the power of Congress to require state institutions to implement federal law—allows national authorities to foist many of the costs of national action onto state institutions. These include financial costs, because states must bear the costs of implementation without any requirement that Congress reimburse them, and political costs, because state officials often become the public face of unpopular federal programs (like nuclear waste disposal in *New York* and limits on gun purchases in *Printz*).[92] The anticommandeering doctrine does not, in practice, prevent the states from implementing federal law; as I have already said, cooperative federalism arrangements are pervasive in our system. But because the doctrine requires Congress to *solicit* rather than command state implementation, the states can insist on compensation for their expenses and refuse to participate in the most unpopular programs.[93] This measure of independence from outright federal control may also enhance the ability of state administrators within cooperative federalism regimes to use the *administrative* process to influence and/or resist federal policy.

Professor Barber makes some very odd assertions about process federalism; for instance, he claims that the process federalist "will eventually claim that the only good anyone can really know is pleasure centered on the individual human body."[94] I suspect this conclusion would come as a major surprise to scholars (like this one) who have long advocated process federalism. As I have already suggested, it may be more constructive to engage the arguments that process federalists actually make—Barber's essay is devoid of citation to any work that actually discusses process federalism—than to theorize about what arguments process federalists *must* make. In any event, what actually distinguishes process-based from dual federalism models is simply the former's focus on the political and procedural dynamics by which the states participate in the national political process and federal actors construct supreme federal law. Get those dynamics right, the process federalist contends, and

one need not worry about whether particular national initiatives intrude into some protected state sphere of authority.

Immunity Federalism

A final model is rarely discussed distinctively in the literature but is quite prominent in the Court's case law. That model is "immunity federalism," which seeks to protect the institutions of state government themselves from being subjected to or held accountable for violations of national law.[95] Dual federalism emphasized affirmative authority to regulate—that is, to prescribe legal rules governing the conduct of nongovernmental actors. It was thus concerned, for example, with whether national or state authorities get to control the legal regime governing public education or immigration. Immunity federalism, by contrast, is relatively unconcerned with affirmative regulatory jurisdiction; it sets no limits on the scope of national regulatory authority over private individuals. This model concerns national regulation solely as it impacts the institutions of state governments themselves. A good example is thus *National League of Cities v. Usery*,[96] which did not challenge Congress's authority to regulate the wages and hours of all privately employed workers in the United States but did restrict its right to apply those regulations to state governmental employees.

The most obvious flowering of immunity federalism has, of course, occurred in the Supreme Court's cases construing the sovereign immunity of states from lawsuits by private individuals and corporations. More than a century ago, in *Hans v. Louisiana*,[97] the Court construed the scope of this immunity to extend significantly beyond the text of the Eleventh Amendment, which had generally been considered the source of state sovereign immunity.[98] Much more recently, in *Seminole Tribe v. Florida*,[99] the Court held that Congress may not subject states to suit when they violate federal law by enacting statutes that "abrogate" the states' immunity, at least when Congress acts pursuant to its Article I powers. Subsequent decisions have extended this principle to suits in state courts and before federal administrative agencies, notwithstanding the limitation of the Eleventh Amendment's text to "the *judicial* power of the *United States*,"[100] and an impressive line of cases has narrowly construed Congress's exceptional power to abrogate state sovereign immunity when it acts pursuant to its power to enforce the

Reconstruction Amendments.[101] The important point about all of this is that state sovereign immunity does not protect a single square inch of state regulatory "turf" from federal intrusion; it simply exempts the states from (one means of) accountability when they themselves violate federal law.[102]

A final, less frequently remarked instance of immunity federalism appears in the Court's habeas corpus jurisprudence. Although habeas has recently played a prominent role in the national War on Terror as a remedy for detention by national executive authorities, by far its most common use is as a vehicle for collateral review of state criminal convictions for compliance with the procedural requirements of federal constitutional law.[103] Habeas corpus is thus another mechanism for holding states accountable when they violate federal law, and the extensive jurisprudence of the Burger, Rehnquist, and Roberts Courts limiting the scope of federal habeas review is thus another instance of immunity federalism.[104] (In this, it is worth noting, the Court has been encouraged and even surpassed by Congress itself, which passed extensive restrictions on habeas as part of the Antiterrorism and Effective Death Penalty Act in 1996.)[105] Importantly, the number of state sovereign immunity and habeas corpus decisions by the Supreme Court over the course of the "federalist revival" dwarfs the number of cases considering substantive limitations on Congress's powers.

* * *

The point of this survey of the multifarious models of contemporary federalism doctrine is to show that dual federalism and managerial decentralization are not the only choices for allocating authority between the national government and the states, and that dual sovereignty may be maintained in other ways than by defining separate and exclusive spheres of state and national authority. These models, like any analytical construct imposed upon an unruly and variegated set of real-world decisions and structures, are vague around the edges, often overlap, and indeed may not be mutually exclusive; process federalism, for example, can be a valuable tool to preserve some measure of state sovereignty in an institutional structure of cooperative federalism. The important point is that there is a tendency to assume that any rule of law that accords some measure of sovereignty to state governments is an

instance of "dual federalism," but we should resist that tendency. It is of course a prerogative of scholars to define terms any way that we want, but we lose valuable analytical distinctions when we lump together approaches that are in fact quite different.

2. The Current State of Play

Having sketched out the dual federalist model and its competitors, we are in a position to evaluate which of these models best reflects the current state of affairs in intergovernmental practice and constitutional doctrine. My principal contention is that, although scholars and sometimes dissenting judges often worry that the Supreme Court is about to revive dual federalism, it has not in fact done so and is extremely unlikely to do so in the future. Current doctrine and practice instead reflect a blend of managerial decentralization, cooperative federalism, and process federalism.

The Court's restraint, however, has sometimes been unidirectional—that is, it has generally rejected dual federalism in its cases limiting national power, but has often embraced it in its cases limiting *state* power. These cases tend to define an exclusive sphere of federal authority—most often involving foreign affairs or immigration, but sometimes more prosaic fields like banking—and presumptively exclude state regulatory activity touching on those fields. Neither the results nor the reasoning is categorical, and the Court has actually left far more room for state activity within these presumptively federal spheres than it might have in the heyday of dual federalism. Nonetheless, these cases represent a troubling movement back in the direction of the old unworkable doctrine.

Dual Federalism Is Dead

Dual federalism dominated constitutional law for roughly a century and a half. Beginning in cases like *Gibbons*, the Court sought to define separate and exclusive spheres of state and federal authority. Because Congress was not eager to exercise its affirmative regulatory powers for most of the nineteenth century, most of the cases involved challenges to *state* regulation under either the dormant Commerce Clause or the judge-made "general common law"—both of which effectively forbade state intrusion into the

"national" sphere of interstate commerce.[106] As federal regulatory efforts increased around the turn of the twentieth century, the courts began to employ dual federalism to restrict those efforts, either by construing federal statutes narrowly to avoid intruding on state spheres of authority[107] or simply by striking them down.[108]

The Court upheld as many statutes as it struck down, however, even during the infamous *Lochner* era. It was thus forced to draw increasingly fine distinctions between goods that were in the "stream of commerce" and those that were not, or between "direct" and "indirect" effects on the interstate market.[109] The advent of the New Deal put increasing pressure on these distinctions, and the Court's eventual capitulation to the national regulatory state in 1937 ultimately swept them away. In *NLRB v. Jones & Laughlin Steel Corp.*,[110] the Court signaled that it would no longer distinguish between phases of the production cycle—that is, between regulation of "manufacturing" or "employment," which had heretofore been a state sphere, and the actual buying, selling, or transport of goods. And in *Wickard v. Filburn*,[111] decided five years later, a unanimous court held that Congress may regulate even individual activities with a minimal impact on commerce, so long as in the aggregate that *class* of activity would have a substantial effect on the interstate market. By 1950, Edward Corwin could say that the "entire system of constitutional interpretation" embodied in dual federalism lay "in ruins."[112]

The question, of course, is whether the "federalist revival" of the Rehnquist Court (and possibly the Roberts Court) has revived dual federalism. Professor Barber and a surprising number of other critics seem to think that it has.[113] Barber fears a "recrudescence of state sovereignty" under which "the states' rights bloc on the Rehnquist Court [has] affirmed the contract theory [under which the states are "separate and independent sovereigns who could nullify unconstitutional national acts and even withdraw from the union"] and voided numerous national acts in the name of 'state sovereignty.'"[114] There are, however, very few citations. The only case from this period that Barber actually mentions by name is *U.S. Term Limits, Inc. v. Thornton*,[115] which he takes to represent "an endorsement of the contract theory by four members of the Rehnquist Court."[116] One can quibble about whether even that is really true—*Term Limits* grappled with the Framers' theory of

representation in order to construe whether the Constitution's Qualifications Clauses for members of Congress were exclusive, not the limits of Congress's regulatory powers, and invoking the contract theory for the former purpose is quite different from using it to determine the latter.[117] But putting that aside, Justice Thomas's opinion in *Term Limits* was a *dissent*. It struck down nothing and has not been an important source of guidance for any of the decisions in which the Court *has* struck down federal statutes. Moreover, even Justice Thomas has made clear that he has a sophisticated theory of the Supremacy Clause (which was not at issue in *Term Limits*) that allows broad scope for federal authority.[118]

The best cases for a dual federalist revival would be *United States v. Lopez*,[119] in which the Court struck down the federal Gun Free School Zones Act as exceeding Congress's authority under the Commerce Clause, and *United States v. Morrison*,[120] in which the Court similarly invalidated the private civil suit provision of the federal Violence Against Women Act. *Lopez* was certainly exciting, in the sense that it was the first time that the Court had struck down a federal statute under the Commerce Clause since the New Deal revolution, and many of us took *Morrison* as confirming that *Lopez* was not a sport and the Court was, in fact, serious about limiting national power. Neither of these cases, however, amounted to a return to the traditional doctrine of dual federalism. As I have discussed in more detail elsewhere,[121] both cases turned on whether Congress was regulating an act that was "commercial" in nature. The *Lopez* Court explicitly reaffirmed *Wickard v. Filburn*[122] and the rest of its post–New Deal jurisprudence,[123] and it defined "commercial" activity so broadly that there are no substantive fields of regulatory concern in which many, if not most, activities will not be subject to federal regulation.[124] Equally important, both *Lopez* and *Morrison* made clear that the Court had abandoned the distinction—initially drawn by John Marshall in *Gibbons*—between commerce "among the several states" and "the exclusively internal commerce of a State."[125] The Rehnquist Court, in other words, was significantly less committed to dual federalism than is "Marshallian federalism."

In any event, the excitement over *Lopez* and *Morrison* was short-lived. Five years after *Morrison*, in *Gonzales v. Raich*,[126] the Court affirmed Congress's power to regulate the medicinal use of home-grown marijuana, notwithstanding the fact that the marijuana in

question had been neither purchased nor transported across a state line. And the Court considered it legally irrelevant that California had enacted a regulatory scheme licensing and regulating the use of marijuana for medicinal purposes.[127] Justice Kennedy joined Justice Stevens's majority opinion, signaling that he was unwilling to find that any significant federal regulatory program lacked the requisite link to commercial activity. And, perhaps most damaging of all to any hopes of a return to dual federalism, Justice Scalia wrote a concurrence embracing a broad view of the Necessary and Proper Clause, which would allow Congress to regulate even *non*commercial activity so long as it bears some relation to a commercial activity that Congress can reach.[128]

The Court's recent decision on the Patient Protection and Affordable Care Act (PPACA) complicates the picture somewhat, but none of the justices endorsed a return to dual federalism. In *National Federation of Independent Business v. Sebelius* (*NFIB*),[129] a majority of the Court upheld the act's "individual mandate" that all persons must buy health insurance under the taxing power,[130] but a different majority opined that the mandate did exceed the limits of Congress's commerce power.[131] That portion of the opinion—the most relevant for our purposes—did not suggest that health care is somehow an exclusively state sphere of regulation. Rather, the Chief Justice and the four dissenters agreed that the Commerce Clause does not permit Congress to regulate pure inactivity—that is, the decision *not* to buy health insurance.[132] This is an important holding, both because the PPACA is an important statute and because it reverses the post-*Raich* impression that the Court might be ready to abandon *Lopez* and *Morrison*. But there are not many such mandates in federal law, and the Court's holding at most places a particular regulatory tool off limits rather than isolating a substantive field of regulation as beyond federal competence.[133]

Finally, when Professor Barber refers to "numerous national acts" that the Rehnquist Court has "voided . . . in the name of 'state sovereignty,' "[134] he can only be referring to the Court's admittedly impressive string of holdings under the Eleventh Amendment doctrine of state sovereign immunity. I agree that these cases are wrongly decided and that they represent an unhelpful focus on state sovereignty rather than state regulatory autonomy.[135] But they hardly represent a return to dual federalism.[136] First, these cases

simply invalidate provisions of the relevant federal acts that subject the states to suits by private individuals for money damages; they do not invalidate the underlying substantive requirements of the relevant acts, which continue to bind even the states. It is thus impossible to say that these decisions carve out any exclusive sphere of state authority; they simply restrict the remedies available when states violate the law. Second, these remedial restrictions are radically incomplete: they do not bar suits against state officers for prospective relief or for damages when the officers are sued in their individual capacity. Nor do they bar even suits against the state itself for damages when the United States is the plaintiff or when Congress, through its power of the purse, induces the states to waive their immunity. All these "workarounds" significantly minimize the practical significance of state sovereign immunity.[137] Finally, the Court seems to be in substantial retreat from these holdings, having upheld congressional provisions abrogating state sovereign immunity in several recent decisions.[138]

Sixty years later, Professor Corwin is still right: dual federalism lies "in ruins." What we have instead is a complicated and not always coherent set of doctrines emphasizing process federalism (particularly in the Court's "clear statement" rules of statutory construction),[139] an important but narrow rule against "commandeering" state institutions operating within cooperative federalism regimes, and (perhaps) even narrower rules prohibiting use of the commerce power to reach pockets of activity that either have no relation to commerce (*Lopez* and *Morrison*) or do not even amount to activity at all (*NFIB*). The Necessary and Proper Clause, moreover, looms as a congenial catchall power in doubtful cases.[140] There are interesting debates to be had concerning whether the Court's current doctrines—both permissive and restrictive—are legitimate, whether they go far enough, and even whether the courts are well suited to balance national and state authority. But it will help, in approaching any of these questions, to appreciate how much the ground has shifted since 1937.

Long Live Dual Federalism?

Both the Court and the commentators have done their best to inter dual federalism, and for the most part they have succeeded.

But in some areas, dual federalism dies hard. To paraphrase Justice Scalia's famous description of the *Lemon* test in the Court's Establishment Clause jurisprudence: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, [dual federalism] stalks our [federalism] jurisprudence once again."[141] Only this time, it is frightening the proponents of *state* regulatory activity in fields where the national government has traditionally played a significant role. The tendency to revive dual federalist notions of exclusive national power has been most pronounced in the area of foreign relations law, including recent controversies of state efforts to ratchet up the enforcement of federal laws regulating undocumented aliens. But a similar, if more low-profile, trend has surfaced in the Court's statutory preemption cases. The Court would do better to bring each area into line with its more general federalism doctrine by giving these dual federalist tendencies a speedy quietus.

I wrote in 2001 that the Court seemed to be clinging to a dual federalist view in some of its foreign affairs cases by applying a more vigorous rule of preemption.[142] In *Crosby v. National Foreign Trade Council*,[143] for example, the Court struck down a Massachusetts law limiting state dealings with companies doing business in Burma, notwithstanding the absence of any explicit federal statutory language preempting such state laws. More recently, the Court seemed to extend *Crosby* in *American Insurance Association v. Garamendi*,[144] which struck down a California law requiring insurance companies to disclose any connection they might have to Holocaust insurance policies, again in the absence of explicit preemptive language. Both decisions strongly suggested that the states simply had no place regulating the business of foreign relations.

Likewise, in the last year, much of the debate concerning state governmental initiatives to regulate illegal immigration has taken a decidedly dual federalist turn. In particular, the Ninth Circuit's ruling striking down Arizona's restrictive immigration law strongly suggested that states are simply incapable of regulating immigration—this is an exclusively federal field.[145] On review in *Arizona v. United States*, however, the Supreme Court took a more equivocal position. On the one hand, it suggested that im-

migration must be a federal sphere by emphasizing that "foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."[146] On the other, Justice Kennedy's majority opinion also acknowledged that the states have a role to play in this field, noting that "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."[147] The Court's actual analysis stressed ordinary preemption principles, not doctrines of federal exclusivity,[148] although it does seem fair to say that the Court applied those doctrines with a pro-preemption thumb on the scale.

Similar echoes of dual federalism can be found in the Court's other preemption cases, where the Court often emphasizes traditional fields of state or federal regulatory authority. Rick Hills has asserted that "the Roberts Court's [preemption] decisions seem to follow a traditional script of dual federalism—that is, carving out separate spheres for state and federal governments and enforcing norms of mutual non-interference between these spheres."[149] A good example is *United States v. Locke*,[150] in which the Court held that federal law preempted Washington state regulations governing oil tanker safety in Puget Sound that went further than federal requirements. The Court emphasized that maritime safety, which implicated international obligations as well as domestic law, was a traditionally *federal* field and thus refused to apply any presumption against a preemptive reading of the statute. *Locke* illustrates not only the backward glance to dual federalism but also the trouble inherent in that glance; after all, it is equally easy to characterize *Locke* as a case about safeguarding the natural resources of the state—a traditional *state* sphere.[151]

In any event, efforts to revive dual federalism even in these limited nationalist enclaves blink reality. As Grodzins has pointed out, "[f]oreign affairs, national defense, and the development of atomic energy are usually considered to be exclusive responsibilities of the national government. In fact, the state and local governments have extensive responsibilities, directly and indirectly, in each of these fields."[152] This has only become more true in the decades since Grodzins wrote.[153] In our increasingly globalized world,

no governmental actor—including states and even localities—can avoid interacting with the rest of the world in a way that implicates national foreign policy.[154]

This nationalist version of dual federalism should not be overstated, however. All the cases I have mentioned are statutory construction cases, not efforts to draw hard constitutional lines in the sand, and cases like *Arizona* seem to leave significant room for state regulation even in areas of federal primacy. Moreover, there are plentiful counterexamples. Just this past term, for instance, the Court upheld a different Arizona law providing for penalties on employers who employ undocumented aliens.[155] The Court not only found the law not preempted; it also went out of its way to say that the law did not implicate any unique field of federal authority. We are far from a revival of dual federalism, but some of the cases in these areas are worrisome nonetheless.

3. Is Dual Federalism "Self-Defeating"?

This final section considers two distinct critiques of dual federalism. The first is Professor Barber's, which holds that dual federalism is necessarily incoherent because public goods like liberty and democracy must be defined by national actors in a national forum, leaving no room for more particularistic arguments from "states' rights." The second is more in the vein of conventional wisdom, which believes dual federalism became extinct because it was not susceptible to principled application over time.

Professor Barber's Argument

The central claim of Professor Barber's essay is that dual federalism—by which, as I have said, he seems to mean dual *sovereignty*—is logically self-defeating. "Should there be a dual federalist as well as a national reading of . . . any . . . matter material to the federalism debate, including the nature of the Constitution as a whole—if there is an interpretive choice of any description, dual federalism will (or should) lose the debate."[156] This proposition extends not only to "the Supremacy Clause," but also to "the Tenth Amendment, or the enumeration of powers, or the breadth of national powers, or the Framers' intentions, or the formation of the Union,

or the nature of liberty."[157] Every aspect of our constitutional law, in other words, is to be construed in a nationalist way.

In assessing the scope of this proposition, much would seem to depend on how often we think "there is an interpretive choice of any description." On some issues there may not be. John Marshall wrote in *Gibbons*, for example, that "[t]he enumeration [of federal powers] presupposes something not enumerated,"[158] which seems to mean that the very notion that the national government must operate within finite bounds is not really open to question. But that is arguably enough to decide a case like *United States v. Lopez*;[159] the critical moment in that case occurred when Justice O'Connor asked Solicitor General Drew Days whether, if the Gun Free School Zones Act were constitutional, he could think of anything Congress might do that would be *outside* its power.[160] He could not, and that was that; the Court was simply unwilling to transgress Marshall's principle that *something* must lie outside Congress's enumerated powers.[161] Although some very smart justices dissented in *Lopez*, I would be tempted to classify it as a case in which there was *not* "an interpretive choice of any description."

I doubt, however, that Professor Barber would agree. Barber sums up his argument this way:

> The states' rights debate is a national debate, conducted in a national forum. An admittedly local good can't count as a reason in that forum. The dual federalist who submits to the forum loses the debate before it begins because the good that would justify dual federalism would be a nationally recognized good applied by a national agency as a restraint on the states.[162]

It's hard to know what to make of this argument. As an empirical description of the actual debates that take place in national forums, it's simply incorrect. Consider, for example, a typical appropriations debate in Congress. A congressman may well argue for a benefit to his local district—say, a "bridge to nowhere" or a research grant to a local university. To say that people cannot make arguments based on local goods in a national forum is to ignore what goes on in the halls of national government every day. Professor Barber's claim would also render incomprehensible Wechsler's influential argument that the *primary* protection for state autonomy and prerogatives comes from the states' ability to argue for

those things *in a national forum*—the Congress—through their elected representatives.[163] If a national forum can consider only "national goods"—whatever those are—then how are the "political safeguards of federalism" to operate?

Professor Barber's argument is also flatly inconsistent with the role of national courts in enforcing the boundaries of state and national authority in federal systems. Commentators often emphasize that arguments for limiting national power vis-à-vis the subnational units can and should be presented in a national forum—a proposition that Barber argues is simply impossible. The European jurist Koen Lenaerts, for instance, has stated that "[f]ederalism is present whenever a divided sovereign is guaranteed by a national or supranational constitution and umpired by the supreme court of the common legal order."[164] And, in fact, the constitutional courts of many federal systems hear, with some regularity, the sorts of claims that national power must be limited.[165] Alphonso Lopez's (victorious) lawyer would no doubt be surprised to hear that it is impossible to make arguments for limiting national power vis-à-vis the states in a national forum like the Supreme Court.

But perhaps Professor Barber means this to be a *normative* argument: the only reasons that *should* count in a national forum are national reasons. It's not clear why this should be true; the argument that states' rights claims must fail because only national reasons should count seems to assume the very point in issue. But even if we grant the premise, it is hardly clear that Barber's conclusion follows. On his view, the appropriation-seeking congressman must explain why a federal expenditure in his district benefits the nation as a whole. But can he not point out that few federal programs benefit all Americans at once, or evenly, and that by benefiting some (his constituents) we benefit the larger whole?[166] That is certainly the premise behind federal disaster relief funds, for example. The broader point is that it may not always be easy to distinguish between national and local goods.

The critical case of this ambiguity is the value of state sovereignty in checking national power. As Madison suggested in *The Federalist* No. 51, federalism is a central ingredient in our system of checks and balances, part of the "double security" for individual liberty at the heart of the Constitution.[167] If that is right, then why

isn't state sovereignty itself a national good? If it is, then it seems to me that Professor Barber's argument collapses in on itself.[168]

Professor Barber seems to deny that checks and balances can itself be a national good when he says that "Marshall's was a positive constitutionalism; dual federalism belongs to a tradition of negative constitutionalism. Marshall's positive constitutionalism makes more sense than negative constitutionalism because establishing a government to pursue good things makes sense while establishing a government mainly to prevent government from doing bad things makes no sense."[169] This is a highly contestable assertion, of course.[170] Much of constitutional law is concerned with preventing government from doing bad things.[171] The original Constitution was obsessed with dividing and checking governmental power,[172] and Barber's dismissal of "negative constitutionalism" (it "makes no sense") condemns not only federalism but also separation of powers and individual rights. It would condemn Marshall's own jurisprudence, which struck down governmental action when it transgressed constitutional limitations.[173] Moreover, limiting the power of the national government is not simply a "negative" enterprise. Much of the point is to preserve the autonomy of *state* governments to pursue their own "positive" programs—for example, permitting gay marriage and medicinal marijuana, or protecting the environment more rigorously than federal law—without national interference.[174]

In any event, Professor Barber's claim that proponents of state sovereignty simply *can't* argue for that value in a national forum like Congress or the Supreme Court[175] reminds me of Mark Twain's reply when asked if he believed in infant baptism: "Of course I do," he said. "I've seen it done." People who believe in state sovereignty *do* make these arguments in national forums, and they are unlikely to stop simply because someone tells them that it's impossible. It is far better, in my view, to engage the arguments that people actually do make on their merits.

Determinate Line Drawing and the Frankfurter Constraint

All that said, I agree with Professor Barber that dual federalism—defined considerably more narrowly than he suggests—is a failed

approach; I simply disagree about the reason for that failure. Our disagreement has practical consequences. For one thing, our contrasting accounts of the reason dual federalism must fail point in different directions for the use of dual federalist doctrines to limit *state* authority. If the problem with dual federalism is that we need a single nationalist vision of liberty and democracy, then we have every reason to defend exclusive zones of *national* authority, like foreign affairs or immigration, from intrusions by the states.[176] But if, as I argue in this section, the real trouble is that exclusive spheres of authority simply cannot be defined and maintained in a principled way, then that difficulty will plague dual federalism whether it is used to restrict state or national power.

Dual federalism was primarily a model of judicial review, and as such it had to be amenable to the institutional constraints faced by courts. As I have argued at greater length elsewhere,[177] the primary constraint on courts is that they must make decisions according to *law*; to invoke Hamilton again, they must exercise "judgment," not "will."[178] Or, as Wechsler put it, judicial decision making must be "principled" in a way that legislative decision making need not be.[179] Most assessments of dual federalism have agreed that dual federalism failed because, especially as the national economy became more integrated and the public came to expect more from government, the separate spheres model became incapable of principled application. As Vicki Jackson has observed, "[W]ithout written guideposts on the content of the enclaves in the face of changing economies and functions of government, the substantive enclave theory is unworkable."[180]

In the 1930s, Felix Frankfurter published an analysis of the Supreme Court's nineteenth-century decisions construing the boundaries of dual federalism under the Commerce Clause that emphasized the Court's need and desire to avoid the appearance of "judicial policy-making."[181] Larry Lessig calls this the "Frankfurter Constraint," and he contends that it is fundamental to judicial legitimacy.[182] "[A] rule is an inferior rule," he writes, "if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application."[183] And when the Court perceives that it is incurring costs to its legitimacy by pursuing a doctrinal rule perceived to be political, we can expect the Court to abandon that rule and try something else.[184]

So it was with dual federalism. A doctrinal model that calls upon the Court to define and police separate and exclusive spheres of state and national authority puts enormous pressure on the Court's ability to draw the boundary line in a principled and consistent way.[185] After a century and a half of trying to draw lines between commercial and police powers regulation,[186] essentially national and essentially local regulation,[187] manufacturing and commerce,[188] items in the "stream of commerce" and those without,[189] and "direct" and "indirect" effects on interstate commerce,[190] the Court found itself under fire for its inability to seem principled in that effort.[191] Perhaps these doctrinal distinctions collapsed under their own weight, causing the Court to change course.[192] Perhaps the perceived inconsistency of the Court's results helped mobilize popular support for President Roosevelt's "court-packing" plan, and the threat of that plan in turn caused the Court's "switch in time."[193] Either way, the point is that the essential indeterminacy of the line between state and national spheres was a key factor in dual federalism's demise.

If this is right, then at least as a historical matter, dual federalism did not die because there is anything fundamentally incoherent about the notion of state sovereignty or differing state conceptions of democracy or liberty. There is, then, no necessary impediment to alternative models of dual sovereignty that do not raise the same line-drawing problems.[194] Moreover, if indeterminacy is the root problem with dual federalism, then that problem will afflict *any* dual federalist model, including one that restricts state power as much as one that restricts national power. The persistent nostalgia for exclusive zones of national power over areas like foreign affairs or immigration, then, remains puzzling.

4. Conclusion

Justice O'Connor said in *New York v. United States* that "discerning the proper division of authority between the Federal Government and the States" is "our oldest question of constitutional law."[195] But the persistence of that question should not blind us to the ways in which the federalism debate has changed over the course of our history. Although the dual federalist model dominated that debate for the first century and a half, it collapsed in 1937 and has

found few adherents since. Dual sovereignty remains, and a variety of other models for preserving the constitutional equilibrium between the nation and the states have arisen to take dual federalism's place. But outside of a few pockets wherein the courts seek to maintain exclusive zones of *national* control over foreign affairs, immigration, and the like, dual federalism has given way to cooperative federalism, subsidiarity, process federalism, and sovereign immunity.

I fear, however, that the puzzling persistence of dual federalism as an analytical category, particularly among critics of the Supreme Court's efforts to enforce constitutional constraints on national power, has distorted federalism's research agenda. We spend too much time discussing the follies of exclusive subject matter categories as a tool for dividing state and federal regulatory jurisdiction, and far too little analyzing the models of federalism that are actually in play. Any number of more fruitful projects call out for study: we are beginning to have some helpful analyses and case studies of the impact of political parties on the political safeguards of federalism, for example, but much more remains to be done. Heather Gerken and Jessica Bulman-Pozen's theoretical account of "uncooperative federalism" called for careful analyses of the way that state and national administrators actually interact in practice, but relatively few have answered the call. And little has been done to bridge the gap between scholars of public administration steeped in the practical intricacies of fiscal federalism and legal scholars analyzing how to interpret the Spending Clause.

Vestiges of dual federalism should be rooted out, and the Court should be warned against tendencies toward relapse. But for the most part, the horse of dual federalism is dead, and we should quit beating it. The more fundamental debate about dual *sovereignty*, however, remains worth having.

NOTES

I initially contributed this essay to the American Society for Political and Legal Philosophy's Annual Meeting, panel on "Federalism and Subsidiarity: Against Dual Federalism," which convened in August 2011, and I have revised it only slightly in light of the Supreme Court's health care

and immigration decisions in June 2012. I am grateful to Jim Fleming and Jacob Levy for inviting me to participate and to Sotirios Barber, whose paper "Defending Dual Federalism: A Self-Defeating Act" provides the focus for these comments.

1. Edward S. Corwin, "The Passing of Dual Federalism," *Virginia Law Review* 36 (1950): 1–22.

2. *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the federal Gun Free School Zones Act—the first time the Court had struck down an act of Congress as outside the commerce power since the 1930s).

3. *Printz v. United States*, 521 U.S. 898 (1997) (striking down provisions of the Brady Act on the ground that they required state executive officials to implement federal law).

4. See Ernest A. Young, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception," *George Washington Law Review* 69 (2001): 139–88.

5. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding, by a vote of 6 to 3, application of the national Controlled Substances Act to the medicinal use of homegrown marijuana).

6. *Wickard v. Filburn*, 317 U.S. 111 (1942).

7. See Young, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception," 146–50 (collecting examples of this approach).

8. Compare Sotirios A. Barber, "Defending Dual Federalism: A Self-Defeating Act," in this volume, with Malcolm M. Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: University of Michigan Press, 2008).

9. Jenna Bednar and William N. Eskridge Jr., "Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism," *Southern California Law Review* 68 (1995): 1447, 1448.

10. Alpheus Thomas Mason, "The Role of the Court," in *Federalism: Infinite Variety in Theory and Practice*, ed. Valerie A. Earle (Itasca, IL: F. E. Peacock, 1968), 8, 24–25; see also Anthony J. Bellia Jr., *Federalism* (New York: Aspen, 2010), 183 ("The *dual federalism* paradigm understands federal and state governments to operate in different spheres of authority.").

11. Corwin, "The Passing of Dual Federalism," 4.

12. See, e.g., John Kincaid, "From Dual to Coercive Federalism in American Intergovernmental Relations," in *Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States*, ed. Jong S. Jun and Deil S. Wright (Washington, DC: Georgetown University Press, 1996), 29 ("Dual federalism was marked . . . [by] maintenance of the independent integrity of federal powers and state powers through separations of national and state spheres of action.").

13. See generally *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty."); Gordon S. Wood, *The Creation of the American Republic 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), 524–32; Akhil Reed Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): 1425, 1434–36.

14. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 151–52 (1996) (Souter, J., dissenting).

15. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819).

16. Robert M. Cover and T. Alexander Aleinikoff, "Dialectical Federalism: Habeas Corpus and the Court," *Yale Law Journal* 86 (1977): 1035, 1047–48.

17. See, e.g., Sir William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–1769), *49 ("[T]here is and must be in all [governments] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside."); Jean Bodin, *Six Books of the Commonwealth*, abr. and trans. M. Tooley (Oxford: B. Blackwell, 1955 [1576]), bk. 2, ch. I, 52–53; Thomas Hobbes, *Leviathan*, ed. N. Fuller (Chicago: Britannica, 1952 [1651]), pt. II, ch. 29, 150–51.

18. See Wood, *The Creation of the American Republic*, 526–30 (describing how the Federalists initially eschewed use of the term "sovereignty" and adopted it only after it became apparent that too many of their countrymen were wedded to it); Samuel Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, MA: Belknap Press, 1993), 150–51 (observing that the American view of sovereignty was "radically different" from that of British tradition).

19. See, e.g., Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998).

20. See Edward L. Rubin and Malcolm Feeley, "Federalism: Some Notes on a National Neurosis," *UCLA Law Review* 41 (1994): 903, 910–14.

21. See, e.g., Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong* (*And How We the People Can Correct It*) (New York: Oxford University Press, 2006), 167 (decrying "[t]he functional impossibility of amending the [U.S.] Constitution with regard to anything truly significant"); see also Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (New York: Cambridge University Press, 1998), 152–53 (identifying entrenchment as a basic function of constitutions).

22. Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009), 18–19.

23. See ibid.

24. *New York v. United States*, 505 U.S. 144, 162 (1992) (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869)); see also *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("Under our federal system, the States possess sovereignty concurrent with that of the Federal Government.").

25. See Ernest A. Young, "The Constitution Outside the Constitution," *Yale Law Journal* 117 (2007): 408.

26. Cf. *Egelhoff v. Egelhoff*, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (suggesting that "in today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress's commerce power at its edges . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law"); Ernest A. Young, "'The Ordinary Diet of the Law': The Presumption against Preemption in the Roberts Court," *Supreme Court Review* (2011): 253 (arguing that the preemptive effect of federal statutes is the most important issue in federalism doctrine).

27. Barber, "Defending Dual Federalism."

28. See Ernest A. Young, "The Rehnquist Court's Two Federalisms," *Texas Law Review* 83 (2004): 1.

29. Barber, "Defending Dual Federalism."

30. See also Larry Kramer, "Understanding Federalism," *Vanderbilt Law Review* 47 (1994): 1485, 1499 ("[J]ust because it's no longer possible to maintain a fixed domain of exclusive state jurisdiction it's not necessarily impossible to maintain a fluid one.").

31. Barber, "Defending Dual Federalism."

32. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle."); see also Ernest A. Young, "Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments," *William and Mary Law Review* 46 (2005): 1733 (collecting textual and historical arguments).

33. See, e.g., *United States v. Morrison*, 529 U.S. 598, 618 n. 8 (2000) ("With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (London: Vintage, 1996), 162 (discussing the inevitability of state sovereignty at the Founding).

34. Barber, "Defending Dual Federalism" (quoting *The Federalist* No. 45).

35. See ibid.

36. Alternatively, one might think of Professor Barber's argument as simply collapsing the Constitution's specific provisions into one phrase of the Preamble ("promote the general welfare"). See Harvey Mansfield, "The Formal Constitution: A Comment on Sotirios A. Barber," *American Journal of Jurisprudence* 42 (1997): 187.

37. 505 U.S. 144, 157 (1992).

38. See, e.g., Young, "Making Federalism Doctrine," 1754–65 (discussing the obligation of constitutional fidelity).

39. Barber, "Defending Dual Federalism." Strictly speaking, this formulation is tautological because, under the Tenth Amendment, the states' reserved powers begin where the national authority ends. See U.S. Const., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

40. See, e.g., Barber, "Defending Dual Federalism" ("[A] true love of democracy would move people to construe the Fourteenth and Fifteenth Amendments in a manner that permitted Congress and the Supreme Court to police the states' performance and devolve or resume responsibility as circumstances required.").

41. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (holding that the national Fugitive Slave Law preempted state efforts to provide due process for persons accused of being escaped slaves); H. W. Brands, *American Colossus: The Triumph of Capitalism 1865–1900* (New York: Doubleday, 2010), 53 (recounting how Congress enacted laws providing for federal enforcement of exploitative "coolie" labor contracts between railroad companies and Chinese immigrants); Ann Althouse, "The Vigor of Anti-commandeering Doctrine in Times of Terror," *Brooklyn Law Review* 69 (2004): 1231, 1253–57 (describing opposition by state and local governments to provisions of the USA PATRIOT Act).

42. *The Federalist* No. 28, at 138–39 (Alexander Hamilton), ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001).

43. Rubin and Feeley, "Federalism: Some Notes on a National Neurosis," 910–11.

44. Ibid., 912.

45. Barber, "Defending Dual Federalism."

46. Kenneth A. Shepsle, "Congress Is a 'They,' Not an 'It': Legislative Intent as an Oxymoron," *International Review of Law and Economics* 12 (1992): 239.

47. Barber, "Defending Dual Federalism."

48. Ibid.

49. *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

50. 17 U.S. (4 Wheat.) 316, 423 (1819). See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

51. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). This formulation arguably combines dual federalism with a distinct model of "collective action" federalism, which I discuss later. The important point is simply that *Gibbons* plainly rejects plenary congressional power to delegate and recall power to and from the states.

52. Morton Grodzins, "The American Federal System," in *A Nation of States: Essays on the American Federal System*, ed. Robert A. Goldwin (Chicago: Rand McNally, 1961), 1–2.

53. Philip J. Weiser, "Towards a Constitutional Architecture for Cooperative Federalism," *North Carolina Law Review* 79 (2001): 663, 665.

54. See also Martin H. Redish, *The Constitution as Political Structure* (New York: Oxford University Press, 1995), 26 (contrasting "dual" and "cooperative" federalism).

55. Joseph F. Zimmerman, *Contemporary American Federalism: The Growth of National Power* (Westport, CT: Praeger, 1992). For a quite different critique of cooperative federalism, see Michael S. Greve, *The Upside-Down Constitution* (Cambridge, MA: Harvard University Press, 2012), 184–86 (arguing that cooperative federalism is designed to facilitate cartels among the states that subvert the original competitive structure of federalism).

56. Kramer, "Understanding Federalism," 1544.

57. Ibid.

58. Jessica Bulman-Pozen and Heather K. Gerken, "Uncooperative Federalism," *Yale Law Journal* 118 (2009): 1256, 1258–59.

59. Ibid, 1259.

60. Grodzins, "The American Federal System," 22.

61. See *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997); but see *Testa v. Katt*, 330 U.S. 386 (1947) (holding that Congress may generally require state *courts* to entertain claims under federal law).

62. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

63. Donald H. Regan, "How to Think about the Federal Commerce Power and Incidentally Rewrite *United States v. Lopez*," *Michigan Law Review* 94 (1995): 554, 557; see also Ann Althouse, "Enforcing Federalism after *United States v. Lopez*," *Arizona Law Review* 38 (1996): 793, 817 (arguing for a "jurisprudence that looks deeply into why it is good for some matters to

be governed by a uniform federal standard, why it is good for some things to remain under the control of various states, and what effect these choices will have on the federal courts"); Stephen Gardbaum, "Rethinking Constitutional Federalism," *Texas Law Review* 74 (1996): 795, 826–27 (making a similar suggestion).

64. EC Treaty art. 5 (ex art. 3b).

65. See, e.g., Edward T. Swaine, "Subsidiarity and Self-Interest: Federalism at the European Court of Justice," *Harvard International Law Journal* 41 (2000): 1, 5 ("Subsidiarity is a critical reaction not only to the gradual shift in legislative authority from the Member States–dominated Council to more autonomous Community institutions, but also to the Court of Justice's expansive interpretation of Community powers against the apparent interest of Member States."). For a compelling argument that subsidiarity is not, in fact, a suitable or effective protection for Member State autonomy, see Gareth Davies, "Subsidiarity: The Wrong Idea, in the Wrong Place at the Wrong Time," *Common Market Law Review* 43 (2006): 63.

66. Robert D. Cooter and Neil Siegel, "Collective Action Federalism: A General Theory of Article I, Section 8," *Stanford Law Review* 63 (2010): 115.

67. Ibid, 119.

68. See *The Federalist* No. 78, at 405 (Alexander Hamilton). Notably, Professors Cooter and Siegel remain mostly agnostic as to whether their approach is suitable for judicial enforcement. See Cooter and Siegel, "Collective Action Federalism," 154.

69. See, e.g., George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," *Columbia Law Review* 94 (1994): 331, 391 ("The same characteristics that make the inquiry difficult for the political branches to conduct—namely, uncertainty about how much localism really matters on a given issue, the heavy reliance on prediction and the probabilities of competing scenarios, the possibility of discretionary tradeoffs between subsidiarity and proportionality, and the sheer exercise of political judgment entailed—make the inquiry even more problematic for the Court."); Ernest A. Young, "Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism," *New York University Law Review* 77 (2002): 1612, 1677–82 (describing early efforts by the European Court of Justice to enforce subsidiarity).

70. See, e.g., Young, "Making Federalism Doctrine," 1846–47; Young, "Protecting Member State Autonomy in the European Union," 1679–81.

71. Grodzins, "The American Federal System," 17.

72. Professor Siegel's more recent work suggests that he believes that courts should be quite deferential to Congress in evaluating collective action arguments for national action. See Neil S. Siegel, "Free Riding

on Benevolence: Collective Action Federalism and the Minimum Coverage Provision," *Law and Contemporary Problems* 75 (2012): 29, 33 ("[T]he decisive commerce power question is whether Congress could reasonably conclude that a requirement to obtain health insurance coverage or pay a fee will help to solve one or more significant collective action problems involving multiple states."); see also ibid, 32 n. 25 ("Heightened scrutiny in Commerce Clause cases is unheard of in the Court's contemporary federalism jurisprudence."). In that case, collective action federalism would serve largely to erase the minimal doctrinal checks on national action that currently exist. On the other hand, any serious and rigorous effort by courts to review whether particular federal statutes responded to actual collective action problems that the states cannot resolve on their own might well end up striking down far more federal statutes than current doctrine.

73. See, e.g., Neil S. Siegel, "Distinguishing the 'Truly National' from the 'Truly Local': Customary Allocation, Commercial Activity, and Collective Action," *Duke Law Journal* 62 (2012): 797 (arguing that collective action is a superior model to approaches relying on a customary allocation of federal and state functions).

74. 469 U.S. 528 (1985).

75. William W. Van Alstyne, "The Second Death of Federalism," *Michigan Law Review* 83 (1985): 1709. The first death, of course, occurred in the New Deal revolution.

76. 469 U.S. at 554 (quoting *EEOC v. Wyoming*, 450 U.S. 226, 236 (1983)).

77. But see Andrzej Rapaczynski, "From Sovereignty to Process: The Jurisprudence of Federalism after *Garcia*," *Supreme Court Review* (1985): 341 (anticipating that meaningful process-based protections for states would develop out of *Garcia*).

78. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

79. See generally Ernest A. Young, "Two Cheers for Process Federalism," *Villanova Law Review* 46 (2001): 1349.

80. See Ely, *Democracy and Distrust*, 73–104.

81. Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54 (1954): 543. For Madison's earlier version, see *The Federalist* Nos. 45 and 46, at 237–48.

82. See, e.g., Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism," *Columbia Law Review* 100 (2000): 215 (stressing parties); Franita Tolson, "Partisan Gerrymandering as a Safeguard of Federalism," *Utah Law Review* (2010): 859 (stressing redistricting).

83. Bradford R. Clark, "Separation of Powers as a Safeguard of Federalism," *Texas Law Review* 79 (2001): 1321, 1339–40.

84. *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

85. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989).

86. *Atascadero St. Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

87. *Pennhurst St. Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16–18 (1980).

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

89. See William N. Eskridge Jr. and Philip P. Frickey, "Quasi-constitutional Law: Clear Statement Rules as Constitutional Lawmaking," *Vanderbilt Law Review* 45 (1992): 593 (surveying arguments pro and con).

90. See Ernest A. Young, "The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey," *California Law Review* 98 (2010): 1371.

91. See note 61 and accompanying text.

92. See Young, "Two Cheers for Process Federalism," 1349, 1360–61.

93. See ibid.; see also Greve, *The Upside-Down Constitution*, 351–53 (arguing that the anticommandeering increases the accountability of government officials).

94. Barber, "Defending Dual Federalism."

95. See Ernest A. Young, "State Sovereign Immunity and the Future of Federalism," *Supreme Court Review* (1999): 1.

96. 426 U.S. 833 (1976).

97. 134 U.S. 1 (1890).

98. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." But the Court has made clear that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728 (1999).

99. 517 U.S. 44 (1996).

100. *Alden v. Maine*, 527 U.S. 706 (1999) (state courts); *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743 (2002) (administrative agencies).

101. See, e.g., *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

102. See generally Young, "The Rehnquist Court's Two Federalisms," 154–60.

103. See, e.g., *Brown v. Allen*, 344 U.S. 443 (1953).

104. See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976) (holding that chal-

lenges to state convictions under the Fourth Amendment "exclusionary rule" are not reviewable in habeas); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (tightening the doctrine of "procedural default" that bars federal habeas review where the petitioner failed to comply with state procedural rules); *Teague v. Lane*, 489 U.S. 288 (1988) (holding that habeas petitioners may not avail themselves of "new rules" of constitutional law announced after their convictions have become final).

105. 110 Stat. 1214; see also Richard H. Fallon Jr., John F. Manning, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (Eagan, MN: Foundation Press, 6th ed. 2009), 1157–58.

106. Under the "general common law," the federal courts applied judge-made rules of decision rather than state law to private litigation between parties from different states. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Although these cases did not initially have the effect of excluding state regulatory authority—at the outset, they simply reflected the decision of states to adopt uniform rules on subjects like commercial paper—they later came to have that effect. See generally Tony Freyer, *Harmony and Dissonance: The* Swift *and* Erie *Cases in American Federalism* (New York: NYU Press, 1981); William Fletcher, "The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance," *Harvard Law Review* 97 (1984): 1513.

107. *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

108. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

109. See, e.g., Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998).

110. 301 U.S. 1 (1937).

111. 317 U.S. 111 (1942).

112. Corwin, "The Passing of Dual Federalism," 17.

113. See also, e.g., Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (Chicago: University of Chicago Press, 2009), 55 (characterizing the Court's current jurisprudence as reflecting a dual federalist model).

114. Barber, "Defending Dual Federalism."

115. 514 U.S. 779 (1995).

116. Barber, "Defending Dual Federalism." Of course, none of the Court's cases have actually involved secession or nullification, and the Court has repeatedly affirmed the supremacy of federal law. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. . . . As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.").

117. See *Term Limits*, 857–62 (Thomas, J., dissenting); see also ibid. at 852–53 ("The question raised by the present case . . . is not whether any principle of state sovereignty implicit in the Tenth Amendment bars congressional action that Article I appears to authorize, but rather whether Article I bars state action that it does not appear to forbid.").

118. See, e.g., *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (plurality opinion); see also Young, " 'The Ordinary Diet of the Law,' " 326–29 (discussing Justice Thomas's preemption jurisprudence).

119. 514 U.S. 549 (1995).

120. 529 U.S. 598 (2000).

121. See Young, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception," 157–63.

122. 317 U.S. 111 (1942).

123. 514 U.S. 549, 556–59, 560 (1995); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (stating that *Wickard* is the "*ne plus ultra* of expansive Commerce Clause jurisprudence" but accepting it as valid).

124. See *Lopez*, 514 U.S. at 559 ("[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce."); ibid., 561 (noting that the Gun Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms").

125. 22 U.S. (9 Wheat.) at 195. Under *Lopez* and *Morrison*, an activity need merely be "economic" in nature to fall within Congress's power. See, e.g., *Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 613 (noting that "our cases have upheld Commerce Clause regulation of intrastate activity" so long as "that activity is economic in nature").

126. 545 U.S. 1 (2005).

127. See ibid., 29 (insisting that "state action cannot circumscribe Congress's plenary commerce power").

128. See ibid., 35–42 (Scalia, J., concurring in the judgment).

129. 132 S. Ct. 2566 (2012).

130. Ibid., 2593–2600. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined this portion of the Chief Justice's opinion.

131. See ibid., 2585–91 (opinion of Roberts, C.J.); ibid., 2647–48 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). The Chief Justice explained that this portion of his opinion was not dictum because the unconstitutionality of the mandate under the Commerce Clause triggered a presumption in favor of "saving" the act by construing it as a tax. See ibid., 2600–01 (opinion of Roberts, C.J.); see generally Adrian Vermeule, "Saving Constructions," *Georgetown Law Journal* 85 (1997): 1945.

132. See 132 S. Ct. at 2587 ("The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.").

133. The more important federalism holding in *NFIB* was the Court's conclusion—joined by a whopping *seven* justices—that the PPACA's expansion of Medicaid exceeded the limits of Congress's power under the Spending Clause. See 132 S. Ct. at 2601–07. But again, spending is an *instrument* of federal regulation, not a subject matter field, and the Court's limit did not rest on any suggestion that the Medicaid expansion entered an exclusive state sphere.

134. Barber, "Defending Dual Federalism."

135. See, e.g., Young, "The Rehnquist Court's Two Federalisms," 154–60.

136. See Young, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception," 154.

137. See, e.g., Daniel J. Meltzer, "Overcoming Immunity: The Case of Federal Regulation of Intellectual Property," *Stanford Law Review* 42 (2001): 1331 (illustrating how to work around state sovereign immunity in intellectual property cases).

138. See *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (upholding state liability provisions of the Family Medical Leave Act as valid exercise of the Section Five power); *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that Congress could subject states to damages liability under the Americans with Disabilities Act for denying disabled access to courts); *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (holding that Congress could abrogate the sovereign immunity of the states in certain bankruptcy cases).

139. See, e.g., Ernest A. Young, "The Story of *Gregory v. Ashcroft:* Clear Statement Rules and the Statutory Constitution of American Federalism," in *Statutory Construction Stories*, ed. William Eskridge Jr., Philip P. Frickey, and Elizabeth Garrett (Eagan, MN: Foundation Press, 2010), 196.

140. See also *United States v. Comstock*, 130 S. Ct. 1949 (2010) (holding that the federal civil commitment scheme for federal prisoners considered to be sexually dangerous was "necessary and proper" to Congress's power to punish violators of federal laws enacted pursuant to its enumerated powers).

141. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

142. See Young, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception," 177–85.

143. 530 U.S. 363 (2000).

144. 539 U.S. 396 (2003).

145. *United States v. Arizona*, 641 F.3d 339, 352–54 (9th Cir. 2011). Although the Ninth Circuit majority also applied traditional statutory preemption principles, Judge Noonan's concurrence offered a full-throated endorsement of dual federalist exclusivity:

> The foreign policy of the United States preempts the field entered by Arizona. Foreign policy is not and cannot be determined by the several states. Foreign policy is determined by the nation as the nation interacts with other nations. Whatever in any substantial degree attempts to express a policy by a single state or by several states toward other nations enters an exclusively federal field.

Ibid., 368 (Noonan, J., concurring).

146. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

147. Ibid., 2500.

148. See ibid., 2501.

149. Roderick M. Hills Jr., "Preemption Doctrine in the Roberts Court: Constitutional Dual Federalism *by* Another Name?," available at http://ssrn.com/abstract=1910761, in *Business and the Roberts Court*, ed. Jonathan Adler (New York: Oxford University Press, forthcoming)

150. 529 U.S. 89 (2000).

151. See Young, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception," 178–80; see generally Young, " 'The Ordinary Diet of the Law,' " 332–40 (criticizing the Court's emphasis on traditional spheres of state and federal activity in preemption cases).

152. Grodzins, "The American Federal System," 3.

153. See, e.g., Julian Ku, "Gubernatorial Foreign Policy," *Yale Law Journal* 115 (2006): 2380, 2414 (describing "an emerging system of gubernatorial foreign policy characterized by governors exercising independent decision-making power over matters affecting the foreign policy of the entire United States"); Ivo D. Duchacek, "Perforated Sovereignties: Towards a Typology of New Actors in International Relations," in *Federalism and International Relations: The Role of Subnational Units*, ed. Hans J. Michelmann and Panayotis Soldatos (New York: Oxford University Press, 1990), 1, 28 ("International activities undertaken by democratic non-central governments have already become facts of international life, however much their effects may be minimized as marginal and purely technical by some, or described as portents of diplomatic chaos by others."); Brian Hocking, "Introduction," in *Foreign Relations and Federal States*, ed. Brian Hocking

(Leicester: Leicester University Press, 1993), 1, 3 ("The notion of a hierarchy of political authority, with central government acting as the effective gatekeeper between national communities and their international environment, is outdated" because of "changes in the domestic and international environments."); John Kincaid, "Constituent Diplomacy in Federal Polities and the Nation-State: Conflict and Co-operation," in *Federalism and International Relations*, ed. Michelmann and Soldatos, 54, 73 (arguing that international activities by subnational governments are beneficial for both economic and democratic reasons).

154. See, e.g., Jack L. Goldsmith, "Federal Courts, Foreign Affairs, and Federalism," *Virginia Law Review* 83 (1997): 1617, 1674 ("As international markets and means of communication have expanded, subnational units have become increasingly aware of, affected by, and in contact with foreign elements. To the extent that central governments are unable or unwilling to redress local needs and interests, state and local governments have been doing so unilaterally in both the economic and political realms.").

155. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

156. Barber, "Defending Dual Federalism."

157. Ibid.

158. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

159. 514 U.S. 549 (1995) (striking down the national Gun Free School Zones Act as outside the reach of Congress's power under the Commerce Clause).

160. Transcript of Oral Argument in *United States v. Lopez*, 1994 U.S. Trans. LEXIS at **4–5 (November 8, 1994).

161. 514 U.S. at 567–68 ("To [accept the Government's argument] would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local. . . . This we are unwilling to do.").

162. Barber, "Defending Dual Federalism."

163. Wechsler, "The Political Safeguards of Federalism," 543.

164. Koen Lenaerts, "Constitutionalism and the Many Faces of Federalism," *American Journal of Comparative Law* 38 (1990): 205, 263; see also Martin Shapiro, "The European Court of Justice," in *The Evolution of EU Law*, ed. Paul Craig and Grainne de Burca (Oxford: Oxford University Press, 1999), 321.

165. See generally Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondents, *Gonzales v. Raich*, No. 03-1454 (filed October 13, 2004), at 9–10 (collecting examples from Europe, Canada, and Australia).

166. See, e.g., John Donne, "Meditation XVII," in *The Norton Anthology*

of English Literature, Major Authors Edition (New York: Norton, 3rd ed. 1975 [1623]), 620 ("No man is an island, entire of itself; every man is a piece of the continent, a part of the main.").

167. *The Federalist* No. 51, at 270 (James Madison).

168. It does no good to point out, as Barber does, that "the national government would be 'limited' in important ways even if there were no states." Barber, "Defending Dual Federalism." This is a little like saying individuals would have important rights even if they had no free speech rights. The point in each case is that the national government must be limited in the way that the Constitution provides, whether or not those protections are redundant or might be supplemented by extraconstitutional limits.

Likewise, it is no answer to say that "the dual federalist notion of limited government conflicts with other constitutional ideas," such as the principle "from *The Federalist* No. 45 . . . that 'the real welfare of the great body of the people is the supreme object to be pursued.'" Barber, "Defending Dual Federalism." Putting aside the quibble that *The Federalist* No. 45 is not the same thing as the Constitution, it is easy to demonstrate that many different constitutional ideas are in tension with one another. The Free Exercise Clause and the Establishment Clause often push in opposing directions, and individual rights like free speech often undermine constitutional principles of equality grounded in the Equal Protection Clause. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (holding that the First Amendment protected the right to burn a cross on a black family's lawn). Certainly, the U.S. Reports are replete with cases in which the Court has thwarted the national government's ability to pursue "the real welfare of the great body of the people" in the name of some other constitutional principle. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (invoking the First Amendment to reject the United States' attempt to enjoin publication of the "Pentagon Papers" on national security grounds). There is nothing for it in each of these cases but to carefully construe the scope and limits of each constitutional principle in question, with an eye toward reconciling them if possible. Neither courts nor commentators have a warrant for simply discarding a constitutional principle because it may come into conflict with some other principle they like better.

169. Barber, "Defending Dual Federalism."

170. See, e.g., Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987), 33 ("[F]ederalism is concerned simultaneously with the diffusion of political power in the name of liberty and its concentration on behalf of unity or energetic government.").

171. See, e.g., *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) ("The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.").

172. See, e.g., *The Federalist* No. 51, at 267–72 (James Madison).

173. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (striking down a state law repealing a land grant to private parties); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (striking down a state legislature's attempt to alter the charter of a private college). It is even hard to parse the distinction between "negative" and "positive" constitutionalism, particularly in the context of federalism. John Marshall's decisions in *McCulloch* and *Gibbons*, for example, both empowered the national government to do "good things" and prevented the state governments from doing "bad things." Perhaps the point is that negative constitutionalism is appropriate for state governments but not for the national government. But that would ignore much of our history, in which most of the positive goods that government provides—e.g., public education, stable rules of contract and property, most public infrastructure—have been furnished by the states. See, e.g., *The Federalist* No. 46, at 243–45 (James Madison) (predicting that this would be the case).

174. See, e.g., Ernest A. Young, "Federal Preemption and State Autonomy," in *Federal Preemption: States' Powers, National Interests*, ed. Richard A. Epstein and Michael S. Greve (Washington, DC: AEI Press, 2007), 249, 255–57 (stressing the autonomy of states to make their own policy choices over libertarian conceptions of federalism that stress minimizing regulation).

175. See, e.g., Barber, "Defending Dual Federalism" ("[A]n argument for dual federalism would have to occur in a national forum, and the expectations of that forum make it impossible to defend dual federalism.").

176. For a somewhat similar argument, stressing the need for a clear division of labor between national and state governments in order to promote market competition, see Greve, *The Upside-Down Constitution*, 6–78.

177. See Young, "Making Federalism Doctrine," 1836–40.

178. *The Federalist* No. 78, at 405 (Alexander Hamilton).

179. Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 1, 15.

180. Vicki Jackson, "Federalism and the Uses and Limits of Law: *Printz* and Principle," *Harvard Law Review* 111 (1998): 2180, 2232.

181. See Felix Frankfurter, *The Commerce Clause under Marshall, Taney, and Waite* (Chapel Hill: University of North Carolina Press, 1937), 54.

182. See Larry Lessig, "Translating Federalism: *United States v. Lopez*," *Supreme Court Review* (1995): 125, 174 ("To the extent that results of a particular rule appear consistent, it is easier for the legal culture to view this rule as properly judicial, and its results as properly judicial. . . . To the extent, however, that the results appear inconsistent, this pedigree gets questioned; it becomes easier for observers to view these results as

determined, or influenced, by factors external to the rule—in particular, factors considered political.").

183. Ibid.

184. Ibid., 174–75.

185. See, e.g., Siegel, "Distinguishing the 'Truly National' from the 'Truly Local.' "

186. Compare *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), with *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

187. *Cooley v. Board of Wardens*, 53 U.S. 299 (1852).

188. *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

189. *Stafford v. Wallace*, 258 U.S. 495 (1922).

190. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

191. See, e.g., Franklin Delano Roosevelt, "Fireside Chat on Reorganization of the Judiciary, March 9, 1937," reprinted in Ernest A. Young, *The Supreme Court and the Constitutional Structure* (Eagan, MN: Foundation Press, 2012), 284, 286.

192. See Cushman, *Rethinking the New Deal Court*, 42–43.

193. See, e.g., William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

194. All models, of course, raise *some* line-drawing problems. But that is true throughout the law. Nonetheless, courts have been unwilling to abandon less-than-pellucid distinctions such as those between content-based and content-neutral restrictions on speech, fundamental and nonfundamental rights, and reasonable and unreasonable searches. The question is whether alternative models of federalism might offer somewhat more workable doctrinal tools than the failed jurisprudence of dual federalism.

195. 505 U.S. at 149.

4

FOOT VOTING, FEDERALISM, AND POLITICAL FREEDOM

ILYA SOMIN

1. Introduction

The idea of "voting with your feet" has been an important element in debates over federalism for several decades.[1] Economists, legal scholars, and others have analyzed its efficiency and equity. But foot voting is still underrated as a tool for enhancing political freedom: the ability of the people to choose the political regime under which they wish to live.[2]

Section 2 of this essay explains some key ways in which foot voting in a federal system is often superior to ballot box voting as a method of political choice. A crucial difference between the two is that foot voting enables the individual to make a decision that has a high likelihood of actually affecting the outcome. By contrast, the odds of casting a meaningful ballot box vote are vanishingly small. This reality both enhances the individual's degree of political freedom and incentivizes him or her to make better-informed and more rational decisions. In addition, foot voting in a federal system will often enable the individual to choose from a wider range of options, thereby further increasing political freedom.

Obviously, this does not mean that all decisions should be made by foot voting rather than at the ballot box, or that all political power should be decentralized. Many other issues must

be considered in determining how centralized a political system should be. But the enhancement of political choice is a crucial advantage that is often overlooked. It justifies greater political decentralization than might be optimal otherwise.

Section 3 considers some possible limitations of foot voting in a federal system as a tool for enhancing political freedom. These include moving costs, the possibility of "races to the bottom," and the problem of oppression of minority groups by subnational governments. Each of these sometimes poses a genuine constraint on effective foot voting. But none is as severe a limitation as critics claim.

Section 4 argues that the case for foot voting under federalism should be expanded "all the way down" to local governments and private communities, and "all the way up" to freer international migration. It builds on a growing recent literature that advocates granting greater autonomy to local governments relative to regions.[3] Foot voting between localities creates greater choice with lower moving costs than does foot voting between large regions. This is even more true of foot voting between private planned communities.

Just as foot voting can be expanded all the way down to the local level, there is also a strong case for extending it "all the way up" to the international level. The potential gains from freer international foot voting in some respects dwarf those that can be achieved domestically.[4] Moreover, for people living under authoritarian regimes, foot voting through international migration is often their only means of exercising political choice.

2. Foot Voting and Political Choice

A variety of political theories emphasize that government should be freely chosen by the governed. Some argue that such political freedom has inherent value.[5] As the Declaration of Independence puts it, "Governments . . . deriv[e] their just powers from the consent of the governed."[6] Individuals who lack the ability to choose their governments are not fully free.[7] Other theories primarily emphasize the instrumental benefits of political choice. When people are able to choose their governments, political leaders

have stronger incentives to adopt policies that benefit the people, or at least avoid harming them.[8] And the people themselves are able to select the policies they prefer.

In modern states, the ballot box is the main mechanism for popular political choice. If the public disapproves of government policy, it can vote to "throw the bastards out" and elect a new set of bastards who will, hopefully, do better. There is no doubt that the ballot box does indeed enhance political choice. Most important, it effectively incentivizes political leaders to avoid large and obvious disasters. It is significant, for example, that no modern democracy has ever had a mass famine within its territory,[9] even though such famines are all too common in dictatorships. Democratic electorates also have some success in forcing government policy to conform to majority public opinion.[10]

Ballot box voting understandably has a central place in modern theories of political freedom. It is a major improvement over the traditional alternatives of dictatorship and oligarchy, to say nothing of totalitarian one-party states. But its very real benefits coexist with severe limitations. The right to vote at the ballot box is an important aspect of political freedom. But it is not enough. Ballot box voting has systematic weaknesses that can be at least partially offset by allowing a greater role for foot voting.

As Albert Hirschman famously recognized, people dissatisfied with a political regime can use either "voice" or "exit" to address the situation.[11] Exit in the form of foot voting has some important advantages over voice in the form of ballot box voting that are often ignored.

Limitations of the Ballot Box

Ballot box voting has significant limitations as an expression of political freedom.[12] The most significant are the extremely low likelihood that any one vote will make a difference, voters' inability to exercise choice over the basic structure of the political system, and the presence of widespread rational political ignorance, which ensures that many ballot box decisions will be poorly informed. Ballot box voters also have poor incentives to make rational use of the political information they do know.

Low Probability of Decisiveness

In all but the very smallest elections, the individual voter has only a vanishingly small chance of making a difference to the outcome. In an American presidential election, the probability of casting a decisive vote is roughly 1 in 60 million.[13] The odds are better in elections with smaller numbers of voters but are still extremely low.

The low probability of decisiveness surely diminishes the extent to which ballot box voting is a meaningful exercise of political freedom. This may seem a counterintuitive conclusion, since citizens of democratic states have long been taught to view voting as an important exercise of individual freedom. We implicitly assume that the individual enjoys political freedom if he or she can effectively influence the government as part of a much larger group.

But in most other contexts, we would not say that a person is truly free to make a particular decision if he or she in fact has only a minuscule chance of actually determining the outcome. For example, a person who has only a 1 in 60 million chance of being able to decide what to say has only a very attenuated degree of freedom of speech. A person with only a 1 in 60 million chance of being able to decide what religion to practice surely lacks meaningful freedom of religion. A worker who has only a 1 in 60 million chance of being able to decide whether to quit her job is not a free laborer but a serf. In each of these cases, the person would not be considered truly free merely because she could say what she wants, practice her religion freely, or change jobs if she first persuades a majority of a much larger group to give her permission. The same can be said for most if not all other valuable freedoms. Similarly, a person with only a minuscule chance of affecting the nature of the government she lives under has only a very attenuated degree of political freedom.

The point is not to suggest that the low probability of decisiveness makes ballot box voting worthless as an exercise of political freedom. It surely has at least some value. I merely insist on the less sweeping point that this low probability significantly diminishes the degree of political freedom that ballot box voters enjoy.

Lack of Choice over Basic Political Structure

A second and at least equally fundamental limitation of ballot box voting is that the voters are unable to choose the basic structure

of the regime they live under. Democracy cannot be democratic all the way down. Before one can make any decisions at the ballot box, there must be a prior decision on such questions as what the voting rules will be, who gets to be part of the electorate, and what the powers of the government will be.[14] Of necessity, these decisions will have to be made by some procedure other than ballot box voting itself, since the voting system itself cannot function until they have been addressed.

This problem can be partially alleviated by means of a constitutional amendment process. For example, voters in the United States can change the basic structure of the political system if they can muster a supermajority large enough to pass a constitutional amendment under the procedures set out in Article V of the Constitution. But, obviously, the rules for constitutional amendments are themselves part of the basic structure of the political system, and an amendment process that requires a supermajority to effect fundamental change is itself an important potential constraint on political choice. Thus, the existence of an amendment process merely pushes the problem of political freedom one step back; it brings to light the public's lack of freedom to select the rules for the amendment process itself.

Moreover, in practice, the vast majority of people in democratic societies are born into relatively stable, well-established political systems that they have little hope of fundamentally altering. Short of emigration, they have little or no meaningful choice over basic political structures.

Rational Ignorance

Finally, political choice under ballot box voting is undermined by the problem of rational political ignorance.[15] Because of the low probability that any one vote will make a difference, ballot box voters have little incentive to acquire political information. It is actually rational for them to remain ignorant about the decisions they are making.[16] No matter how well informed a voter is, the chance that his knowledge will actually make a difference in improving the quality of government is vanishingly small. Thus, it makes sense for most citizens to devote their time and energy to other activities, which have a higher expected payoff than acquiring political information.

Even highly intelligent and rational citizens could choose to devote little or no effort to the acquisition of political knowledge. The theory of rational ignorance suggests that most people will acquire little or no political knowledge and also that they will often make poor use of the information that they do learn. Both political knowledge acquisition and the rational evaluation of that information are classic collective action problems, in which individual citizens have incentives to "free ride" on the efforts of others.[17]

This point applies to altruistic, civic-minded people as much as to rationally self-interested ones. A rational altruist will devote most of her time and effort to activities that are more likely to succeed in benefiting others than spending time on the acquisition of political knowledge.[18]

Decades of survey research show that most citizens do in fact acquire very little political information, just as the theory of rational ignorance predicts.[19] In the immediate aftermath of the 2010 election, in which Republicans made record gains, only 42 percent of Americans realized that the outcome of the vote was that the Republicans had taken control of the House of Representatives but not the Senate.[20] A 2009 survey showed that only 24 percent of Americans realized that the "cap and trade" proposal then recently passed by the House of Representatives as an effort to combat global warming addressed "environmental issues."[21] About 46 percent said that it was either a "health care reform" or a "regulatory reform for Wall Street."[22] A 2006 Zogby poll found that only 42 percent of Americans could even name the three branches of the federal government.[23] Hundreds of other examples of ignorance could be used to illustrate the point.[24] Moreover, widespread ignorance is not of recent origin but stretches as far back as we have survey data to measure it.[25]

Rational Irrationality

Not only do rational ballot box voters usually acquire little political information, but they also often make poor use of the information they do possess. Rational ignorance does not imply that voters will learn nothing at all about politics. Rather, it predicts that they will acquire very little or no information *for purposes of voting*. Many, however, will learn political information for other reasons, such as that they find politics interesting.[26] In much the

same way, dedicated sports fans acquire knowledge about their favorite teams, even though they know they have little chance of influencing the outcomes of games. People with a strong interest in politics often act as "political fans."[27] They evaluate information in a highly biased manner that overvalues any evidence that supports their preexisting views, while ignoring or discounting that which cuts against them. Various studies find that this is exactly how those with a strong interest in politics actually do respond to new political information.[28]

Such bias is perfectly rational if the goal is not to get at the "truth" of a given issue in order to be a better voter but to enjoy the psychic benefits of being a political "fan."[29] As Bryan Caplan puts it, this is a case of "rational irrationality."[30] A person can rationally choose to limit the amount of effort he devotes to logically evaluating the information he possesses and instead allow himself to give in to emotionally driven, illogical reactions.

One can argue that rational ignorance and irrationality are not genuine constraints on the exercise of political choice through voting. After all, rationally ignorant voters choose not to acquire more information than they do. But this argument ignores the reality that rational ignorance is part of a collective action problem, in which individually rational action leads to results that none of the individuals involved might actually want. Moreover, voting decisions influenced by ignorance end up imposing policies not only on the ignorant voters themselves but also on the rest of society. For this reason, ignorance constrains not only ignorant voters themselves but others as well.[31]

Some scholars argue that political ignorance and irrationality are of little importance because voters can offset their effects by relying on various "information shortcuts." I have addressed these claims in great detail elsewhere.[32] Here, I would only suggest that shortcuts are unlikely even to come close to fully offsetting widespread ignorance of fairly basic political information, even though the shortcuts do have some utility.

Building on a well-known argument by Albert Hirschman, one might contend that the ready availability of foot voting might reduce voters' incentives to invest in political knowledge. Hirschman claimed that the availability of an easy exit option diminishes the incentive to invest in political voice,[33] possibly including

political knowledge. But political ignorance is severe even in cases where exit is very difficult, as in the case of national politics.[34] Even where exit is hard, the incentive to invest in political information is minimal, because the low probability of influencing political outcomes ensures that there is little gain from such investments. Thus, foot voting is unlikely to be more than a minor contributor to the problem of ignorance. It could even make voice more effective, in so far as knowledge of government policy acquired for the purposes of foot voting is sometimes also useful for ballot box voting.[35]

Advantages of Foot Voting

Foot voting has important advantages over ballot box voting on all three of the dimensions considered here. Foot voting is usually decisive, it allows for a greater degree of choice over basic structure, and it creates superior incentives to acquire and rationally evaluate information.

Individual decisiveness is the most obvious advantage of foot voting over ballot box voting. A person who chooses which jurisdiction to live in usually has an extremely high probability of being able to implement her decision. In many cases, of course, the individual might be constrained by the desires of a spouse or other family members. But even in these situations, he generally has a much higher probability of influencing the final result than does a ballot box voter. One vote out of, say, 10, in a large family is far more likely to be influential than 1 vote out of 10 million or even 1 vote out of 10,000 in an election.

Adam Przeworski, one of the world's leading scholars of democracy, laments that "[n]o rule of collective decisionmaking other than unanimity can render causal efficacy to equal individual participation."[36] Foot voting does not perfectly achieve this ideal either, but it does come relatively close. It enables a wide range of people to make decisive political choices that are also relatively equal. Though equality is not perfect, even poor and politically downtrodden people can often make effective use of foot voting.[37]

Foot voting in a federal system also allows greater choice over basic structure. A person who can choose between multiple state

and local governments can potentially choose between jurisdictions with very different systems of governance. For example, they might have divergent state constitutions, electoral systems, basic social welfare policies, and so on. Obviously, the range of choice here is far from unlimited. The choices are limited to those available in the given federal system.[38] Moreover, foot voters generally are unable to control the basic structure of the federal system itself, such as the determination of how many different jurisdictions will exist, and what their boundaries will be. Nonetheless, especially in a sizable nation with many different jurisdictions, the range of choice is likely to be substantially greater than that available through ballot box voting in a unitary state.

Finally, foot voting also creates much better incentives than ballot box voting for acquiring and rationally evaluating relevant information.[39] Since foot-voting choices are individually decisive, decision makers have strong incentives to acquire good information and evaluate it in a relatively unbiased way. Historical evidence suggests that even foot voters with very low education levels and significant barriers to acquiring new information nevertheless often successfully overcome them. For example, millions of poor African Americans in the early twentieth-century Jim Crow–era American South managed to acquire enough information to realize that conditions were better in the northern states, and migrated accordingly. They did so despite the fact that most had very low education levels, and southern state governments often deliberately sought to keep them ignorant.[40] This is in sharp contrast to the widespread ignorance of basic facts among ballot box voters, including many who are much better educated and face lower information costs.

Obviously, foot voters face information problems of their own. The more issues are left up to the private sector or to lower-level political jurisdictions, the more information foot voters potentially have to learn. But an increasing number of issues raises information costs regardless of whether the political system is federal or unitary, and regardless of whether foot voting is a viable option. The great advantage of foot voting over ballot box voting is not that it eliminates the need for information but that it gives participants stronger incentives to seek out the necessary

knowledge and rationally evaluate it. In some cases, moreover, foot voters actually need *less* in the way of detailed knowledge than ballot box voters do. For example, they sometimes do not need to know whether superior conditions in one jurisdiction relative to another are caused by government policy or not.[41] If conditions are better in region X than region Y and likely to remain that way, that is often sufficient for a good foot-voting decision. By contrast, rewarding or punishing political leaders at the polls for outcomes they did not cause is often dangerous and self-defeating for ballot box voters.[42]

Obviously, we should not assume that foot voters are perfectly informed or perfectly rational. No one ever has complete information, and people sometimes make irrational decisions in many different aspects of their lives.[43] The advantage of foot voting over ballot box voting is not that it avoids ignorance and irrationality entirely but that it gives us stronger incentives to reduce them. Irrational cognitive biases are most likely to influence our decisions when we don't make a conscious effort to make good decisions and act rationally.[44] And people are less likely to do the hard work needed to overcome ignorance and irrationality when there is little incentive to do so.[45]

Implications for Federalism

The advantages of foot voting described here justify greater political decentralization than might otherwise be desirable. The more decentralized political power is, the more issues citizens will be able to decide through foot voting as opposed to ballot box voting. The more decisions, therefore, will be made by processes where individuals make choices that are individually decisive, have greater leverage over basic political structure, and are subject to better incentives for the acquisition and use of knowledge.

The benefits of foot voting are enhanced when jurisdictions compete for potential migrants by offering the most attractive possible package of public services and taxes.[46] In such a situation, the number and quality of choices open to foot voters are likely to increase. But effective foot voting does not necessarily *require* competition. Even if jurisdictions choose their policies at random or solely for the purpose of catering to the desires of current

residents, foot voters can take advantage of the resulting policy diversity to select options that best fit their preferences. They are still likely to have a wider range of choices than in a unitary state.[47]

In theory, these benefits could potentially be achieved through decentralization without "federalism," as defined by Malcolm Feeley and Edward Rubin and some earlier writers.[48] A unitary central government, they contend, can choose to transfer power to local or regional authorities without giving the latter any genuine political autonomy, defined as a guarantee against interference from the center.

In my view, this definition of "federalism" is too narrow. A federal system can potentially exist in any society where there are multiple separate levels of government, even if the lower levels are not legally immune from interference by the higher levels. So long as overruling the lower-level government requires a costly affirmative act by the center,[49] such as a legislative vote, the lower-level government retains a measure of real power. At the very least, it can exist so long as the leaders of territorially based lower-level governments are selected by processes that are not under the central government's control.[50] In any event, legal autonomy is a continuous variable, not a binary one. Lower-level governments can be—and usually are—legally autonomous on some issues, while subject to central government override on others.

Elsewhere, I have suggested that decentralization without legal autonomy is unlikely to be a stable equilibrium; the central government is likely to have strong incentives to override local decision making when national political majorities or powerful interest groups want it to do so.[51] If this is correct, a high degree of decentralization probably cannot persist for very long without some kind of constitutional protection for federalism.

But the distinction between the two is not crucial to the argument advanced here. In order to achieve the enhancement of political freedom promised by foot voting, some substantial degree of decentralization is necessary. Whether that decentralization requires "federalism," as defined by Feeley and Rubin, is a question that I do not attempt to resolve here. It does, however, require federalism in the broader sense of having multiple levels of government, and a significant sphere of autonomy for regional authorities.

3. Potential Limitations of Foot Voting as a Tool for Political Choice

While foot voting has some important advantages over ballot box voting, critics argue that it also has severe limitations as a mechanism for political choice. Among the most important are moving costs, the danger of a "race to the bottom," and the plight of unpopular racial and ethnic minorities. Each of these poses genuine challenges for foot voting. But the problems are not as severe as critics claim.

Moving Costs

The most obvious shortcoming of foot voting is the problem of moving costs.[52] Moving from one jurisdiction to another can be costly in several ways. Potential migrants must pay the direct costs of moving themselves and their possessions. But often, these direct moving costs are outweighed by much greater indirect costs, such as the cost of parting with employment opportunities, family members who stay behind, and social networks. Where moving costs are high, the choices created by foot voting may be illusory, since many will not be able to take advantage of them.

Moving costs can indeed undermine the freedom of choice of potential foot voters. But they are not as prohibitively high as is sometimes supposed. Modern technology has made it cheaper and easier than ever before to move from one jurisdiction to another. And, in a relatively large federal structure such as the United States or the European Union, the existence of numerous jurisdictions with a wide range of job opportunities reduces the extent to which people in most professions are limited to just one part of the country.

Interstate and other moves are actually extremely common, which suggests that moving costs are often quite manageable. A 2008 Pew Research Center study showed that 63 percent of Americans have moved at least once in their lives, and 43 percent have made at least one interstate move.[53] Interstate migration driven by variation in public policy is also commonplace. In the small state of New Hampshire, which has the lowest taxes and nearly the lowest levels of economic regulation in the country,[54] some 57 percent

of the population now consists of out-of-state migrants, many of them drawn by the state's economic policies.[55]

In Western Europe, freedom of migration between the Member States has also led to extensive foot-voting-based migration. Hundreds of thousands of French citizens have moved to Britain in large part because that country has lower taxes and more open labor markets, enabling them to pursue economic opportunities.[56] During the 2007 French presidential election, the winning candidate, Nicolas Sarkozy, even campaigned in London in order to seek the support of French expatriates there.[57] Tens of thousands of Germans have moved to Switzerland for similar reasons, to the extent that some Swiss even complain of a German "invasion."[58]

Contrary to claims that foot voting is usually a realistic option only for the relatively affluent, census data finds that households with an income under $5,000 per year are twice as likely to make interstate moves as the population as a whole.[59] The poor often actually face lower effective moving costs than more affluent households because they own much less in the way of immobile assets, such as property in land.

Some scholars suggest that foot voting over public policy is rare because surveys show that most moves are motivated by job-related considerations, rather than by direct calculations of the quality of public services.[60] If so, this might suggest that moving costs are too high to make foot voting worthwhile. However, these arguments ignore the fact that employment prospects are heavily influenced by local and state public policy on taxation, regulation, and other issues. Ignoring job-related moves is consistent with Charles Tiebout's classic 1956 foot-voting model, which assumes such moves away, because it focuses purely on the provision of local public goods.[61] But it is not appropriate for a broader discussion of policy-motivated foot voting, which incorporates government policy affecting private goods as well. Moreover, some local public goods might affect employment prospects as well. For example, a well-run legal system or a clean environment might attract some categories of businesses.[62]

The fact that someone is making a move based on employment opportunities does not mean that her choice was unrelated to variations in public policy. Moreover, the surveys in question either completely neglect to ask movers whether public policy factors

played a role in their decisions[63] or else included only a few possible policy influences.[64]

I do not mean to suggest that job-related moves are necessarily policy-related moves, merely that they should not be assumed as necessarily *non*–policy based. It may well be that one of the things people care most about when exercising political freedom is how a jurisdiction's policies affect their economic prospects, just as polls often show that the economy is voters' top policy concern in ballot box elections. A foot voter who prioritizes economic concerns in choosing which government to live under is still exercising political choice.

A well-known critique of Tiebout's foot-voting model claims that it is at least partly falsified by empirical evidence, because the data does not show that the policy heterogeneity of American communities increased as moving costs fell during the late nineteenth and twentieth centuries.[65] But Tiebout's and other models of foot voting don't necessarily predict greater heterogeneity as transportation costs fall. They do so only if preference heterogeneity remains constant or increases. But it is quite possible that heterogeneity of preferences decreased during the course of the twentieth century as immigrants became more assimilated, the United States developed more of an integrated national culture, and more was learned about the effectiveness or lack thereof of different kinds of local policies.

Overall, the evidence does not show that moving costs generally preclude foot voting, even if foot voting would be more effective if they were lower. Moving costs are, however, particularly severe in the case of policies that target immobile assets, such as property in land. Here, moving is not just potentially expensive but literally impossible. This is a genuine and to some extent irremediable shortcoming of foot voting under federalism. Thus, effective protection for immobile assets will usually have to be provided by other means, probably including centrally enforced limits on the powers of regional governments.[66] Foot voting can, potentially, help address such problems if more issues are handled by private sector organizations, or if people can choose to reject the jurisdiction of a particular government without physically migrating.[67]

But it may not be possible to make foot voting a fully effective mechanism for protecting immobile assets and people. For poli-

cies that target primarily mobile assets, however, foot voting often provides an effective mechanism of political choice even in spite of moving costs.

The Race to the Bottom

The "race to the bottom" argument is one of the best-known long-standing criticisms of federalism.[68] Because of a desire to attract taxpaying business interests, it is argued, state and local governments are likely to lower environmental and safety regulations below reasonable minimums, thereby inflicting great harm on consumers, workers, and the general public. Such "destructive competition" could make the choices available to foot voters illusory. Effectively, they could end up choosing between jurisdictions that have all been forced to sell out to narrow business interests in order to keep up tax revenue.

In a series of influential articles in the 1990s, Richard Revesz significantly undermined the theoretical rationale for the race to the bottom argument in the field of environmental policy—an area where the argument was traditionally thought to be at its strongest.[69] Revesz pointed out that states compete with each other on more than one dimension, and that an attractive and healthy environment is one of the factors that is likely to attract relatively affluent taxpayers and some businesses. Thus, there is no reason to expect that state and local governments will systematically sacrifice environmental concerns to the needs of polluting businesses.[70] Indeed, higher-income citizens of the type most valuable to states as taxpayers generally assign a higher priority to environmental protection than do lower-income groups.[71] Local governments also have other forms of leverage against mobile business interests that reduce the extent to which the latter can expect to capture the lion's share of the gains from interjurisdictional competition.[72] The empirical record to a large extent supports Revesz's predictions. State governments pioneered many forms of environmental protection long before the federal government required them to do so.[73]

In addition to environmental protection, the other iconic example of a dangerous race to the bottom is the Supreme Court's 1918 decision in *Hammer v. Dagenhart*, which invalidated federal

child labor laws as beyond the scope of congressional authority.[74] However, all but five states had already enacted child labor bans of their own by 1910 (though some were less strict than the federal law),[75] and industrial child labor disappeared almost completely by 1930, just twelve years after *Hammer*.[76] By the time *Hammer* was reversed by the Supreme Court in 1941, the majority of states had laws comparable to the federal one the Supreme Court had invalidated.[77]

None of this suggests that genuine races to the bottom never happen. They can occur in various situations, particularly where state or local governments seek to attract a mobile asset by means that exploit an immobile one, such as property rights in land. By placing the burden on the immobile asset, states can potentially impose the costs of attracting the mobile factor on people who have no effective exit option. This may, for example, explain cases where states use "economic development" takings to transfer property from politically weak local owners to potentially mobile firms such as General Motors.[78]

But while races to the bottom can and do happen, they are less likely than critics claim. Even in environmental policy and labor policy, two fields where the problem has traditionally been thought to be especially severe, races to the bottom turn out to be far less prevalent than previously believed.

The Problem of Minority Rights

No issue has done as much to discredit federalism in the United States as its association with the oppression of racial and ethnic minorities. The conventional wisdom holds that federalism was largely a disaster for African Americans and other minorities, while the growth of federal power greatly alleviated their plight.[79] As the leading political scientist William Riker put it in 1964, "The main beneficiary [of federalism] throughout American history has been the Southern Whites, who have been given the freedom to oppress Negroes. . . . [I]f in the United States one approves of Southern white racists, then one should approve of American federalism."[80]

There is no doubt that American state and local governments have in fact oppressed minority groups on many occasions, and that federal intervention sometimes played a key role

in diminishing that oppression—as with the abolition of slavery in 1865 and Jim Crow segregation in the 1960s. If federalism is generally inimical to the interests of racial and ethnic minorities, this undermines the utility of foot voting in a federal system as a mechanism for political choice, at least when it comes to unpopular minorities. The choices available to these groups would be very poor ones indeed. However, the conventional wisdom on the relationship between federalism and Jim Crow is at the very least overstated. Although state and local governments often oppressed African Americans and other minorities, the same can be said of the federal government throughout much of American history. And in many cases, oppressed minorities would have been even worse off with a unitary state than they were under federalism.

During much of American history, a unified national policy on racial issues might well have led to greater oppression for minorities rather than less. At the time the Constitution was drafted in 1787, all but one state (Massachusetts) still had slavery, though a few others had enacted gradual emancipation laws.[81] New York and Pennsylvania, two of the largest and most politically powerful northern states, did not enact emancipation laws until 1799 and 1804, respectively.[82] A unitary policy on slavery at that time would likely have resulted in a nationwide law legalizing the institution. Moreover, it would have deprived antislavery forces of the example effect of states without slavery, which turned out to be more economically successful than southern slave states did. Throughout much of the antebellum period, many opponents seized on this fact as a justification for abolition or at least for limiting the spread of slavery to new territory.[83]

During much of the antebellum period, Congress and the presidency were controlled by pro-slavery forces, which succeeded in enacting such measures as the Fugitive Slave Acts of 1793 and 1850.[84] During this period, too, a unitary state might well have had a more pro-slavery policy than that which actually existed under federalism. The District of Columbia, the one part of the United States under complete federal control, had legalized slavery until 1862, when it was abolished in large part because most slave state representatives had left Congress as a result of the secession of southern slave states that triggered the Civil War.[85] Overall, the federal government flexed its muscles in support of slavery

much more often than against it.[86] As Henry Adams put it in 1898, "[b]etween the slave power and states' rights there was no necessary connection. The slave power, when in control, was a centralizing influence, and all the most considerable encroachments on states' rights were its acts. . . . [W]henever a question arose of protecting or extending slavery, the slaveholders became friends of centralized power, and used that dangerous weapon with a kind of frenzy."[87]

After the 1870s, a long period set in during which the white South was far more committed to maintaining segregation than most white northerners were to eliminating it. It is difficult to say with certainty that a unitary United States would have repressed African Americans even more than state governments did during this period of actual history. But it is at least quite likely that a unitary national policy would have been more repressive than that of the northern states, even if not as much so as that of the South. The District of Columbia during this period was striking in being as much segregated as most of the South. Other federally controlled institutions were also highly segregated, such as the armed forces and the federal civil service.[88]

In addition to its role in promoting slavery and segregation of African Americans for much of American history, the federal government has taken the lead in a number of other notorious episodes of persecution of minority groups. For example, it interned more than 100,000 Japanese Americans in concentration camps during World War II and extensively persecuted the Mormons during the nineteenth century.[89]

Finally, foot voting between rival state jurisdictions played a key role in preventing the plight of African Americans and other minorities from being even worse than it was. Between 1880 and 1920, some 1 million blacks left the South for less oppressive states in the North and West. This greatly improved the lives of the migrants themselves, and to a lesser extent even some of those blacks who stayed in the South.[90] Without variation in policies created by federalism, things would likely have been worse for minority groups than they were. In more recent years, other unpopular minorities—notably gays and lesbians—have also benefited from foot voting and federalism. Sympathetic state and local governments enacted pro-gay policies such as gay marriage at a time

when the federal government was at best indifferent and at worst actually hostile.[91]

In a democracy where public opinion was as much contaminated by racism as it was in the nineteenth- and early twentieth-century United States, racial minorities were likely to experience extensive oppression regardless of whether the government was federal or unitary. Foot voting facilitated by federalism certainly was not a panacea for this tragic situation. But, for a long time, it made the situation substantially less bad than it might have been without it.

Foot voting under federalism can also be of great benefit to minorities in a situation where some local or state governments are controlled by the minority group in question, or at least substantially influenced by it. In such a scenario, pro-minority jurisdictions can serve as a valuable exit option for minority group members facing adverse policies elsewhere; such jurisdictions are also likely to be more favorable to the minority group than is the majority-dominated central government. This is widely recognized in federal systems outside the United States, where the existence of national minorities that are regional majorities is one of the main justifications for the establishment of a federal system in the first place.[92]

In the United States, such majority-minority jurisdictions have historically been rare, with Mormon-dominated Utah an unusual and oft-ignored exception. As a result, state and local governments are usually seen as the enemies of minority groups rather than their friends. In recent years, however, a variety of minority groups have gained greater leverage at the state and local level, which suggests that the U.S. situation may become less anomalous in the future.[93]

None of this suggests that federalism was always a net positive for minority groups. In situations where the national majority strongly supports protection for a minority group, while a regional majority supports discrimination against them, concentration of power in the federal government may well be the most advantageous political structure for the minority in question. This, of course, is exactly what happened in the case of African Americans during the civil rights revolution of the 1960s. But such a configuration of opinion is far from a universal rule, and it is risky to

design a political system on the assumption that this unusual alignment of political forces will be the norm.

Federalism is not always a boon for unpopular minority groups, and sometimes centralization can serve their interests better. Yet foot voting in a decentralized political system is often at least as valuable for minority groups as for the majority, and in particularly oppressive situations, even more so.

Foot voting may have less to offer minority groups in the many federal systems where they are actually the majority in a few regions, but widely despised elsewhere. For example, an Iraqi Kurd moving into a majority-Arab province might reasonably fear violence or at least discrimination. Even in the absence of overt hostility, such minority groups might face painful cultural and linguistic adjustments if they move out of their home areas. A French Canadian who moves from Quebec to Alberta or Ontario is unlikely to face ethnic violence or even perhaps much in the way of discrimination. But moving to a majority-Anglophone area might still be a difficult transition, creating substantial additional moving costs, even if nonmonetary in nature.

Yet foot voting is still potentially useful in such conditions. The federal system in question can and often should include multiple majority-minority districts. For example, the French-speaking minority in Switzerland can choose between multiple majority-French cantons. Iraq has three majority-Kurdish provinces. French Canadians would enjoy a broader array of foot-voting options if Quebec were divided into several smaller provinces rather than remaining as one big one. I do not suggest that either Quebec or any other large majority-minority jurisdiction must necessarily be broken up to facilitate foot voting. Other considerations would have to be weighed as well before reaching that conclusion in any given case. But the foot-voting benefits of such partitions should not be neglected.

Such arrangements allow even regionally concentrated minorities a degree of choice through foot voting. That range of choice can be greatly expanded if more power is devolved to local governments and private organizations, as suggested in section 4. The area where a given ethnic group is in the majority may only be large enough to contain a small number of regional governments. But it could have many more localities and private communities.

4. All the Way Up and All the Way Down

The crucial role of federalism in promoting political choice through foot voting suggests two important extensions of the idea. Foot voting can be extended "all the way down" to encompass a greater role for private organizations, such as private planned communities, and "all the way up" to allow greater migration across international boundaries. Both reforms can help extend the scope and effectiveness of foot voting, while alleviating some of its weaknesses. In some cases, the potential gains are even greater than those available through more conventional foot voting within a single federal system.

All the Way Down: Local Governments and Private Communities

In recent years, prominent scholars such as Heather Gerken and Richard Schragger have advocated extending federalism "all the way down" by allocating greater authority to local governments, as opposed to states.[94] This important new literature has outlined several possible advantages of empowering more local governments. But it has largely ignored the ways in which it could make foot voting more effective.

Local Governments

Devolution of greater authority to local governments can increase the range of choices available to foot voters, while also reducing the problem of moving costs. There are obviously more local governments to choose from than state or regional ones. In the United States, there are only fifty states, but thousands of local jurisdictions.[95] The same is true in most other federal systems. Other things equal, more local governments means a wider range of options for foot voters. Devolution to local governments can also help alleviate concerns that federal units are too large and inflexible for optimal foot voting.[96] Local governments can exhibit greater variation in size and more flexibility in adjusting boundaries than states or provinces.

Perhaps even more important, moving costs are often much lower for those migrating between local governments than between states.[97] Within most large metropolitan areas, there are

dozens or even hundreds of local governments to choose from. This enables foot voters to change their local government without having to disrupt their employment arrangements and social networks nearly as much as is often the case with interstate moves. Obviously, however, foot voting between local governments is likely to be more effective the greater the range of issues subject to those governments' control.

Decentralization to local governments also helps to alleviate another potential obstacle to foot voting: agglomeration effects. In some cases, economic efficiency is increased by concentrating many different enterprises in a single area. In industries where agglomeration effects are significant, they make it more difficult for foot voters to choose jurisdictions based on their government policies.[98] With greater decentralization, however, foot voters can often have their agglomeration cake and eat it too. Within a given large metropolitan area, there can be dozens or even hundreds of different local governments. Foot voters can choose the one they prefer, while still remaining in the same general metropolitan area, and thereby continuing to capture the benefits of agglomeration.

Private Communities

The foot-voting benefits of devolution to local governments can be expanded even further by allowing a greater role for private planned communities and other nongovernmental organizations. These organizations potentially offer foot voters an even wider range of options and lower moving costs than local governments do. Obviously, a given area can potentially support a much larger number of private communities and contractors than of local governments. This both widens the potential range of choice and reduces moving costs and agglomeration constraints still further. The same goes for concerns about optimal size and flexibility,[99] since private communities can alter their size and boundaries more easily than governments.

Unlike moves between local governments, foot voting in the private sector can potentially provide protection for immobile assets as well as mobile ones.[100] In the private sector, owners of immobile property can switch service providers and governance institutions without physically moving. For example, they could contract with a different security firm to provide protection, a different trash

removal firm to deal with waste, or even a different agency to manage their private planned community.

As with local governments, private planned communities can better facilitate foot voting if they are allowed to address a wider range of issues. Obviously, not all functions of local and state government can be carried out by private entities. But many potentially could be. By 2004, more than 52 million Americans lived in private planned communities such as condominium associations.[101] These organizations often provide security, trash removal, environmental protection, local zoning rules, and other services that are traditionally controlled by local governments.[102] Similar organizations have proved popular in Europe, Latin America, and parts of Asia.[103] The widespread popularity of these organizations despite the fact that residents effectively end up paying two sets of property taxes (one to the local government and one to the private community) is a testament to the generally high quality of the services they provide.[104]

Closely related to the idea of increasing the range of issues addressed by the private sector is Swiss economist Bruno Frey's proposal for non–territorially bound governments.[105] Frey contends that various government agencies providing different kinds of services could have overlapping jurisdictions, and that individual citizens could change government service providers without a physical move. Something along these lines already exists in the field of commercial transactions in the United States, where businesses and others are often able to choose for themselves which state's law will govern their dealings with each other, even if they do not actually reside in the state in question.[106] Abraham Bell and Gideon Parchomovsky have proposed a similar regime for property law, allowing landowners to choose to have their property governed by the laws of other jurisdictions with respect to various issues.[107] If these theories turn out to be viable, they could facilitate foot voting in the public sector comparable to that which exists in the private.

In theory, devolution of greater authority to either local governments or private planned communities need not involve "federalism" in the sense of a legally enforceable sphere of autonomy that higher-level governments are forbidden to intrude upon. It might only require federalism in the more limited sense of multiple

jurisdictions.[108] A higher-level government might retain the right to override local communities or private organizations, but rarely or never exercise it. In practice, effective devolution often does require a sphere of juridical autonomy for lower-level governments and private communities.[109] But the extent of this dependence need not be resolved here. What is crucial for present purposes is that devolution of power "all the way down" can increase the value of foot voting.

Downsides of Decentralization

Obviously, the advantages of "all the way down" decentralization for foot voting do not mean that all functions of government should be decentralized as much as possible or transferred to the private sector. A variety of other considerations must be weighed in determining the appropriate degree of centralization and privatization in a political system. For example, local governments and private sector actors often cannot effectively handle large-scale externalities, such as pollution that crosses multiple jurisdictional lines.[110] The fact that devolution of power to local governments facilitates foot voting does not mean they are capable of handling a global externality such as global warming. Some scholars also contend that subnational governments cannot effectively engage in redistribution to the poor, for fear of becoming "welfare magnets" that attract migrants who consume more in welfare services than they pay in taxes.[111]

Externalities, redistribution, and various other issues must be considered in any comprehensive theory of federalism. The key point here is that devolution "all the way down" can augment the effectiveness of foot voting as a tool for exercising political freedom. This consideration should be an important factor in the discussion over federalism, one that is currently often neglected.

All the Way Up: Foot Voting across International Boundaries

The potential foot-voting gains from free international migration are even greater than those possible through foot voting within a single state.[112] The variation in policy and quality of government between nations dwarfs that between subnational jurisdictions

within any one nation. No American state, for example, is as poor or corrupt as Mexico, to say nothing of far worse-off Third World nations. A Mexican who migrates to the United States stands to increase his or her wages by twofold to sixfold, and this does not even take into account noneconomic benefits of migration.[113] A migrant from a repressive authoritarian state to a liberal democracy enjoys a quantum increase in individual freedom, greater than any that is likely to be achieved through internal migration alone.

In addition, for much of the world's population, international migration is virtually their only chance of exercising any political freedom at all. Almost 2.5 billion people live in the forty-eight countries designated as "not free" in Freedom House's most recent annual survey of political freedom.[114] In "not free" states, "basic political rights are absent, and basic civil liberties are widely and systematically denied."[115] In these countries, there is little if any democratic control of government. Another 1.5 billion people live in the sixty "partly free" countries, where political rights and democracy are still very limited.[116] For the vast majority of people living in "not free" societies and many of those in "partly free" ones, international migration is probably the only way for them to have any say in deciding what kind of government they wish to live under, short of violent revolution. That greatly differentiates their condition from that of internal migrants within a federal system in liberal democracies.

Unfortunately, most citizens of poor and oppressive nations are severely limited in their emigration options because advanced liberal democracies greatly restrict immigration. Even for refugees from highly oppressive governments, gaining admission to advanced democratic states is often difficult or impossible.[117] As a result, hundreds of millions are denied their only possible opportunity for political freedom, as well as their best chance of escaping other forms of oppression and rising out of poverty.

For these reasons, there is a strong case for liberalizing immigration law in liberal democracies, especially for migrants from authoritarian states where the population lacks even minimal political rights. If political freedom is ever a morally significant concern in public policy, it should be here.

The most intuitively obvious response to this kind of case for

migration rights is that Western nations are not responsible for the political oppression experienced by citizens of dictatorships and are not required to affirmatively aid these victims of the wrongdoing of others. But Western nations that severely restrict immigration are not mere passive observers of political oppression. Their governments are actively using force and the threat of force to compel would-be migrants to stay in their own countries or depart from the West if they have entered illegally.[118] Even when these migrants seek only to obtain jobs from employers voluntarily willing to hire them, Western governments still use the threat of force to deport them. While the United States and other liberal democracies may not be responsible for the oppression of authoritarian regimes, they *are* responsible for their own use of the threat of force to deny political freedom to migrants seeking to escape from these countries.

A regime of relatively free international migration would replicate on the international stage many of the benefits of foot voting in a domestic federal system. Unfortunately, the presence of much higher moving costs would make it difficult for many to take full advantage of these potential benefits. International migrants not only often have to travel greater distances than domestic ones; they also often face more difficult cultural and linguistic adjustments in their new homes. But these "natural" barriers to movement should at least not be reinforced by the artificial ones imposed by migration restrictions.

A regime of much greater freedom of movement across international boundaries would not necessarily result in a federal system in a traditional sense, in so far as the latter requires a single, unitary sovereign.[119] But it would partially replicate domestic federalism in so far as there would be multiple competing sovereigns that are economically interconnected, and that individuals can choose between. One can easily imagine quasi-federal international arrangements that fall well short of imposing a single global sovereign.[120] In any event, even if free international migration does not necessarily lead to the creation of any truly "federal" system, its costs and benefits have much in common with those of domestic migration under federalism, and can usefully be considered in tandem.

The enormous potential benefits of free international foot voting do not necessarily prove that the United States and other advanced democracies must adopt a complete "open borders" policy. Political freedom and other arguments for liberalizing immigration could potentially be outweighed by other values in particular cases. For example, critics of immigration argue that free migration might undermine recipient nations' economies, create a dysfunctional class of welfare dependents, or undermine the host nations' cultures. However, the denial of political freedom through foot voting to hundreds of millions of the world's most oppressed people is an extremely important moral issue, even if it does not always outweigh competing considerations. So far, unfortunately, it has received little consideration in the ongoing political debate over immigration policy in the United States and Western Europe.

Moreover, to the extent that competing considerations are present, we should consider whether they can be addressed by measures less harsh than expelling would-be migrants and returning them to a life of poverty and denial of political freedom. For example, the possible burden that migrants impose on welfare state programs can be mitigated by requiring recent immigrants to pay extra taxes.[121]

There may indeed be extreme cases where migration restrictions really are the only way to prevent some great harm.[122] But we should carefully consider less draconian alternatives before accepting such a conclusion.

5. Conclusion

Foot voting under federalism is an important dimension of political freedom. To realize its benefits as fully as possible, political power should be decentralized to a greater extent than might otherwise be optimal. At the same time, migration should be as free as possible across both domestic and international boundaries.

Foot voting is not the only worthwhile element of political freedom, and it is certainly not the only factor that must be considered in the design of federal systems. But it is nonetheless an extremely important consideration whose value is all too often ignored.

NOTES

For helpful suggestions and comments, I would like to thank James Fleming, Heather Gerken, Michael Greve, Jacob Levy, David Schleicher, and Ernest Young. I would also like to thank Ryan Facer and Matt Lafferman for their valuable work as research assistants.

1. The seminal article is Charles Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64 (1956): 516–24.

2. For an otherwise thorough recent survey of the implications of exit voting for democratic theory that largely neglects political ignorance and other points raised here, see Mark Warren, "Voting with Your Feet: Exit-Based Empowerment in Democratic Theory," *American Political Science Review* 105 (2011): 683–701. Warren does briefly note some of these issues, however. Ibid., 688, 692.

3. See, e.g., Heather K. Gerken, "Foreword: Federalism All the Way Down," *Harvard Law Review* 124 (2010): 6–83; Richard C. Schragger, "Cities as Constitutional Actors: The Case of Same-Sex Marriage," *Journal of Law and Politics* 21 (2005): 105–44.

4. I have previously advanced this case in Ilya Somin, "Tiebout Goes Global: International Migration as a Tool for Voting with Your Feet," *Missouri Law Review* 73 (2008): 1247–64 (symposium on federalism and international law). That earlier article did not tie in the case for international foot voting to the case for domestic foot voting as fully as I do here.

5. See, e.g., A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979); Thomas Christiano, *The Rule of Many* (Boulder, CO: Westview Press, 1996). Simmons is a leading writer emphasizing the importance of individual consent, while Christiano emphasizes the inherent value of collective democratic control of government.

6. Declaration of Independence (1776).

7. See, e.g., Simmons, *Moral Principles and Political Obligations.*

8. For some leading examples of such instrumental theories, see, e.g., Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956); Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: HarperPerennial, 3rd ed. 1950); Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA: Harvard University Press, 2003).

9. Amartya Sen, *Development as Freedom* (Norwell, MA: Anchor Press, 1999), 178.

10. For various studies documenting this, see, e.g., James L. Stimson, *Tides of Consent: How Public Opinion Shapes American Politics* (New York: Cambridge University Press, 2006); Lawrence R. Jacobs, *The Health of Nations:*

Public Opinion and the Making of American and British Health Policy (Ithaca, NY: Cornell University Press, 1993); Benjamin Page and Robert Shapiro, *The Rational Public* (Chicago: University of Chicago Press, 1992).

11. See Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).

12. For some related points on the limitations of political participation as an expression of individual freedom, see Jason Brennan, "Political Liberty: Who Needs it?," *Social Philosophy and Policy* 29 (2012): 1–27.

13. Andrew Gelman, Nate Silver, and Aaron Edlin, "What Is the Probability That Your Vote Will Make a Difference?," *Economic Inquiry* 50 (2012): 321–26. There is considerable variation between states, with the odds rising to 1 in 10 million in a few smaller swing states. Ibid., 322–24.

14. As Robert Dahl puts it, a democracy cannot be established until we have decided "what persons have a rightful claim to be included in the demos" and "[w]hat rightful limits are there on the control of a demos." Robert A. Dahl, *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989), 119.

15. The ideas discussed in this and the next subsection were developed more fully in Ilya Somin, "Foot Voting, Political, Ignorance, and Constitutional Design," *Social Philosophy and Policy* 28 (2011): 204–11. The analysis of political ignorance presented here is based on the one I advanced in that earlier article.

16. The idea of rational political ignorance was first introduced in Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row, 1957), ch. 13.

17. Mancur Olson, *The Logic of Collective Action* (Cambridge, MA: Harvard University Press, rev. ed. 1971).

18. I discuss this point in greater detail in Ilya Somin, *Democracy and Political Ignorance* (Stanford, CA: Stanford University Press, 2013), 65–66.

19. For a detailed survey of the evidence, see ibid., ch. 1. See also Michael X. Delli Carpini and Scott Keeter, *What Americans Know about Politics and Why It Matters* (New Haven, CT: Yale University Press, 1996); Richard Shenkman, *Just How Stupid Are We? Facing the Truth about the American Voter* (New York: Basic Books, 2008); Scott Althaus, *Collective Preferences in Democratic Politics* (New York: Cambridge University Press, 2003); Ilya Somin, "Voter Ignorance and the Democratic Ideal," *Critical Review* 12 (1998): 413–58.

20. See Somin, *Democracy and Political Ignorance*, ch. 23.

21. Rassmussen Poll, May 7–8, 2009, available at http://www.rasmussenreports.com/public_content/politics/toplines/pt_survey_toplines/may_2009/toplines_cap_trade_i_may_7_8_2009.

22. Ibid.

23. Zogby Poll, July 21–27, 2006, available at http://www.zogby.com/wf-AOL%20National.pdf.

24. See Somin, *Democracy and Political Ignorance*, ch. 1.

25. Ibid., 20.

26. Ibid., 78–82.

27. Ibid. See also Ilya Somin, "Knowledge about Ignorance: New Directions in the Study of Political Information," *Critical Review* 18 (2006): 255–78, 260–62.

28. See, e.g., Charles Lord, Lee Ross, and Mark R. Lepper, "Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence," *Journal of Personality and Social Psychology* 37 (1979): 2098–2109; Charles S. Taber and Milton R. Lodge, "Motivated Skepticism in the Evaluation of Political Beliefs," *American Journal of Political Science* 50 (2006): 755–69; Edward Glaeser and Cass R. Sunstein, "Extremism and Social Learning," *Journal of Legal Analysis* 1 (2009): 1–62.

29. For a detailed discussion, including analysis of possible objections, see Somin, *Democracy and Political Ignorance*, ch. 3.

30. Bryan Caplan, *The Myth of the Rational Voter* (Princeton, NJ: Princeton University Press, 2007); Bryan Caplan, "Rational Irrationality," *Kyklos* 54 (2001): 5.

31. For an extensive discussion of the latter issue, see Jason Brennan, *The Ethics of Voting* (Princeton, NJ: Princeton University Press, 2011).

32. See Somin, *Democracy and Political Ignorance*, ch. 4; Somin, "Voter Ignorance and the Democratic Ideal," 413–58.

33. Hirschman, *Exit, Voice, and Loyalty*, ch. 4.

34. See works cited in note 19.

35. Hirschman's argument has other limitations as well. For example, it only applies in a narrow range of circumstances. See Ilya Somin, "Revitalizing Consent," *Harvard Journal of Law and Public Policy* 23 (2000): 753–805, 795–97.

36. Adam Przeworski, *Democracy and the Limits of Self-Government* (Cambridge: Cambridge University Press, 2010), 101.

37. See the discussion of the benefits of foot voting for the poor and minorities later in this essay. See also Somin, *Democracy and Political Ignorance*, 128–33, 147–50.

38. In section 4, I consider the expansion of these choices that arises from allowing greater scope for international migration, and from allocating a greater role to private institutions.

39. I analyze this point in much greater detail in Somin, "Foot Voting, Political Ignorance, and Constitutional Design," 202–27.

40. Ibid., 215–21.

41. Ibid., 211.

42. See Somin, *Democracy and Political Ignorance*, 101–3.

43. See, e.g., Daniel Kahneman, *Thinking Fast and Slow* (New York; Farrar, Straus and Giroux, 2011); Dan Ariely, *Predictably Irrational* (New York: HarperCollins, 2009). For a recent critique of the empirical evidence underlying claims of widespread irrationality in market and other foot-voting settings, see Joshua Wright and Douglas H. Ginsburg, "Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty," *Northwestern University Law Review* 106 (2012): 1–58.

44. Kahneman, *Thinking Fast and Slow*, 31–38, 41–48.

45. This point is developed in more detail in Caplan, *Myth of the Rational Voter*, 114–37.

46. See, e.g., Thomas Dye, *American Federalism: Competition among Governments* (New York: John Wiley, 1990), 1–33; Barry Weingast, "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development," *Journal of Law, Economics, and Organization* 11 (1995): 1–31; Barry Weingast, "Second Generation Fiscal Federalism: Implications for Decentralized Democratic Governance and Economic Development," unpublished paper (2007).

47. It is worth noting that Charles Tiebout's original classic article outlining the potential benefits of foot voting did not assume any attempts at competition between jurisdictions. See Tiebout, "A Pure Theory of Local Expenditures."

48. For the distinction between the two, see Malcolm Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: University of Michigan Press, 2008). Feeley and Rubin argue that most of the advantages ascribed to federalism can be achieved through mere decentralization. Ibid. For an earlier influential definition of federalism similar to theirs, see Ronald L. Watts, "Federalism, Federal Political Systems, and Federations," *Annual Review of Political Science* 1 (1998): 117–37, 120–21.

49. Alternatively, one can argue that the requirement of an affirmative act to override itself creates a kind of sphere of juridical autonomy for the lower-level government. It can govern certain issue areas so long as it is not affirmatively overridden.

50. For a definition of federalism similar to this, see, e.g., Jenna Bednar, *The Robust Federation: Principles of Design* (New York: Cambridge University Press, 2009), 18–19. Bednar also argues that each level of government must be sovereign in "at least one policy realm." But it is not clear whether lower-level governments' sovereignty is compatible with an override power by the national government.

51. See generally John McGinnis and Ilya Somin, "Federalism vs. States'

Rights: A Defense of Judicial Review in a Federal System," *Northwestern University Law Review* 99 (2004): 89–130.

52. Some of the material in this section is based on Somin, *Democracy and Political Ignorance*, ch. 5.

53. Pew Research Center, *Who Moves? Who Stays Put? Where's Home?* (Washington, DC: Pew Research Center, December 2008), 8, 13.

54. See William P. Ruger and Jason Sorens, *Freedom in the Fifty States: An Index of Personal and Economic Freedom* (Arlington, VA: Mercatus Center, George Mason University, 2009), 34.

55. Kenneth Johnson, *The Changing Faces of New Hampshire: Recent Demographic Trends in the Granite State* (Durham: Carsey Institute, University of New Hampshire, 2007).

56. Mark Deen and Alan Katz, "London's French Foreign Legion Shuns Sarkozy Plea to Come Home," *Bloomberg News*, January 17, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=acDlozxrk7iE.

57. Ibid.

58. Tony Paterson, "German 'Brain Drain' at Highest Level since 1940s," *Independent*, June 1, 2007.

59. Ilya Somin, "Political Ignorance and the Countermajoritarian Difficulty," *Iowa Law Review* 89 (2004): 1287–1371, 1351.

60. See, e.g., Robert C. Ellickson, "Legal Sources of Residential Lock-Ins: Why French Households Move Half as Often as US Households," *University of Illinois Law Review* (2012): 373–404, 395–97; Paul W. Rhode and Koleman S. Strumpf, "Assessing the Importance of Tiebout Sorting: Local Heterogeneity from 1885 to 1990," *American Economic Review* 93 (2003): 1648, 1649. Ellickson cites survey data showing that 16 percent of American and 26 percent of French movers switch locations because of jobs. Rhode and Strumpf cite an earlier and differently worded survey in which only 5 percent move because of public services (education) and 50 percent due to family or job considerations.

61. Tiebout, "A Pure Theory of Local Expenditures."

62. See the discussion of the environmental point in section 3 of this chapter.

63. Ellickson, "Legal Sources of Residential Lock-Ins," 395–96.

64. Rhode and Strumpf relied on surveys that asked whether people move in order to take advantage of better public education systems, but they did not ask whether people were motivated by differences in tax rates, regulatory policies, environmental quality, or numerous other polices that might potentially attract migrants. Rhode and Strumpf, "Assessing the Importance of Tiebout Sorting," 1649.

65. See ibid.

66. For a detailed discussion of this issue, see Ilya Somin, "Federalism and Property Rights," *University of Chicago Legal Forum* (2011): 53–88.

67. I consider these possibilities in section 4.

68. For a helpful summary and defense of the race to the bottom theory, see Kirsten H. Engel, "State Environmental Standard-Setting: Is There a 'Race' and Is It 'to the Bottom?,'" *Hastings Law Journal* 48 (1997): 274–369. For other modern defenses, see, e.g., Kirsten Engel and Scott R. Saleska, "Facts Are Stubborn Things: An Empirical Reality Check in the Theoretical Debate over State Environmental Rate-Setting," *Cornell Journal of Law and Public Policy* 8 (1998): 55–88; and Joshua D. Sarnoff, "The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection," *Duke Environmental Law and Policy Forum* 7 (1997): 225–54.

69. Richard Revesz, "Rehabilitating Interstate Competition: Rethinking the 'Race to the Bottom' Rationale for Federal Environmental Regulation," *New York University Law Review* 67 (1992): 1210–54; Richard Revesz, "The Race to the Bottom and Federal Environmental Regulation: A Response to Critics," *Minnesota Law Review* 82 (1997): 535–64.

70. Revesz, "Rehabilitating Interstate Competition."

71. For a summary of the evidence on this point, see Ilya Somin and Jonathan H. Adler, "The Green Costs of *Kelo:* Economic Development Takings and Environmental Protection," *Washington Law Review* 84 (2006): 623–66, 663–64.

72. See generally Richard C. Schragger, "Mobile Capital, Local Economic Regulation, and the Disciplining City," *Harvard Law Review* 123 (2009): 483–540.

73. See, e.g., Jonathan H. Adler, "Judicial Federalism and the Future of Federal Environmental Regulation," *Iowa Law Review* 90 (2005): 377–474; Jonathan H. Adler, "Interstate Competition and the Race to the Top," *Harvard Journal of Law and Public Policy* 35 (2012): 89–99.

74. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

75. See Carolyn Moehling, "State Child Labor Laws and the Decline of Child Labor," *Explorations in Economic History* 36 (1999): 72–106, table 1, 76–77.

76. Michael S. Greve, *The Upside-Down Constitution* (Cambridge, MA: Harvard University Press, 2012), 187–88. See also Moehling, "State Child Labor Laws and the Decline of Child Labor," 94–95. The 1918 federal law did not ban agricultural child labor, which remains legal to this day. Moehling argues that child labor laws had little effect on the decline in industrial child labor, which mostly followed preexisting trends. But if this is true, it is far from clear that federal laws would have had any greater effect. National child labor restrictions in Britain had little effect in reducing child labor

there. See Clark Nardinelli, "Child Labor and the Factory Acts," *Journal of Economic History* 40 (1980): 739–55.

77. *Hammer* was overruled in *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). For a discussion and summary of state laws, see Moehling, "State Child Labor Laws and the Decline of Child Labor."

78. See Somin, "Federalism and Property Rights," 60–64. The most famous case of this type was the 1981 *Poletown* condemnation, in which the city of Detroit condemned more than 4,000 peoples' homes and much other property in order to transfer it to General Motors to build a new factory. See Ilya Somin, "Overcoming *Poletown: County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use," *Michigan State Law Review* 2004 (2004): 1005–39.

79. For a good recent summary of this conventional wisdom, see Douglas Laycock, "Protecting Liberty in a Federal System: The US Experience," in *Patterns of Regionalism and Federalism: Lessons for the UK*, ed. Jorg Fedtke and B. S. Markesisinis (London: Hart, 2006), 121–45.

80. William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964), 152–53, 155. Riker later developed a less negative view of American federalism. See William H. Riker, *The Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987), xii–xiii. But Riker's earlier position remained his most influential work on federalism. See Craig Volden, "Origin, Operation, Significance: The Federalism of William H. Riker," *Publius* 34 (2004): 89–107.

81. See Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: University of Chicago Press, 1967).

82. Ibid.

83. See, e.g., Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (New York: Oxford University Press, 1970), chs. 1–2.

84. Some Northern states and abolitionists even resisted the Fugitive Slave Acts on "states' rights" grounds. See Robert Kaczorowski, "The Tragic Irony of American Federalism: National Sovereignty versus State Sovereignty in Slavery and Freedom," *University of Kansas Law Review* 45 (1997): 1015–61, 1034–40.

85. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 1988), 497.

86. For a brief review of the record, see Lynn Baker and Ernest Young, "Federalism and the Double Standard of Judicial Review," *Duke Law Journal* 51 (2001): 75–162, 143–47.

87. Henry Adams, *John Randolph* (Boston: Houghton Mifflin, 1898), 270–71.

88. For an overview of segregationist federal policies during this period,

see Desmond King, *Separate and Unequal: African-Americans and the US Federal Government* (New York: Oxford University Press, rev. ed. 2007).

89. See Roger Daniels, *Concentration Camps, USA: The Japanese Americans and World War II* (New York: Holt, Rinehart and Winston, 1971); Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002).

90. For a summary of the evidence, see Somin, "Foot Voting, Political Ignorance, and Constitutional Design," 215–21.

91. See generally Stephen Clark, "Progressive Federalism? A Gay Liberationist Perspective," *Albany Law Review* 66 (2003): 719–57.

92. For an overview covering many such cases, see Luis Moreno and César Colino, eds., *Diversity and Unity in Federal Countries* (Montreal: McGill-Queen's University Press, 2010); see also Dawn Brancati, *Peace by Design: Managing Intrastate Conflict through Decentralization* (New York: Oxford University Press, 2009).

93. See Heather K. Gerken, "A New Progressive Federalism," *Democracy* (Spring 2012), http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=1.

94. See, e.g., Gerken, "Foreword: Federalism All the Way Down"; Schragger, "Cities as Constitutional Actors." For a brief overview, see Daniel Halberstam, "Federalism: Theory, Policy, Law," in *Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andras Sajo (New York: Oxford University Press, 2012), 604–05.

95. As of 2007, the latest date for which data have been released, the Census Bureau counted some 19,402 municipal governments in the United States, 3,033 county governments, and 16,519 townships. U.S. Census Bureau, Statistical Abstract of the United States (Washington, DC: Government Printing Office, 2012), 267.

96. See, e.g., Jacob Levy, "Federalism, Liberalism, and the Separation of Loyalties," *American Political Science Review* 101 (2007): 459–77, 460–62.

97. See the discussion of moving costs as an important constraint on foot voting in section 3 above.

94. For a survey and discussion of the relevant literature on agglomeration and its effects on foot voting, see David Schleicher, "The City as a Law and Economic Subject," *University of Illinois Law Review* (2010): 1507–64, 1509–11, 1515–29, 1533–40.

99. See, e.g., Levy, "Federalism, Liberalism, and the Separation of Loyalties," 460–62.

100. For the weaknesses of foot voting between government jurisdictions with respect to immobile assets, see Somin, "Federalism and Property Rights," and section 3 above.

101. Robert Nelson, *Private Neighborhoods and the Transformation of Local Government* (Washington, DC: Urban Institute, 2005), xiii.

102. Ibid.

103. See generally Georg Glasze, Chris Webster, and Klaus Frantz, eds., *Private Cities: Global and Local Perspectives* (New York: Routledge, 2006).

104. This point is well articulated by Robert H. Nelson, "The Puzzle of Local Double Taxation: Why Do Private Community Associations Exist?," *Independent Review* 13 (2009): 345–65.

105. See Bruno Frey, "A Utopia? Government without Territorial Monopoly," *Independent Review* 6 (2001): 99–112; Bruno Frey, *Happiness: A Revolution in Economics* (Cambridge, MA: MIT Press, 2008), 189–97; Bruno S. Frey and Reiner Eichenberger, *The New Democratic Federalism for Europe: Functional, Overlapping, and Competing Jurisdictions* (London: Edward Elgar, 2004).

106. See Erin O'Hara and Larry Ribstein, *The Law Market* (New York: Oxford University Press, 2009).

107. Abraham Bell and Gideon Parchomovsky, "Of Property and Federalism," *Yale Law Journal* 115 (2005): 72–115, 101–13.

108. See discussion in section 2.

109. See, e.g., McGinnis and Somin, "Federalism vs. States' Rights."

110. See Richard Revesz, "Federalism and Interstate Environmental Externalities," *University of Pennsylvania Law Review* 144 (1996): 2341–2402. Many smaller-scale externalities, however, can be handled by negotiation between local governments. See Thomas W. Merrill, "Golden Rules for Transboundary Pollution," *Duke Law Journal* 46 (1997): 931–1019.

111. See, e.g., Paul Peterson, *The Price of Federalism* (Washington, DC: Brookings Institution, 1995). For a critique of the conventional wisdom on this issue, see Frank H. Buckley and Margaret Brinig, "Welfare Magnets: The Race for the Top," *Supreme Court Economic Review* 5 (1997): 141–77.

112. I have explored some of the issues considered in this section in more detail in Somin, "Tiebout Goes Global," and Ilya Somin, "Immigration and Political Freedom," *International Affairs Forum* (Fall 2010): 38–43.

113. Somin, "Tiebout Goes Global," 1259. Similar gains are realized by other migrants from poor nations to wealthy ones. See Lant Pritchett, *Let Their People Come: Breaking the Gridlock on Global Labor Mobility* (Washington, DC: Center for Global Development, 2006).

114. Freedom House, *Freedom in the World 2012* (New York: Freedom House, 2012), 3–4.

115. Ibid., 4.

116. Ibid., 3–4.

117. See Somin, "Tiebout Goes Global," 1260–61.

118. This point is effectively developed in Michael Huemer, "Is There a Right to Immigrate?," *Social Theory and Practice* 36 (2010): 429–61.

119. This is the more common sense in which some political theorists propose extending federalism "all the way up": some sort of global federal state. See Halberstam, "Federalism," 605–07. For a recent defense of world government, see Craig Campbell, "The Resurgent Idea of World Government," *Ethics and International Affairs* 22 (2008), http://www.cceia.org/resources/journal/22_2/essay/001.html.

120. Halberstam, "Federalism," 606.

121. For this and other less coercive alternatives to migration restrictions, see Bryan Caplan, "Why Should We Restrict Immigration?," *Cato Journal* 32 (2012): 5–24. Neither Caplan nor I necessarily endorse these ideas as first-best policies. He merely contends that they are usually less bad than denial of migration rights.

122. For some possible scenarios, see Somin, "Tiebout Goes Global," 1263.

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PART II

CONSTITUTIONS, FEDERALISM, AND SUBSIDIARITY

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5

FEDERALISM AND SUBSIDIARITY: PERSPECTIVES FROM U.S. CONSTITUTIONAL LAW

STEVEN G. CALABRESI AND
LUCY D. BICKFORD

We live in an Age of Federalism.[1] Of the G-20 countries with the most important economies in the world, at least twelve have federal constitutional structures and several others are experimenting with federalism and the devolution of power. The first group includes the United States, the European Union, India, Germany, Brazil, Argentina, Canada, Indonesia, Australia, Russia, Mexico, and South Africa. The latter group includes the United Kingdom, Spain, Belgium, Italy, and Japan. Of the ten countries with the highest GDPs in the world, only two—China and France—lack any semblance of a federal structure. Of the world's ten most populous countries, eight have federal or devolutionary structures—every country except for China and Bangladesh. The only top ten countries by territorial size to lack a federal structure are China and Sudan, which recently experienced a secession.

Though the United States invented constitutional federalism only 220 years ago, today it has taken the world by storm. Every major country in the world has some federal structure except China and France (a European Union [EU] member). Nation-states worldwide are under pressure to surrender power both to

growing international entities such as the EU, NAFTA, GATT, and NATO, and to regional entities as well. Thus, the EU's twenty-seven member countries have all surrendered significant powers over trade, commerce, and their economies to the confederal EU government. At the same time, these countries have faced growing pressure to devolve power to their national subunits. Most evidently, the United Kingdom has devolved power to Scotland, Wales, and Northern Ireland, and Spain has devolved power to Catalonia and the Basque region. Even tiny Belgium has devolved most of its power to ethnic subunits in Flanders, Wallonia, and Brussels. Federalism limits meanwhile remain very constraining in such European countries as Germany and Switzerland. In North America, Canada has surrendered some economic power to NAFTA—a transnational free trade association—while surrendering other powers to the increasingly assertive province of Quebec. It is not an exaggeration to say that our time is witness to the decline and fall of nation-states as they dissolve from above and from below.

The United States has seen a revival of interest in federal limits on national power since the U.S. Supreme Court's 1995 decision in *United States v. Lopez*.[2] Beginning in the 1990s, the Rehnquist Court limited national power in a series of important federalism cases: mandatory retirement age for state court judges,[3] compelling state participation in a federal radioactive waste program,[4] compelling state officers to execute federal gun control laws,[5] federal protection of religious freedoms,[6] and federal protection for women against violence.[7] A major issue on the U.S. Supreme Court's recent agenda was whether President Obama and Congress exceeded the scope of national power with a national plan that forces otherwise uninsured individuals to buy health insurance.[8] Constitutional federalism is more vibrant in the United States than at any time since the New Deal.

This Age of Federalism marks the end of an experiment with nationalism that began with the French Revolution's rejection of provincial power and endorsement of hypercentralization. This nationalism experiment gathered steam with Italian and German unification in the nineteenth century and with the carving up of the Austro-Hungarian and Turkish Empires after World War I into dozens of newly independent nation-states. The last gasp of

nationalism, in retrospect, came when many African and Asian countries that had once been Britain's and France's colonial subjects declared independence. In the 1950s and 1960s, postcolonial nations formed new transnational confederal entities to perform the defense and free trade functions that had once been performed by the European empires. Ultimately the G-20, NATO, the EU, NAFTA, and GATT fulfilled those needs.

Fundamentally, the Age of Federalism responds to one of the most urgent questions of democratic theory: What is the proper size of a democracy? It is all well and good to believe the people ought to rule themselves, but at which demos or territorial unit of the people?[9] Is the relevant territorial demos for a resident of Quebec City the province of Quebec, the country of Canada, the whole area covered by NAFTA, or the whole area covered by NATO? The answer varies depending on whether the matter at hand is cultural, economic, or related to foreign policy and defense.

Proponents of democratic theory often ask: What are the rights of minority groups as against the will of the majority? But this question presupposes that we know the appropriate territorial unit for addressing the issue. French speakers may be a majority in the province of Quebec, a powerful minority with constitutional rights in Canada, or a small minority in NAFTA and NATO. Which unit—provincial, national, or international—is the correct one to decide a given matter? We will offer some thoughts on this question later.

Our thesis is that constitutional federalism enforced through judicial review is the correct legal response to the demands of the principle of subsidiarity. Subsidiarity is the idea that matters should be decided at the lowest or least centralized competent level of government. We understand that subsidiarity grows from the belief that individual rights exist as a matter of natural law. Because rights belong naturally only to individuals, social entities (such as families, communities, cities, nations, or confederations) may legislate only to the extent that individuals or smaller social units lack competence. As Professor Daniel Halberstam has described it, the principle of subsidiarity holds that

> [t]he central government should play only a supporting role in governance, acting only if the constituent units of government are

> incapable of acting on their own. The word itself is related to the idea of assistance, as in "subsidy," and is derived from the Latin "subsidium," which referred to auxiliary troops in the Roman military.[10]

Subsidiarity "traces its origins as far back as classical Greece, and [is] later taken up by Thomas Aquinas and medieval scholasticism. . . . [S]ubsequent echoes of it [can be found] in the thought of political actors and theorists as varied as Montesquieu, Locke, Tocqueville, Lincoln, and Proudhon."[11] Subsidiarity first appeared prominently in modern European political thought as a result of Catholic teachings in the 1930s emphasizing the importance of the individual as a rights bearer in an era of fascism and communism. The papal encyclical *Quadragesimo Anno* provided:

> Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.[12]

Or, as the current Catechism of the Catholic Church says:

> [A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.[13]

The principle of subsidiarity formally entered EU law in the 1992 Treaty of Maastricht and was reaffirmed by the Treaty of Lisbon.[14] Subsidiarity was supposed to reassure small EU member nations that their rights and powers would be respected when the Council of Ministers voting rule switched from unanimity to qualified majority voting. Presently, subsidiarity in EU law appears in Article 5(3) of the Treaty on European Union:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently

> achieved by the Member States, either at [the] central level or at [the] regional or [the] local level, but can rather by reason of the scale or effects of the proposed action, be better achieved at [the] Union level.[15]

Protocol 30 to the European Community Treaty spells out the EU's commitment to subsidiarity in more detail. Suffice it to say that the principle is very important to both EU law[16] and federal constitutions worldwide.

We believe the correct legal response to the demands of subsidiarity is constitutional federalism enforced through substantive judicial review. Thus, federalism and subsidiarity are interrelated themes. Our argument builds on an important 1994 law review article by George A. Bermann titled "Taking Subsidiarity Seriously: Federalism in the European Community and the United States."[17] Professor Bermann argued, as we do, for taking subsidiarity very seriously,[18] but we strongly disagree with two of his claims.[19] First, Bermann argues that the European Court of Justice should mainly enforce subsidiarity in the EU by forcing policy makers to establish the need for EU-wide laws. We think Bermann's approach is too deferential and that the EU would benefit from more vigorous substantive enforcement of subsidiarity. Second, Bermann argues that the subsidiarity idea is totally foreign to U.S. constitutional law and that the U.S. Supreme Court treats federalism issues as if they raise political questions. Bermann reiterates this claim in a short essay—also published in 1994.[20] The Supreme Court proved Bermann wrong only a year later with *United States v. Lopez*.[21] Professor Bermann acknowledged the U.S. neofederalist revival in a brief subsequent article, but he neither praises nor criticizes the development nor does he explain its deep roots in U.S. constitutional tradition.[22]

Since 1995, the U.S. Supreme Court has enforced constitutional federalism by striking down two laws on Commerce Clause grounds and four laws on the grounds that they exceeded federal power to enforce the Fourteenth Amendment, and it has ruled that Congress lacks power to make the states liable for money damages because of the constitutional doctrine of state sovereign immunity. Bermann's claim is thus no longer sustainable, if it

ever was. Additionally, the Supreme Court's dormant Commerce Clause doctrine,[23] the law of federal jurisdiction,[24] theoretical concerns underlying the law of federal preemption,[25] and perhaps subsidiarity concerns with present federal conflict of law rules[26] belie Bermann's claim. As the litigation over President Obama's health care plan showed, constitutional federalism is alive and well on the U.S. Supreme Court, contrary to Bermann's 1994 article.

To defend the thesis that constitutional federalism enforced through substantive judicial review is the correct legal response to the demands of subsidiarity, we focus primarily on the United States over the last 220 years because it is the longest functioning federal regime and because of the post-1995 federalist revival.[27] We do not claim that the original understanding of the U.S. Constitution-as-amended always corresponds to the economically efficient design of competing jurisdictions and to the justificatory theory of subsidiarity. We do claim that reading the present-day doctrinal tests with an eye to what we call the Economics of Federalism provides the best understanding of the U.S. Supreme Court's federalism doctrine as it stands in 2013. This approach gives substantive content to the subsidiarity idea.[28]

This chapter will proceed in four sections. Section 1 will summarize the Economics of Federalism and of subsidiarity and will explain when activities are best conducted at a lower or higher level of government. Section 2 will address the U.S. Constitution's enumerated national powers in light of the Economics of Federalism and of subsidiarity. Section 3 will address the national constraints the Fourteenth Amendment to the U.S. Constitution imposes on the states, again in light of the Economics of Federalism and of subsidiarity. Section 4 concludes.

1. The Economics of Federalism and of Subsidiarity

Economics teaches us some simple but fundamental truths about when government decision making is best done at the state or local level versus the national level. Although one of us (Professor Calabresi) has discussed this topic in three prior publications, it is necessary to briefly describe the Economics of Federalism before we discuss subsidiarity.[29]

The Advantages of State Lawmaking

Restricting lawmaking to the state or provincial level in any federation has at least four obvious advantages: (1) regional variation in preferences; (2) competition for taxpayers and businesses; (3) experimentation to develop the best set of rules; and (4) lower monitoring costs.

First, tastes, preferences, and real-world conditions may often differ between territories in a large, continental-sized democracy. For example, some states like Alaska or Montana with a very low population density may prefer a higher speed limit for automobiles than a high-density state like New Jersey. If the national government decides all speed limits, the result may be too low for Alaska and too high for New Jersey. In contrast, if speed limits are decided at the state level, each state can tailor its speed limit to conform to local tastes, preferences, and real-world conditions. Such a federal outcome will generally lead to higher overall levels of social utility assuming everything else is held equal. Thus, the first economic argument for smaller decision-making units is that they can better accommodate geographically varying tastes, preferences, and real-world conditions.[30]

Second, in a federal system where states make certain decisions, the states compete for people, taxpayers, businesses, and other financial resources to the extent that property and persons are fully mobile (which is not always the case). Each state offers a different bundle of public goods, level of taxation, and package of government services. Residents weigh these bundles to decide whether to stay put or to move if another state offers a perceived superior bundle. This argument is today most associated with Charles M. Tiebout.[31] As an example, consider the states of Texas and New York. The different levels of taxation and government services in these two states reflect different philosophies about the role of government. Recently, people and businesses have been moving to Texas and away from New York; arguably, this competition among the states has been typical of American federalism. Monopoly providers are often inefficient and dismissive of consumer preferences. The same holds true for government monopoly providers of bundles of public goods. Therefore, competition among states

is better if everything else is equal and property and persons are fully mobile.[32] Language and cultural differences reduce mobility in the European Union. It is easier for an American to move from Virginia to California than it is for an Italian to move to the United Kingdom.

Professor Føllesdal notes that some federal governments, like Germany's, modify the competition among the states (called länder) by redistributing wealth to some degree from richer to poorer states.[33] Canada, the United States, and the European Union have done this to a lesser extent as well. But as the recent Greek debt crisis shows, the willingness of federal entities like Germany to subsidize inefficient monopoly providers of governmental services is limited, even in the EU. In a true federal system, inefficient state governments will pay a price for tax and regulatory excesses and mismanagement. This is a concrete benefit of constitutional federalism.

A third Economics of Federalism argument for state-level decision making is that states will continually experiment with new bundles of services to attract new taxpayers and businesses. As Justice Brandeis famously said in his 1932 dissent in *New State Ice Co. v. Liebmann*:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[34]

Currently, the fifty United States are experimenting with legalizing gay marriage, allowing assisted suicide, and legalizing medical marijuana use. These experiments are beneficial for the country. Experimentation and competition among the states thus support reserving decision-making power to the state level.

Finally, monitoring state officials as compared to national officials may cost less. The smaller territorial size of state legislative districts may produce greater congruence between the mores of the legislators and the people.[35] Also, the people may more easily physically observe and question government officials in close proximity rather than many miles away. Local officials may thus

avoid what has been called an "inside-the-beltway mentality." Large, multilayered bureaucracies cannot efficiently process new information—neither in government nor in the private sector—as Friedrich Hayek shows in *Law, Legislation, and Liberty* and Thomas Sowell shows in *Knowledge and Decisions*.[36] Federalism avoids overly centralized, top-down command and control mechanisms that national governments might otherwise tend to favor.

In our judgment, these four arguments for leaving governmental decision-making power at the state or provincial level establish a presumption in favor of state over national decision making. This presumption gives effect to the principle of subsidiarity, discussed earlier. As the papal encyclical *Quadragesimo Anno* says, "[I]t is an injustice and at the same time a great evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do." As the encyclical adds:

> For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them. . . . Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.[37]

The Economics of Federalism helps us better understand when states and provinces should act without federal or transnational intervention. Unless one of the arguments for national power described in the following applies, a matter ought to be decided at the state or provincial level.

The Advantages of National Lawmaking

There are at least four arguments for allowing a national government to legislate and preempt state lawmaking power in some circumstances.

First, sometimes there are substantial economies of scale in undertaking an activity or financing a program only once rather than fifty times.[38] Surely economies of scale may be realized as a result, for example, of one federal space program rather than fifty separate programs. There are probably economies of scale in most

national defense and foreign policy activities. One danger is that rent-seeking efforts at regulatory capture may be rewarded more fully at the federal level because federal capture is more likely to yield rents in the absence of competing jurisdictions. This cost must be weighed against the benefits from economies of scale or otherwise that may be available when national governments act.[39]

Second, national action can overcome the high costs of collective action that the states would otherwise face.[40] It would be very time-consuming and expensive for the fifty states to act collectively on foreign policy, or defense, or national economic policy. Some states might refuse to join in policies that a majority of states representing a majority of the people endorse. Such holdout states might trigger a race to the bottom and cause the legal standard of the most permissive state to force all other states to comply, even if a majority of the nation wished otherwise.[41] An example is no-fault divorce law; Nevada's easy divorce policies ultimately set a national standard. The states also famously raced to the bottom by allowing child labor in the first decades of the twentieth century. Federal action can stop races to the bottom and can overcome collective action problems, which is the primary justification for federal power in some circumstances.

Third, national action may be necessary if the states' activities generate serious external costs on out-of-state residents.[42] For example, when a state pollutes the air or the water and downwind states bear the burden, the polluting state may need incentives to reduce pollution. If a state could realize the economic benefits of a factory while the costs of its pollution fell mostly on other states, the polluting state would have no incentive to clean up its act. National regulation of clean air and water is thus essential to correct for the externalities problem. Other circumstances may also necessitate national lawmaking when state action negatively affects other states.

Fourth, the national government is better at handling civil rights issues than are the states.[43] James Madison first predicted this phenomenon in *The Federalist* No. 10, where he noted that the legislature of a large continental democracy would represent many more factions or interest groups than a small democratic city-state.[44] Therefore, it is less likely that a permanent, oppressive majority coalition will capture the legislature of a large federation

than that it might capture the legislature of a member unit of the federation. There are more interest groups vying to capture Congress than vie to capture the Illinois legislature, so it is harder to form and hold together a permanent entrenched majority coalition. Also, discrete and insular minorities face lower organizational costs in lobbying Congress than are faced by the so-called silent majority nationwide. Part of the reason national majorities are "silent" is because it is so hard and expensive for them to organize.[45]

As Madison predicted in *The Federalist* No. 10, the U.S. national government has in fact been much more protective of the civil rights of minority groups than the states. Congress freed the slaves, helped to end segregation, and was the first institution to protect women's equal rights in the Civil Rights Act of 1964. Federal action is thus warranted when a matter concerns fundamental civil rights. Federal action may also be needed if state laws infringe on immobile property, like real estate, or on people who may find it overly burdensome to move, like the elderly.

One difficulty is that one person's fundamental civil rights issue may be another person's instance where varying tastes and cultural preferences favor state-level decision making. There is no easy answer to this problem. In general, we must fall back on practical wisdom and common sense to try to decide whether the issue implicates fundamental civil rights or varying tastes and cultural preferences. Decision makers should approach this problem in a spirit of tolerance and of willingness to "live and let live."

How the Number of States in a Federation Affects the Balance

The U.S. federation has grown from thirteen states at the Founding to fifty states today. How has this affected the Economics of Federalism and subsidiarity? In general, increases in the number of member states in a federation augments the arguments both for state and for federal power.[46]

In a fifty-state federation, it is more likely that different states will reflect differing tastes, cultural preferences, and real-world conditions than in a thirteen-state federation. A fifty-state federation will also be more competitive than a thirteen-state federation. There will also be more experimentation in a fifty-state federation

than there is in a thirteen-state federation. Finally, state governments ought to be easier to monitor in a fifty-state federation, at least if everything else is held equal.

Conversely, in a fifty-state federation, there will be more circumstances that would benefit from economies of scale at the national level. The costs of collective action are also higher if there are fifty states instead of thirteen, so this rationale also suggests the need for more federal power as the number of states increases. Fifty states also generate more externalities both because there are more states taking actions that might have external effects and because there are more states that might experience a negative external effect. Finally, a fifty-state federation is likely to be even better at protecting civil rights because it will likely contain even more interest groups, which makes the likelihood of a self-dealing majority coalition less likely. In sum, the increase in the number of states in the U.S. federation from thirteen to fifty has led to a kind of hyperfederalism where both the economic case for leaving things at the state level and the economic case for handling things at the national level become augmented.

Is the optimal number of states thirteen, as at the Founding, or fifty, as we have today? We think the answer is probably between twenty and thirty.[47] Federations with too few states may have big or populous states that can realistically threaten secession to hold up the federation for special benefits. Canada, with only ten provinces, one of which is Quebec, has too few states. On the other hand, the fifty U.S. states are so weak and powerless relative to the central government that too much centralization occurs. The necessary balance of power in a federation counsels for between twenty and thirty states. The EU, with twenty-seven member nations, and the G-20 economies, with twenty member nations, are both optimally sized federal or confederal entities.

Balance: Decentralization versus Federalism

In sum, there is a strong economic case for presumptively leaving power at the state level unless the presumption is trumped by evidence that (1) there are economies of scale to national action; (2) the states are suffering from a collective action problem; (3) the states are imposing negative external costs on their neighbors; or

(4) there is a bona fide fundamental civil rights issue at stake. The Economics of Federalism thus sheds light on the subsidiarity principle discussed earlier. Subsidiarity suggests that power ought to be left presumptively at the state level unless the advocates of federal action can show an Economics of Federalism need for national intervention. The Economics of Federalism thus elaborates and gives content to the EU and Catholic doctrine of subsidiarity. Subsidiarity is desirable not because it maximizes utility, although it may often do that, but because it recognizes the natural right of individuals to have their problems addressed by the level of government that is closest to them.[48] It respects individual, natural rights. European Union and U.S. courts enforcing federalism limits on national power should consider economics in determining matters that are inherently state and local and matters that require the aid of a national or transnational government.

A second conclusion is that federalism inherently calls for some balance between state and national power. Sometimes it will be a close judgment call as to whether the economic arguments for state-level or national action predominate. Federalism is neither the same thing as nationalism nor the same thing as states' rights. Federalism is inherently about the need for a balance—a golden mean—between the extremes of nationalism and of states' rights.[49]

Third, the analysis thus far has implications for national supreme courts enforcing vague human rights guarantees in national constitutions or in transnational conventions on human rights. Those courts must balance the need to protect fundamental human rights with the fact that tastes, cultural preferences, and real-world conditions may differ at the state level in the United States or at the national state level in the EU or among the countries that are signatories to the European Convention on Human Rights. The Economics of Federalism thus has implications for the incorporation of the Bill of Rights in the United States[50] and for the margin of appreciation doctrine of the European Court of Human Rights.[51] We will come back to these subjects in section 3.

Finally, some American critics of constitutional federalism have suggested that the economic arguments presented earlier counsel in favor of decentralization at the grace of the national government.[52] We disagree.[53] The problem is that it is too easy for the national government to legislate in circumstances where it ought

to defer to the states because Congress and the president are self-interested national actors. Ensuring the right balance requires a constitutional federal structure such that neither the central government nor the states are the sole judges of what gets nationalized and what is left to the states. It is a fundamental maxim of Anglo-American constitutional law that no man ought to be a judge in his own cause.[54] The advocates of decentralization over constitutional federalism would wrongly make the national government the judge of the extent of its own powers vis-à-vis the states.

In his landmark 1994 article, Bermann identifies six values that he thinks are protected by constitutional federalism and subsidiarity.[55] Bermann argues that (1) self-determination and accountability are enhanced by constitutional federalism to the extent it requires that decisions be made at levels of government where people are effectively represented;[56] (2) political liberty is enhanced if power is constitutionally fragmented rather than being merely decentralized at the grace of a national government;[57] (3) subsidiarity makes government more flexible and responsive to the real needs of the people it serves;[58] (4) constitutional federalism helps preserve local social and cultural identity—an identity that often has deep historical roots and that is thus important;[59] (5) constitutional federalism and subsidiarity foster diversity which "may be valued in its own right";[60] and (6) constitutional federalism may reinforce local, city, and county power in the component states of a federation.[61]

We agree with Bermann on all six of these points, especially the argument that constitutional federalism and subsidiarity fragment political power in a way that mere decentralization does not do. We believe with Lord Acton that "[p]ower tends to corrupt, and absolute power corrupts absolutely,"[62] and we think this counsels in favor of constitutional federalism and checks and balances rather than merely decentralization. We would add that constitutional federalism and subsidiarity might be more appealing to skeptics than to Cartesian rationalists because the former may instinctively value experimentation and competition and disfavor a one-size-fits-all approach. As admirers of the empiricism and practicality of the Scottish Enlightenment, we feel drawn to federalism on these grounds as well.

Federal supreme courts enforcing subsidiarity guarantees in light of the Economics of Federalism ought to be deferential to national and international lawmaking bodies. Such courts should strike down federal laws once every ten years, not ten times every year, so as to guard against too much judicial policy making. They ought to invalidate national and international laws often enough to remind politicians that subsidiarity concerns are real and must be respected.

2. The U.S. Constitution's Enumeration of Powers and Subsidiarity

The principle of subsidiarity, as illuminated by the Economics of Federalism, suggests that the need for some constitutional federalism is rooted in the very nature of things (that is, in natural law for those of us who believe in such a thing). It is highly unlikely that any territorially large or populous country would not benefit greatly from a federal system. The need for federalism is thus a fundamental fact of human existence. The reason for this Age of Federalism and vibrant discussion of subsidiarity is precisely that constitutional federalism and subsidiarity respond to essential aspects of the human condition. We would expect the U.S. constitutional structure to protect both ideas, then, since the United States is the world's oldest and longest-functioning democratic federation.

So far, we have commented on the economic nature of the concepts of federalism and subsidiarity as they have developed historically in the United States, but we have not yet explained how these two concepts ought to affect American constitutional law. We now offer a perspective from American constitutional law on the relevance of judicially enforced subsidiarity. To reiterate, we believe that constitutional federalism enforced through judicial review is the correct legal response to the demands of subsidiarity. First, we discuss recent arguments for and against judicial enforcement of federalism in the United States; second, we show how the Framers infused the Constitution with the idea of subsidiarity; and third, we discuss the case law involving enumerated federal powers, the dormant Commerce Clause, intergovernmental immunities, and preemption, all of which show that judicial enforcement

of subsidiarity is ongoing in U.S. constitutional law. We do not claim that the U.S. case law as it presently stands produces all the gains that might be ideal, but we do claim that it achieves many such gains.

Judicial Enforcement of Federalism in the United States

How is constitutional federalism protected in U.S. constitutional law today? The primary protection no doubt is that both houses of Congress and the president must approve of federal laws or, if the president does not approve, two-thirds of the House and the Senate may override a presidential veto. This onerous process of bicameralism and presentment for federal lawmaking, coupled with such add-ons as the Senate filibuster, helps make federal law the exception and not the rule. As a result, many areas of law remain mostly at the state level, even after 220 years of American federalism. This is true of tort law, family law, contract law, property law, and criminal law.

Judicial review, as exercised by the U.S. Supreme Court, also vigorously protects constitutional federalism. In federal enumerated power cases, dormant Commerce Clause cases, preemption cases, and intergovernmental immunity cases alike, the present Supreme Court has not hesitated to enforce constitutional limits against Congress's efforts to aggrandize its power.[63] From 1954 to the early 1990s, commentators sometimes claimed that federal courts did not have power to review limits on national enumerated powers because federalism cases raise political questions. Thus, Professors Jesse Choper and Herbert Wechsler argued that because the states are powerfully represented in Congress, political safeguards would protect federalism and obviate the need for judicial review in enumerated powers federalism cases. Choper believed that judicial review was more necessary in individual rights cases than in enumerated powers cases, and he urged the Supreme Court to spend all of its political capital in the former rather than the latter.

The Choper-Wechsler theory prevailed 5 to 4 in the *Garcia* case in 1985,[64] but it was decisively rejected in *Gregory v. Ashcroft*,[65] *New York v. United States*,[66] and *United States v. Lopez*[67] and its progeny in the 1990s. Over the last twenty years, a majority of five justices have consistently believed the Supreme Court ought to decide

enumerated powers cases, even though four justices may have dissented for Choperian reasons. The Supreme Court is right to hear and decide enumerated powers cases for several reasons.[68]

First, the enumeration of federal powers is as much a part of our written Constitution as is the Bill of Rights. The *Marbury v. Madison*[69] argument for judicial review thus applies in federalism cases just as it applies in individual rights cases. When Congress passes a law that unconstitutionally aggrandizes national power, it is the Supreme Court's duty to hold up that statute against the Constitution and to follow the Constitution where there is a conflict.

Scholars have long recognized that judicial umpiring for federalism guarantees is centrally important to the global spread of judicial review.[70] Constitutional courts and supreme courts often begin as federalism umpires and later expand to protect individual rights, as happened in the United States. Historically, Canadian and Australian courts enforced their Commerce Clause analogues very vigorously,[71] and the German Constitutional Court has done the same.[72] In the British Empire, the Privy Council in London enforced imperial federal allocations of power between Britain and its colonies and, in Canada, between the provinces and the national government. Ample precedent worldwide favors judicial umpiring in federalism cases—precedent that Bermann overlooks in his 1994 subsidiarity article.

The text of the U.S. Constitution demands that the courts play such a role, and that role is played by courts as well in Germany, Canada, Australia, India, and South Africa. Just as federalism has spread all over the world, judicial enforcement of federalism has spread all over the world as well. Judicial review in federalism or subsidiarity cases is sometimes deferential,[73] but it does take place and has had widespread consequences.[74] Bermann himself identifies possible politically accountable bodies for policing subsidiarity in the EU context in his short 2008 essay titled "National Parliaments and Subsidiarity: An Outsider's View."[75]

Second, abdication to Congress in all U.S. federalism, enumerated powers cases, as Professors Choper and Wechsler call for, would make Congress the judge of the scope of Congress's own powers. This is a form of putting the fox in charge of the henhouse. It would quite improperly make Congress the judge in its own cause as to the scope of national congressional power. As

Bermann recognizes, in the EU there are almost no political safeguards of nation-state power against the EU,[76] so there, especially, a more active judicial role in enforcing subsidiarity would be desirable. The political institutions of a national or transnational entity cannot safely be entrusted with the power to determine the scope of national or transnational powers. If federalism and subsidiarity are valuable, as we have argued they are, then they need to be enforced by a powerful independent entity like a constitutional or supreme court.

There is no real danger that the U.S. Supreme Court will excessively limit national power in enumerated powers federalism cases. The nine Supreme Court justices are selected by the nationally elected president and by senators elected statewide, all of whom are national officers paid out from the U.S. Treasury. It is extremely unlikely that the Supreme Court would long challenge a national majority sentiment—a point made decades ago by Professors Robert Dahl and Gerald Rosenberg.[77] It is more likely that the Court might deferentially uphold laws that it ought to strike down, thus giving those laws an undeserved patina of legitimacy.[78] Supreme Court enforcement of enumerated powers thus poses small risks while offering substantial benefits.[79]

Third, a democracy's greatest challenge with the institution of judicial review is that it generates a countermajoritarian difficulty. A tiny group of life-tenured judges have authority to disallow, for example, a popular law banning indecent speech on the Internet because it violates the First Amendment. This countermajoritarian difficulty is always present in individual rights cases, but to a lesser degree in federalism cases. When the U.S. Supreme Court struck down the federal Gun Free School Zones Act in *United States v. Lopez*, for example, it did not preclude Texas from passing a similar law at the state level. The Court held simply that state-level majorities could constitutionally address guns in schools, but a national majority could not.[80] *Lopez* was thus not a countermajoritarian decision like *Roe v. Wade*.[81] It was simply a decision that the majority with proper jurisdiction to legislate was at the state level and not the national level.[82]

Fourth, Professor Choper and his acolytes often argue that questions about the scope of national power or the Economics of Federalism are inherently normative and require an expertise

that is lacking in the Supreme Court. This claim is also incorrect. The U.S. Supreme Court has historically enforced the Economics of Federalism in so-called dormant Commerce Clause cases, and its efforts in this field have been almost universally praised.[83] In dormant Commerce Clause cases, the Supreme Court strikes down state laws that discriminate against or unreasonably burden interstate commerce even if Congress has not yet legislated in the field. The Court thus uses economics to decide whether a state law intrudes on the national economic domain or whether its impact is exclusively local.[84] This Economics of Federalism analysis is no different from what the Supreme Court entertained in *Lopez*.

Finally, Professors Choper's and Wechsler's arguments about the political safeguards of American federalism simply no longer hold true in the United States, much less in the EU. Wechsler argued, for example, that malapportionment of House seats in the 1950s gave the states huge power over Congress. Malapportionment, however, bit the dust in the United States way back in the 1960s as the result of the Supreme Court's one person, one vote decisions in *Baker v. Carr*[85] and *Reynolds v. Sims*.[86] Campaign finance reforms in the meantime have led representatives and senators to raise most campaign funds in increments of less than $2,500 from national interest groups, whose members mostly live outside the election district. This tends to mean that elected representatives and senators share views with national special interests as much as their districts or states. We doubt the political safeguards of federalism were ever as great as Wechsler and Choper claimed they were, but, whatever such safeguards may once have existed, they no longer exist today.[87]

In sum, a polity that wants to garner the economic benefits of federalism and subsidiarity needs to constitutionally protect those concepts in a written constitution that is enforced by judicial review. Decentralization at the grace of the national government leads to overcentralization, which is costly, and the absence of judicial review to enforce federalism and subsidiarity ideas leads to the same pitfall. Happily, the Framers of the U.S. Constitution understood these points, and so in 1787 they enumerated and limited national power in a document that the federal courts have the power to enforce. We will now turn to the historical origins and subsequent development of subsidiarity in U.S. constitutional law.

Subsidiarity, the Philadelphia Convention, and Two Centuries of Practice

In order to understand fully subsidiarity's relevance to U.S. constitutional law, it is necessary to begin with the enumeration of federal power in Article I, Section 8 of the U.S. Constitution. The Framers of the Constitution were quite familiar with a rudimentary instinct as to the Economics of Federalism even though they did not use that term or understand the concept as well as we do today.[88]

Between May and September 1787, a constitutional convention of fifty-five delegates drafted the U.S. Constitution. The delegates met in secret in Philadelphia, but thanks to James Madison's copious notes and other records, we know a fair bit about the convention's deliberations and the delegates' understanding of the Article I, Section 8 enumeration of powers.

Before the Philadelphia Convention, the Virginia delegates, led by James Madison, met and drafted the so-called Virginia Plan as to what the new constitution ought to look like. This plan is sometimes referred to as the Randolph Plan because Virginia Governor Edmund Randolph presented it early on to the Philadelphia Convention. Resolution 6 of the Virginia Plan addressed the scope of the new federal government's power. This resolution proposed a two-branch Congress, and it said:

> 6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress bar the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst any member of the Union failing to fulfill its duty under the articles thereof.[89]

The Virginia Plan then openly proposed to give Congress (1) the same very limited powers it had enjoyed under the Articles of Confederation; (2) the power to legislate in all cases to which the separate states are incompetent; (3) the power to legislate in cases where the harmony of the United States may be interrupted by

the exercise of individual legislation; and (4) the power to negative all state laws that contravened the Constitution in Congress's opinion.[90] In addition, the eleventh resolution of the Virginia Plan gave the national government the power and duty of guaranteeing to every state a republican form of government.[91]

The Virginia Plan is striking because it essentially proposes to give the national government the power to act in cases where the states face collective action problems and are separately "incompetent to act," that is, where there are economies of scale, and where state laws have major external effects that disrupt the harmony of the Union. The Virginia Plan does not use such modern economic terms as "collective action problem," "economy of scale," or correction of "negative externalities," but this seems pretty plainly to be what the plan's authors aimed to say. James Madison, and the Virginia delegations, understood at a gut level that states could not carry out some activities on their own and that a federal government should act in those unusual and limited situations.

The Virginia Plan was not the last word on the scope of national power, however. The small states, led by New Jersey, resisted giving the federal government the powers specified in the Virginia Plan. New Jersey put forward a plan of its own that categorically limited and enumerated national power.[92] The New Jersey Plan contemplates a national government that has very limited and categorically enumerated powers and that cannot correct all collective action problems or negative externalities imposed by state laws.

The Philadelphia Convention argued back and forth for weeks over the merits of the Virginia and New Jersey Plans and eventually reached a Great Compromise that incorporated parts of both plans. States were equally represented in the Senate, but population size determined representation in the House of Representatives. The Bedford Resolution was the Philadelphia Convention's final resolution on the scope of national power before sending the Constitution to the Committee of Style for drafting. It was introduced by Representative Gunning Bedford, of Delaware, and it provided:

> [T]he national legislature ought to posses the legislative rights vested in Congress by the Confederation [and the right] to legislate in all cases for the general interests of the Union, and also in those

> to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.[93]

Here, the Philadelphia Convention endorsed the Virginia Plan's Economics of Federalism intuition as to the scope of the power of the new federal government. Judge Stephen Williams, of the U.S. Court of Appeals for the DC Circuit, reached much the same conclusion after one of us (Professor Calabresi) called this legislative history to his attention.[94] The Bedford Resolution dropped James Madison's proposal to give Congress the power to negative state laws, however. Bermann does not discuss this history in claiming that the subsidiarity idea has no roots in U.S. constitutional law.

The Committee on Style of course had no authority to make substantive changes or decisions in drafting the U.S. Constitution; its charge was only to mechanically reduce resolutions like the Bedford Resolution to a legal text. The Committee on Style adopted constitutional text for Article I, Section 8 that was quite different from the Economics of Federalism text approved as the Bedford Resolution. As Professor Kurt Lash notes, the Committee on Style opted instead for a categorical approach to federalism in which the national government was given power in certain categories of situations.[95] National power was extended to the following categories: (1) taxing and spending to promote the general welfare; (2) borrowing money; (3) regulating interstate and foreign commerce; (4) passing naturalization and bankruptcy laws; (5) coining money and regulating the standard of weights and measures; (6) punishing counterfeiting; (7) establishing post offices and post roads; (8) establishing patents and copyrights; (9) creating lower federal courts; (10) punishing piracy and offenses against the law of nations; (11) all powers over foreign policy and the waging of war, including the power to raise armies and navies; (12) power to legislate for the District of Columbia and the territories; (13) power to guarantee to the states a republican form of government; and, finally (14) power to adopt all necessary and proper laws for carrying into execution the foregoing powers.

When the Constitution was up for ratification, many people argued—rightly in retrospect—that the broad enumerated powers generally, and the Necessary and Proper Clause in particular,

would give Congress sweeping power to act to solve collective action problems. Fearful of that outcome, the Anti-Federalist opponents of the Constitution insisted on adding the Bill of Rights to the document as the first order of business of the new national government. Representative James Madison, serving in the First Congress, promptly drafted the Bill of Rights and included this federalism protection in the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[96]

This provision hardly protected the states from ever-expanding federal power because it did not enumerate the reserved powers of the states over such topics as manufacturing, mining, agriculture, education, criminal law, and regulation of local health and safety. The Tenth Amendment was thus easily dismissed as stating a truism—all is retained that is not delegated—as the U.S. Supreme Court explicitly held in *United States v. Darby Lumber Co.*, where the manufacturing regulation at issue was a necessary and proper means for carrying into execution Congress's commerce power.[97]

Some have argued that the Tenth Amendment suggests that the Framers split the atom of sovereignty and that it makes the states co-sovereign together with the national government. We do not buy that argument and would note that the Tenth Amendment does not use the word "sovereignty" any more than did Article I, Section 8. We agree with Paolo Carozza that the sovereignty idea is inconsistent with the idea of subsidiarity and that it is an unhelpful idea at best.[98] In any event, sovereignty under the U.S. Constitution lies not with the states or the federal government but with We the People of the United States who made the Constitution by a majority vote of three-quarters of the states that sent representatives to the Philadelphia Convention. Article V requires a majority in three-quarters of the states to acquiesce to changes to the Constitution, so it seems sovereignty must lie at that threshold. From 1789 to the present, the Supreme Court has consistently read the Constitution as giving the federal government the power under the Necessary and Proper Clause "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of

the United States may be interrupted by the exercise of individual legislation."[99] The categorical listing of powers in Article I, Section 8, Clauses 1 to 17 did not prevent the Supreme Court from reading the Constitution as if it had enacted the words of the Bedford Resolution rather than a categorical enumeration of powers.

Thus, the Supreme Court upheld laws regulating navigation in intercoastal waterways—laws that Chief Justice Marshall said were constitutional in *Gibbons v. Ogden*.[100] Federal navigation laws governing intercoastal waters are appropriate under an Economics of Federalism approach, but they are harder to justify under the categorical federalism of Article I, Section 8.[101] Arguably, Congress can regulate even recreational navigation or intrastate navigation under the Necessary and Proper Clause if it has a substantial effect on interstate commerce, but if Congress can do that, the effort to limit federal power categorically is a failure.

The U.S. Supreme Court read the Necessary and Proper Clause broadly in *McCulloch v. Maryland*, holding that Congress had the implied power to charter a national bank of the United States because doing so was a convenient, useful, and appropriate means of executing such enumerated powers as the powers of taxation, spending, regulation of commerce, and the raising of armies. Chief Justice Marshall said:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[102]

Note that Marshall's test in *McCulloch* replaces the Constitution's categorical textual requirement that means be "necessary and proper" with the weaselly requirement that they be merely "appropriate."[103] *McCulloch* implied a greatly expanded sphere of federal power, and the "appropriateness" inquiry almost invites a consideration of the Economics of Federalism. *McCulloch* is striking because the Framers at Philadelphia had specifically considered—and decided against—empowering the federal government to charter corporations. John Marshall almost certainly knew this history when he authored *McCulloch*.

In two post–Civil War cases, the Supreme Court built on *McCulloch*'s foundation for a sweeping understanding of national power.

In *Knox v. Lee*, the Court held that Congress had power under the Necessary and Proper Clause to issue paper money during the Civil War[104]—a striking decision because Congress has a categorically enumerated power to "coin" money under Article I, Section 8, Clause 5.[105] That power is superfluous if the Necessary and Proper Clause provides Congress the power to print paper money—something James Madison railed against at the end of *The Federalist* No. 10.[106] The Supreme Court also followed an Economics of Federalism noncategorical approach in its 1893 decision in *Fong Yue Ting v. United States*, holding Congress had power to expel longtime resident aliens under the Necessary and Proper Clause.[107] This implied national power over immigration generally goes well beyond Congress's enumerated power to pass naturalization laws. *Fong Yue Ting*, like *Knox v. Lee*, is compatible with an Economics of Federalism approach but not with a categorical approach to federalism.

The Supreme Court famously rejected categorical federalism in favor of an Economics of Federalism approach in *The Shreveport Rate Cases*, decided in 1914. In that series of cases the Court considered whether the Interstate Commerce Commission could regulate wholly intrastate rates along interstate railway lines.[108] Justice Charles Evans Hughes wrote that congressional power in these circumstances "necessarily embraces the right to control . . . operations in all matters having a close and substantial relation to interstate traffic, to the efficiency of interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms."[109] The power to regulate wholly intrastate railway shipments that have "a close and substantial relation" to interstate commerce is a Bedford Resolution–type power accomplished under the guise of the Necessary and Proper Clause. Between 1895 and 1937, the Supreme Court did strike down acts of Congress to enforce categorical constitutional federalism in a series of cases that Professor Bermann declines to mention, presumably because most of them are no longer good law. In those cases the Court distinguished between commerce, which Congress could regulate, and manufacturing or agriculture, which it could not. Among these cases are *United States v. E. C. Knight Co.*;[110] *Hammer v. Dagenhart*;[111] *Bailey v. Drexel Furniture Co.*;[112] *Schecter Poultry Corp. v. United States*;[113] *Carter v. Carter Coal Co.*;[114] and *United States v. Butler*.[115] Though these cases are all now overruled (except for

Bailey), they importantly foreshadow the reemergence of judicially enforced constitutional federalism in the 1995 *United States v. Lopez* decision discussed later.

During the New Deal constitutional revolution of 1937, the Supreme Court decisively rejected categorical federalism for all time, holding that all wholly intrastate commerce that substantially affects commerce among the states is regulable under the Necessary and Proper Clause. The Court held in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* that the National Labor Relations Act of 1935, popularly known as the Wagner Act, was constitutional.[116] The Wagner Act effectively governed labor law in manufacturing entities that shipped goods nationwide. Chief Justice Charles Evans Hughes found the same "close and substantial" connection between a wholly intrastate activity and interstate commerce that he had found as an associate justice in *The Shreveport Rate Cases*. *Jones & Laughlin Steel* says that labor peace is so important to commerce among the several states that Congress can regulate it as a means (under the Necessary and Proper Clause) toward promoting interstate commerce. *Jones & Laughlin Steel*, together with *McCulloch*, *Knox*, *Fong Yue Ting*, and the *Shreveport Rate Cases*, made it clear beyond any doubt that the federal government has power under Article I, Section 8 to solve all collective action and Economics of Federalism problems.[117]

In conclusion, U.S. constitutional law has been infused with subsidiarity considerations from the outset, as the Bedford Resolution history indicates. Further, in a series of landmark Supreme Court opinions from the Founding era up until 1995, the Supreme Court has held that the national government may regulate all wholly intrastate activities that *substantially* affect commerce or any other federal power. This test, indeterminate on its face, invites consideration of the Economics of Federalism as a way to supply needed content. We turn now to four areas where the U.S. Supreme Court currently enforces constitutional federalism that might benefit from an Economics of Federalism analysis.

Supreme Court Case Law and Subsidiarity

The four areas of current Supreme Court case law that enforce subsidiarity include (1) Congress's enumerated lawmaking pow-

ers; (2) the dormant Commerce Clause; (3) intergovernmental immunities and preemption; and (4) federal jurisdiction case law. In each area, fleshing out the subsidiarity idea with an open consideration of the Economics of Federalism could help to clarify the law.[118]

Congress's Enumerated Lawmaking Powers

In its 1995 decision in *United States v. Lopez*, the U.S. Supreme Court held by a vote of 5 to 4 that Congress lacked power under the Commerce Clause and the Necessary and Proper Clause to criminalize bringing a gun within 1,000 feet of a school.[119] The Court distinguished all the cases previously discussed, noting that they all involved commercial activities whereas *Lopez* involved a garden-variety state law crime. Further, more than forty states criminalized bringing guns to school, which meant there was no race to the bottom over the issue. It was also clear from the facts of the case that federal regulation would realize no economies of scale, there were no negative external effects of state law to correct, and there were no civil rights issues lurking in the case. The outcome in *Lopez* was thus entirely consistent with the Economics of Federalism.[120] *Lopez* reiterated the doctrine of *Jones & Laughlin Steel* that Congress could only regulate wholly intrastate activities that *substantially* burdened interstate commerce, but this time it struck down a federal statute instead of upholding it.

Since *Lopez*, the Supreme Court has applied the substantial effects test twice—and reached the wrong result both times in our view. In *United States v. Morrison*, the Supreme Court wrongly struck down a civil rights measure, the Violence Against Women Act,[121] while in *Gonzales v. Raich*, the Court wrongly upheld a federal statute that criminally punished a woman who grew six marijuana plants in her house, which was legal under California state law.[122] The Court's holding in *Morrison* was consistent with a categorical approach but inconsistent with the Economics of Federalism. The law at issue in *Morrison* was a civil rights law, and, as we argued earlier, the federal government ought to have the power to adopt such measures.[123] The Court's holding in *Gonzales v. Raich* was problematic because states differed in their tastes, preferences, and conditions on the medical use of marijuana and because the federal interest in regulating possession of very small amounts of

homegrown marijuana by very ill people was quite small. We agree with the dissenters in both *Morrison* and *Raich* for Economics of Federalism reasons.

Thus, with these three cases since 1995, the Supreme Court is back in the business of policing Article I, Section 8 of the Constitution. The justices' vigorous oral arguments in March 2012 over the constitutionality of President Barack Obama's newly enacted national health care mandate especially illuminated this revival.[124]

Three other post-*Lopez* cases enforcing the limits of federal enumerated powers also deserve mention. First, in *City of Boerne v. Flores*, the Supreme Court struck down the Religious Freedom Restoration Act.[125] This act purported to protect religious freedom more expansively than the Supreme Court's interpretation of Section 1 of the Fourteenth Amendment, but the Court did not agree that Congress's Section 5 power to enforce the Fourteenth Amendment by enacting "appropriate" laws authorized the act. *City of Boerne v. Flores* announced a new test of "congruence and proportionality" to determine whether laws were "appropriate" measures to enforce Section 1. The Supreme Court went on to invalidate federal laws in three subsequent cases: (1) *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*;[126] (2) *Kimel v. Florida Board of Regents*;[127] and (3) *Board of Trustees of the University of Alabama v. Garrett*.[128] Eventually, the Supreme Court paused in its vigorous application of the "congruence and proportionality" test and upheld two of Congress's acts.[129] Nonetheless, by invalidating federal laws in *City of Boerne*, *Florida Prepaid*, *Kimel*, and *Garrett*, as well as *Lopez* and *Morrison*, the Court starkly reminded Congress that it was very definitely back in the business of policing and enforcing the enumeration of federal powers.

Second, in *Printz v. United States*,[130] the Court held 5 to 4 that Congress could not commandeer states into helping to execute federal laws under the Necessary and Proper Clause. This important opinion built on the Court's prior holding in *New York v. United States*[131] that Congress could not conscript state legislatures. In 2010, the Supreme Court decided another Necessary and Proper Clause case, *United States v. Comstock*,[132] addressing whether Congress had power to authorize committing a mentally ill and sexually dangerous prisoner to federal custody beyond the date the

prisoner would otherwise be detained. The Court allowed that federal power in this case, but the very narrow and closely reasoned decision suggested the justices took the issue seriously. Justice Breyer's opinion for the Court upheld Congress's claimed power only because of five very specific concerns. Justice Thomas's dissent, joined by Justice Scalia, complained that the federal prisoner civil commitment statute was not necessary and proper *for carrying into execution* some other federal enumerated power. Justices Alito and Kennedy voted with the majority and wrote that the federal law carried into execution the same enumerated power that had supported the prisoner's original conviction.

Third, in two sovereign immunity cases—*Seminole Tribe of Florida v. Florida*[133] and *Alden v. Maine*[134]—the Supreme Court held that an act of Congress purporting to give state employees a right to sue state governments for money damages in federal and state court was an unconstitutional exercise of federal enumerated powers. These two decisions thus strongly support the proposition that there has been a strong federalist revival in U.S. constitutional law in recent years.

In summary, since the 1995 decision in *United States v. Lopez*, the Supreme Court has vigorously enforced federalism limits on congressional legislative power. It struck down two federal statutes on Commerce Clause grounds and four statutes on the grounds that they were not "appropriate" laws for the enforcement of the Fourteenth Amendment. The Supreme Court decided two big Necessary and Proper Clause cases during this period, *Printz v. United States* and *United States v. Comstock*, in which it upheld a federal law only because five separate considerations taken together suggested that the law was necessary and proper. Finally, the Court held federal laws allowing individuals to sue state governments for money damages in federal or state court were unconstitutional. The message from the Supreme Court is loud and clear: it is policing the enumeration of federal powers in a serious way.

The Supreme Court has not, however, articulated a very useful test to evaluate whether a federal law is unconstitutional. It continues to use Chief Justice Hughes's test from *Jones & Laughlin Steel*, that Congress may regulate wholly intrastate activities only if they *substantially* affect interstate commerce. But what does the word

"substantially" really mean? How do we know which wholly intrastate activities "substantially" affect interstate commerce and which do not? The Supreme Court simply never says.

The Court has no better test for enforcing Section 5 of the Fourteenth Amendment, which gives Congress power to pass "appropriate" legislation. Since *City of Boerne v. Flores*, the Court has asked whether Section 5 legislation is a "congruent and proportional" measure to secure Section 1 Fourteenth Amendment rights. But what does "congruence and proportionality" mean? In *Tennessee v. Lane*, Justice Scalia announced that he would no longer follow the "congruence and proportionality" test because it was too indeterminate.[135] Instead, he would uphold any rational Section 5 legislation targeted at race discrimination, and he would strike down anything else. Justice Scalia's approach is inadequate; moreover, it is even less faithful to the original meaning of the Fourteenth Amendment than is the congruence and proportionality test.[136]

We think the "substantially affecting" test under the Commerce Clause and the "congruence and proportionality" test under Section 5 of the Fourteenth Amendment are inherently indeterminate. The Economics of Federalism approach would better resolve whether an act inherently falls within the sphere of national power or state power. The Economics of Federalism reveals the Gun Free School Zones Act in *Lopez* was unnecessary grandstanding; the states had no race to the bottom or other problem to correct. The statute in *Morrison*, on the other hand, might have been a valid federal civil rights measure. Finally, the Controlled Substances Act, as applied in *Gonzales v. Raich*, and the federal statute in *Wickard v. Filburn*, hardly met the "substantial" effects test because homegrown marijuana or wheat has at most an indirect effect on national markets. Also, California is among eighteen states that have legalized medical marijuana in recent years. Given that more than one-third of the fifty states have spoken on the issue, it is apparent that tastes and cultural preferences vary sharply across the United States. It is thus a classic Economics of Federalism issue, which ought to be left at the state level to accommodate many viewpoints and to permit this experiment with the medical marijuana to proceed.

We have no idea what the future will hold for the Supreme Court's enforcement of federal constitutionally enumerated powers. We think the post-1995 Supreme Court case law conclusively

indicates that constitutional federalism and subsidiarity are alive and well in present-day American constitutional law. Students of U.S. constitutional law ought to study the Economics of Federalism and subsidiarity to analyze enumerated powers and the dormant Commerce Clause.[137] Both concepts are essential to understanding American federalism from the days of the Bedford Resolution, at the Philadelphia Convention, on up to *Lopez*'s holding that federal power extends only to those "intrastate activities that *substantially* affect interstate commerce." Both answer what "substantial" effects and "necessary and proper for carrying into execution" the enumerated powers really mean.

Dormant Commerce Clause

Under the dormant Commerce Clause doctrine, the U.S. Supreme Court says the Constitution implicitly preempts state laws that burden interstate commerce in certain prohibited ways. The doctrine was born in *Gibbons v. Ogden*,[138] percolated in *Wilson v. Black-Bird Creek Marsh Co.*,[139] and first flourished in a recognizable holding in *Cooley v. Board of Wardens*,[140] where the Supreme Court upheld a Pennsylvania law that required all ships entering or leaving the port of Philadelphia to have a local pilot.

Cooley, decided in 1851, says that sometimes the commerce power was an exclusively national power that preempted conflicting state laws, but at other times it was merely a concurrent national power that did not constitutionally preempt state laws. Justice Curtis's opinion for the Court explained:

> Either absolutely to affirm, or deny that the nature of [the commerce] power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain.[141]

The Court thus essentially upheld the Pennsylvania law requiring local pilots based on an Economics of Federalism intuition. Justice Curtis thought the law was a bona fide local health and

safety measure and not economic protectionism which unreasonably burdened interstate commerce.

Since *Cooley*, the Supreme Court has enforced the dormant Commerce Clause with some regularity. And since the New Deal, the Court has almost exclusively used the dormant Commerce Clause to prevent state economic protectionism. Professor Donald H. Regan explained in an important law review article, "Not only is this what the Court has been doing, it is just what the Court should do. This and no more."[142] In *Pike v. Bruce Church*,[143] a landmark 1970 dormant Commerce Clause case, the Supreme Court said:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[144]

Pike v. Bruce Church thus announced a two-part test for identifying whether state laws run afoul of the dormant Commerce Clause. State laws are invalid if either (1) they discriminate on their face against interstate commerce, or (2) the burden on interstate commerce outweighs any state or local benefit. Professor Regan explains *Pike v. Bruce Church* and its progeny as cases that prevent the states from engaging in economic protectionism with tariffs and embargoes, for example.

The dormant Commerce Clause case law asks the Court to distinguish between state laws only reflecting varying state preferences and conditions and those also burdening interstate commerce. The Court must police a line between laws that mainly affect one state and laws that affect national interests and are thus preempted. In practice, state laws with significant negative external effects on other states are struck down under the dormant Commerce Clause. In *Pike v. Bruce Church* itself, the Court invalidated an Arizona law that required that Arizona cantaloupes be packed in Arizona and be labeled as Arizona-grown rather than being packed across the border in California. The Supreme Court

easily decided that whatever state interest this law served was outweighed by its protectionist effect on interstate commerce.

The Supreme Court has decided several dormant Commerce Clause cases since the New Deal, and all of them address the economic line between matters that affect mainly one state and matters that are protectionist and affect interstate commerce. The Court thus applies the Economics of Federalism and, in effect, subsidiarity in its dormant Commerce Clause case law. Therefore, subsidiarity cannot be a stranger to U.S. constitutional law. Subsidiarity concerns are quite evident in the dormant Commerce Clause context, and the Supreme Court routinely enforces them.

Intergovernmental Immunities and Preemption

The Supreme Court has long held that the different levels of American government cannot single out each other's officers and instrumentalities for discriminatory treatment. This principle is evident in *McCulloch v. Maryland*.[145] In *McCulloch*, the Supreme Court struck down a Maryland state tax on a Maryland branch of the federally chartered Bank of the United States. A critical fact in the Court's analysis was that the state taxed only the Bank of the United States and not all other Maryland banks. The Supreme Court held that Maryland could equally tax all banks doing business in the state, but that it could not single out the federal bank. In the Court's view, the Constitution preempted such action even without a preempting act of Congress.

John Hart Ely praises *McCulloch* in *Democracy and Distrust*, writing that if majorities in one state could tax all U.S. citizens on federal instrumentalities, there would be an obvious failure in the political process.[146] This explains why we allow states to tax federal employees' income, but at the same rates private employees pay. Similarly, the federal government may tax state employees' income at the same rates private employees pay. Neither level of government can constitutionally single out the officers or instrumentalities of another level of government for unusual treatment.

This insight underlies the Supreme Court's new federal common law doctrine, first announced in *Clearfield Trust Co. v. United States*.[147] That case held that federal negotiable instruments issued by the Federal Reserve Bank of Philadelphia were governed by a federal common law rule, rather than by state common law under

Erie Railroad Co. v. Tompkins.[148] The Court's conclusion rested on the important Economics of Federalism interest in the uniformity context. The Court reached a similar conclusion in 1988 in *Boyle v. United Technologies Corp.*,[149] which held that a federal common law rule protected military contractors from state tort suits for damages caused by their design specifications. The Court held the Constitution preempted such state tort suits because of the national government's Economics of Federalism interest in designing military equipment free from state tort juries' second-guessing. The Supreme Court's new federal common law doctrine thus represents another area of case law that addresses subsidiarity concerns.

Finally, in *New York v. United States*[150] and *Printz v. United States*,[151] the Supreme Court held that Congress could neither commandeer state legislatures or executive officials to pass certain laws nor impose unfunded mandates on state law enforcement officers. Economics of Federalism concerns animate both of these cases because state officers should set policies that reflect state majorities' differing tastes, conditions, and preferences. The Court expresses concern that lines of voter accountability will be blurred and the benefits of federalism lost if Congress can force state legislatures and executives to do its bidding using state resources and personnel. *New York v. United States* and *Printz* reflect the concern in *McCulloch* and in the dormant Commerce Clause cases that one level of government ought not to be able to burden or discriminate against the other in American constitutional federalism. The intergovernmental immunities cases all involve the Constitution preempting state laws that burden national interests or institutions, but often very important cases also arise as to whether federal statutes preempt state law. Under the Supremacy Clause of Article VI, federal law preempts state law, including state constitutional law, when federal and state law conflict.[152] It is Congress's intent that controls in statutory preemption cases, and Congress may indicate its preemptive intent either expressly or through the structure and purpose of the statute enacted. Statutes may impliedly preempt state law where (1) federal law is in conflict with state law, or (2) Congress's regulatory structure is so comprehensive that it occupies the whole field in that area of law.

The Supreme Court's statutory preemption cases turn on the language and history of each federal statute and on the facts of each case. Critics find it at best to be a muddle and at worst to be an invitation to judges to fall back on their own policy views in federal statutory preemption cases. One judge, Judge Stephen F. Williams, has openly called on federal judges to apply the Economics of Federalism in these decisions.[153] We agree with Judge Williams that this would improve the federal statutory preemption case law.

Federal statutory preemption is yet another context where federal judges weigh whether a state law intrudes on a federal interest or concerns only a state matter as to which tastes, preferences, and conditions may legitimately vary. It is simply inevitable that the federal courts will have to consult the Economics of Federalism and thus subsidiarity in these cases. Subsidiarity may not be mentioned in the text of the Constitution, but the document is of necessity infused with subsidiarity concerns.

Federal Jurisdiction

Federal jurisdiction is the final area of case law where subsidiarity concerns are clearly present. Professor Richard H. Fallon Jr. of Harvard Law School argues that federal jurisdiction approaches have tended to display either a federalist sympathy for state power or a nationalist sympathy for federal court power.[154] Professor Martin H. Redish has made much the same point in an important book in the field.[155] There are several doctrines in the field of federal jurisdiction that proponents of state autonomy have used to guarantee that federal power should only be used where it is a vital *subsidium* or form of aid for the federal courts.

The law of federal jurisdiction protects the autonomy, and some would even say the primacy, of state over federal courts. This is due to (1) the Anti-Injunction Act, which limits federal court injunctions of state judicial proceedings;[156] (2) the various abstention doctrines, which require federal courts to often abstain from acting until proceedings have finished in the state courts;[157] and (3) federal protection of state sovereign immunity. Recent Supreme Court cases have also cut back on federal habeas corpus review, which review remains nonetheless as a significant limit on congressional power.[158] The state courts also share concurrent jurisdiction

with the federal courts over at least some federal question and diversity cases.[159]

Federalism subsidiarity concerns took center stage in 1938 when the New Deal Supreme Court abandoned *Swift v. Tyson*'s[160] so-called general federal common law in *Erie Railroad Co. v. Tompkins*,[161] a landmark holding. The New Deal Court valued federalism in this area of law because it promoted experimentation and competition, which are core subsidiarity concerns. Given that the New Dealers abandoned enumerated powers federalism, it is striking that the Supreme Court in that era championed federalism in most federal common law contexts (excepting the *Clearfield Trust* line of cases mentioned earlier).

The *Erie* doctrine is motivated by subsidiarity concerns, though Michael Greve has criticized it for leading to "upside-down federalism" because it enhances state efforts at maintaining cartels.[162] We are quite sympathetic, as a policy matter, with Greve's criticisms of *Erie*, but there is no doubt as a historical matter that the opinion reflects in part Justice Brandeis's devotion to subsidiarity. Brandeis authored the *Erie* opinion and the dissent in *New State Ice Co. v. Liebmann*, which lauded the states as laboratories of experimentation. *Erie* is additional evidence of how intricately the law of federal jurisdiction is intertwined with subsidiarity concerns.

In summary, the law of federal jurisdiction supports our thesis that subsidiarity concerns have long animated the U.S. Supreme Court even without the label "subsidiarity." We think that a better understanding of subsidiarity and the Economics of Federalism would thus be of great value to the U.S. Supreme Court in deciding federal jurisdiction cases.

* * *

We think judicial enforcement of constitutional federalism is a good idea; that the Framers of the U.S. Constitution infused that document with the idea of subsidiarity; and that the U.S. Supreme Court's case law involving Congress's enumerated lawmaking powers, the dormant Commerce Clause, intergovernmental immunities, preemption, and federal jurisdiction suggests that there is judicial enforcement of subsidiarity in present-day U.S. constitutional law. We do not claim that the current U.S. case law generates all the gains that judicial enforcement of subsidiarity ideally

would realize, but we do believe it achieves many such gains. In any event, current doctrine could be improved if its relationship to the Economics of Federalism and subsidiarity were more widely understood.

3. Incorporation of the Bill of Rights and the Margin of Appreciation

The Economics of Federalism and subsidiarity are relevant as well to a second big problem in American constitutional law: the debate over whether and to what degree the Fourteenth Amendment incorporates the Bill of Rights and applies it against the states.[163] This question recently took center stage in *McDonald v. City of Chicago*, where the Supreme Court held that the Second Amendment right to keep and bear arms was incorporated by the Fourteenth Amendment, which applied that right against the states.[164] This issue ended up splitting the Supreme Court 5 to 4, and even the five justices in the majority were unable to agree among themselves on a rationale.

We consider here what relevance the Economics of Federalism has for the question of when to guarantee human rights across the whole United States and when the Supreme Court ought to leave a matter for decision by the states.[165] We begin in the first section by discussing the applicability of the Economics of Federalism to the problem of whether to incorporate the Bill of Rights against the states. We then turn to a discussion of the original meaning of the Fourteenth Amendment as it bears on the incorporation problem. The third section considers the three main approaches taken in practice by Supreme Court justices to the incorporation issue between 1897 and 2010. Next we discuss the approach we think the Supreme Court ought to follow in incorporation cases. Finally, we analyze the opinions in *McDonald v. City of Chicago* (2010) in light of our interpretive theory.

Subsidiarity and Incorporation of the Bill of Rights

While the Bill of Rights applies only to actions by the federal government, the Fourteenth Amendment applies to state and local governments. The Fourteenth Amendment was ratified in 1868,

but the incorporation of the Bill of Rights into the amendment so that the Bill of Rights would apply against the states did not begin until 1897 in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*,[166] and even today several provisions of the Bill of Rights have not been incorporated. Thus, today, the Third Amendment guarantee against the quartering of soldiers in private homes, the Fifth Amendment guarantee of indictment only by a grand jury, and the Seventh Amendment right of civil jury trial have not been incorporated. Moreover, while the Sixth Amendment right to a jury trial has been incorporated, it means a lot less at the state level than it does at the federal level. The states are allowed to have criminal juries of only six persons, while a common law jury of twelve persons is required at the federal level. What, then, are the economic and subsidiarity-based arguments against and in favor of the recognition of a new national individual constitutional right?

The first argument against the recognition of new national or transnational individual rights is that tastes, cultural preferences, and real-world conditions may vary from one state to another. Thus, the residents of large, scarcely populated western states where there is a lot of hunting may have a different preference with regard to gun rights than is held by residents of smaller, more densely populated northeastern states. The Supreme Court may be well advised to avoid recognizing new national rights until they are supported by an overwhelming proportion of the population. This concern counsels not only against incorporation of parts of the Bill of Rights but also against the creation of new national substantive due process rights such as a right to an abortion or to gay marriage.[167]

The second and third arguments against the creation or recognition of new national individual rights are that, in the absence of such rights, the states will compete with one another and experiment in order to obtain an optimal and popular Bill of Rights climate. State competition and experimentation with gay rights, including gay marriage, have been a relatively peaceful and harmonious process in part because the Supreme Court has only acted to protect gay rights after national public opinion had shifted in their favor. The Supreme Court did not act as an agent of social change in its decisions in *Romer v. Evans*,[168] where it invalidated one highly idiosyncratic state law, or in *Lawrence v. Texas*,[169]

where it invalidated thirteen state sodomy laws that were never enforced after thirty-seven other states had already repealed their sodomy laws. In contrast, the Supreme Court did act as an agent of national social change and it did stifle competition and experimentation with its sweeping abortion ruling in *Roe v. Wade*.[170] The public controversy and ill will engendered by *Roe* can be usefully contrasted with the comparative harmony on gay rights issues.

The fourth and final argument against the creation or recognition of new national individual rights by the U.S. Supreme Court is the higher cost of monitoring a national life-tenured institution as compared with the much lower cost of monitoring state supreme courts, the justices of which are often term-limited or even subject to election. There is no question but that it is very hard and expensive for state voters to monitor and rein in the U.S. Supreme Court when it makes a mistake.

On the flip side, however, there are also powerful economic arguments in favor of incorporation of the Bill of Rights or in favor of substantive due process, national rights creation. First, the fifty states of the United States are so territorially small and numerous that they may be unable collectively to guarantee individual rights. Consider the First Amendment protection of freedom of speech and of the press. Much of what we say or publish today gets disseminated in a national market. If our rights to freedom of speech or of the press existed only at the state level, we might be liable to prosecution in some states where our remarks were broadcast or published. There are economies of scale to protecting First Amendment rights nationally, and the cost to the states of protecting such rights collectively might be prohibitively high.

Second, state laws that experiment too boldly or that stray too far from the national consensus may impose a huge negative external cost on other states. In the late nineteenth century, Congress and the Supreme Court reached a consensus opinion that states like Utah or Idaho ought not to be allowed to have legal polygamy. This view was epitomized in the Supreme Court's unanimous 1879 decision in *Reynolds v. United States*.[171] Essentially, the national majority concluded that polygamy was too disruptive a social experiment for it to be allowed to go forward. Just as states are not allowed to experiment with aristocratic or theocratic constitutions under the Guarantee Clause, so too the states could not

be allowed to experiment with polygamy. One can argue with the judgment call in *Reynolds* itself, but the principle is undoubtedly a correct one. It is for this reason that we no longer allow states to experiment with laws that discriminate on the basis of race.

Third, the civil rights rationale for national power in the theory of the Economics of Federalism suggests that some core civil rights guarantees such as protection from discrimination based on race or religion or sex ought to be nationally guaranteed. National governments in fact do a better job of protecting civil rights than do state and local governments. For the same reason, national Supreme Courts may do a better job of protecting civil rights than state supreme courts will do. There is value in having a geographically distant, life-tenured tribunal reviewing the decisions of entrenched majorities in state capitals. Geographic distance can lead to impartiality and fairness.

In summary, the Economics of Federalism tends to support some degree of variation in national individual rights from state to state, but no variation as to fundamental civil rights, especially rights of political participation and rights against discrimination on the basis of race, religion, or sex. Indeed, laws that limit rights of political participation, or that discriminate, may actually close down the political processes of change that Ely described in *Democracy and Distrust*.[172] If that happens, federalism may cease to work effectively because an entrenched state majority may just shut out and completely tyrannize a minority. This is, of course, precisely what happened with the Jim Crow laws in the South prior to 1964.

The Economics of Federalism suggests powerful reasons overall for protecting the rights of political participation that Ely wrote about, such as the rights to freedom of speech and of the press, freedom of association, freedom of religion, freedom from racial and sex discrimination, and the right to one person, one vote. The Economics of Federalism does not, however, necessarily suggest that we ought to have national codes and rights of criminal or civil procedure, unless those rights are needed for the protection of a racial or other minority's civil rights. Competition and experimentation among the states as to criminal procedure or civil procedural rights might well be better than a one-size-fits-all, fifty-state approach. The Economics of Federalism points us toward some kind of selective incorporation of the Bill of Rights of the

kind favored by Justice Felix Frankfurter and the younger Justice John Marshall Harlan, although without the substantive due process that both those justices favored. Substantive due process often leads to major federalism problems as happened with *Roe v. Wade* and before *Roe* with *Lochner v. New York*.[173]

Original Meaning and Incorporation

Selective or partial incorporation with no substantive due process may be optimal as a policy matter, but is it consistent with the original public meaning of the Fourteenth Amendment? A full exposition of our views on the original and present-day meaning of the Fourteenth Amendment is set out in the sources cited in the endnote at the start of this section.[174] Suffice it to say here that not everything that is wise is constitutionally mandated, and not everything that is unwise is constitutionally proscribed.

Analysis of the Fourteenth Amendment and the incorporation question must begin with its text. Section 1 of the amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[175]

Many scholars agree that the rights-conferring clause in the language quoted in this passage was meant to be the Privileges or Immunities Clause, which protected all common law rights, rights in state bills of rights, and possibly rights in the national Bill of Rights from "abridgment." The Due Process Clause in 1868 was almost certainly understood as a guarantee only of procedural regularity as against arbitrary executive branch and judicial action. The Equal Protection Clause was understood originally as guaranteeing each citizen a right to equal "protection" of those laws against murder and violence and theft that were already on the books. The Equal Protection Clause thus protected against nonenforcement of a state's murder laws when there had been a

lynching. The clause was about the equal protection of those laws that were already on the books and not about protection from discrimination in the making of laws.[176]

The only clause in the Fourteenth Amendment that addresses equality in the making of laws is the Privileges or Immunities Clause. This clause explicitly says, "No state shall *make or enforce* any law which shall abridge the privileges or immunities of citizens of the United States." How does this clause ban race discrimination? It says no state may give an abridged or shortened set of rights to one class of citizens, like African Americans, as compared to another class of citizens, like whites. Abridgments can be targeted at a class of citizens, which is why the Fifteenth Amendment says: "The right of citizens of the United States to vote shall not be denied or *abridged* by the United States or by any state on account of race, color, or previous condition of servitude."[177]

But abridgments need not be targeted at a class of people to qualify as abridgments. Some abridgments burden only an individual and his individual rights. This is evident in the First Amendment, which bans "abridgments" of individual rights. The text of the First Amendment provides that "Congress shall make no law . . . *abridging* the freedom of speech, or of the press."[178] The Privileges or Immunities Clause then protected both against discrimination and against depriving an individual of his rights.

What rights did the Privileges or Immunities Clause protect? What were the privileges or immunities of citizens of the United States? First, we know that everyone born in the United States is by operation of the first sentence of the Fourteenth Amendment a citizen both of the United States and of the state wherein he resides. It follows a fortiori that the privileges or immunities of a citizen of the United States include not only his privileges or immunities as a citizen of the nation but also his privileges or immunities as a citizen of the state wherein he resides. This has to be true because we know the Fourteenth Amendment was meant to protect the right of African Americans to exercise the same common law rights of contract, property ownership, torts, and so forth as state law allowed white citizens to exercise. The privileges or immunities of citizens of the United States thus included not only their common law rights but also their rights under state bills of rights.[179]

The general consensus on the original meaning of the Privileges or Immunities Clause is that it protected as privileges or immunities those privileges and immunities that Article IV, Section 2 guarantees to out-of-staters when they are in another state. The content of those privileges and immunities is described in a rambling opinion by Justice Bushrod Washington (George's nephew) that all the Framers of the Fourteenth Amendment seemed to regard as talismanic. Justice Washington said the following in *Corfield v. Coryell* about what were and were not privileges or immunities:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to *those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.* What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; *subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.* The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."[180]

The bottom line under *Corfield* is that all common law rights and state constitutional rights that were deeply rooted in history and tradition were protected as privileges or immunities, but that those rights could be trumped by a state's police power to promote the common good. Note the passage italicized in the preceding quoted passage, which says that all rights are "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." Under *Corfield*, there is a right to liberty of contract and probably also a right to bodily integrity, but they are subject to reasonable police power regulation that promotes the common good. *Corfield* grants a huge number of rights with one hand, but it makes all those rights subject to police power negation so long as the state government is acting "justly" to promote "the general good of the whole."

What does this indicate about the question of whether the Fourteenth Amendment was originally meant to apply the federal Bill of Rights to the states or to offer federal constitutional protection to items in state bills of rights? It suggests the Framers of the Fourteenth Amendment did mean to protect a broad array of individual rights, but all of those rights could be trumped by a state government that was acting "justly" and that was trying to secure "the general good of the whole [people]." So read, the Fourteenth Amendment is little more than a protection against special interest or class-based laws. It offers little protection for individual rights.

Incorporation and Practice from 1868 to 2010

The Framers of the Fourteenth Amendment never gave us any clear guidance on their vision of a Privileges or Immunities Clause that protected everything but did not protect it very much. And, in any event, the Supreme Court almost immediately read the Privileges or Immunities Clause to be a nullity in *The Slaughter-House Cases*.[181] As a result, the individual rights–protecting function of the Privileges or Immunities Clause came to be performed by the doctrine of substantive due process, and the antidiscrimination function of the Privileges or Immunities Clause came to be performed by the Equal Protection Clause. Incorporation of the federal Bill of Rights against the states began in 1897 as a matter of protecting fundamental rights through substantive due process

and, in the recent *McDonald v. City of Chicago* incorporation case, substantive due process remained the textual underpinning of the incorporation doctrine. In practice, the justices of the Supreme Court have weighed three different theories of incorporation between 1897 and 2010. All of these theories are open to criticism in light of the history recounted earlier.

The first clearly articulated theory of incorporation was Justice Felix Frankfurter's idea that the Fourteenth Amendment protected only fundamental rights—a category that was both larger than and smaller than the Bill of Rights. Frankfurter articulated his theory in *Adamson v. California*, where he made it clear that freedom of speech and of the press, freedom of religion, and protection of private property from takings were all secured by the Fourteenth Amendment, but that the Amendment did *not* protect the criminal procedure guarantees in the Bill of Rights.[182] Frankfurter's approach made sense as a policy matter, since all Western democracies recognize and protect the rights he labeled as fundamental while many civil law nations do not recognize a right to jury trial or to protection from self-incrimination or double jeopardy.

The problem with Justice Frankfurter's position, as Justice Hugo Black frequently pointed out, was that in the Anglo-American constitutional tradition as it stood in 1868, the criminal procedure rights that Justice Frankfurter disparaged were all clearly recognized as being fundamental rights. More than three-quarters of the state bills of rights in 1868 protected the rights to criminal and civil jury trial and to freedom against self-incrimination or double jeopardy. Justice Frankfurter's position was thus exposed as being in tension with Anglo-American constitutional history.

The second clearly articulated theory of incorporation was Justice Hugo Black's idea, set forth in his dissenting opinion in *Adamson v. California*.[183] Justice Black thought the Fourteenth Amendment incorporated the rights in the first eight amendments in the Bill of Rights and nothing more and nothing less. Justice Black eschewed substantive due process, and he called for lashing Section 1 of the Fourteenth Amendment to the first eight amendments in the federal Bill of Rights. Justice Black may well have been right that the Fourteenth Amendment was originally meant to apply the federal Bill of Rights against the states, but there are multiple weaknesses in his argument.

First, if Section 1 of the Fourteenth Amendment was meant to incorporate the federal Bill of Rights and only the federal Bill of Rights against the states, why does it talk open-endedly about protecting the privileges or immunities of national and state citizenship? Surely, the Privileges or Immunities Clause and Due Process Clause of the Fourteenth Amendment are a strange way of incorporating the rights in the first eight amendments to the federal Constitution. This is especially the case because the first eight amendments include the Due Process Clause of the Fifth Amendment. Why would it be necessary to include a Due Process Clause in the Fourteenth Amendment if that amendment had been meant to incorporate the federal Bill of Rights?

Second, under Justice Black's reading, Section 1 of the Fourteenth Amendment does not protect such state common law rights as liberty of contract, the right to own property, rights under family law, the right to sue in torts, and so forth. If so, then Section 1 fails in its goal to outlaw race discrimination by the states as to common law rights. It is implausible to read Section 1 of the Fourteenth Amendment in a way that causes it to fail to accomplish the central goal of its drafters.[184]

Third, Justice Black is wrong in so far as he argues that Section 1 of the Fourteenth Amendment does not protect at least some common law liberty rights such as freedom to pursue one's livelihood or occupation. A brief glance back at the passage quoted from *Corfield v. Coryell* makes it clear that Section 1 was meant to apply to economic rights that go well beyond anything to be found in the first eight amendments to the Constitution.

Ultimately, the deficiencies of Justice Black's and Justice Frankfurter's opinions in *Adamson* led to a third theory of selective incorporation—a theory that was put forward and championed by Justice William J. Brennan. Justice Brennan argued that Justice Black was right that the Fourteenth Amendment incorporated the criminal procedure rights in the first eight amendments to the federal Constitution, while Justice Frankfurter and the younger Justice Harlan were also right that the Fourteenth Amendment protected such unenumerated rights as the right to privacy that was elaborated in *Griswold v. Connecticut*[185] and *Roe v. Wade*.[186] Justice Brennan's view largely carried the day on the Supreme Court as most of federal criminal procedure came to be incorporated

even while the Supreme Court also used the Fourteenth Amendment as a font of unenumerated rights.

Justice Brennan's views were sharply criticized, however, by Chief Justice William Rehnquist and Justice Antonin Scalia in a series of dissenting opinions. Rehnquist and Scalia directed their most withering fire at the notion of substantive due process. They argued that the only rights protected by the Fourteenth Amendment are those that are deeply rooted in history and tradition. They expressed this view in the plurality opinion in *Michael H. v. Gerald D.*[187] and the majority opinion in *Washington v. Glucksberg*,[188] and Justice Alito followed this approach in incorporating the Second Amendment in *McDonald v. City of Chicago*.[189] Justice Thomas declined to join Alito's opinion because he would have correctly based incorporation on the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause.

The bottom line, today, is that the Supreme Court has mostly backed away from unenumerated substantive due process rights of the kind Justice Brennan favored, and it has adhered to its past precedents where it has already explicitly incorporated criminal procedure rights against the states. The Court has gone out of its way, however, to avoid any further application of the federal criminal procedure rights in the first eight amendments to the states. The Court has declined to grant certiorari in cases where it has been asked to impose a twelve-person rather than six-person criminal jury trial right on the states. It also has shown no interest in forcing the states to indict only by a grand jury or to use jury trial in civil cases. The Court has also pruned back its understanding of the Fourth Amendment exclusionary rule and the Fifth Amendment *Miranda* warnings to allow for greater state experimentation in these areas. From the late 1970s down to the present day, the U.S. Supreme Court has so thoroughly backed off in these areas that state supreme courts have largely taken the lead in Bill of Rights innovation and enforcement.[190]

The Right Answer

So what is the right answer to the question of what limits Section 1 of the Fourteenth Amendment imposes on the states? The original history suggests that many rights were protected, but none

of them very much. Justice Frankfurter's approach is unhelpful because he discounts the importance of Anglo-American procedural rights that the Framers of the Fourteenth Amendment thought were fundamental. Justice Black's approach fails because it does not explain how the Fourteenth Amendment protected the common law rights of free African Americans. And, Justice Brennan's approach seems ad hoc and led to a virulent right to abortion in *Roe v. Wade*, which the nation is still troubled by forty years later.

We think all three approaches taken by Justices Frankfurter, Black, and Brennan have something to recommend them when we look at them in terms of the Economics of Federalism and subsidiarity. Justice Frankfurter's instinct that rights of freedom of speech, political participation, and antidiscrimination were more fundamental than criminal procedural rights is, we think, entirely sound. Ely's work in *Democracy and Distrust* shows that freedom of speech and of the press; one person, one vote; freedom of religion; and protection against all forms of discrimination are essential if the states are to function effectively as democracies.[191] The Supreme Court is most effective when it sticks to policing rights of political participation and antidiscrimination rights, and it is most likely to get itself into political trouble when it prescribes a federal code of abortion law or of criminal procedure that the states must follow. This is part of the insight of footnote 4 of *United States v. Carolene Products Co.*[192]

This emphatically does *not* mean that criminal procedure rights or rights to liberty of contract or to bodily integrity are not fundamental rights under the Fourteenth Amendment. They are. What it does mean is that in figuring out which exercises of the police power are "just" efforts to legislate to promote "the general good of the whole [people]," we have to look at our practice from 1868 to the present day and perhaps even to the practice in other Western constitutional democracies. Whatever people might have thought in 1868 about the proper scope of the police power, we know today that we must be far more cautious about police power interferences with freedom of speech or of the press than we need to be concerned about six-person criminal juries or a sixty-hour workweek limit for bakers. The Framers of the Fourteenth Amendment did not protect fundamental rights absolutely. In their world,

all rights were fairly easily trumped by the police power. We know better thanks to 145 years of practice living under the Fourteenth Amendment since 1868. We know that rights of political participation and antidiscrimination rights ought only to be trumped where there is the most compelling of governmental interests, while many other rights are properly protected only by rational basis scrutiny. Other rights, such as the right to a criminal jury trial in state cases, get middle-level scrutiny, which is why six-person juries are OK at the state level but are not OK at the federal level.

Justice Hugo Black's approach to incorporation had the advantage that it led him to dissent in *Griswold v. Connecticut*,[193] a case that foreshadowed the calamity of *Roe v. Wade*. Justice Black was very aware of the mistakes that Supreme Court justices enforcing their own ideas about fundamental justice could cause. But Justice Black had no theory that was rooted in the 1860s as to why he gave First Amendment rights such elevated protection while not recognizing economic liberties as being protected at all. There is more evidence from 1868 that tends to suggest the Framers of the Fourteenth Amendment cared about economic liberty than there is evidence to suggest they cared about free expression. Justice Black's theory of the Fourteenth Amendment is thus more deeply rooted in the history and tradition of the court-packing fight of the 1930s than it is rooted in the civil rights struggles of the 1860s.

Justice William Brennan's selective incorporation approach had the advantage that it could explain why the Fourteenth Amendment recognized so many rights, including criminal procedure rights, but it suffered from the disadvantage that he gave insufficient weight to the state's police power that could trump fundamental rights. Justice Brennan's nemesis, former Chief Justice William H. Rehnquist, on the other hand, gave too much weight to the police power and was insufficiently protective of fundamental rights. As is often the case, the correct answer lay somewhere in the middle of these two extremes.

McDonald v. City of Chicago

So what does all of this indicate with respect to the recent Supreme Court opinion incorporating the Second Amendment into the Fourteenth so that it now applies against the states? Was the Court

right to strike down Chicago's ban on gun ownership? Did Justice Alito's plurality opinion analyze the issues correctly, or did Justice Thomas's concurrence or Justice Stevens's or Justice Breyer's dissents analyze them correctly?

We think the majority was right to strike down the Chicago ban on gun ownership. To begin with, there is no question, in our view, but that the right to keep and bear arms is deeply rooted in English and American history and tradition. Both Justice Alito's plurality opinion and Justice Thomas's concurrence clearly prove as much. Moreover, the right to own guns has traditionally been viewed as being *a political right* in American law. We have a right to own guns at least in part because it protects our liberty as against the government. We may also have a right to defend ourselves and to hunt, but a key part of the right to keep and bear arms is political. A local or state law that completely deprives the citizenry of any right even to own a gun is not a "just" law enacted for "the general good of the whole [people]" in light of American history and tradition.

Would other regulations of the right to keep and bear arms, such as laws that prohibit concealed carry in schools or other public places, be constitutional? We would have to analyze these issues one by one as they arose, with careful attention to the facts of each case. Some kinds of guns are more dangerous today than guns were in 1791 or 1868. Fundamental rights can be regulated, and even the First Amendment is subject to a time, place, and manner restriction. We think it is permissible in our legal tradition to outlaw machine guns, privately owned tanks, heat-seeking missiles, and other military weapons. On the other hand, state governments may not under the guise of regulation render the right to own a gun totally meaningless.

The Margin of Appreciation

There is a doctrine in European law that is related to the concept of subsidiarity which the European Court of Human Rights invokes in deciding cases under the European Convention on Human Rights. That doctrine is one that recognizes that large continental human rights courts have to tolerate some reasonable diversity of enforcement among the member units of any such federation.

The European Court of Human Rights calls this sphere of "live and let live" toleration a "margin of appreciation."[194] The margin of appreciation is the fudge factor by which the European Court of Human Rights allows some of the forty-seven member countries to deviate from international human rights norms.

The idea of a margin of appreciation is somewhat less rights protective than is the idea of subsidiarity because the former is a doctrine of judicial deference while the latter is a theory of federalism.[195] Nonetheless, the margin of appreciation doctrine has come to be recognized as a foundational feature of European human rights law. The margin of appreciation doctrine could be described as a federalism discount extended by some national or international courts whereby some regions are allowed to vary from the approach followed by other regions in the enforcement of rights.

The European Court of Human Rights invoked the margin of appreciation concept in two striking instances in recent years. First, in *Leyla Sahin v. Turkey*, the European Court of Human Rights allowed Turkey to ban the wearing of an Islamic headscarf in major educational institutions notwithstanding the European Convention's protection of religious freedom.[196] The Court reasoned that Turkey faced unusual threats from militant Islamists, and it thus concluded that Turkey had the right to ban the wearing of a headscarf in schools even if in other countries that right might be protected. Second, in *Lautsi v. Italy*, the European Court of Human Rights upheld an Italian state policy of displaying crucifixes on the walls of classrooms in state-run schools.[197] Once again, the state action was challenged as impairing religious freedom, and once again the Court invoked the margin of appreciation to recognize the cultural importance of the crucifix and of Catholicism to Italy.

We think these cases make a lot of sense for a human rights court that seeks to protect human rights in the forty-seven-member Council of Europe. The council includes an incredibly diverse collection of nations, some of which are very secular while others are quite traditional and religious. The council's members include countries with Protestant, Catholic, Eastern Orthodox, and Islamic majorities, and it seems highly likely that tastes, cultural preferences, and real-world conditions vary sharply among the Council of Europe's member nations. The failure by the European Court

of Human Rights to embrace a margin of appreciation would be more likely to torpedo efforts at international human rights protection in Europe than it would be to get crucifixes removed from classroom walls. Moreover, some cultural variation among the member countries ought to be viewed as being no more threatening than the prevalence of different languages and cultures among these countries. European human rights law bans all of the following across the continent of Europe: (1) the death penalty; (2) waterboarding; and (3) denials of gay rights to have sexual relationships. It is thus hard to see much of a threat to European constitutional freedoms coming from the allowance of national flexibility as to public displays of a religious sort. This is especially true since the European Court of Human Rights did, for example, protect the right of Jehovah's Witnesses aggressively to proselytize in *Kokkinakis v. Greece*.[198]

Strikingly, the U.S. Supreme Court has recently taken a similar margin of appreciation approach to issues of religious endorsement. In *Arizona Christian School Tuition Org. v. Winn*, the Supreme Court made it substantially harder for taxpayers who object to public religiosity to get standing to sue in such cases.[199] The Court held that taxpayers did not have standing to sue to block the provision of tax credits by a state to individuals who donate to school tuition organizations that then provide scholarships to students attending religious schools. This case built on a 2007 opinion in *Hein v. Freedom from Religion Foundation*,[200] where the Supreme Court held that taxpayer standing under *Flast v. Cohen*[201] to challenge government religiosity does not apply when the taxpayer is challenging discretionary executive branch action instead of a legislative appropriation. Taken together, the Supreme Court's decisions in *Hein* and in *Winn* suggest that the Court is moving sharply to cut back on taxpayer standing to object to public displays of religiosity.

We think this is a salutary development. Tastes and cultural preferences vary widely across the United States just as they vary widely among the forty-seven members of the Council of Europe. Parts of the United States are very religious, while other parts are quite secular. It makes sense to leave state governments and federal executive branch personnel some freedom to engage in religious speech or to facilitate the funding of religious schools so long as the state does not discriminate against people as to their religion

and so long as it does not mandate an official state church whose clergy are taxpayer funded. Federalism concerns call for a margin of appreciation to be given here to the state just as the European Court of Human Rights recognizes in Europe.

More fundamentally, we think the margin of appreciation idea counsels against the U.S. Supreme Court handing down substantive due process decisions like that in *Roe v. Wade* creating a hitherto unknown and highly specific constitutional right to an abortion. Federal substantive due process is only appropriate where (1) the right in question is very deeply rooted in American history and tradition such that evidence of it can be seen as long ago as 1868 when the Fourteenth Amendment was ratified; and (2) where the state police power justification for regulating a right seems plainly excessive. This suggests that the Supreme Court got things right in *McDonald v. City of Chicago*, but it got things wrong in *Roe v. Wade*.

4. Conclusion

In conclusion, we hope we have been able to shed some light on why federalism and subsidiarity are both very important concepts when viewed from the perspective of law. Specifically, the European constitutional ideas of subsidiarity and a margin of appreciation are in our view directly relevant to U.S. constitutional law. The "substantial effects" test of *United States v. Lopez* is neither more originalist nor more law-like than is the idea of subsidiarity, as illuminated by a consideration of the Economics of Federalism. Similarly, the question of when and to what degree the concept of the police power ought to be allowed to trump fundamental rights in the Fourteenth Amendment context is quite indeterminate. Borrowing ideas like the margin of appreciation from European law is well worth considering.

The bottom line is that federalism remains very important in U.S. constitutional law, as was shown when the Supreme Court ruled on the constitutionality of President Obama's national health care law and as was shown in *McDonald v. City of Chicago*. On June 16, 2011, the U.S. Supreme Court handed down a federalism decision in which Justice Anthony M. Kennedy described the importance of federalism. We close with this quotation from Justice Kennedy's opinion for the Court:

> Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. . . . Federalism also protects the liberty of all persons within a state by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake. . . . The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. . . . An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.[202]

NOTES

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1. Steven G. Calabresi, "'A Government of Limited and Enumerated Powers': In Defense of *United States v. Lopez*," *Michigan Law Review* 94 (1995): 752, 756–73.
2. *United States v. Lopez*, 514 U.S. 549 (1995).
3. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).
4. *New York v. United States*, 505 U.S. 144 (1992).
5. *Printz v. United States*, 521 U.S. 898 (1997).
6. *City of Boerne v. Flores*, 521 U.S. 507 (1997).
7. *United States v. Morrison*, 529 U.S. 598 (2000).
8. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). Although the case was decided in favor of the national law based on Congress's taxing power, a majority of the justices agreed that the individual mandate to purchase health insurance was not a proper exercise of Congress's Commerce Clause powers.

9. The most sophisticated discussions of this issue of which we are aware include Robert A. Dahl and Edward R. Tufte, *Size and Democracy* (Stanford, CA: Stanford University Press, 1973), and Alberto Alesina and Enrico Spolaore, *The Size of Nations* (Cambridge, MA: MIT Press, 2005).

10. Daniel Halberstam, "Federal Powers and the Principle of Subsidiarity," in *Global Perspectives on Constitutional Law*, ed. Vikram David Amar and Mark V. Tushnet (Oxford: Oxford University Press, 2009), 34.

11. Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law* 97 (2003): 38.

12. Pius XI, *Quadragesimo Anno* (1931), available in English at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html. Pius XI's 1931 encyclical *Quadragesimo Anno* built on and explained an earlier papal encyclical—Leo XIII's *Rerum Novarum*, issued in 1891—in which the Catholic Church had tried to chart a middle way between the perceived excesses of laissez-faire liberal capitalist society and Marxism. By 1931, "the political circumstances of course were dramatically different, dominated more by the rising threat of totalitarianism than by the failure of the state to protect the constituent parts of society." Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," 41.

13. *Catechism of the Catholic Church*, para. 1883. Professor Føllesdal argues that Catholic social teaching endorses not only subsidiarity but also the obligation of the wealthy to help those who are less well off. Andreas Føllesdal, "Competing Conceptions of Subsidiarity," in this volume. We agree with the Catholic Church that such a moral obligation exists, but we disagree with anyone who has ever suggested socialism as a means of attaining such an objective. We do not cite the Catholic Church here because we agree with all of its teachings. We don't. We cite the Catholic Church on subsidiarity because it happens to be right on that issue. We agree on the question of social justice with John Tomasi, *Free Market Fairness* (Princeton, NJ: Princeton University Press, 2012).

14. Treaty on European Union, February 7, 1992, 31 I.L.M. 247.

15. Ibid., art. 5.

16. The subsidiarity idea was extended to human rights law in the Charter of Fundamental Rights of the European Union. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," 39, 46–49.

17. George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," *Columbia Law Review* 94 (1994): 331.

18. There is an extensive literature on subsidiarity aside from Professor Bermann's seminal article. See generally Chantal Millon-Delson, *L'etat*

subsidiare: Ingérence et non-ingérence de l'etate: Le principe de subsidiarité aux fondements de l'histoire européenne (Paris: Presses Universitaires de France, 1992); Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity, and Primarity in the European Convention on Human Rights* (Leiden: Koninklijke Brill NV, 2009); Antonio Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford: Oxford University Press, 2002); Andrea Daniel, *Subsidiarity in the European Community's Legal Order* (Munich: Grin, 1998); Mariya Pereginets, *The Application of the Principle of Subsidiarity in EU Law* (Saarbrucken: VDM, 2010); Simeon Tsetim Iber, *The Principle of Subsidiarity in Catholic Social Thought* (Pieterlen: Peter Lang, 2011); Aurelian Portuese, "The Principle of Subsidiarity as a Principle of Economic Efficiency," *Columbia Journal of European Law* 17 (Spring 2011): 231; Alex Mills, "Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws," *University of Pennsylvania Journal of International Law* 32 (2010): 369; Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law"; Denis J. Edwards, "Fearing Federalism's Failure: Subsidiarity in the European Union," *American Journal of Comparative Law* 44 (1996): 537; Gerald L. Neumann, "Subsidiarity, Harmonization, and Their Values: Convergence and Divergence in Europe and the United States," *Columbia Journal of European Law* 2 (1996): 573; W. Gary Vause, "The Subsidiarity Principle in European Union Law—American Federalism Compared," *Case Western Reserve Journal of International Law* 27 (1995): 61.

19. Subsidiarity in EU law is supplemented by the doctrine of proportionality—a different doctrine—whereby courts may determine (1) whether a measure bears a reasonable relationship to the legitimate objective it is meant to implement; (2) that the costs of the measure do not manifestly outweigh the benefits; and (3) that the measure represents the least burdensome solution to the problem identified. Bermann, "Taking Subsidiarity Seriously," 386.

20. George A. Bermann, "Subsidiarity as a Principle of U.S. Constitutional Law," *American Journal of Comparative Law* 42 (1994): 555.

21. *United States v. Lopez*, 514 U.S. 549 (1995).

22. George A. Bermann, "National Parliaments and Subsidiarity: An Outsider's View," *European Constitutional Law Review* 4 (2008): 453.

23. The key article here, which Bermann does not cite, is Donald H. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," *Michigan Law Review* 84 (1986): 1091.

24. Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (Charlottesville, VA: Michie Co./Bobbs-Merrill Law, 2nd ed. 1990).

25. Stephen F. Williams, "Preemption: First Principles," *Northwestern University Law Review* 103 (2009): 323.

26. Mills, "Federalism in the European Union and the United States," 369 (describing how there are more concrete federal conflict-of-law rules in the EU than there are in the United States and arguing in favor, as a matter of subsidiarity considerations, of the EU's approach). Mills suggests that the United States revise its rules to make them more like those in the EU.

27. For brief discussions of subsidiarity in the EU, see Bermann, "National Parliaments and Subsidiarity," and Portuese, "The Principle of Subsidiarity as a Principle of Economic Efficiency," 231.

28. See also Portuese, "The Principle of Subsidiarity as a Principle of Economic Efficiency" (taking a similar but not identical view). Our approach could help correct for some of the erroneous, cartel-empowering outcomes that Michael S. Greve documents vividly in his important new book, *The Upside-Down Constitution* (Cambridge, MA: Harvard University Press, 2012).

29. Steven G. Calabresi and Nicholas Terrell, "The Number of States and the Economics of American Federalism," *Florida Law Review* 63 (2011): 1; Steven G. Calabresi, "Federalism and the Rehnquist Court: A Normative Defense," *Annals of the American Academy of Political and Social Science* 574 (2001): 24–36; Calabresi, "A Government of Limited and Enumerated Powers." These articles build on prior work done in David Shapiro, *Federalism: A Dialogue* (Evanston, IL: Northwestern University Press, 1995); Wallace E. Oates, *Fiscal Federalism* (Northampton, UK: Edward Elgar, 2011); Charles M. Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64 (1956): 416; Michael W. McConnell, "Federalism: Evaluating the Founders' Design," *University of Chicago Law Review* 54 (1987): 1484; and Jacques LeBoeuf, "The Economics of Federalism and the Proper Scope of the Federal Commerce Power," *San Diego Law Review* 31 (1994): 555. See also Williams, "Preemption" (calling for a reconceptualization of federal preemption law in light of the Economics of Federalism). Professor Calabresi's understanding of this subject grew out of lengthy conversations with his then colleague, Professor Thomas W. Merrill.

30. McConnell, "Federalism," 1493–94.

31. Tiebout, "A Pure Theory of Local Expenditures."

32. Richard A. Epstein, "Exit Rights under Federalism," *Law and Contemporary Problems* 55 (1992): 147.

33. Føllesdal, "Competing Conceptions of Subsidiarity."

34. 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

35. Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Row, 1957), 253–54, 259.

36. Friedrich Hayek, *Law, Legislation, and Liberty: Volume One, Rules and Order* (Chicago: University of Chicago Press, 1973); Hayek, *Law, Legislation,*

and Liberty: Volume Two, The Mirage of Social Justice (Chicago: University of Chicago Press, 1976); Hayek, *Law, Legislation, and Liberty: Volume Three, The Political Order of a Free People* (Chicago: University of Chicago Press, 1979) (contrasting the efficiency in processing dispersed economic information of spontaneous systems of order, like markets, with the inefficiency of planned systems of order like those that exist in government bureaucracies); Thomas Sowell, *Knowledge and Decisions* (New York: Basic Books, 1980) (arguing that decentralized social orders process dispersed information better than do centralized social orders).

37. Pius XI, *Quadragesimo Anno.*

38. LeBoeuf, "The Economics of Federalism and the Proper Scope of the Federal Commerce Power," 565–66.

39. Portuese, "The Principle of Subsidiarity as a Principle of Economic Efficiency," 239.

40. LeBoeuf, "The Economics of Federalism and the Proper Scope of the Federal Commerce Power," 567–74.

41. Ralph K. Winter, "Private Goods and Competition among State Legal Systems," *Harvard Journal of Law and Public Policy* 6 (1982): 127; Richard Revesz, "Rehabilitating Interstate Competition: Rethinking 'The Race to the Bottom' Rationale for Federal Environmental Regulation," *New York University Law Review* 67 (1992): 1210.

42. LeBoeuf, "The Economics of Federalism and the Proper Scope of the Federal Commerce Power," 567.

43. This argument is developed in Calabresi and Terrell, "The Number of States and the Economics of American Federalism," 26–32, and in Steven G. Calabresi, Note "A Madisonian Interpretation of the Equal Protection Doctrine," *Yale Law Journal* 91 (1982): 1403.

44. *The Federalist* No. 10 (James Madison), ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961).

45. Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, MA: Harvard University Press, 1965).

46. This subject is addressed in depth in Calabresi and Terrell, "The Number of States and the Economics of American Federalism." See also Peter H. Aranson, "Federalism as Collective Action," unpublished manuscript on file with the authors.

47. Calabresi and Terrell, "The Number of States and the Economics of American Federalism," 30–44.

48. We thus disagree with the utilitarian conclusion reached by Portuese, "The Principle of Subsidiarity as a Principle of Economic Efficiency."

49. Similarly, courage is often described as being a golden mean between recklessness and cowardice.

50. Calabresi, "A Government of Limited and Enumerated Powers," 811–26.

51. We have benefited in understanding the implications for American law of the margin of appreciation doctrine from a conversation with Northwestern law professor Erin F. Delaney and from reading her draft paper on that subject.

52. Edward L. Rubin and Malcolm Feely, "Some Notes on a National Neurosis," *UCLA Law Review* 41 (1994): 903.

53. Calabresi, "A Government of Limited and Enumerated Powers," 786–87.

54. Sir Edward Coke argued for this idea in seventeenth-century England in Dr. Bonham's Case, *Thomas Bonham v. College of Physicians*, 8 Co. Rep. 114 (1610).

55. Bermann, "Taking Subsidiarity Seriously," 340–44.

56. Ibid., 340.

57. Ibid., 341.

58. Ibid.

59. Ibid.

60. Ibid., 341–42.

61. Ibid., 342.

62. John E. E. D. Acton, "Letter to Bishop Mandell Creighton, April 5, 1887," in *Historical Essays and Studies*, ed. J. N. Figgis and R. V. Laurence (London: Macmillan, 1907), 503.

63. Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980); Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54 (1954): 543.

64. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

65. 501 U.S. 452 (1991).

66. 505 U.S. 144 (1992).

67. 514 U.S. 549 (1995).

68. The argument for federal judicial enforcement of U.S. federalism limits against the national government is developed in more depth in Calabresi, "A Government of Limited and Enumerated Powers," 790–831.

69. 5 U.S. 137 (1803).

70. Mauro Cappelletti and William Cohen, *Comparative Constitutional Law* (Indianapolis, IN: Bobbs-Merrill, 1979), 10–11; see also Allen R. Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989).

71. Richard E. Johnston, *The Effect of Judicial Review on Federal-State Relations in Australia, Canada, and the United States* (Baton Rouge: Louisiana State University Press, 1969), 233–78.

72. Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 1989), 69–120; David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994), 33–101.

73. Portuese acknowledges that the European Court of Justice has been very timid in its enforcement of subsidiarity, but he regrets this and urges more activism along many of the same Economics of Federalism lines that we discuss here. Portuese, "The Principle of Subsidiarity as a Principle of Economic Efficiency," 246.

74. Bermann, "Taking Subsidiarity Seriously," 390–95. For discussion of one federalism clause that is not judicially enforced by the German Constitutional Court, see ibid., 394 n. 249. Other federalism provisions, some of them structural and not textually enumerated, are enforced by the German Constitutional Court.

75. Bermann, "National Parliaments and Subsidiarity."

76. Bermann, "Taking Subsidiarity Seriously," 395–400.

77. Robert A. Dahl, "Decisionmaking in a Democracy: The Supreme Court as National Policymaker," *Journal of Public Law* 6 (1957): 279; Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

78. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (wrongly upholding the Controlled Substances Act in so far as it applied to ban possession of a few homegrown marijuana plants).

79. Calabresi, "A Government of Limited and Enumerated Powers," 806–11.

80. 514 U.S. 549 (1995).

81. 410 U.S. 113 (1973).

82. Steven G. Calabresi, "Textualism and the Countermajoritarian Difficulty," *George Washington University Law Review* 66 (1998): 1373–94.

83. Regan, "The Supreme Court and State Protectionism," 1091.

84. Ibid.

85. 369 U.S. 186 (1962).

86. 377 U.S. 533 (1964).

87. Calabresi, "A Government of Limited and Enumerated Powers," 790–99.

88. These points are developed in more depth in Michael Stokes Paulsen, Steven G. Calabresi, Michael W. McConnell, and Samuel L. Bray, *The Constitution of the United States* (Eagan, MN: Foundation Press, 2nd ed. 2013), 633.

89. Virginia Plan, presented by Edmund Randolph to the Federal Convention, May 29, 1787, http://avalon.law.yale.edu/18th_century/vatexta.asp.

90. Ibid.

91. Ibid.

92. The first two articles of the New Jersey Plan address the vision of the small states as to the scope of national power:

> 1. Resd. that the articles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union.
> 2. Resd. that in addition to the powers vested in the U. States in Congress, by the present existing articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the U. States, by Stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general post-office, to be applied to such federal purposes as they shall deem proper & expedient; to make rules & regulations for the collection thereof; and the same from time to time, to alter & amend in such manner as they shall think proper: to pass Acts for the regulation of trade & commerce as well with foreign nations as with each other: provided that all punishments, fines, forfeitures & penalties to be incurred for contravening such acts rules and regulations shall be adjudged by the Common law Judiciaries of the State in which any offence contrary to the true intent & meaning of such Acts rules & regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits & prosecutions for that purpose in the superior common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law & fact in rendering Judgment, to an appeal to the Judiciary of the U. States.

Resolution three of the New Jersey Plan goes on to give Congress specific power to requisition funds from the States, power that Congress lacked under the Articles of Confederation. New Jersey Plan, Madison Debates, June 15, 1787, available at http://avalon.law.yale.edu/18th_century/debates_615.asp.

93. Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1966), 2:21, 27.

94. Williams, "Preemption," 325–28; Robert Stern, "That Commerce

Which Concerns More States Than One," *Harvard Law Review* 47 (1934): 1335, 1339.

95. Kurt T. Lash, " 'Resolution VI': National Authority to Resolve Collective Action Problems under Article I, Section 8," *Notre Dame Law Review* 67 (2012): 2123. Lash argues that the open-ended language of the Bedford Resolution was not an endorsement of a national power to solve collective action problems, but that it was instead a placeholder for the future insertion of categorical national powers. Lash may or may not be right, as a matter of the original meaning of Article I, Section 8, but over the last 220 years the Supreme Court has in a series of cases read Article I, Section 8 to allow the national government especially broad leeway when it is attempting to solve a state collective action problem. If Professor Lash were right about the meaning of Article I, Section 8, the Clean Air Act and Clean Water Act would be unconstitutional along with the immigration laws, paper money, the federal labor laws, and aspects of the Civil Rights Act of 1964. It is well settled as a matter of stare decisis that the laws mentioned above are all constitutional and that the federal government can act to solve genuine state collective action problems.

96. U.S. Const. amend. X.

97. 312 U.S. 100 (1941).

98. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," 52, 63–68.

99. Farrand, *The Records of the Federal Convention of 1787*, 2:21, 27.

100. 22 U.S. 1 (1824).

101. Chief Justice Marshall said in *Gibbons* that navigation is commerce, which includes all forms of social intercourse or interaction, but this is almost certainly wrong. Commerce comes from the Latin words *com*, meaning "with," and *merce*, meaning "buying and selling." It comes from the same Latin roots as the words "mercenary," "mercantile," "market," and "merchandise." Navigation in the course of buying and selling things may thus be a form of commerce, but recreational navigation is almost certainly not.

102. 17 U.S. 316, 421 (1819).

103. Professor Calabresi is indebted to Professor Richard Epstein for this point.

104. 79 U.S. 457 (1871) (opinion of Justice Strong). See also *Hepburn v. Griswold*, 75 U.S. 603 (1870).

105. U.S. Const. art. I, § 8, cl. 5.

106. *The Federalist* No. 10 (James Madison).

107. 149 U.S. 697 (1893).

108. *Houston E. & W. T. Ry. Co. v. United States*, 234 U.S. 342 (1914).

109. Ibid., 351.

110. 156 U.S. 1 (1895).
111. 247 U.S. 251 (1918).
112. 259 U.S. 20 (1922).
113. 295 U.S. 495 (1935).
114. 298 U.S. 238 (1936).
115. 297 U.S. 1 (1936).
116. 301 U.S. 1 (1937).
117. The New Deal Supreme Court codified the new understanding in *United States v. Darby*, 312 U.S. 100 (1941), and in *Wickard v. Filburn*, 317 U.S. 111 (1942). *Wickard* held that in determining whether Congress had power to regulate the growing of wheat for one's own consumption, the Supreme Court not only should look at the wheat grown by one particular farmer-litigant but also should look in the aggregate at all the wheat grown for such purposes nationwide. During the Great Society years of the 1960s, the Supreme Court expanded *Darby* and *Wickard* by holding in *Katzenbach v. McClung*, 379 U.S. 294 (1964), that in applying the *Wickard* aggregation test to wholly intrastate activities that substantially affect commerce, the Supreme Court ought to defer to Congress if it had some rational basis for thinking, after aggregation, that a wholly intrastate activity substantially affected commerce among the states. The combination of the *Wickard* aggregation test, together with the *Katzenbach* rational basis test, meant that anything Congress wanted to do under the Commerce Clause and the Necessary and Proper Clause was now potentially within Congress's reach. These two opinions, in our view, run counter not only to categorical federalism but also to the Economics of Federalism by giving Congress the power to legislate without any constitutional constraint. As we explained earlier, we do not think the benefits of the Economics of Federalism are likely to be realized in a world where Congress has the last word on the scope of Congress's own powers.
118. See also Mills, "Federalism in the European Union and the United States," arguing that the United States could improve its conflict of laws rules if it would follow the EU's subsidiarity optimizing approach.
119. 514 U.S. 549 (1995).
120. Nonetheless, the justices explained their holding by trying to draw a categorical distinction between commercial activities, which were federally regulable, and noncommercial activities, which were not. This distinction was to prove to be very difficult to sustain in the post-*Lopez* case law.
121. 529 U.S. 598 (2000).
122. 545 U.S. 1 (2005).
123. Moreover, there was state action in this case because the states are under a Fourteenth Amendment obligation to provide women with the equal protection of the laws—an obligation they were failing to fulfill. The

failure of the states to give women the same protection of the laws they were giving to men was thus forbidden state action that Congress could legislate against.

124. The most recent enumerated power/federalism/subsidiarity issue to confront the U.S. Supreme Court involved the constitutional challenges to President Obama's national health care law—a law that was passed by Congress on March 21, 2010. This law requires individuals who lack health insurance to either buy it or pay a tax penalty for their failure to do so. The health care mandate is defended as being a necessary and proper means of carrying into execution Congress's commerce power to regulate the national, commercial health insurance industry. The proponents of the law argued that the states cannot themselves regulate health care because doing so would set off a race to the bottom, a collective action problem. This argument seems dubious, since only one state—Massachusetts—has so far tried to mandate the purchase of health insurance, and its efforts to do so have not in fact been stymied by any race to the bottom. Moreover, Congress had never before forced people to buy something—to enter into commerce. Past regulations of commerce have always involved the regulation of buying and selling that is already going on.

Is the health care mandate congruent and proportionate? We think the answer is no for two reasons. First, in 220 years of American constitutional history Congress has never previously imposed a mandate that compelled people to buy something they did not want to buy. Obviously, there is a first time for everything, but the fact that this has never, ever been done before is certainly enough to raise suspicion. And, second, if Congress could mandate the buying of things—if it could compel people to enter into commerce as well as regulate commerce that is already ongoing—there would open up a vast prospect of new rent-seeking legislation by the special interests to which the government in Washington, DC, is already enthralled. GM and Chrysler would seek mandates forcing people to buy their cars, dairy farmers would seek mandates forcing people to buy milk, and chiropractors and acupuncturists would seek legislation to force consumers to buy their services. A majority of the justices concluded that the individual mandate is not a valid exercise of Congress's Commerce Clause and Necessary and Proper Clause powers for similar reasons.

125. 521 U.S. 507 (1997).

126. 527 U.S. 627 (1999).

127. 528 U.S. 62 (2000).

128. 531 U.S. 356 (2001).

129. *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

130. 521 U.S. 898 (1997).

131. 505 U.S. 144 (1992).
132. 130 S. Ct. 1949 (2010).
133. 517 U.S. 44 (1996).
134. 527 U.S. 706 (1999).
135. 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting).
136. Professor Calabresi's views on the original meaning of the Fourteenth Amendment are set out in Steven G. Calabresi and Nicholas Stabile, "On Section Five of the Fourteenth Amendment," *University of Pennsylvania Journal of Constitutional Law* 11 (2009): 1431; Steven G. Calabresi and Julia Rickert, "Originalism and Sex Discrimination," *Texas Law Review* 90 (2011): 1; Steven G. Calabresi, "Substantive Due Process after *Gonzales v. Carhart*," *Michigan Law Review* 106 (2008): 1517; and Steven G. Calabresi and Sarah E. Agudo, "Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?," *Texas Law Review* 87 (2008): 7.
137. Regan, "The Supreme Court and State Protectionism."
138. 22 U.S. 1 (1824).
139. 27 U.S. 245 (1829).
140. 53 U.S. 299 (1852).
141. Ibid., 319.
142. Regan, "The Supreme Court and State Protectionism," 1092.
143. 397 U.S. 137 (1970).
144. Ibid., 142.
145. 17 U.S. 316 (1819).
146. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 85–86.
147. 318 U.S. 363 (1943).
148. 304 U.S. 64 (1938).
149. 487 U.S. 500 (1988).
150. 505 U.S. 144 (1992).
151. 521 U.S. 898 (1997).
152. *Altria v. Good*, 555 U.S. 70 (2008).
153. Williams, "Preemption."
154. Richard H. Fallon Jr., "The Ideologies of Federal Courts Law," *Virginia Law Review* 74 (1988): 1141.
155. Redish, *Federal Jurisdiction*, 230, 337.
156. 28 U.S.C. § 2283 (1982).
157. *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).
158. *Boumedienne v. Bush*, 553 U.S. 723 (2008).
159. 28 U.S.C. §§ 1331 & 1332.

160. 41 U.S. 1 (1842).

161. 304 U.S. 64 (1938).

162. Greve, *The Upside-Down Constitution.*

163. Calabresi, "A Government of Limited and Enumerated Powers," 813–23. Professor Erin F. Delaney of Northwestern University School of Law is working on a project that addresses the incorporation doctrine in the United States and the margin of appreciation in the European Union in more depth. Professor Calabresi has benefited from talking with her about her work.

164. 130 S. Ct. 3020 (2010).

165. This question is addressed in part in Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law."

166. 166 U.S. 226 (1897).

167. See Calabresi, "Substantive Due Process and *Gonzales v. Carhart*," and Calabresi and Agudo, "Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868."

168. 517 U.S. 620 (1996).

169. 539 U.S. 558 (2003).

170. 410 U.S. 113 (1973).

171. 98 U.S. 145 (1878).

172. Ely, *Democracy and Distrust.*

173. 198 U.S. 45 (1905).

174. See sources cited in note 136.

175. U.S. Const. amend. XIV, § 1.

176. Ibid.

177. U.S. Const. amend. XV (emphasis added).

178. U.S. Const. amend. I.

179. Calabresi and Agudo, "Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868."

180. 6 Fed. Cas. 546, 551–52 (No. 3,230) (C.C.E.D. Pa., 1823).

181. 83 U.S. 36 (1873).

182. 332 U.S. 46 (1947).

183. 332 U.S. 46, 70–89 (1947) (Black, J., dissenting). Justice Black's views are for the most part defended in Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 2000).

184. This argument is developed further in Steven G. Calabresi and Andrea Matthews, "Originalism and *Loving v. Virginia*," *Brigham Young University Law Review* 2012 (2012): 1393.

185. 381 U.S. 479 (1965).

186. 410 U.S. 113 (1973).

187. 491 U.S. 110 (1989).

188. 521 U.S. 702 (1997).

189. 130 S. Ct. 3020 (2010).

190. Randy J. Holland, Stephen R. McAllister, Jeffrey M. Shaman, and Jeffrey S. Sutton, *State Constitutional Law: The Modern Experience* (Eagan, MN: West, 2010). See also Jeffrey M. Shaman, *Equality and Liberty in the Golden Age of State Constitutional Law* (Oxford: Oxford University Press, 2008).

191. Ely, *Democracy and Distrust.*

192. 304 U.S. 144 (1938).

193. 381 U.S. 479 (1965).

194. There is a substantial literature on the margin of appreciation doctrine, which includes Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Ardsley, NY: Transnational, 2002); Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards," *New York University Journal of International Law and Policy* 31 (1999): 843; George Letsas, "Two Concepts of the Margin of Appreciation," *Oxford Journal of Legal Studies* 26 (2006): 705; Javier Garcia Roca, "La Muy Discrecional Dontrina del Margen di Apreciacion Nacional segun el Tribunal Europeo de Derechos Humanos: Soberania e Integracion," *Teoria y Realidad Constitutional* 20 (2007): 117; Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Norwell, MA: Kluwer Academic Publishers, 1996); Steve Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2000); Rafaella Nigro, "The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil," *Human Rights Review* 11 (2010): 531. Professor Calabresi also wishes to acknowledge an unpublished paper written by Pablo Contreras entitled "The Margin of Appreciation and the European Court of Human Rights" (on file with the authors).

195. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," 69–71.

196. App. No. 44774/98 Eur. Ct. H.R. (2005).

197. App. No. 30814/06 Eur. Ct. H.R. (2011).

198. App. No. 14307/88 Eur. Ct. H.R. (1993).

199. No. 09-987 (U.S. Apr. 4, 2011).

200. 551 U.S. 587 (2007).

201. 392 U.S. 83 (1968).

202. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (as quoted in *Wall Street Journal*, Notable and Quotable, June 20, 2011).

6

SUBSIDIARITY, THE JUDICIAL ROLE, AND THE WARREN COURT'S CONTRIBUTION TO THE REVIVAL OF STATE GOVERNMENT

VICKI C. JACKSON

Professor Steven Calabresi and Lucy Bickford have suggested that the concept of subsidiarity, an explicit aspect of the quasi-federal system in the European Union, is already inherent in the U.S. constitutional system; that it serves several distinct goals; and that it should be employed by courts in their doctrine.[1] As someone who has written positively about the idea of subsidiarity in the context of U.S. federalism in the past, I am delighted at their interest, though I part company on particulars.

In the first section of this Comment, I raise some questions about their essay and what they mean by subsidiarity. I question the aptness of the U.S.-EU comparison and the conception of subsidiarity as being primarily about externalities; I raise the problem of "bricolage" and constitutional multifunctionalism for any single-minded application of subsidiarity (at least one consistent with broader commitments to constitutionalism and the rule of law); and note the lack of a basis in comparative experience for strong judicially enforced versions of subsidiarity.

In the second section, assuming that the idea of "subsidiarity" is a valuable goal toward which federalism is directed, I advance an

alternative "proceduralist" approach to the courts' role in advancing subsidiarity in the U.S. constitutional context. That is, I suggest that the courts may be better situated as an institutional matter to try to assure that other branches attend to considerations of subsidiarity than to make the substantive judgments directly.

In the third section, I offer a different perspective on what foreign comparisons suggest, this time set in the context of debate over the Warren Court and federalism. The premise of the Calabresi-Bickford essay is that courts protect federalism by judicially declaring certain areas or forms of regulation off limits to the federal government. I suggest that courts may advance federalism in other ways, and that the Warren Court promoted federalism by nationalizing the Bill of Rights. In so doing, I suggest, and especially with respect to voting rights, national intervention dramatically improved the legitimacy and efficacy of the state governments, so that they could assume a more prominent role both in day-to-day governance and in resolving major controversies that emerge over time.

1. Subsidiarity as a Constitutional Concept

Calabresi and Bickford argue that the U.S. Constitution should be read to establish a presumption in favor of state-level regulation in areas of concurrent jurisdiction, for reasons in part of the "Economics of Federalism." They argue that the benefits of legislation at the state level are (1) better accommodating local preferences; (2) promoting competition for businesses and taxpayers; (3) advancing experimentation; and (4) lowering monitoring costs.[2] They argue that national lawmaking has other benefits, including (1) economies of scale; (2) overcoming collective action problems; (3) responding to externalities generated by state activity; and (4) protecting civil rights.[3] These benefits do not, however, as a self-explicating matter, establish a presumption in favor of one level or the other.[4] The authors, rather, rely on the theory of subsidiarity, "recogniz[ing] the natural right of individuals to have their problems addressed by the level of government that is closest to them,"[5] to argue for a presumption in favor of state-only power unless one of the four benefits of national regulation described earlier is at stake. And they argue that "constitutional federalism enforced

through substantive judicial review is the correct legal response to the demands of subsidiarity."[6]

Calabresi and Bickford seem to be suggesting that the concept of subsidiarity be used to define the scope of the enumerated powers themselves.[7] In Europe, subsidiarity operates in theory to define allowable uses within the enumerated powers of the Union that are held concurrently with the Member States; that is, the doctrine goes not to the scope of the power but to the permissibility of its use in particular instances.[8] Whether anything turns on this distinction depends, in part, on one's views of whether doctrine and conceptual categories really constrain. But if one does so believe, as I think the authors do, then this is a bit of a conceptual problem. In their proposal, as I understand it, the European conception would function, in the United States, as a constitutional limit on the scope of enumerated powers, except insofar as they are exclusive. This limitation would be a substantial departure from precedent, placing greater weight on the need to decide whether or not a federal power is exclusive or concurrent, a distinction often elided in recent cases through preemption analysis.[9] (A similar suggestion, some years earlier, by Stephen Gardbaum, was that where resort to the Necessary and Proper Clause was required to sustain a national law, its language should be interpreted in light of a principle like that of subsidiarity.[10] As a formal matter, Gardbaum's approach would not apply subsidiarity to the scope of substantive enumerated powers as such but rather to the means that are "necessary and proper" to carry out the powers of the national government.)

Second, subsidiarity is not only about economics and externalities. As the authors recognize,[11] it is linked in Catholic thought to ideas of social solidarity and the importance of mediating institutions in order for people to lead good and fulfilled lives.[12] Although the authors pay lip service to this idea, their account of the "Economics of Federalism" does not align well with the constellation of ideas in which subsidiarity is rooted. It is not clear, for example, whether action by the states or by the federal government will be more likely to promote the beneficial maintenance of such important mediating institutions as cities, minority religious groups, or labor unions.[13]

Third, the ambitious effort to apply subsidiarity across the en-

tire Constitution, as suggested by the scope of topics discussed, is in tension with at least two other features of constitutions generally. First, as Mark Tushnet has observed, constitutions are in fact put together in a process that entails a good deal of bricolage—of drawing in highly contingent ways from materials that happen to be "at hand," regardless of their degree of fit with other parts of the Constitution.[14] Assumptions of the Constitution as a coherent whole, then, are counterfactual in terms of original driving forces or creation moments. This phenomenon in turn suggests a need for caution in the adoption of any single value to resolve all justiciable constitutional questions of federalism.

Moreover, constitutions are multifunctional. Even if the process of constitution making had infinite amounts of time and full awareness of the knowable universe of possibilities, the very function of a constitution is to do many things at once.[15] One can see this multifunctionality in the provisions of the U.S. Constitution for the election of national office holders. It might have been very sensible and functional to have the national government simply set qualifications for national elections, from a subsidiarity point of view, as, for example, is authorized to occur in Australia.[16] But the U.S. Constitution reserves to the states the authority to set qualifications for voters for national office by the qualifications states set for voting in elections for state office, notwithstanding the externalities imposed on other states by any one state's particularly restrictive, or particularly liberal, approach to enfranchisement.[17] So competing constitutional values, or restrictive constitutional texts, may legitimately trump subsidiarity in constitutional interpretation.

Moreover, particularly with respect to individual rights, it is unclear what a political economy/subsidiarity approach will contribute. True, Madison's prediction was that factions would have less force at the national level than at the state level;[18] and in the United States, it was federal intervention in the South that was emphatically needed to correct egregious human rights abuses. But on other issues—consider discrimination against sexual minorities, or the issue of same-sex marriage—many of the states have been far more progressive, sooner, in protecting emerging rights than was the national Congress.[19] And in other countries, it has sometimes been at the subnational, sometimes at the national,

level that the most progressive protections of equality rights for women and sexual minorities have occurred.[20] Other scholars have noted that economic concern with externalities and collective action problems do not resolve interpretive issues about the protection of individual rights or issues of jurisdictional allocation to protect those rights.[21]

Fourth, the authors state that "the correct legal response to the demands of subsidiarity is constitutional federalism enforced through substantive judicial review."[22] They go so far as to state their disagreement with George Bermann's argument for a process-based form of subsidiarity analysis in the EU, arguing instead that the "EU would benefit from more vigorous substantive enforcement of subsidiarity."[23] This position is not elsewhere argued in their essay and may be a throwaway line, but it is symptomatic of a mind-set that believes that there is a single "correct" legal response to any problem across transnational settings. Although there may be legal questions that have a single right answer across national cultures, there are relatively few of these; and federalism—given its roots in historically contingent compromises, among existing power holders, in complex and interdependent institutional designs that, taken as a whole, create a certain balance of powers[24]—is an unlikely candidate for universalistic right answers.

2. Subsidiarity and the Judicial Role: Procedural Review

Calabresi and Bickford argue for judicial enforcement of substantive rules of federalism as a mechanism for enforcing subsidiarity. But U.S. history suggests that substantive approaches to a "ruling out" methodology in judicially enforced federalism in the United States have tended to be unstable.[25] Not only have they been unstable, but some of the decisions judged most ill-advised by history were ones in which the Court believed it had identified a substantive federalism-based limit to national power.[26] Although such categorical approaches may work well, or work for longer periods of time, in a formalist legal culture, U.S. legal culture has been deeply influenced both by the flexibility inherent in common law adjudication and by the insights of pragmatism. And as I have written elsewhere, federalism itself is in some tension with

the demands for principled adjudication required by the exercise of judicial review: "Federalism is, quintessentially, a political deal among different governments. Workability is its core. It is a means to many ends, the most basic of which is the stable survival of the union it creates. To be successful, federalism must be pragmatic and it must be dynamic."[27]

If there were a stable consensus on the functions allocated to each level, substantive ideas of subsidiarity might be able to play a constitutionally useful role in monitoring questions of state and federal power at the margins. Thus, for example, in Canada federalism doctrine asks about what the "pith and substance" of a law is, in order to assign it to the national or state sphere;[28] such a test requires some degree of agreement on "essences" or essential characteristics that can be applied to legislation. Where a background consensus is absent, however, there is no baseline from which to apply subsidiarity in a way that will not be seen simply as reflecting an unjustified choice about favored subjects or levels of government.[29] And with respect to review of federal legislation, it is difficult to imagine that a law could be enacted by the national Congress that would fall in an area widely regarded as inappropriate for federal action (though given the vagaries of the legislative process it is not impossible).

Subsidiarity enforced by courts is thus unlikely to be a cure-all for whatever Calabresi and Bickford believe ails American constitutional law or federalism, though subsidiarity as a *question for legislators* might well have quite salutary impact if it were treated with any degree of seriousness. In *United States v. Lopez*, as the authors and others have pointed out,[30] the legislative history reflected very little attention to whether local law enforcement thought there was a serious need for additional support in their own commitments to keep guns out of schools. A body of constitutional law that was designed to encourage legislators to ask questions on which they have stronger capacities than courts might be a salutary thing indeed, fulfilling what Philip Bobbitt has called a "cueing function" of reminding the legislature of its responsibilities.[31]

Although the current push for legislative primacy on matters of fundamental constitutional concern is based in part on a view of the relationship between moral and constitutional questions and the claimed superiority of representative bodies in making

fundamental decisions of morality for a polity,[32] my argument is different. The question of the need for centralized as compared to decentralized decision making is partly a normative question, but it is also in part a deeply empirical and a deeply pragmatic question. Ideological preferences at the local or national level may play an important role on some issues, for example, education, and the debates over court versus legislative superiority on such ideological issues will not be rehearsed here. However, some issues—for example, the need for federal criminal law in some areas—may well depend on empirical judgments, such as the degree to which criminals use the existence of multiple states to facilitate their criminal activity and the capacity of the separate state systems to monitor and prosecute such activity. Such large-scale prospective judgments about complex social phenomena are at the heart of much legislation and raise questions of legitimacy when performed as a first-order task by courts.[33]

Even if subsidiarity is a constitutional value, that does not necessarily imply that it is best served by courts directly seeking to enforce it as a substantive matter. An essentially procedural approach to the judicial role in implementation of this value has much to be said for it.[34] In light of both the difficulties with stable, judicially enforced substantive limits and the possible benefits of encouraging legislative focus on the need for added layers of federal regulation (based on their benefits and costs), it is worth considering the merits of a more procedural approach to the role of the courts in enforcing the idea of subsidiarity.

The merits are essentially threefold. The first two are related. Procedural review—that is, review of the process, evidence, and reasoning offered in support of legislation—is something on which courts are more likely to have expertise than on the end result. Courts deal with the adequacy of procedure across a wide range of cases, involving other courts and administrative agencies. Second, evaluating whether there is a need for national as well as local regulation is a subject on which national representatives are presumably better than courts at deciding, as they have more access to relevant information. While it is true that legislators may have self-interested incentives to legislate in the absence of necessity, some check on those may be achieved through courts'

capacity to require a second look where the process has not provided a sufficient foundation for a finding of need.

Third, there is a rule of law basis for courts to inquire into whether or not Congress considered the need for federal legislation, where Congress is not acting within an enumerated power, but in the Necessary and Proper Clause. An important idea of limited government is that government acts only according to law; government action requires for its justification a legitimating source in law. Although Bobbitt's "cueing" function does not necessarily require a doctrinal framework capable of consistent application, "rule of law" concerns do require that both congressional action and judicial action appear plausibly based in the law of the Constitution.[35] When the basis for the exercise of federal power by Congress is not already clear, some attention to what that basis is by the Congress would be consistent with rule of law norms. And although *McCulloch v. Maryland*[36] and many other cases hold that the need for legislation is for Congress to decide, a "clear consideration" rule would not substantively obstruct Congress's decision making but could assure that it had considered whether there was a need for federal legislation in addition to state regulation.[37] Finally, from a rule of law perspective, a process-based doctrine seems to me more likely to be capable of application by the courts, in a way that can be viewed as principled or consistent, than a substantive ban,[38] though either approach has risks of inconsistency and misapplication.

Procedural review cannot assure that only truly necessary federal laws are enacted. What it can do is to require at least the form of careful legislative consideration, a process-based approach already reflected to some extent in the way the Court has applied *Boerne v. Flores* to examine the legislative record for sufficient support to find that statutes are valid under the Fourteenth Amendment.[39] And it can do so by playing to the relative strengths of courts as institutions concerned with "due process" in a variety of spheres. Where there is reason to think that the need for a federal law has not been carefully considered, there may be less reason to press the boundaries of existing doctrine to uphold extensions of federal power. And while it is true that the procedural question of adequate consideration is only indirectly connected to the values

Calabresi and Bickford identify, sometimes asking and answering indirect questions is a better role for courts faced with the challenge of reviewing democratically enacted legislation. A defect in process is one that can be cured; if a statute is struck down for some inadequate showing, it may be less of an assault on democracy than if it is struck down on categorical, substantive grounds.

Whether there is a sufficient basis in U.S. constitutional text and history for the Court to treat subsidiarity as a judicially enforceable constitutional value is a different question; although it seems perfectly sensible to me that it is a principle that should guide legislation—on policy grounds—the evidence that it was the principle enacted into the Constitution or provided by the case law is more doubtful. It may be that the goal of designing the enumerated powers was based on a theory of subsidiarity, which resulted in the categories of federal legislative jurisdiction identified in Article I, Section 8. Certainly with respect to some issues—regulation of interstate commerce and national defense, for example—this seems like a plausible understanding, though as already pointed out, some elements of Article I are difficult to understand through the frame of subsidiarity. Moreover, sometimes legal purposes are carried out through categorical rules that are over- and underinclusive to that purpose. Whether that is the case with respect to subsidiarity and its relationship to the enumerated powers is a different subject, one that I do not address in this comment, but one that would need to be addressed to establish that—on a case-by-case or statute-by-statute basis—the Court should apply norms of subsidiarity rather than an understanding of the substantive character of the power granted to Congress in the text of the Constitution.

The Necessary and Proper Clause provides a plausible textual basis to read "subsidiarity" into the Constitution; this understanding, though, would limit the role of subsidiarity to the evaluation of measures enacted by Congress for which reliance on the Necessary and Proper Clause was required.[40] But such an interpretation would also result in a substantial rejection of precedent, beginning with the interpretation offered in *McCulloch*. Essentially, as I understand it, the Calabresi-Bickford proposal argues that a strong "need" for federal-level, rather than state-level, regulation must be established to the satisfaction of the courts in order to

justify federal-level regulation.[41] Why we should depart so thoroughly from the division of authority suggested by *McCulloch*, and embraced in many other cases, though, is not clear: in *McCulloch*, the Court interpreted the Necessary and Proper Clause as a broad grant of power to enact "appropriate" measures to carry out other powers, indicating that the degree of necessity was to be decided by Congress. Even a process-based approach to subsidiarity is in tension with *McCulloch*, though given the increase in the size of Congress's docket, there may be arguments that the ordinary legislative process is no longer sufficient to assure thorough consideration. But a more substantive approach would require rejection of foundational constitutional approaches to the Necessary and Proper Clause, a step for which I do not think an adequate case has been made.

3. Federalism and the Warren Court: Reinforcing Federalism by Constraining, and Thus Empowering, the States

The premise of the Calabresi-Bickford essay is that the Court cannot protect federalism without carving out areas in which states are constitutionally empowered to act free from federal regulation or coercion. I want to offer an alternative understanding, one that flows from conceiving of U.S. federalism as based on multiple centers of power resting on democratic accountability, with broad areas of concurrent authority and opportunities for dialogue between the different levels of government.[42] Rather than focusing on demarcating arenas of exclusive jurisdiction for the states, I suggest instead a focus on sustaining concurrent jurisdiction, where possible, by adherence to a presumption against preemption where Congress has not spoken clearly; by a recognition that the power to preempt state law may not be as broad as the national power to legislate; and by promoting constitutional democracy within the states. I have noted these elsewhere;[43] given limitations of time and space here, I will focus only on the last.

So, how is it that federal intervention to impose restrictions on the states can promote a healthy federalism? I have argued elsewhere, and suggest here as well, that the Warren Court, far from "killing" federalism,[44] actually reinvigorated federalism through a

strategy of nationalizing rights and requiring the more democratic and equal apportionment of state legislatures.[45]

A precondition for effective federalism is an effective representative democracy. Without this, there is no assurance that federalism will operate to promote useful experimentation, satisfy preferences, provide meaningful choices, or enable meaningful participation in self-government. Although the Warren Court is sometimes portrayed as being a purely nationalizing, centralizing force, bent on "killing" federalism, its decisions can be understood instead as providing the foundation for the revival of the state governments as a vital source of initiatives.

To be sure, the Warren Court did interpret the Constitution to impose uniform national standards, derived from the Bill of Rights, that would operate as a minimum below which state government practices could not fall.[46] Rather than seeing this as an intrusion inconsistent with federalism, however, it could be seen as an effort to bring the U.S. constitutional system into the *post–World War II model of constitutional federalism* that the United States in essence imposed on postwar Germany and encouraged elsewhere—one with a nationally uniform and guaranteed set of minimal rights providing a floor of constraints on how governments deal with their peoples while at the same time assuring a vibrant basis for democratic federalism in the structural design of the federal system.[47]

The Warren Court's reapportionment decisions have been much criticized. They affected most state legislatures, which required reapportionment in the wake of the decisions. The decisions could thus be regarded as highly intrusive, and into the core of a state's political self-definition.[48] Yet these decisions had important effects on state government to the benefit of the federal system. If one reads the Council of State Governments' Book of the States reports in the 1940s, 1950s, and early 1960s, one is struck by a tide of bad news: ancient systems in need of modernization but blocked from action; growing cities being underserved by rural-dominated legislatures; a lack of a professional civil service in the state governments; a failure of coordination in the development of economic advancement policies.[49] The tide changes after reapportionment.[50]

Although these decisions had the effect of requiring revised apportionment in many (if not all) states, and thus might appear to have been very disruptive of the interests of the states, a deeper look suggests that the decisions—though disruptive for existing state officeholders—might well have helped to improve state government.[51] Such a purpose was obvious in *Reynolds v. Sims*, where Chief Justice Warren, writing for the Court, declared that "Each citizen [must] have an equally effective voice in the election of members of his state legislature. *Modern and viable state government needs, and the Constitution demands, no less.*"[52] Justice Brennan, in extrajudicial speeches, similarly predicted that the reapportionment decisions would lead to "a more effective operation of the process by which political judgments are reached."[53] Although the reapportionment decisions, like the criminal justice decisions of the Warren Court, may have been motivated in part by concern for racial inequalities in the existing voting systems,[54] the reach of the apportionment decisions was much broader; indeed, so many states had to change under the Court's "one person, one vote" rule that their very number might have been seen as a beneficial signal that the Court was not engaged in "picking on" the southern states.[55]

That the apportionment decisions may have contributed to the greater legitimacy and effectiveness of state governments is suggested by several different kinds of data. First, studies in public trust levels of local, state, and national governments show a distinct rise in trust of state as compared with federal government beginning in the late 1960s and 1970s.[56] Second, studies of the dynamism and effectiveness of state governance and policy initiatives describe the apportionment decisions as accelerating a momentum for reform.[57] Third, the self-reporting of organizations such as the Council of State Governments shows a markedly improved assessment of state efficacy, expertise, and vigor.[58] Given the personal background in state government of two of the leaders of the Warren Court's major cases—Chief Justice Earl Warren (former governor of California) and Justice William Brennan (former judge on the New Jersey Supreme Court)[59]—the reparative, rather than destructive, effects of these decisions should not come as a surprise. And, perhaps unintentionally, the reconfigurations of state government that arose in part from the court-mandated

reapportionment, as well as from the Voting Rights Act's requirements for full enfranchisement of minority populations, may well have contributed to the plausibility of renewed calls in the 1970s and 1980s for respect for state organs of government.

Indeed, in her opinion in *Gregory v Ashcroft*,[60] Justice O'Connor repeatedly juxtaposed the views of "the people" of Missouri with what she characterized not as the "people of the United States" but as "Congress," suggesting through the contrasting rhetoric the stronger democratic appeal of the "people" at the state level.[61] (Her opinion for the Court in *Gregory v. Ashcroft* is widely regarded as the first sign of the 1990s' Court's willingness to enforce federalism limits against the national government.) Justice O'Connor also emphasized that setting the terms and conditions for public office-holding in state offices was at the "heart of representative self-government"[62]—a phrase whose origin in the Supreme Court's case law is in *Reynolds v. Sims*,[63] the leading case holding that the one person, one vote ruling applies to both houses of the state legislatures. The goal of the reapportionment cases—to make the state legislatures more democratically representative and accountable, a goal expressed in the cases and also in Justice Brennan's extrajudicial writings[64]—could be seen to bear fruit in the revival of concern for the role of the states in the Court's late twentieth-century jurisprudence.

To regard the development of a nationalized Bill of Rights, including the decisions requiring reapportionment of the state legislatures, as hostile to federalism misses how much the Warren Court's work advanced a new form of post–World War II constitutional federalism.[65] This postwar model of constitutional federalism guarantees a set of basic individual rights against all levels of government. It is a model that was clearly inspired by the human rights abuses of World War II and was adopted by many of the new postwar constitutions. It is, indeed, the model that the United States, as occupying power, insisted be followed in postwar Germany.[66] So, rather than seeing the Warren Court's jurisprudence as "destructive" of state governmental powers or hostile to them, one could conclude that the Warren Court's jurisprudence—despite its apparent lack of concern for protecting state autonomy in specific subject areas—was forward-looking and reparative with respect to the legitimacy and the capacities of the state governments.

4. Conclusion

The idea of subsidiarity is a valuable one. It is easy for governments, like other institutions, once established to develop more projects to justify their own maintenance and expansion, even if the benefits to be achieved thereby are not greater than the perhaps unintended costs. There are decided opportunities for better decision making in some areas from focusing the locus of governance authority closer to those who are to be governed, all other things being equal. Understanding subsidiarity as a political ideal, then, one among many, seems quite sensible.

Whether it is a constitutional ideal is a separate matter. While the ideas behind subsidiarity may well, writ large, have informed many of the decisions of the drafters of the U.S. Constitution, I am skeptical that it was the only idea so informing them. And from a rule of law perspective, the Convention did not adopt the text of the Bedford Resolution, so it is difficult to determine quite what continued force that idea was expected to or should have.

Moreover, even assuming subsidiarity is a constitutional value, a separate matter is the question of judicial enforcement. It is a mistake to equate judicial decisions that carve out substantive areas for the states free from national intrusion with judicial decisions that are good for federalism. And it is also a mistake to assume—without thoughtful consideration of the unintended consequences of exercising such a power—that judicial review of any good value will be a good thing of itself. Subsidiarity as a value in federal legislation, however, is a good thing. If judicial doctrine can help direct legislative attention to the question whether there is a need for federal legislation, that might improve the quality of the legislative process—at the margins, and if it were taken seriously by enough members of Congress.

NOTES

With thanks to Jason Lee for his excellent research assistance.

1. Steven G. Calabresi and Lucy D. Bickford, "Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law," in this volume.

2. Ibid. I agree that the first three potential benefits in theory can be

provided through a federal system. I do not agree that the monitoring costs in a federal system are generally lower than the monitoring costs in a unitary system, nor that the monitoring costs for state government are lower than those for the national government, in large part because of the structure and economics of the media that play an important intermediary role. Indeed, it might be thought that it is on the whole easier for both journalists and social movements to monitor what is happening in a single national legislature than in the fifty different state legislatures. See Vicki C. Jackson, "Citizenships, Federalisms and Gender," in *Migrations and Mobilities: Citizenship, Borders, and Gender*, ed. Seyla Benhabib and Judith Resnik (New York: NYU Press, 2009), 439. Even within a single state, what the local government is doing and what the national government is doing may have just as much, or even greater, public salience and elicit as much, if not more, media coverage as what the state legislature is doing, though this may be highly contingent.

3. Calabresi and Bickford, "Federalism and Subsidiarity."

4. The authors also may be suggesting that the great growth in the number of states since the Founding may provide a reason to presume more heavily in favor of state rather than federal regulation because, as they argue, with so many more states, it may be expected that a larger range of interests is embraced so that there would be greater costs from single national rules. See ibid. This is quite an intriguing and interesting point, one that might be thought instead to counterbalance the increasing homogenization of popular culture through mass media.

5. Ibid.

6. Ibid.

7. See Ibid. The authors quote the EU principle, which they argue for, and which operates only as to those powers of the EU that are not exclusive. They make an originalist argument about the scope of the enumerated powers reflected in the "subsidiarity" views of the Bedford Resolution, and they discuss cases dealt with by the Court under the Necessary and Proper Clause, the enumerated powers, and unwritten principles of federalism.

8. See George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," *Columbia Law Review* 94 (1994): 331, 334 ("According to the principle [of subsidiarity,] the [European] Community institutions should refrain from acting, *even when constitutionally permitted to do so*, if their objectives could effectively be served by action taken at or below the Member State level.") (emphasis added).

9. See, e.g., *Crosby v. Nat. Foreign Trade Council*, 530 U.S. 363 (2000) (finding that a Massachusetts law prohibiting the purchase of goods or services from companies doing business with Burma was an obstacle to the

purposes and intended effects of federal statutes and thus preempted); *Amer. Ins. Ass'n v. Garimendi*, 539 U.S. 396 (2003) (holding that a California statute designed to require information from insurance companies concerning Nazi-era policies was preempted because it interfered with the president's conduct of foreign policy in having encouraged the German government to establish a fund out of which Holocaust-era insurance claims were to be paid). In each of these cases, arguments were made, but not accepted, that without regard to statutes enacted or the executive agreement made, the state's actions were precluded because they fell within exclusive federal powers. See Brief for the United States as Amicus Curiae Supporting Affirmance at 19, *Crosby*.

10. Stephen Gardbaum, "Rethinking Constitutional Federalism," *Texas Law Review* 74 (1996): 795, 812–14.

11. See Calabresi and Bickford, "Federalism and Subsidiarity" (quoting Catechism of the Catholic Church).

12. See generally Address of His Holiness Benedict XVI, to the Participants in the 14th Session of the Pontifical Academy of Social Sciences (May 3, 2008), on theme of Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together, the Pontifical Academy of Social Sciences (2008), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/may/documents/hf_ben-xvi_spe_20080503_social-sciences_en.html; see also Holy See, Position Paper III, Preparatory Committee Meeting of the U.N. Conference on Sustainable Development (Rio de Janeiro, June 13–15, 2012), available at http://www.vatican.va/roman_curia/secretariat_state/2012/documents/rc_seg-st_20120614_position-paper-rio_en.html ("[*T*]*he principle of subsidiarity must be closely linked to the principle of solidarity and vice versa.* For if subsidiarity without solidarity lapses into social privatism, it is likewise true that solidarity without subsidiarity lapses into a welfare mentality which is demeaning to those in need.") (emphasis in original).

13. On cities and the benefits to cities of a direct relationship with the national government (as opposed to the state governments), see Nestor M. Davidson, "Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty," *Virginia Law Review* 93 (2007): 959, 966–74 (discussing the importance of direct cooperation between the national government and local governments); cf. Richard Briffault, "What about the 'Ism'? Normative and Formal Concerns in Contemporary Federalism," *Vanderbilt Law Review* 47 (1994): 1303, 1348 (noting tensions between federalism and localism and importance of local governments as sites of grassroots democracy); Richard Shragger, "Cities as Constitutional Actors: The Case of Same-Sex Marriage," *Journal of Law and Politics* 21 (2005): 147 (arguing for a federal constitutional doctrine requiring that states allow their local

governments to regulate in some areas that the states cannot); David J. Barron, "Commentary: A Localist Critique of the New Federalism," *Duke Law Journal* 51 (2001): 377 (criticizing federalism doctrine for failing to support localism). On the divergent views toward unions at the national level over time, compare, e.g., *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (holding unconstitutional a law prohibiting employers from requiring their workers to foreswear joining labor unions) and *Adair v. United States*, 208 U.S. 161, 179 (1908) (same with respect to a federal law) with *Texas & N.O.R. Co. v Bhd. of Ry & S.S. Clerks*, 281 U.S. 548, 570 (1930) (upholding collective bargaining provisions of the Railway Labor Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding national statute providing protection for collective bargaining). On the Supreme Court's uncertainty over whether state or federal governments are better for minority religions, compare *Reynolds v. United States*, 98 U.S. 145 (1887) (upholding federal law prohibiting polygamy as applied to practicing Mormons) with *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (prohibiting application of state law requiring flag salute and recitation of Pledge of Allegiance to Jehovah's Witnesses and overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)). See also Richard C. Schragger, "The Role of the Local in the Doctrine and Discourse of Religious Liberty," *Harvard Law Review* 117 (2004): 1810.

14. Mark Tushnet, "The Possibilities of Comparative Constitutional Law," *Yale Law Journal* 108 (1999): 1225, 1285–1306.

15. See, e.g., Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (New York: Oxford University Press, 2010), 3–8 (noting that constitutions may serve to symbolize a particular national identity, provide a foundation for domestic governance, help establish a basis for being viewed as a sovereign by other countries, and address a variety of internal and external subjects—constitutions are thus "concerned with a complex mix of values, goals, and functions").

16. See Australian Constitution, Section 30 ("*Until the Parliament otherwise provides*, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.") (emphasis added).

17. See U.S. Const. art. I, § 2; U.S. Const. amend. XVII. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that states lacked constitutional authority to establish additional qualifications for national representatives). For an argument that the states' authority to set qualifications for voters should be understood as constrained by the Constitution's requirement that the voting electorate be capable of being viewed

as representative of "the people" of each state, see Vicki C. Jackson, Taft Lecture, " 'To Endure for Ages to Come': The U.S. Constitution in a Transnational Era," *University of Cincinnati Law Review* (forthcoming).

18. *The Federalist* No. 10 (James Madison), ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961); Calabresi and Bickford, "Federalism and Subsidiarity."

19. For national laws embodying discrimination against homosexuals, see Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), section 3 of which was held unconstitutional in *United States v. Windsor*, 133 S. Ct. 2675 (2013); and the "Don't Ask, Don't Tell" law concerning military service, 10 U.S.C. § 654 (2006), *repealed by* Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (December 22, 2011). For state laws permitting, e.g., civil unions for same-sex couples, see, e.g., N.J. Stat. Ann. §§ 37:1-28 to 37:1-36 (West Supp. 2012), and, in other states, same-sex marriage, see, e.g., Mass. Gen. Laws ch. 207 (2012); see also *Goodridge v. Department of Public Health*, 440 Mass. 309, 343 (2003). True, the Court struck down state laws burdening gay rights in Colorado in *Romer v. Evans*, 517 U.S. 620 (1996), and state sodomy laws in *Lawrence v. Texas*, 539 U.S. 558 (2003); and there are states that, by referendum, have rejected judicial decisions supporting same-sex marriage. (For discussion of California's Proposition 8, see *Strauss v. Horton*, 46 Cal. 4th 364, 395–96 (2009).) But this may go less to the nature of federalism and which level of government should have jurisdiction than to whether there is a greater likelihood that courts will be more quickly responsive to novel individual rights claims of minorities than will legislatures. For a theoretical framework to understand the likely range of state action on issues of individual rights, see Ann Althouse, "Vanguard States, Laggard States: Federalism and Constitutional Rights," *University of Pennsylvania Law Review* 152 (2004): 1745.

20. See Beverley Baines, "Federalism and Pregnancy Benefits: Dividing Women," *Queen's Law Journal* 32 (2006): 190, 222–23 (proposing that whichever level within the Canadian federal system, provincial or national, was most progressive on women's issues should be deemed to have controlling authority; resisting interpretations of national laws as imposing ceilings on what the provinces could do to advance equality). From this perspective, the idea of a "natural right" to be governed by the government closest at hand might appear to be subordinate to a "natural right" to have one's "natural rights" protected, by whatever level of government is most likely to do so.

21. Cf. Robert D. Cooter and Neil Siegel, "Collective Action Federalism: A General Theory of Article I, Section 8," *Stanford Law Review* 63 (2010): 115, 165–66 (arguing that there is no basis for applying externality analysis

to Fourteenth Amendment rights provisions or their enforcement and that while concern for collective action problems supports leaving marriage for the states, because there are few externalities or potential for state-state extortion, saying this does not answer the individual rights question).

22. Calabresi and Bickford, "Federalism and Subsidiarity."

23. Ibid.

24. See Vicki C. Jackson, "Comparative Constitutional Federalism and Transnational Disclosure," *International Journal of Constitutional Law* 2 (2004): 91, 102–08.

25. Consider, for example, the effort in the late nineteenth century and early twentieth century to demarcate the field of economic activity that was, and was not, subject to federal regulation. In *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895), the Court stated that manufacture or production cannot be regulated by the federal government; in *Loewe v. Lawlor*, 208 U.S. 274 (1908), the Court upheld application of the federal Sherman Antitrust Act to labor activities in manufacturing; in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), it held, again, consistently with *Knight*, that children's employment in production cannot be regulated; in *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925), however, the Court held that intentional efforts to disrupt production can be regulated; in *Carter v. Carter Coal*, 298 U.S. 238 (1936), it held that working conditions in production cannot be regulated; and in *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937), the Court held that the distinction between production and trade is not relevant to determining the scope of congressional power. For similar instability with respect to Congress's power to impose its general regulations on the activities of state governments, see *United States v. California*, 297 U.S. 175 (1936) (upholding application of the federal Safety Appliance Act to state activities); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding application of the Fair Labor Standards Act to certain state employees); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Wirtz*); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *National League of Cities*). See also, e.g., Cooter and Siegel, "Collective Action Federalism," 118 ("The crisis of the Great Depression ultimately exploded the *Lochner* Court's categorical differentiations between 'manufacturing' and 'commerce,' 'direct' and 'indirect' effects on commerce, goods in the 'flow' of commerce and goods not in the flow, and 'harmful' and 'harmless' goods in commerce.").

26. See, e.g., *Hammer v. Dagenhart*, overruled by *United States v. Darby Lumber Co.*, 312 U.S. 300 (1942); *Carter v. Carter Coal*, the reasoning of which is weakly distinguished and essentially ignored in *Jones & Laughlin Steel*; *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895), overruled in

part by U.S. Const. amend. XVI, and in part by *South Carolina v. Baker*, 485 U.S. 505 (1988); *Dred Scott v. Sandford*, 60 U.S. 393 (1857), overruled by the Thirteenth and Fourteenth Amendments.

27. Vicki C. Jackson, "Federalism and the Uses and Limits of Law: *Printz* and Principle?," *Harvard Law Review* 111 (1998): 2180, 2228.

28. See, e.g., *Labatt v. Attorney General of Canada*, [1980] 1 S.C.R. 914 (Canada Sup. Ct.) (holding unconstitutional national-level beer-labeling requirements as falling within exclusively provincial powers); *Reference re Employment Insurance Act* (*Can.*), *ss. 22 and 23*, 2005 Can. Sup. Ct. LEXIS 59 (upholding federal law concerning parental leave benefits as in "pith and substance" within national power over unemployment insurance).

29. Other analysts of federalism who use a frame of "externalities" and transaction costs to explain allocations of powers reach conclusions with which Calabresi and Bickford may not agree. Cooter and Siegel, for example, argue that the driving forces in making the Constitution in 1787 were to enable states to overcome collective action problems with national defense and to maintain a common market, and that the powers allocated to Congress can be understood as involving essentially defense, creating a free market, and the institutional structure to support these functions. Although in agreement with Calabresi and Bickford on the important role of externalities in analyzing questions of congressional power under Section 8, they argue that the current categorical dividing line—between economic and noneconomic activity—does not capture the more important problem of externalities and collective action. Cooter and Siegel, "Collective Action Federalism," 135, 164–66. And to some extent their analysis suggests that ex ante categorical lines will be unstable, as the degree to which action in an area creates externalities may vary over time and with political behavior. See ibid., 144 (commenting on need to anticipate likelihood of interstate bartering or efforts at coercion over issues to decide whether there are externalities).

30. See Calabresi and Bickford, "Federalism and Subsidiarity" (analyzing *United States v. Lopez*, 514 U.S. 549 (1995)).

31. Philip Bobbitt, *Constitutional Fate: A Theory of the Constitution* (New York: Oxford University Press, 1984), 194.

32. See generally Jeremy Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115 (2006): 1346; cf. Robin West, "Toward the Study of the Legislated Constitution," *Ohio State Law Journal* 72 (2011): 1343, 1361–62 (criticizing the "interpretive construction of constitutional politics as demonizing legislative authority" and its tendency to promote "a distrust of the legislator and valorization of the judge"). On the cognitive or epistemic advantages of legislative decision making over "common law"

modes of adjudication, see Adrian Vermeule, "Common Law Constitutionalism and the Limits of Reason," *Columbia Law Review* 107 (2007):1482, 1506–09.

33. Courts are widely regarded as better situated to review the procedural rationality of legislative or administrative determinations of social facts than to make those judgments in the first instance.

34. See Jackson, "Federalism and the Uses and Limits of Law," 2230; Gardbaum, "Rethinking Constitutional Federalism," 799–800. Cf. Robert Schapiro, "Monophonic Preemption," *Northwestern University Law Review* 102 (2008): 811.

35. Jackson, "Federalism and the Uses and Limits of Law," 2230.

36. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

37. See Jackson, "Federalism and the Uses and Limits of Law," 2234 ("Insisting on showing a connection between legislative acts and legislative authority may help enhance the legislator's sense of accountability to law and may make more palpable to the electorate the questions of constitutional power (and public policy) at stake. This insistence has the benefit of drawing the attention of the legislative body to the linkages between its everyday decision-making and the fundamental law under which it operates. And, if enforced through some form of 'clear evidence' or 'clear statement' requirement . . . this approach might also increase deliberative attention to the effects of legislation on the middle-run operation of the governments of the United States.").

38. See ibid., 2225–26 ("An important question, from a 'rule of law' perspective, is whether a basis exists for overturning national action on federalism grounds that will appear sufficiently principled to be accepted as based on 'law.' If no principled basis exists, holding out the prospect of a judicial check that either is never realized, or cannot be articulated in a principled way, may be in effect more destabilizing than the 'hands-off' rule that an extreme reading of *Garcia* can generate.").

39. 521 U.S. 507 (1997).

40. Compare, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 187–88 (1824) (concluding that the federal coastal law was within Congress's power to regulate interstate commerce, and not relying on the Necessary and Proper Clause) with *McCulloch v. Maryland*, 17 U.S. 316 (1819) (relying on Necessary and Proper Clause to uphold Congress's action in providing for the National Bank, where Congress had no enumerated power to incorporate banking institutions but doing so was useful to advance other powers).

41. Calabresi and Bickford, "Federalism and Subsidiarity" ("[T]here is a strong economic case for presumptively leaving power at the state level unless the presumption is trumped by evidence that (1) there are economies of scale to national action; (2) the states are suffering from

a collective action problem; (3) the states are imposing negative external costs on their neighbors; or (4) there is a bona fide fundamental civil rights issue at stake.").

42. On the importance of such dialogical interactions, see, e.g., Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (Chicago: University of Chicago Press, 2009), 98–99 (arguing that "dialogue" between federal and state government officials and institutions "magnifies the value of plurality" by allowing "different regulators [to] learn from each other" and by "facilitat[ing] regulatory innovation"); Robert B. Ahdieh, "Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination," *Missouri Law Review* 73 (2008): 1185, 1187–88 (suggesting that "[g]rowing state and local initiative in international affairs" has "foster[ed] potential for recurrent engagement, learning, and coordination" among "sub-national, national, and international institutions and interests"); Heather K. Gerken, "Foreword: Federalism All the Way Down," *Harvard Law Review* 124 (2010): 4, 11–20 (summarizing relevant literature); cf. Barry Friedman, "Valuing Federalism," *Minnesota Law Review* 82 (1997): 317, 386–405 (describing values of decision making at state rather than federal level). For rule of law and other reasons, I do not reject the possibility of limits on the scope of national legislative power, limits that have the effect of preserving areas for exclusively state legislation. See generally David Shapiro, *Federalism: A Dialogue* (Chicago: Northwestern University Press, 1995). However, I do not think the search for limits should be the defining characteristic of federalism jurisprudence, nor do I believe that identifying such limits is the only or best way for courts to promote federalism.

43. On the possibility of a constitutional limit on preemption that is distinct from the scope of national power to legislate, see Jackson, "Federalism and the Uses and Limits of Law," 2255 & n. 314, acknowledging and drawing on Gardbaum, "Rethinking Constitutional Federalism," 818–19. On the importance of understanding the wide range of concurrent jurisdiction, and the corresponding importance of preemption doctrine for the health of federalism, see Vicki C. Jackson, "The Early Hours of the Post World War II Model of Constitutional Federalism: The Warren Court and the World," in *Earl Warren and the Warren Court*, ed. Harry Scheiber (Lanham, MD: Lexington Books, 2007), 137, 173–75; Vicki C. Jackson, "Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, and Interpretation," in *Constituting Equality: Gender Equality and Comparative Constitutional Law*, ed. Susan H. Williams (Cambridge: Cambridge University Press, 2009), 312, 330–31.

44. See Lucas A. Powe Jr., *The Warren Court and American Politics* (Cambridge, MA: Harvard University Press, 2000), 494–95. The paragraphs that

follow are largely drawn from Jackson, "The Early Hours of the Post World War II Model of Constitutional Federalism."

45. For theoretical explication of the role of judicial review in fostering representative democracy, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 105–34.

46. Jackson, "The Early Hours of the Post World War II Model of Constitutional Federalism," 138, 181.

47. Ibid., 138.

48. See ibid., 156–57.

49. Ibid., 158–59.

50. Ibid., 159.

51. For a recent study so concluding, see Jon C. Teaford, *The Rise of the States: Evolution of American State Government* (Baltimore: Johns Hopkins University Press, 2002), 195–96 (noting agreement that by 1974, in important part because of the reapportionment mandated by *Baker v. Carr* and its progeny, the "states were no longer rusty, creaking cogs in the machinery of government. They had been refashioned and were operating more effectively than the once admired federal dynamo. . . . [S]tate government was both better and more significant. . . .").

52. 377 U.S. 533, 565 (1964) (emphasis added).

53. William J. Brennan Jr., "Some Aspects of Federalism," *New York University Law Review* 39 (1964): 945–55.

54. See Sanford Levinson, "One Person, One Vote: A Mantra in Need of a Meaning," *North Carolina Law Review* 80 (2002): 1269, 1296.

55. This paragraph and the next two paragraphs are drawn in part from Susan Low Bloch and Vicki C. Jackson, *Federalism: A Reference Book* (Santa Barbara, CA: ABC-CLIO, 2013), ch. 4.

56. See Jackson, "The Early Hours of the Post World War II Model of Constitutional Federalism," 158, 158 n. 104.

57. See ibid., 159–60 & nn. 106–08.

58. These propositions and sources are discussed in more detail in Jackson, "The Early Hours of the Post World War II Model of Constitutional Federalism," 159 & n. 105.

59. In addition, Potter Stewart had experience working in local government in Cincinnati, and Hugo Black served as a judge in the Birmingham police court before being elected to the Senate from Alabama. See ibid., 161 n. 109.

60. 501 U.S. 452 (1991).

61. See, e.g., ibid., 460–01.

62. Ibid., 461.

63. 377 U.S. at 555.

64. See ibid., 565 ("Full and effective participation by all citizens in state governments requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less."); William J. Brennan, "Some Aspects of Federalism," 954 (from a speech given to the state court chief justices: "Our decisions in the reapportionment cases have enforced this guarantee [of equal protection] and the result should be, not the return of discredited judicial intrusion into the field of political judgment, but a more effective operation of the process by which political judgments are reached.").

65. Jackson, "The Early Hours of the Post World War II Model of Constitutional Federalism," 138, 182–92.

66. Ibid., 188–89 (noting orders to U.S. military commanders in Germany during its reconstruction to insist on a strongly federal system with a nationwide set of civil and political rights that would be "uniformly effective").

7

COMPETING CONCEPTIONS OF SUBSIDIARITY

ANDREAS FØLLESDAL

A principle of subsidiarity has gained prominence in law and politics as well as in legal and political theory, on topics ranging from U.S. constitutional interpretation and European integration to the constitutionalization of international law. Its popularity stems from its aspirations to address the allocation or use of authority within a political order, typically those where authority is dispersed between a center and various member units.[1] Subsidiarity places the burden of argument on those who seek to centralize such authority. Increased attention to subsidiarity is due not least to its inclusion in the 1991 Maastricht Treaty on European Union. The Lisbon Treaty applies the principle of subsidiarity to certain issue areas, requiring that the Member States should make decisions unless central action will ensure higher comparative efficiency or effectiveness in achieving the specified objectives.[2] A principle of subsidiarity is also urged as a promising "structuring principle" for international law: be it for human rights law in particular,[3] to determine the limits of sovereignty,[4] or possibly for international law more generally.[5] Subsidiarity has also been appealed to in defense of American federalism, and in favor of fiscal federalism and other calls to decentralize authority.[6] It is most recently used to recommend drastic reforms of the European Court of Human Rights.[7]

Alas, the popularity of subsidiarity partly stems from its obfuscation of the central issues. Indeed, considerations of subsidiarity will seldom resolve disagreements about the allocation of authority. A review of the competing traditions of subsidiarity suggests that its more defensible versions instead transpose the contentious issues. Remarkably different conceptions of subsidiarity appear in the U.S. constitutional debate, in the EU setting, by the Catholic Church, and as applied to international law. Each conception rests on contested premises, and each renders important trade-offs quite differently. These different conceptions and their conflicting implications are too often overlooked. Different historical and theoretical traditions of subsidiarity yield strikingly different and sometimes incompatible implications for the allocation and use of authority within a multilevel social, legal, or political order. Their salient differences concern several features: whether they *proscribe* or *prescribe* intervention by the center, whether they *add* or *remove* issues from the sphere of political decision making, the objective of the larger political and legal order, and whether they place the authority to apply the principle of subsidiarity itself either centrally or with the member units. The upshot is that the different versions drastically reduce or enlarge the scope of member unit authority.

To illustrate how different conceptions of subsidiarity have profoundly different implications for constitutional and institutional design, we first consider four different theories before turning to some implications as seen in the discussions about U.S. federalism, debates in Europe about the EU and the European Court of Human Rights, and international law.

1. Some Theories of Subsidiarity

Alternative versions of subsidiarity have very different implications for the allocation of authority. They differ as to the objectives of the polities, the domain and roles of member units such as states, and the allocation of the authority to apply the principle of subsidiarity. The upshot is that the choice of interpretation has drastic implications for the preferred institutional or constitutional configuration for more legitimate multilevel governance, including the appropriate authority of international institutions vis-à-vis domestic courts. The four accounts sketched in the following

draw on insights from Althusius, the American Confederalists, economic or fiscal federal thought, and Catholic Personalism, respectively.[8] They are briefly sketched in the order that grants the member units less authority. These accounts may regard subsidiarity as *proscribing* or *prescribing* central intervention, apply subsidiarity to the *allocation* of political powers or to their *exercise*, and *add* or *remove* issues from the sphere of political decision making altogether. Some of these features reduce the scope of state authority, while some may protect states against intervention.

Liberty: Althusius

Althusius (1557–1630), "the father of federalism," developed an embryonic theory of subsidiarity drawing on Orthodox Calvinism. He was "syndic" of the German city of Emden in East Friesland and sought to maintain its autonomy in two directions: both against its Lutheran provincial lord and against the Catholic emperor.

Althusius held that communities and associations are instrumentally and intrinsically important for supporting ("subsidia") the needs of individuals. Yet political authority arises on the basis of covenants not among individuals but among such associations. Several features are important for our purposes of delineating conflicting premises and implications of these conceptions of subsidiarity. First, Althusian subsidiarity is strongly committed to immunity of the local unit, such as cities,[9] from interference by more central authorities. Second, this interpretation of subsidiarity appears to take the existing subunits for granted. That is, this account has few limits on how the local authorities treat individuals or other standards of legitimacy. Third, on this view the common good of a political order is limited to respecting member units' immunities and to Pareto improvements among them. That is, this conception only allows undertakings deemed by every subunit to be in their interest compared with their present status quo. Thus, coercive redistributive arrangements among individuals or associations are deemed illegitimate.

Two weaknesses of this account are worth mentioning. First, it fails to deal adequately with subunits—associations or states—that lack normative legitimacy. Second, it does not apply to situations

that require redistribution among member units, for example, according to standards of distributive justice in a federation.

Liberty: Confederalists

Similar conclusions emerge from *confederal* arguments for subsidiarity based on the fear of tyranny. On this view, individuals should be free to choose in matters where no others are harmed. In effect this argument supports a *proscriptive* version of subsidiarity, again limited to Pareto improvements where the member units enjoy veto. This account shares one weakness with the Althusian, namely, its inapplicability to institutions with distributive requirements across member units. Furthermore, it is not at all clear whether this account is correct to focus exclusively on protection from tyranny by central authorities as the sole ill to be avoided. For instance, as Madison pointed out,[10] the plight of minorities *within* a subunit is uncertain, since it is unlikely that smaller units are completely homogeneous. Note that these first two conceptions of subsidiarity are illustrated in "coming together" federations,[11] whose member units join by treaty to secure certain objectives otherwise unattainable. For them, it may be initially plausible to allow only Pareto improvements.[12]

Efficiency: Fiscal Federalism

The third conception of subsidiarity holds that powers and burdens of public goods should be placed with the populations that benefit from them. Decentralized government is to be preferred mainly because such targeted provision of public goods—that is, "club goods"—is more efficient in economic terms. On this conception, subunits do not enjoy veto powers: free-riding subunits may be overruled to ensure efficient coordination and production of public or club goods. Some limitations of these arguments are that they apply only to such public or club goods, and possibly to Pareto improvements. This conception does not apply easily to cases where the shared objectives include transfers or equalization, and may indeed seem to proscribe central action for such objectives.

Justice: Catholic

The Catholic tradition of subsidiarity merits some more details, given that it is often cited (including in contributions in this volume).[13] The principle of subsidiarity is first expressed, albeit without that name, in Pope Leo XIII's 1891 encyclical, *Rerum Novarum*, which simultaneously sought to protest capitalistic exploitation of the poor and to protect the Catholic Church against socialism. Leo XIII argued that the state should support lower social units but not subsume them: "Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it." Thus a task of the state is to protect workers against the "hardheartedness of employers and the greed of unchecked competition": "[I]t is the province of the commonwealth to serve the common good. And the more that is done for the benefit of the working classes by the general laws of the country, the less need will there be to seek for special means to relieve them." At the same time, "[T]he State must not absorb the individual or the family: both should be allowed free and untrammeled action so far as is consistent with the common good and the interest of others."[14]

This conception was further developed and named in Pius XI's 1931 encyclical *Quadragesimo Anno* against fascism and its encroachment on the Catholic Church. This account holds that subsidiarity must go "all the way down" to the individual and required central intervention when and only when subordinate organizations cannot act alone: "For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly." The state thus must serve the common interest, and intervene to further individuals' autonomy, as necessary.[15]

This view allows and may require taxation and other means of transfers among member units, including individuals, when required for the "common good" as defined by the authorities. Intervention into member units is legitimate and required when the public good is threatened, such as when a particular class suffers.[16]

Subunits thus do not enjoy veto rights. Indeed, interpretation of this subsidiarity principle may also sometimes be best entrusted to the center unit.

This account can also provide standards of legitimacy for member units. For instance, the state must comply with natural and divine law to serve the common interest.[17]

Some weaknesses of this conception are also apparent. Assessment of member units, as well as the proscription and prescription of central action, must draw on a normative conception of the social order and its objectives. In the Catholic version, this includes a conception of the human good as a particular mode of human flourishing, where this is specified on the basis of either a "thick" conception of the good life or an explicitly theological one as willed by God. Some such normative accounts are contested and difficult to square with commitments to respect a plurality of reasonable conceptions of the good. Where there is disagreement on such matters, this account cannot settle which subunits and cleavages should be embedded, and with what responsibilities—for example, regarding families or labor unions. In constitutions and treaties, such disagreements can be avoided or reduced by express announcement of objectives. But interpretations of these texts must still often draw on further, possibly contested sources.

2. Conflicting Conclusions

We now turn to consider some issue areas where the different conceptions of subsidiarity yield surprisingly different recommendations. Their salient differences stem from several features: whether they place the authority to apply the principle of subsidiarity itself either centrally or with the member units, whether they *proscribe* or *prescribe* intervention by the center, and importantly the objective of the larger political and legal order which *adds* or *removes* issues from the sphere of political decision making. Consider two main issues: Who should have the authority to apply the principle, and which objectives guide the application of subsidiarity—Pareto improvements, human rights, or redistribution across member units? I conclude by illustrating the dilemmas for the European Court of Human Rights, which grants states a "margin of appreciation" justified by subsidiarity.

Who Should Have the Authority to Apply the Principle of Subsidiarity?

One central, contentious issue is: Who should use the principle of subsidiarity to allocate authority or when making policies? Conceptions that favor centralization may leave these issues with the central authorities, such as a central legislature or a central or federal court. Other conceptions may place the assessment of subsidiarity with the member units. There are two main ways to do so: granting member units veto powers (known from international law among states and from various confederal arrangements), or with a body composed of member unit representatives of some sort.

Consider arguments for placing the authority to apply subsidiarity with the member units, typical of Althusian and fiscal federalist traditions, and central to the treaties that much of international law rests on. First, local authorities are often better equipped to tailor decisions in ways that maximize preference satisfaction, especially when local tastes, preferences, or conditions (such as religious beliefs, geography, resources, or risks) are clustered within one territory. Thus "the production of public goods should be attributed to the level of government that has jurisdiction over the area in which that good is 'public.'"[18] To accord authority to such subsets allows them to act on those preferences and hence increase efficiency.[19] Which such "local public" or club goods and subunits should be established remains largely a matter of local preferences and circumstances.

A second fiscal federalist argument for subsidiarity and local control thereof is that competition among member units may foster further preference maximization under mobility. Competition may be in terms of tax levels, or the nature of the public or club goods. These arguments are further strengthened when individuals can "vote with their feet" toward those member units that best match their preferences.[20] This mechanism is especially effective when mobile factors of production may exit the member units with less favorable conditions, be it higher taxes, fewer resources, or worse living conditions.

Alternative ways to allow member units control is to allow them to check central decisions, or to include them in central decision making—including decisions about subsidiarity. The former is illustrated by the EU's Lisbon Treaty, which allows a minimum

number of national parliaments to appeal EU draft legislative acts that these parliaments believe violate subsidiarity.[21] The latter form of control includes a common judicial body that consists of apex court judges from the member units.[22] A common legislative body may be composed of representatives from each member unit and may enjoy significant power as a second legislative chamber typical of "interlocking" federations.

There are potential drawbacks with allocating authority over subsidiarity decisions both with the member units and with the center. Member units may use their veto to bargain for unfair shares of joint benefits, or ignore externalities of their own decisions.[23] More centralized authority creates risks of undue centralization well known from federal arrangements—threatening their long-term stability.[24] The challenge is to create an institutional design that prevents undue centralization and protects minorities against undue majority rule—while remaining sufficiently flexible to change the allocation of competences to reflect changing social circumstances and new risks.[25]

Objectives: Pareto Improvement, Human Rights, or Just Redistribution?

Some of the most striking differences in impact of subsidiarity arise in political orders with different objectives. Consider the arguments rehearsed earlier about the benefits of fiscal competition. They face at least two central challenges. One concerns how to identify, assess, and address externalities—that is, costs wrought outside their borders. What counts as costs is in part a matter of *which* objectives are recognized as legitimate for the local and central legal orders. Consider cases where one unit creates *competition* by maintaining attractive regulations, for example, lower tax rates and corresponding lower redistributive services to the distraught. Other units or their citizens may regard such competition as a race to the bottom, insofar as businesses exit and thereby limit the ability to tax. This may count as a negative externality for these other units, but the unit that lowers its tax rate may disagree—if redistribution is not part of its objectives. Whether central action is required is thus in part in the eyes of the beholder, and depends on whether the objectives of the member units include solidarity or other forms of redistribution. A further related weakness of the

argument is whether it at all registers the plight of those who have nothing to offer on the market. Consider the needs of those who are dependent on public support. Few if any member units will compete to attract them, since there is no gain to be had. They will in practice be immobile, and be more destitute due to their home unit's reduced tax ability. If their plight counts, such competition will thus violate the Pareto criterion.

The contrast is clear when comparing fiscal federalism and the Catholic conception. The former account of subsidiarity requires all joint action to be Pareto improvements and hence will not permit transfers from one person or group to another except as part of larger package deals. In contrast, Catholic conceptions of subsidiarity draw on more distributive conceptions of the objectives of society. Thomas Aquinas held in *Summa Theologiae*: "Man should not consider his material possessions as his own, but as common to all, so as to share them without hesitation when others are in need."[26] This premise, cited in *Rerum Novarum*,[27] is used in a subsidiarity argument to support central redistribution by the state and other bodies, to secure the needs of the poor. This is obviously at odds with the fiscal federalist conception of subsidiarity, which prohibits such transfers that are contrary to the Pareto principle. The Catholic conception explicitly requires constraints on market exchanges, insisting on the need for public intervention in favor of workers who "have no resources of their own to fall back upon and must chiefly depend upon the assistance of the State."[28]

The upshot is that insofar as federations have such different redistributive objectives, subsidiarity has quite different implications. Some federal constitutions reject material equality or any other form of redistribution. In such cases, the efficiency conception of subsidiarity may apply. For instance, in the case of the United States, the original objectives were arguably explicitly against redistribution: the Constitution writers sought a system of governance that would avoid the rage "for an equal division of property, or for any improper or wicked project."[29] In contrast, several federations and quasi federations include some (re)distributive objectives. Germany's federal constitution requires central action when necessary to ensure "the maintenance of *uniformity of living conditions* beyond the territory of any one land."[30] This

includes tax transfers among the member länder. Likewise, but in a weaker form, the Lisbon Treaty for the EU includes among its many objectives "economic, social and territorial *cohesion, and solidarity* among Member States."[31] This puts the EU at odds with the fiscal federalist conception of subsidiarity as laid out by Calabresi and Bickford.[32]

A second challenge to all of these conceptions of subsidiarity concerns the protection of human rights within the member units. This is often regarded as a model case for central action, for instance, to protect the *civil rights* of a minority against the preferences of the majority in a member unit. Such claims seem justified insofar as the authorities of the larger order are unlikely to abuse such permissions. Cases in point in the United States include the abolition of slavery and the end of segregation. Yet Althusian, confederal, and fiscal federalist arguments seem unable to address such concerns, since they tend to proscribe intervention by the center. The Catholic conception is troubled if the list of human rights allows individuals to live contrary to Catholic doctrine.

The confederal conception is unable to address these concerns, since it addresses only risks of human rights abuses by the center, and thus insists on immunity for member units—leaving individuals at risk from local domination. One strategy for the Althusian or fiscal conceptions is to include among the relevant preferences the distress of residents of other member units wrought by local practices elsewhere that they regard as morally objectionable. But surely Althusius would object that the religious sensibilities of the surrounding majority should not permit infringement of his own religious freedom—the opposite was precisely the point of his theory of subsidiarity. Many would agree with Althusius that such "other-regarding" psychological costs—"external preferences"—should not count.[33] On the other hand, many will agree that polygamy or slavery should not be permitted, regardless of the local preferences.[34] But this stands in some tension with one efficiency argument for decentralized decisions, if not subsidiarity proper: to promote experimentation and hence competition among clusters of club goods. This argument harks back at least to Mill's defense of experiments in living.[35] One of the main challenges to this argument is how to draw the line between experiments in local

mores and living, and the violation of rights or vital interests of the "local minorities," as mentioned earlier.[36] Mill remains murky on this issue:

> There is no question here (it may be said) about restricting individuality, or impeding the trial of new and original experiments in living. The only things it is sought to prevent are things which have been tried and condemned from the beginning of the world until now; things which experience has shown not to be useful or suitable to any person's individuality.[37]

So, crucial questions remain unanswered: Which things have been shown not useful or suitable, in which sense, and in whose eyes? In any case, the reason such practices should not be permitted is presumably not a utilitarian calculus of local preference maximization but other moral reasons—which Althusian or fiscal federalist arguments on their own fail to capture. Indeed, it may be relevant to note that the South African practices of *apartheid* and separation into "homelands" were defended precisely by this tradition of subsidiarity, of "sovereignty in one's social circle."[38]

The Catholic conception of subsidiarity is clearly more equipped to allow interventions in member units for the sake of individuals' interests—including protection of human rights. However, the comprehensive conception of the good found in that particular conception stands in some conflict with several central human rights laid out in treaties or among political philosophers. Examples include freedom of religion extended to non-Catholic faiths, or women's rights in the workplace, rights of lesbians and gays, and rights concerning divorce.

On the ECtHR's Margin of Appreciation

An example that illustrates several of these conflicts among conceptions of subsidiarity is the European Court of Human Rights (ECtHR), which adjudicates the European Convention on Human Rights (Council of 1950).[39] Recent calls for reform of the ECtHR have claimed that its review of domestic legislation must be reined in by considerations of subsidiarity,[40] most recently by the British prime minister.[41]

One central issue concerns which rights should be judged by

an international court, and which should be left to the national judiciary—and why. This is largely decided in the relevant treaty and by subsequent court interpretations. The categorization may strike readers as odd: Why should the death penalty, waterboarding, and denials of gay rights be subject to such centralized review, while involuntary subjection to religious symbols such as crucifixes in public schools should not? It makes little sense to insist that subsidiarity requires that as few human rights as possible should be adjudicated by the ECtHR, since the objective of the Convention and its court is precisely "the maintenance and further realization of human rights and fundamental freedoms" by means of the ECtHR.

A second related issue concerns how and who should demarcate permissible local mores in terms of human rights. In particular, what should be done when there is *doubt* about whether rights have been violated: Should the final judgment be with the member unit, for example, the state, or with the ECtHR, which may possibly grant the national judiciary a "margin of appreciation"—and if so, why? The margin of appreciation is a way to respect domestic democratic processes by the ECtHR judges. One reason is epistemic: these judges are "neither equipped to make detailed investigations inside the States nor are they competent to evaluate all the political and social conditions on the national level."[42] But how broad should that margin be? For instance, the ECtHR leaves it for Italian courts to permit crucifixes, but it overruled Norwegian courts to prohibit some religious instruction in Norwegian schools.[43] How are we to make sense of this, if at all?

Indeed, details of the practice of a margin of appreciation are difficult to square with any of the conceptions of subsidiarity. Studies suggest that the ECtHR applies a broader margin of appreciation when "the protection of morals" and national security are alleged to be at stake, while it allows much less leeway when it comes to matters of discrimination, freedom of expression, or rights to family life.[44] Such distinctions are difficult to defend by appeals to subsidiarity. Critics may also suspect other patterns, namely, that the ECtHR draws the margin of appreciation not only out of deference to legitimate national variations but also in order to avoid conflicts with more powerful states. There is apparently also a practice of narrowing the margin when the judges determine

that a standard European practice is emerging, with only a few outlier states. Such patterns are difficult to support by subsidiarity. When determining the proper scope of "tastes and cultural preferences," why should matters of morals merit more respect for local variation than rights to family life? Why does it matter *how many* states have certain views on these issues? The epistemic hindrances seem similar, and the risks to individuals likewise.

The upshot is that the list of rights included in the European Convention, and the practice of the margin of appreciation, do not seem principled, and it is difficult to defend them by appeals to subsidiarity.

3. Conclusions

American constitutional federalism, the European Union, Catholic social thought, fiscal federalism, international law, and the practice of the European Court of Human Rights are all sometimes assessed by *the* principle of subsidiarity. I have suggested that such arguments and institutional proposals are too often conflated: there are drastically different conceptions of subsidiarity, with varying normative plausibility and very different institutional implications. These conceptions of subsidiarity differ as to the objectives of the polities, the domain and roles of member units such as states, and the allocation of the authority to apply the principle of subsidiarity. Indeed, considerations of subsidiarity seldom resolve disagreements about the allocation of authority. Rather, its more defensible versions transpose the contentious issues to the question of what should be the objectives of the legal and political order, and who should have the authority to decide this.

This is not to dismiss the value of the traditions of subsidiarity. One benefit of the concept is to help structure arguments concerning the best allocation of authority over particular issue areas. A second benefit is its value in enhancing the stability of (quasi-) federal orders—a perennial challenge.[45] A federal constitution must, on the one hand, provide sufficient entrenchment against illegitimate majority rule and, on the other hand, secure dynamic development to reflect changing social circumstances and new risks—without risking domination by unaccountable authorities. The central issue is, then, not just who should have

the authority to delineate powers between the center and member units—the issue of "competence competence"—but the power to *reallocate* such powers. How might such decisions be made somewhat dynamic, without creating unacceptable risks for minorities? Two of many options, each with risks, are to allow constitutional changes more easily, or to allow judges more "dynamic" interpretations of the texts. The arguments must no doubt include comparative consideration of risks and benefits of each.[46] Placing such powers with judges runs the risk of being ruled not by law but by lawyers; yet *any* allocation of such powers leads to the question of who should guard these guardians. Justifiable conceptions of subsidiarity may help guide and assess the use of such authority, be it by those revising the constitution or by those interpreting it.

NOTES

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8

SUBSIDIARITY AND ROBUSTNESS: BUILDING THE ADAPTIVE EFFICIENCY OF FEDERAL SYSTEMS

JENNA BEDNAR

1. Introduction

Subsidiarity—a systemic predilection for locating authority at the most local level feasible—has long been admired for its ability to protect localized, diverse interests from the tyranny of a national majority. In this chapter, I suggest a novel benefit of subsidiarity: it boosts the adaptive efficiency of federal systems. To remain relevant, federal systems must adapt to meet changing circumstances. The process of adaptation involves both pushing federalism's boundaries in search of improved national-state balance and selecting beneficial changes and rejecting harmful ones, a job most efficiently conducted by a set of diverse, complementary safeguards. By drawing a distinction between *policy subsidiarity* and *safeguard subsidiarity*, I describe how each form of subsidiarity contributes to the process of constitutional adaptation and federal system robustness.

Subsidiarity is, in a very real sense, the soul of federalism. Subsidiarity is the animating philosophy of the European Union, and it pervades the federalism doctrines of Canada and Germany.[1] It is discreetly, but no less powerfully, the vision behind many other federations, including—the New Deal notwithstanding—the

United States. The federal system, with its layers of decision making, is the scaffold bearing the downward weight of this premise of decentralization. Federalism, in turn, is sustained by a system of safeguards.

But why presume decentralization—why value subsidiarity? Support for it is generally tied to two effects: better satisfying the preferences of a diverse population and promoting efficient use of taxes by creating a horizontally competitive environment.[2] Oates prescribes subsidiarity as one of the tenets of fiscal federalism. His decentralization theorem states: "In the absence of cost-savings from the centralized provision of a [local public] good and of interjurisdictional externalities, the level of welfare will always be at least as high (and typically higher) if Pareto-efficient levels of consumption are provided in each jurisdiction than in *any* single, uniform level of consumption that is maintained across all jurisdictions."[3] In this volume, Calabresi and Bickford underscore this reasoning, calling it the "Economics of Federalism."[4] As long as there are no policy spillovers, and as long as either people, firms, or capital can move, decentralization benefits society. Diverse, geographically clustered populations can create policy tailored to fit their own needs. And with a Tiebout mobile voter, local governments compete with one another for citizens (and their tax dollars), driving down the likelihood of corruption and other inefficient practices.

In these accounts, subsidiarity improves social welfare by satisfying diverse preferences and by encouraging efficient government. These are important features, but they address only the immediate, and static, policy environment. The distribution of national and state authorities is calibrated to optimize social welfare. If the policy environment changes, then a different weighting of national and state authorities may better serve the public. A theory of authority assignment in federations should satisfy not just efficiency but *adaptive efficiency*.

In this chapter, I make the case for a third benefit of subsidiarity: it improves the adaptive efficiency of federal systems. In order to perform well over time and to recover from shocks and changing circumstances, federations must adapt. Adaptation requires exploration of the boundaries of federalism and a system of diverse, complementary safeguards to determine whether alterations to

the boundaries represent improvement. Subsidiarity contributes to that process in two ways: it diversifies the constitutional modifications tested, and it increases the range of interpretive signals used in judging the advantage of the modifications.

I will lay out the model of federal robustness and then in separate sections describe subsidiarity's two roles in constitutional adaptation: through *policy subsidiarity*, it can promote experimentation, and through *safeguard subsidiarity*, it multiplies the perspectives that judge the acceptability of new policies, reducing the likelihood of harmful authority migration. The chapter offers a positive justification for subsidiarity, invoking a theory of system robustness and adaptive efficiency.

2. Robust Federal Design

A constitution is a system blueprint; the government that it creates is composed of intersecting components shaped by the constitution, but with an effect that can only be understood in situ.[5] It is akin to the DNA of an organism or the recipe for a cake. The components (legislature, executive, judiciary, electoral system, expressed rights, etc.), as well as the auxiliary institutions the constitution endows through these components (lobbyists, political parties, the media), each has identifiable effects.

One feature of systems-level approaches is captured by the phrase "the sum is greater than the parts." While each component of a system has identifiable properties, their effects may not be independent of other components. Instead, the role played by one component is either augmented or diminished by the presence of another component. As a result, the system's properties and functionality cannot be inferred from the properties of any one component. For example, Vermeule points out that although the U.S. Supreme Court has countermajoritarian properties that make it, on its face, contrary to democratic principles, the presence of an independent court empowered with constitutional review of legislation enhances the democratic properties of the government.[6] An unelected, countermajoritarian component makes the governmental system more democratic, not less so. When the component's effects are so interlaced, to understand the effect that any one has, one must study the whole as a system.

Federalism adds complexity to a democratic governmental system. Each level of government, national and state, has its own set of components, and the authority to make laws or establish programs is distributed between the levels. There is also a possibility of shared authority. This distribution is set constitutionally, with broad parameters established formally through enumeration of powers written into the constitution itself. But constitutions are a combination of the written words and the conventions, established through practice, that illuminate and extend them. In that unwritten constitutional culture, further assignment of authority may be located.

This added complexity makes possible some functionality that is more difficult to achieve in a unitary system. Madison believed that federalism would enhance democracy by introducing further checks to prevent autocratic control.[7] Weingast argues that federalism preserves markets when federal and state budget making are separated and each has a distinct role in preserving the common market.[8] And most intuitively, by distributing authorities between the national and state governments, a federal constitution enables local control, the subsidiarity invoked by Hayek[9] and Oates.[10]

The distribution of authority—what is often referred to as the boundaries of federalism—is our subject of interest because this distribution determines the capability of a federation. The combination of decentralization and centralization enables a society to enjoy a common market, security, and political accountability while affording local adjustments to suit diverse tastes. It is the control dial of federalism. The balance of national and state authorities affects how well the federal government—the union of national and state actions—serves the people.

Given this purpose of federal systems, we become interested in the federation's ability to maintain that functionality over time and the role played by the constitution in assisting that end. Robustness is an enviable property of any system, whether it be engineered, ecological, or legal. Formally defined, robustness is the capacity of a system to function despite perturbations.[11] A robust system is not derailed by disturbances, whether they be short-term or permanent redefinitions of the environment. In the federal system, these disturbances may be exogenous shocks such as fluctuations in the global trade environment, or they may come from internal dynamics, like the unforeseen rise of the Tea Party movement. The ability

of the federal system to fulfill its purposes should not depend on vagaries such as which political party is in office or fail due to scandal in a politician's personal life.

Redundancy and self-regulation are properties of robust systems. Robust systems are often overdesigned, with multiple components performing similar functions,[12] such as oral communication accompanied by hand gestures to boost the fidelity of a signal's transmission.[13] A robust power grid, with multiple pathways connecting all points, continues to supply electricity to all users when storms down lines or disable power stations. A robust system is also self-regulating. The well-designed power grid will reduce flow to certain users in order to maintain flow to others, using instruments such as discriminatory pricing during peak hours or interruptible service to nonessential devices such as water heaters.

Robust systems are also capable of adaptation. The process is slow, purposefully so. Rapid mutation, if irreversible, may cause systems to overreact to short-term fluctuations when the original configuration might perform better in the long run. For short-term challenges, redundancy, excess capacity (which is a form of redundancy), and regulation support the system's robustness without requiring the system to change. Nevertheless, some environmental change is permanent, and a robust system accommodates that change with its own adaptation.

The policy environment is dynamic, but unlike some dynamic systems, it is not homeostatic; it does not hover around a constant state. It is not a heating and cooling system, regulated through a thermostat, that keeps a room's temperature at a constant seventy-two degrees. Instead, its mean value, if you will, is slowly changing. All policy inherently involves compromise—trading equity against liberty, infrastructure investment against personal savings, common standards against diversity and innovation, short-term advantage against long-term stability, group versus individual rights. The socially preferred compromise point varies over time.

The variation in socially preferable policy can come from any number of environmental sources, from technological innovation to ethical perspectives. Advances in pharmaceutical technology, leading to the opportunity for birth control, leave couples vulnerable in states with moral opposition to interference with conception. A diminishment in the salience of race and a moral sense

of human universality cause fresh national dissatisfaction with discriminatory employment, voting, or marriage rights. In the face of these dynamics, existing national values, expressed in the constitution, can be reinterpreted to be applied to new situations, leading to a disallowance of long-established state policy on constitutional grounds.

One common way that the environment changes is the extent that a state's policy generates externalities. While winds aren't blowing any more strongly these days than they used to, so in that sense the environment is unchanged, they are carrying more pollutants than before. Industrialization and manufacturing developments, population growth, and higher per capita energy demands are processes that cause larger quantities of sulfur dioxide to be released into the air than can be absorbed naturally, leading to acid-laden rainfall in eastward states. If the externalities are negative—if the policy spillovers are harmful to residents in other states—then outright centralization may be warranted, or a method of concurrent regulation that generates incentives for the states to change their policies, such as conditions on federal spending.

Externalities can also be positive. A state offering health care or university education to a population that might very well move out of state are two examples. If the policy is costly—as health care and education are—then the national government can offer incentives (shared costs for Medicaid), create standards (requiring school performance measurement and setting common goals of literacy), or invest in the program to reduce its cost (sponsored university research, guaranteed student loans, Pell Grants, and other student aid). Federalism's layers provide a method for encouraging socially productive policies that otherwise might be deemed too costly to undertake.[14]

Whether the imperative is increased externalities, changing moral beliefs, or economic downturns, the policy environment fluctuates, sometimes in the short term, but sometimes permanently. Now that Americans have discovered the road and own cars, they are not going to stop using the interstate transportation network. Just as the federal government made the train network possible by purchasing vast tracts of land that it essentially ceded to private railroad companies, the federal government built and helps to maintain the highway system and contributes significantly

to air transportation. Future transport will use means we haven't yet imagined, and the relative involvement of the national and state governments in transportation policy may change yet again.

As the nation's goals evolve and the policy environment changes, sometimes the distribution of authority between national and state governments will be more efficient if it is adjusted. It may be centralized or decentralized, or the extent of shared powers may be recalibrated, either by further extending concurrent powers or by granting one level exclusive authority. When the efficacy of the balance of authority changes, the federal system ought to be responsive if it is to remain robust. A robust federation adapts. This claim leads to a question: What is the process of constitutional evolution?

As an initial model of constitutional adaptation, it is a fair approach to consider the processes that contribute to adaptation in biological systems. Organisms evolve through a process of genetic mutation, heritability, and sexual selection. "Innovations" are introduced randomly; some are culled during the reproductive process and then passed on to offspring. Thereafter sexual and environmental competition ensures that only the fitness-enhancing mutations continue to spread through the population. Biological adaptation is a process of trial and error; key to the search for improvements to the organism is the trial of many changes and a multifaceted selection process that gives diverse new forms a chance to prove themselves in the environment.

In contrast, formal constitutional amendment procedures are tightly constrained, admitting little change. In comparison with biological systems, they are overselective. Formal constitutional amendment in the U.S. system, as in many other federal systems, requires a supermajority assembled several different ways. It is a process reserved for policy or institutional modifications that have already acquired widespread support. Given that support often requires experience, to grow comfortable with the idea, it is not hard to surmise why there have been so few amendments to the U.S. Constitution since its adoption.[15]

Given the difficulty of formal amendment, reinterpretation of the existing rules is the primary means of constitutional adaptation. This reinterpretation does happen in court decisions, as one's intuition would anticipate, but by the time a query reaches the courtroom, many steps in the process have already been taken.

Mutation and selection, the main adaptation mechanisms from biology, are at work in legal evolution as well.

Subsidiarity plays a key role in both mutation and selection. Subsidiarity predisposes the system toward decentralization, and with decentralized authority, more governments have an opportunity to modify existing policy, either through setting their own or by adjusting the implementation of federal policy. And the selection mechanism is the set of safeguards, the combination of formal and informal institutions that review government policy, making a determination of its appropriateness. Although the role played by subsidiarity is less intuitive in this part of the adaptive process, it is no less important than with mutation or policy innovation. In the next two sections I describe the assistance that subsidiarity provides in both innovation and selection, thereby contributing to adaptive efficiency of the federal system.

3. Policy Subsidiarity

Policy subsidiarity, where policy authority is set at the lowest competent level of government, is conventionally justified for two reasons: it provides the opportunity to satisfy locally divergent preferences, and it promotes efficient government. Policy subsidiarity lets locally diverse populations devise policy that fits their own, specialized preferences. Tiebout explains how it also puts governments in competition with one another, as citizens can move around a region, "shopping" for a government that best matches their needs.[16] The mobile voter puts governments in competition with one another, motivating them to provide services most efficiently, at lower (tax) cost to the residents.

Both justifications are commonly invoked and intuitively appealing. However, when combined—and they quite regularly appear in the same sentence—they present a paradox: they work against one another. In order to promote efficiency, the local governments must be in direct competition with one another for mobile voters, firms, and capital, and therefore must be substitutes, fully comparable in every dimension, like gas stations or fruit vendors, competing on price. But the lack of differentiation means that they are not catering toward particular categories of voters or capital. The more that governments specialize by offering distinct

services—satisfying divergent preferences—the less that competitive forces drive them toward efficiency.

Sidestepping the contradiction of the two conventional justifications, here I offer a third claim: policy subsidiarity promotes adaptive efficiency. In order to adapt, systems must learn more about their environment, generally through experimental mutation. However, too much experimentation or pursuit of new information can be inefficient when the system fails to use existing information. With adaptive efficiency, the system balances regularity with experimentation, whether the application is machine learning,[17] phenotypical consistency in biology,[18] or standard operating procedures in organizational culture.[19] Given that a system cannot simultaneously exploit current best practice and conduct trials of new practices designed to reduce the error in existing practice, a robust adaptive system will have an internal regulator that allocates some energy to maintaining regularity while some subset of the system conducts trials.

In addition to dedicating energy to exploration, the system will seek *diverse* new information. The more diverse the experimentation, the more likely the system will encounter a modification that improves it. This insight was first articulated by evolutionary theorist R. A. Fisher, who noted that the "rate of increase in fitness of any organism at any time is equal to its genetic variance in fitness at that time."[20] This claim, known as Fisher's fundamental theorem, suggests that biological organisms depend on genetic variation to survive complex environments. In social systems, the more a system is able to incorporate diverse ideas, the more likely it is to discover better solutions to problems.[21]

The structural features of federal systems are ideally suited to meet both criteria of adaptive efficiency. Experimentation is a useful way to explore the policy space, to determine whether any change to the distribution of authority might be welfare-enhancing. Rather than a single government modifying its policy, if policy is decentralized, then some governments may continue with established practice while others experiment. And rather than conduct single experiments, the variety of states and municipalities guarantees that different policies will be tried. Subsidiarity is the catalyst that boosts the likelihood of this experimentation: it is Brandeis's vision of the states as policy laboratories.[22]

Experimentation can take several forms. In the first instance, it is the creation of new laws or programs. When a problem is new, these proposals represent an initial solution, for example, municipality-sponsored Internet access or creation of the Department of Homeland Security in response to domestic acts of terrorism. Experimentation also comes with a novel approach to an old problem, such as a bag tax for plastic bags in an effort to reduce roadside waste, or charging in-state tuition to undocumented immigrants. Experimentation can come from tweaking existing policies: raising expectations on standardized tests in Michigan, or California, in its perennial battle against smog, requiring that a percentage of vehicles sold be zero emission. Nearly all new legislation explores the policy space. Even if a state adopts another state's legislation in full, the second state's distinct context means that society learns something new about the effect of policy as it moves to a new environment.

Experimentation also comes during implementation because the agency charged with executing the law may interpret the law differently from other agencies, including having different standards for enforcement. The state agencies that enforce the Environmental Protection Agency's standards notoriously differ significantly in the extent to which they search for violations, and even in the extent to which they prosecute violations once identified. When authority is shared between national and state governments, states have many opportunities to put their own imprint on federal legislation, and those distinct imprints become experimentation.

Some of this experimentation occurs within the existing distribution of authority, but some of it pushes against existing understandings of the national/state balance. To improve access to health insurance, Congress introduced two innovations: require everyone (with some exceptions) to carry insurance, and set a common floor for Medicaid eligibility thresholds. Both innovations represent a shift in the national/state balance. In another example, to address the policing challenges created by the presence of undocumented residents, Arizona rewrote its police procedures in a way that claims responsibility for immigration policy. While not every experiment will stand scrutiny—that is the subject of the next section—this pressing against the boundaries tests the existing balance of responsibilities.

Policy subsidiarity's role in promoting experimentation is straightforward. It tips the scale of responsibility toward the states and localities. It gives them more opportunities to experiment and also gives them a pass to wander into new policy domains, so that they need less justification for experimentation. In a federal system, policy experimentation can be judged both horizontally, comparing one state's policy to another, and also vertically, where the state and the federal government may compete in the same policy space with rival proposals. By preferencing decentralization, experimentation is far more likely, and more likely to be useful.

4. Safeguard Subsidiarity

Safeguard subsidiarity is as unknown to scholars of federalism as policy subsidiarity is familiar. With *safeguard subsidiarity*, the network of institutions that review the constitutionality of policies is as decentralized as feasible. Given that this concept is less familiar, I divide this section into three subsections. I first review the theory of federal safeguards, then describe the theory of complementary safeguards, where safeguards are not independent contributors to federal robustness but instead are interdependent.[23] Finally, I describe how subsidiarity augments the performance of the system of safeguards.

Safeguards as Selection Mechanisms

While broad experimentation is useful, any ultimate alteration to the distribution of authority between federal and state governments should not happen randomly. It is far too likely that the collective action problems inherent to the federal union will lead to more harmful changes than beneficial ones. With policy subsidiarity, one might be concerned that federations would overinnovate, to the detriment of the union. To regulate authority migration, federations have a system of safeguards.

All adaptive processes require a selection mechanism to maintain system efficiency.[24] In biology there are many different selection mechanisms, ranging from incompatibility with life to interspecies competition. One biological analogy that fits constitutional evolution well is the immune system. Consider what the immune

system must do. It is entirely a part of an organism; its own survival, if you will, is dependent upon the survival of its host. No part of it is external to the system (here we set aside vitamin pills and antibiotics!). Upon encountering a foreign matter in the system that it hasn't seen before—some new protein in the blood—it must decide whether this is friend or foe. It doesn't have a consciousness, obviously, and so is not acting rationally or deliberately. Instead, it first responds nonspecifically, with the innate immune response, including fever and inflammation. Jawed vertebrates have a more complex, layered immune system, including an ability to adapt an antibody to lock on to the new matter, neutralizing it, so that the blood and organs can flush it out of the system innocuously. With acquired immunity, beneficial proteins are accepted and absorbed while harmful ones are flushed out. Memory cells retain the adapted antibodies, so that the next time the system encounters the same pathogen, it responds quickly, preventing disease. The system is self-regulating.

Constitutions have an immune system equivalent: safeguarding institutions designed to monitor and constrain the government from actions that run contrary to the goals of society. Intuitively, when one thinks of a regulatory mechanism—about interpreting and upholding the constitution, the function of a safeguard—one thinks of the judiciary. The court system hears disputes and renders judgments; at its highest level, the constitutional court deliberately reviews governmental action against the constitution to determine acceptability. It is this overt act of constitutional review, combined with the court's power to annul a legislative act outright, that makes the judiciary the conspicuous safeguard.

Despite its salience, the judiciary is far from the federal system's sole defense. Many other safeguards operate in a constitutional system. Madison praised the structural safeguards: the checks and balances of the fragmented and interdependent national government, as well as the incorporation of the states into the federal decision-making apparatus;[25] Wechsler highlighted state incorporation as well as the informal network of lobbyists and state representatives that pressed state interests at the national level (he called these political safeguards).[26] An integrated party system creates a political reliance between elected officials at the state and national levels.[27] And the state agencies, armed with their charge

of executing national law, sometimes actively resist implementation,[28] but more often simply use their discretion to suit their own capacities and interests, or assert their interests effectively in negotiating authority.[29] Finally, the public, through a cultural sense of balance between the levels, approves or disapproves of governmental action.[30]

In light of these alternative safeguards, it is not clear that the judiciary even ranks as the federation's primary regulatory mechanism. In terms of chronology, the judiciary is nearly always one of the later safeguards to act, simply because of the way that the judiciary is structured. In many constitutional systems, including the United States, the court will not engage a question of law until one party has sustained an injury. In some constitutional systems, such as Canada, a government may refer a question of law to the supreme court prior to the law's adoption, but the reference is exceptional. As a matter of routine, judicial review is subsequent to other safeguards permitting the action or being insufficiently powerful to check it.

Despite their variety of forms, each of these safeguards behaves as a selection mechanism: it draws its own line defining (constitutionally) acceptable practice—often, this line is implicit and unannounced (and in most cases, is not a conscious determination by the safeguard). It makes an observation about the policy or practice, and it renders a judgment, comparing its threshold and its observation. Protection is also about interpretation, not just about defending the boundary but about drawing it. If the observation fails the safeguard's standards of acceptability, it punishes in whatever manner it can. Structural safeguards vote against a law; political safeguards use their political networks within the party organization to counter the proposed legislation; the judiciary strikes down the law. Acting in its own way, each safeguard is a component of the federation's regulatory system, halting destructive practices while allowing beneficial experimentation.

Complementary Safeguards

It is one thing to identify different safeguards of federalism and quite another to consider how they fit together. Just as the heart is an essential but interdependent part of the human organ system,

or the pistons are part of an engine, while each component might be physically separable from other parts of the system, each could not function without the other components. If one is interested in system-level properties—rather than asking how steady a heartbeat is or how efficiently a piston fires, but instead how healthy the person is or how fast a car goes—then one must consider the components together.

System effects characterize the way that the components interact to generate positive or negative feedback. Given the collective action dilemma inherent to federations,[31] the union will tend to generate negative externalities. Whether or not the federation surmounts that tendency—whether the states make one another better off rather than worse off—depends upon the effectiveness of federalism's subsystem of safeguards. We can ask: Under what conditions are the components of the federal regulatory system likely to generate positive feedbacks for one another? That is, what makes them *complementary*?[32]

The key insight in the hunt for complementarity is that there is no such thing as a perfect safeguard. "Perfection" in constitutional review is ill-defined. One might strive for an ideal type of safeguard, one that always identifies the true meaning of the constitution. But constitutional truth is subject to interpretation, and despite admirable efforts to deduce it, the fact remains that multiple interpretations of its meaning persist. Rather than wander into the path of the friends or foes of a living constitution, this essay takes a different turn. Complementarity matters because no safeguard on its own is sufficient. Each safeguard is incomplete, and each is an imperfect monitor.

Completeness refers to any one safeguard's ability to regulate all governments within the federation, and all actions that each government might take. Most discussions of subsidiarity seem uniquely concerned that the federal government might encroach on state domain. But given that subsidiarity recommends decentralization to the lowest *competent* government, states can assert themselves inappropriately as well. In order for a safeguard to be effective, it must be able to end noncompliant behavior (and, preferably, to be able to preempt most unproductive, noncompliant behavior just by its presence). The implication is that the safeguard must be deemed legitimate by all parties.

In considering whether a court, for example, is a complete safeguard, one must then ask whether its judgments carry sufficient weight that every government within the federation will respect its decisions and cease their challenged policies. In the American system, the Supreme Court has carved out a position of significant legitimacy and the stature to be able to review the constitutionality of federal and state action, largely by remaining in sync with the public.[33] One hypothesis of how the Court built its federalism legitimacy is that in the early days it focused its constitutional review authority on state actions. Over time, the public grew accustomed to its review power, and it was able to exercise its authority against the national government.[34] In Canada, the story is different. The Canadian Supreme Court has always been viewed with deep suspicion by the provinces.[35] It is an incomplete safeguard: it has a harder time maintaining its legitimacy—its authority base—while striking down provincial law.

Imperfection, in contrast, focuses on procedural deficiencies: judgments skewed by infidelity in the different sources of evidence lead some safeguards to consider dimensions that other safeguards ignore, and inflections in the structure of the decision-making process or the influence of private motivations that cause two safeguards to read the same evidence differently. In this positive sense no safeguard is perfect. No safeguard views the whole of any dispute.

One way that safeguards are imperfect is in the neutrality of the evidence they hear. In standard political economy models with imperfect information, the signal—for us, the safeguard's read of the public policy—is noisy. There is an imperfect correspondence between the true message and the way that it is received. However, in standard political economy models, the noise is not related to the observer, just as the diffusion of light is not affected by one's eyes taking it in. The distortion is generated by the informational source, such as an ambiguously written legislative text.

A different way of thinking about noisy signals is to recognize that each observer has her own perspective which can distort that signal, just as myopic lenses affect the clarity of one's view. This alternative model of imperfect information, *interpretive signals theory*,[36] returns the modeler's attention back to the subject who is making the observation. Different agents would perceive

different implications of the same law not (solely) because of the law's inherent ambiguity but because each agent has characteristics that shape the way it reads the law. In the federal system, each safeguard looks at different evidence or views the same evidence through different criteria—sometimes political expedience, sometimes policy efficiency, sometimes legal reasoning. The safeguards are diverse in procedure, diverse in evidence considered, diverse in interests, and diverse in the threshold they draw between acceptable and unacceptable practice.

A second source of imperfection relates to the high dimensionality of public policies. Each safeguard may observe (or pay attention to) only a subset of a policy's attributes. If the safeguards pay attention to different attributes, then the more diverse the safeguards, the more likely that, as a system, the safeguards will take all attributes into consideration when judging the acceptability of a policy. This form of imperfection is different from the first in that the uncertainty does not come from distortion but instead from any one safeguard's limited view. With both sources of imperfection the result is the same: different safeguards will tolerate different practices.

This final point—that different safeguards would tolerate different policies—would seem to be a violation of the essential foundation of the rule of law, which calls for a consistent interpretation of the law, objectively applied. Given that each safeguard is flawed, one might ask: Why compound the problem with multiple safeguards?

Multiple safeguards are better than one when they fail for different reasons. Failure—accepting harmful new policies or rejecting beneficial ones—results from errors in judgment, and errors, applying the interpretive signals theory, are a product of an agent's perspective. Therefore, different perspectives lead to different sources of failure. If no safeguard has the final word, but several have an opportunity to review new policy, then the safeguards operate as a system. The more uncorrelated their errors—meaning the more uncorrelated their perspectives—the less likely it is that the safeguards, as a collective, will fail. Complementary safeguards are diverse.

No single safeguard is sufficient. Each is limited in its reach, whether culturally, politically, or legally, and each has a biased

view of the evidence regarding a policy's constitutionality. Effective, flexible maintenance of the boundaries of federalism cannot rely on any one safeguard, whether it be the court or the party system. Instead, robust federations rely on a system of safeguards, and the more diverse the safeguards, the more they complement one another. Each is imperfect, but because they are diversely imperfect—flawed in different ways—the system as a whole is more perfect.

Subsidiarity Multiplies Perspectives

With the theory of complementary safeguards in hand, and paying particular attention to the multiplicity of perspectives, we are now prepared to consider what effect subsidiarity has on federal system robustness. In the system of safeguards, subsidiarity will be valuable if it increases the complementarity between the safeguards. One intuitive contribution is that it improves monitoring. I am skeptical. In this subsection I will lay out a different case for subsidiarity: safeguard subsidiarity affects both the organizational structure and the personnel within it, and both effects will diversify the safeguards.

The conventional defense of subsidiarity is that decentralizing policy making reduces the costs of monitoring. A safeguard depends upon the quality and completeness of its information in order to make good judgments about the acceptability of governmental actions. It is commonly understood that, as monitoring costs increase, the performance of a regulatory system decreases. Small-scale organizations generally are able to induce more collective action because the agents all know one another and can directly observe whether one is shirking. In addition to knowing whether one's neighbor is pulling his weight, members of small-scale organizations know one another well enough to be able to be flexible when someone fails to meet expected effort—for example, because of trouble at home, or because of effort elsewhere, say through volunteering.[37] Impersonal organizations lack this knowledge and must make up for it through formal institutions. Optimal institutional design changes with scale because of the difference in information available.

Given the usefulness of personal information, it seems intuitive

that subsidiarity, with its tendency toward decentralization, would improve monitoring by capturing local knowledge. The logic is right, but the empirical evidence is thin. The necessary smallness of scale turns out to be really small. As soon as scale expands to a community of strangers—which certainly is true by the time you hit the typical middle-sized town, such as Ann Arbor, Michigan—direct monitoring is unavailable, and the reach of personal networks is stretched thin.

Whether or not subsidiarity improves the safeguards' monitoring capacity, it bolsters the robustness of the system by multiplying the safeguards' perspectives. Recall that in a robust regulatory system the different components must fail for different reasons. Think again about the chronology. By the time the court hears a case, the policy has already been accepted by many other safeguards. If the system is to avoid the type I error—accepting what it should reject—the safeguards that precede the court should focus on different aspects of a policy so that the errors are not correlated. To diversify these perspectives, an application of the principle of subsidiarity to the design of the federal system of safeguards operates on two dimensions: the organizational structure and the personnel who staff the safeguards.

Where policy subsidiarity decentralizes responsibilities to lower levels of government, safeguard subsidiarity decentralizes the forum for judging policy. Each component—the judiciary, the party system, and so forth—will have a hierarchical structure with the potential to decentralize decisions to lower levels. The U.S. federal system displays two good examples of safeguard subsidiarity in the organizational structure of its judicial and political safeguards. The judiciary is divided into two nearly independent systems: the state and the federal judiciary. Only at the highest appellate level are the two formally joined, and within the system, policy subsidiarity augments the status of state decisions, bleeding over into safeguard subsidiarity. Within the federal judiciary, the district courts are grouped into distinct appellate circuits. One might imagine any number of ways to organize the appellate circuits, from specialization by legal domain to a random assignment to balance dockets. Both would be designed with efficiency in mind. Instead, the appellate courts are organized geographically, a structural choice dating back to a time when judges would ride circuit, hearing

cases throughout a territory defined by their horses' reach. This organizational form, privileging geospatial relationships, is true to the principles of subsidiarity. Whether its origins are calculated or serendipitous, this decentralization provides an opportunity for diverse interpretations to emerge through distinct legal cultures. Their coexistence offers a natural experiment of sorts, at least until the Supreme Court steps in to resolve inconsistencies.

Although less formally structured, the hierarchy within the American party system provides the same advantages. Local party organizations strike their own sets of priorities; at party conventions these separate policy priorities get aggregated. Sometimes the aggregation is a mere discovery of the national party median, but quite often national party platforms are an amalgamation of interests, manifestations of the vote trading that typifies political compromises.

Subsidiarity can also affect the staffing of the safeguards. Even though the institutions are structured differently, if they are all staffed by like-minded people they are far less likely to arrive at different conclusions. If all were raised by upper-middle-class Democrats in established suburbs and attended Yale Law School before going into public service—a very common public servant's CV—the similarity of their shared experiences and education makes it likely that they will arrive at the same conclusion about evidence. If all were taught the same interpretation of the Constitution during their time at Yale, then they all become more likely to draw identical conclusions about the acceptability of new state policy governing citizen rights. The similar mind-set of these public servants reduces the institutional diversity of the safeguards.

Safeguard subsidiarity contradicts this potential flaw. In the U.S. system, safeguard subsidiarity influences the staffing of safeguards in several ways. In the judiciary, local and state judicial appointments and elections are largely free of national political influence. Appointments to the federal courts, although nominally in the president's hands, display deference to local and state interests through norms such as senatorial courtesy: the president seeks the advice of the state's senior senator when making appointments to the appellate bench or for U.S. attorney. The political safeguards are diversified by the sheer number of local elections, which drives up the need for local political organizers with local

knowledge. Rather than hiring a local campaign manager based upon the generic "quality" of her degree from a nationally ranked university, she is valued because she knows whom to call, which local clubs are politically active, and where to send volunteers to knock on doors. In these cases, the influence of local interests shapes the perspectives of those who do the "judging" within the safeguards, determining what is an acceptable policy. We might also remark one change to the safeguards that arguably reduced diversity: the Seventeenth Amendment. By taking the appointment of senators out of the hands of state legislatures and giving them to the state's public to elect, the national party organization has a much greater opportunity to shape outcomes by financing its preferred candidates.

Federal systems have multiple safeguards: judicial, political, structural, and popular. Each is imperfect. If they complement one another through their diversity, the system is more robust; it is less vulnerable to the failures of any one safeguard. It permits more mild experimentation while being more likely to catch destructive deviations. Safeguard subsidiarity improves their complementarity by further ensuring their diversity both through the organizational structure and in the people who staff the safeguards.

5. Discussion

In beautiful phrasing from Calabresi and Bickford, in allocating authority optimally between the two levels of government in a federation, we seek "a golden mean,"[38] a phrase that invites a vision of a sublime proportionality, a natural aesthetic for the relative jurisdictions of each level. A golden mean is also a fixed ratio, and so if we take the phrase literally, a static balance could be the doom of a federal system. Instead, a robust federation must adapt, which means that the balance between national and state governments may change over time. Subsidiarity is a catalyst for that change, empowering many more governments to explore the policy space to devise improvements to the balance, in both exclusive and shared authorities.

A presumption of subsidiarity bolsters the robustness of a federal system. Federalism can help a society achieve particular goals related to the economy, security, or representation, and the distri-

bution of authority between the national and state governments is the instrument that federalism offers. This distribution of shared and exclusive authorities is protected by a system of formal and informal safeguards, from the judiciary to the political culture. Over time, the distribution will need adjustment to fit a changing political, economic, or social environment, raising the essential question for federal constitutional design: How can a system of safeguards be both rigorous and flexible?

In this chapter, I laid out the case for subsidiarity's contribution to federal robustness. Federations must adapt to remain efficient, and subsidiarity contributes to two key aspects of adaptation: experimentation and selection. One of the key positive arguments for subsidiarity is that local governments can experiment; competitive pressures will lead all governments toward efficiency. Without a doubt, subsidiarity enhances such horizontal experimentation as it generates a tendency toward decentralization, necessary for horizontal experimentation. But neglected in the subsidiarity literature is the importance of vertical experimentation.

Vertical experimentation is the tug between the national and state governments for authority (or, less often, attempts to skirt responsibilities). Given that federal constitutions tend to tolerate a lot of shared authority, much experimentation occurs without changing the legal definition of the federal boundaries. States exercise more or less of their discretion, and the national government opens and preemption boxes in state action. Sometimes this experimentation with the boundaries of federalism captures the attention of the judiciary, and when it does, it can transform the federation. Far more often it is the normal stuff of policy making in a federation. Nonetheless, it is important experimentation and could not be possible without the decentralization that subsidiarity tends to bring.

Subsidiarity also boosts the second ingredient in federal adaptation: the selection process. Like a stretchy rubber band, the safeguards can accommodate significant experimentation, but at some point—not always predictable—they will reach their limit and disallow the changes to the federal distribution of authority. The Supreme Court's recent decision to strike down the portion of the Affordable Care Act that mandated a minimal eligibility threshold for state participation in Medicaid was one (unforeseen) example

of national government action pushing the boundaries too far.[39] I develop the theory of multiple and complementary safeguards elsewhere,[40] but here, I describe how subsidiarity contributes to that system.

In the federal political system, information about the usefulness of policy change comes from every agent who voices support or dissent. Drawing on Fisher, the experimentation ought to be diverse if the space of policy options is to be fully explored. The components of the federal system are diverse—with distinct interests, as with each state—but also with distinct perspectives. Sometimes that diversity is created through informational filters: the supreme court learns differently from agents in the political arena because of the rules defining what evidence it might consider. While these diverse entities experiment and judge that experimentation, a public dialogue emerges.

A robust system of safeguards will carry a plurality of perspectives to maximize the amount of information considered by the safeguards in judging governmental policy. Not only are the safeguards, whether judicial, political, popular, structural, or intergovernmental, diverse due to their structure, but aided by subsidiarity, they are diversified in composition as well. With elections, nominations, and appointments rising up from the lowest levels of government, the polity maximizes the potential that the safeguards are staffed by people with diverse experiences, who would be more likely to see distinct aspects of the same case. Judging the appropriateness of legislative or executive action—whether literally as a jurist, or figuratively as a partisan or a voter—is akin to solving a problem by a team; the aggregate judgment is the group's determination of the optimality of constitutional adjustment. Diverse teams can be better problem solvers.[41] This perspective diversity is most likely with subsidiarity. Subsidiarity does not just protect diverse interests; it protects diverse safeguards.

Subsidiarity is often praised for instantiating a toleration of difference. It is related to the European legal definition of the "margin of appreciation": some constituent units will have a different policy, and those differences will be tolerated, even if they are in tension with prevailing norms. Subsidiarity is not necessary for this toleration of difference. Given the inherent imperfection of federalism's system of safeguards, perfect compliance is not possible.

With the margin of appreciation doctrine, one safeguard—here, a court—determines the standard as well as the acceptable margin. In the end, the result is the same: it is a single line drawn by a single referee; it just happens to be drawn more thickly, so that it tolerates different practices in different places.

The contribution of subsidiarity to federal system robustness is not only differences in practices but also different ideas about what practice is acceptable. It diversifies not only policy experimentation but also the judgments by the safeguards, at least within a moderate band of experimentation. If the lower levels of government experiment, and if they have a role in staffing the various safeguards of federalism—both made more likely with subsidiarity—then the constitutional rules evolve not through central planning and formal amendment but more often through a bottom-up process of experimentation and acceptance. Rather than a single safeguard (or multiple safeguards with identical perspectives) proclaiming what deviations are acceptable, there is a possibility of disagreement between the safeguards. With disagreement can come dialogue, a citizenry engaged in consideration of constitutional adaptation. What subsidiarity-weighted federalism brings is not the "toleration of difference"—that is always present—but *different* tolerances.

NOTES

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19. James G. March, "Exploration and Exploitation in Organizational Learning," *Organization Science* 2 (1991): 71–87.

20. Fisher, *The Genetical Theory of Natural Selection.*

21. Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (Princeton, NJ: Princeton University Press, 2007); Scott E. Page, *Diversity and Complexity* (Princeton, NJ: Princeton University Press, 2011).

22. Justice Brandeis makes this argument in dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). Kollman, Miller, and Page derive conditions where decentralization is preferable to centralized policy making in solving difficult problems; Ken Kollman, John H. Miller, and Scott E. Page, "Decentralization and the Search for Policy Solutions," *Journal of Law, Economics, and Organization* 16 (2000): 102–28. The benefits of decentralization increase and then decrease as problem difficulty increases. They consider only a fixed environment. With a dynamic, complex environment, such as considered in this essay, and a cost for policy modification, decentralization will be beneficial for a greater range of the policy environment.

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24. Robert Axelrod and Michael D. Cohen, *Harnessing Complexity* (New York: Basic Books, 2000).

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27. Mikhail Fillipov, Peter C. Ordeshook, and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (New York: Cambridge University Press, 2004).

28. Jessica Bulman-Pozen and Heather K. Gerken, "Uncooperative Federalism," *Yale Law Journal* 118 (2009): 1256.

29. Erin Ryan, "Negotiating Federalism," *Boston College Law Review* 52 (2011): 1–136; Erin Ryan, *Federalism and the Tug of War Within* (New York: Oxford University Press, 2012).

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37. Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1990).

38. Calabresi and Bickford, "Federalism and Subsidiarity."

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PART III

THE ENTRENCHMENT OF LOCAL AND PROVINCIAL AUTONOMY, INTEGRITY, AND PARTICIPATION

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9

CITIES AND FEDERALISM

DANIEL WEINSTOCK

1. Introduction

In most countries, cities are constitutional nonentities.[1] That is, they exist at the pleasure of political entities that do have constitutional standing, be they substate entities like provinces, länder, or U.S. states, or sovereign states. Their boundaries can be redrawn at will, and what powers they hold are entrusted to them by the political entities upon which their existence depends.

Coincidentally or not, cities have largely been ignored by political philosophers. Normative theorizing about cities in recent decades has been left up to sociologists,[2] legal scholars,[3] political scientists,[4] geographers,[5] and planners.[6]

These are both surprising facts. After all, the this-worldly realization of many of the values about which political philosophers have written at great length depends upon the way in which cities are organized. Conclusions about how to organize cities so as to realize these values can moreover not simply be inferred from the abstract arguments that they have tended to engage in. Yet, as can plainly be seen from the work of those few political philosophers who have attempted to connect abstract theorizing with questions of urban policy, applying the abstract conclusions of political philosophy to urban policy contexts is not merely an administrative exercise. Difficult and fascinating philosophical questions emerge in the application process.[7]

The relative political weakness of cities might also come as something of a surprise given that, first, more and more of the world's population inhabits cities, and that trend shows no signs of abating, and second, decisions about the functioning of cities arguably make more of a difference to the everyday lives of urban dwellers than do decisions made at the level of the province or the state.

There are signs that political philosophers are slowly beginning to rise to the challenge of addressing the normative challenges that are posed at the level of the city. For example, theorists such as Clarissa Hayward have sought to unearth the challenges posed for the realization of principles of equality by zoning decisions at the level of cities that may at first glance seem innocuous.[8] Iris Marion Young offered sustained reflection on the distinctive goods realized in city life.[9] Thad Williamson has interrogated the phenomenon of urban sprawl by applying dominant theories of justice to it.[10] Rainer Bauböck has suggested normatively attractive reforms that might give real substance to the notion of urban citizenship.[11]

Surprisingly, none of these theorists have asked what would at first glance appear to be a more philosophically primitive question to do with the status of the city as a political entity. What kind of thing is the city, from the point of view of political philosophy and of the categories and concepts that it has made familiar to us in thinking about nation-states? Is the relative neglect of cities, both constitutionally and in the works of political philosophers, an oversight, one that should be corrected if political philosophy is to speak meaningfully to the political problems faced by modern humans? Or do cities simply lack some of the features that political entities should have in order to "count," constitutionally speaking?

It is to this range of questions that I will devote this chapter. I want to make at least plausible the suggestion that cities should possess greater constitutional standing than they presently do. More specifically, I will argue that theories of federalism, and federal arrangements in the real world, ought to include them. Whether we view federalism as motivated by considerations to do with subsidiarity, or by a concern with collective self-determination, I will argue that cities possess properties that qualify them for inclusion within federal arrangements.

I will proceed as follows. The first two sections will engage in some needed conceptual ground clearing. I will first suggest that

considerations of subsidiarity and of self-determination represent alternative rather than complementary grounds for federalism, in ways that render the task of showing how cities might fit into federal arrangements more complex than might seem at first glance. I will then make some brief remarks about what falls within the extension of the term "city." The substance of the argument will then be developed in the following two sections, which will show, first, why federations governed by a concern with subsidiarity ought to include cities, and second, why even federations construed as bringing together self-determining collective agents should also make space, both conceptual and practical, for cities. A final section will make some preliminary responses to anticipated objections.

2. Subsidiarity and Self-Determination

I want to begin by noting a tension between two ways in which federal arrangements can be justified. The first appeals to the notion of subsidiarity, while the second is grounded in the concept of self-determination.

Defenders of the idea of subsidiarity view federations as nested structures in which jurisdictional levels fit neatly into one another. According to this conception, provinces, länder, and states are wholly encompassed by a larger political structure (typically, a federal state), which may itself be nested within a larger transnational structure (such as the European Union). Subsidiarity obtains when political and economic functions are performed by the "lowest" feasible level. In Andreas Føllesdal's terms, "[T]he 'principle of subsidiarity' regulates authority within a political order, directing that powers or tasks should rest with the lower-level sub-units of that order unless allocating them to a higher level central unit would ensure higher comparative efficiency or effectiveness in achieving them."[12]

It is important for present purposes to note that, as defined, subsidiarity is a rule rather than a principle. That is, it tells us how power should be organized within a federal arrangement. It tells us nothing of why power should be distributed in such a way as to satisfy the subsidiarity rule. As Føllesdal points out, subsidiarity has historically been justified in a variety of ways. For some,

subsidiarity is the best way in which to ensure individual liberty, given the hypothesis that the potential of "local" powers to abuse their authority is more easily checked than is the analogous potential of more "distant" powers. For others, there are democratic reasons to favor federal structures governed by the principle of subsidiarity. According to this line of justification, citizen involvement and democratic virtue are more likely to be elicited by political structures that bring people who identify with one another into deliberation over issues of local interest. Efficiency might also be invoked by defenders of subsidiarity, as might some version of the "all affected principle," according to which the democratic say that individuals have in a political decision-making process ought to be proportionate to the degree to which they are affected by the outcome.[13]

Might the value of self-determination be one possible justification of subsidiarity arrangements? After all, subsidiarity would seem at first glance to allow all manner of political community to exercise some degree of meaningful control over their affairs while also enjoying the benefits that result from being part of a larger political entity. Surely it is a good thing that political communities be able to reconcile the desiderata that are realized by, on the one hand, being able to determine the manner in which certain issues are handled within a community, while at the same time taking part in the ways in which decisions get made at some more politically encompassing decision-making level.

Despite these first appearances, I do not think that self-determination can function as a justificatory principle in quite the same way as the other values invoked earlier. First, the claim to self-determination of a group itself stands in need of justification. Groups are granted the right to some degree of self-determination in virtue of certain features that they possess. Simply claiming self-determination may be a necessary condition of actually exercising self-determination, but it is not sufficient. According to what I take to be the most plausible theory of self-determination, the distribution of self-determination rights to certain groups is answerable to certain more primitive values that have to do, ultimately, with individual well-being.[14] That is, a distribution of self-determination rights is superior to another not because it better satisfies people's preferences for self-determination but because it better realizes

a larger range of individual preferences and interests. (I hasten to add that the preference as to how self-determination rights are apportioned is among the components of individual well-being to which the distribution is ultimately answerable.)

Second, and more important, when a group possesses self-determination, it not only possesses the right to exercise control over certain specific, predetermined issues. It also has some degree of say over the determination of the range of issues over which it will have jurisdiction. And the right to self-determination implies that a self-determining political entity will not necessarily exercise its rights in a manner that will satisfy the subsidiarity principle.[15]

Let me put the matter another way. Once it has been decided that the best way to organize a federation is through the implementation of subsidiarity, it follows that there is always at least in theory a correct answer to the question of where a given power should be vested, and that correct answer is independent of the collective will of self-determining entities. Now, groups joined together in a federation may decide, as an exercise of their power of self-determination, to employ the principle of subsidiarity to order their affairs. But that does not defeat my point, which is that giving ultimate authority to the principle of subsidiarity undercuts the principle of self-determination, rather than strengthening it. Subsidiarity requires that the optimal balance be struck between, on the one hand, the realization of whatever value is taken to justify subsidiarity to begin with and, on the other, considerations of effectiveness. The exact point at which that balance should be struck might be controversial, but those who adopt the rule of subsidiarity approach whatever controversies there are with the assumption that there is a right answer as to where the balance should lie, and that the right answer properly constrains the arbitrary will of any party to the controversy.

Groups that exercise self-determination are not constrained by rules such as subsidiarity. As mentioned earlier, they may choose to submit themselves to such a rule, but they need not. Clearly, the exercise of self-determination rights is not completely unconstrained. Human rights, both of the citizens included within the jurisdiction of a political entity exercising self-determination and of those who lie outside of it but who are affected by its actions, represent one normative constraint on the actions of self-determining

political entities. But such entities will moreover find themselves interacting with other such entities in political space, and they will find themselves being constrained as a result of that reality—by the greater power of some, by the requirements of productive cooperation with others. Self-determining groups are analogous to rights-bearing individuals. While there is a minimal morality that can be imposed as a constraint on all such agents, and while they will willingly take on myriad other constraints in the daily negotiations, trivial and momentous, that they unavoidably engage in, part of what it means to have rights is that one will be able to use them imprudently, rashly, self-defeatingly.

If subsidiarity is like a rule of prudence applied to collective agents, it follows from what has just been said that a self-determining agent need not adopt it. What's more, federal arrangements that impose it in so doing reject the idea that constituent members should exercise self-determination. (This is true both for the conceptual reason that has been developed here and also for the contingent reason that in practice the "largest," most encompassing political entity within a federal arrangement will very often act as the arbiter of conflicts that arise in the application of the principle of subsidiarity, both because it will often possess the power to do so and because it will be able to present itself as neutral with respect to the more "particular" political wills vested in smaller political entities.)

If this is the case, then it follows that the intuitive, vaguely stated claim with which I began, to the effect that cities ought to have greater constitutional standing, is ambiguous as between two different claims.

The subsidiarity claim: cities ought to have more powers than they presently have within federal arrangements which are governed by the rule of subsidiarity.

The self-determination claim: cities ought to be considered as self-determining collective agents within federations that bring together a number of self-determining agents.

I will be arguing that both claims are true. Before I do so, I want to make a number of prefatory remarks both about claims and about their interrelation.

First, though as I have shown, there is a tension between the rule of subsidiarity and the principle of self-determination, it is

only a tension, and not a contradiction. This is most obviously the case because self-determining collective agents can impose the rule of subsidiarity among themselves. But even in cases in which subsidiarity is not formally adopted within a federation among self-determining collective agents, it is nonetheless appropriate to reflect on what subsidiarity would require by way of distribution of powers, as subsidiarity considerations are present in the "space of reasons" that applies to self-determining agents within a federal structure. Establishing the self-determination claim therefore does not make the discussion of the subsidiarity claim otiose.

Second, there are weaker and stronger ways of construing both claims. The stronger version of both claims would be to the effect that unitary states are wrong not to adopt the rule of subsidiarity or not to grant self-determination rights to appropriate internal collective agents, and that they ought therefore to reform their constitutions accordingly. The weaker claim is to the effect that states that already recognize the rule of subsidiarity, or that already accommodate the principle of self-determination, ought to extend the reach of that rule and principle to encompass cities. The stronger claim would be foundationalist in nature, while the weaker one would be a consistency argument, applying to political agents that already accept the legitimacy of the relevant principles. For the purposes of this chapter, I will only be attempting to defend the weaker version of both principles. That is, I will not be defending the appropriateness of adopting the rule of subsidiarity, nor will I be arguing for the principle of self-determination. Rather, I will be arguing that states that already incorporate one or the other should on pain of arbitrariness apply them to cities.

Third, the scope of the two principles need not be the same. For a collective agent to be included in a subsidiarity arrangement, what is required is that its inclusion serve the realization of whatever value or set of values justifies the setting up of a rule of subsidiarity, and that it possess whatever institutional capacity is required in order to perform the task or exercise the power that has been ascribed to it within the federal arrangement. For a collective agent to be included within a federal arrangement among self-determining agents, what is required is that it possess whatever property or properties justify the ascription of self-determination rights to collective agents. The sets made up by the groups that

satisfy these two criteria are intentionally distinct. There is no a priori reason to think that membership in one set logically implies membership in the other. It is difficult to imagine that a collective agent could satisfy the criteria for self-determination without also satisfying those for inclusion within a subsidiarity arrangement. That is, it is difficult to imagine a self-determining group to which it was never appropriate to ascribe any power within a scheme of subsidiarity. Conversely, one can easily imagine a collective agent being included in a subsidiarity scheme without being an appropriate locus of self-determination. This suggests that the set of collective agents to which self-determination potentially attaches is a proper subset of the set of agents that are appropriately included within subsidiarity arrangements. I will return to this hypothesis later.

3. What Is a City?

What exactly will I be referring to in using the term "city"? On the face of it, this might seem like a philosopher's question in the pejorative sense of that term. Presumably, all we need to do to fix the extension of the term is to advert to legal facts on the ground. According to this view, cities are those entities that are picked out by the relevant laws as cities. In order to arrive at a definition of what cities are, one would presumably look to see what the entities picked out by these laws have in common and what distinguishes them from cognate entities such as "villages." We would presumably arrive at a fairly simple definition that would make number criterial. According to such a definition, a city is an agglomeration of more than a certain number of inhabitants. Let me refer to this position as legal positivism about cities.

A positivist account of this kind would spell trouble for my project in this chapter.[16] The question I am asking—whether cities should be recognized as having a more entrenched status within the constitutions of federations—presupposes that cities exist independently of their legal instantiations. It presupposes that we can ask, for any city, whether it should be integrated constitutionally in one manner rather than another. If legal positivism about cities is correct, then the question that forms the basis of this inquiry ceases to make sense. Different legal regimes would simply

mean that we have different entities, not the same entities incorporated constitutionally in different ways.

Consider a comparison with a debate that will presumably be more familiar to political philosophers. According to a view that has gained prominence in the contemporary philosophical literature, nations exist independently of the manner in which they are incorporated. One can ask whether, for example, each nation has a prima facie claim to possessing its own fully sovereign state, or whether its self-determination rights are satisfied through federal arrangements of the appropriate kinds.[17] If legal positivism about cities were true, we could not ask analogous questions about them, since a change in constitutional regime would simply bring about new entities rather than incorporating the same entities in different ways.

The objection to the pertinence of inquiring into the best way in which constitutionally to incorporate cities based on the supposed "prepolitical" nature of nations, on the one hand, and the entirely legally constructed nature of cities, on the other, however is not convincing. To begin with, one can easily exaggerate the extent of the naturalness of nations. Nations are often the result of deliberate, institutionally mediated nation building, through which states have had to convince political subjects thrown together within the same political borders as a result of the vagaries of history that they are actually bound by something more than happenstance. Where such nation-building enterprises have been successful, it has at least in most cases been because citizens have arrived at a sense of shared identity through their partaking in shared institutions.[18] So it is possible to exaggerate the extent to which nations are "natural" and "prepolitical."

But it is also possible to exaggerate the extent to which cities are entirely the result of legal fiat. Or, more precisely, I want to suggest that there is a folk usage of the term "city" that is at odds with legal positivism about cities. Indeed, many of what people commonly think of as cities in the world today are actually made up by a crazy quilt of independent, legally defined "cities." The editors of an important recent volume titled *Justice and the American Metropolis* note, for example, that "Saint Louis" is actually made up of a large number of legally independent entities. Their (completely justified) concerns lie with the obstacles that these legal divisions

pose to the achievement of justice among communities and their members that are in fact entirely interdependent.[19] My concern here is, as it were, conceptually prior and has to do with political ontology rather than ethics. Presumably, most of those who live in these legally independent "cities" think of themselves as in some sense living in Saint Louis. Certainly, an external observer would, in observing their way of life, see a set of practices, institutions, and modes of everyday behavior that massively straddle these legal divisions rather than being largely contained within them.

What I will be referring to in the context of this chapter as "a city" refers to what I have called the "folk conception" of the city that is unproblematically available both to the citizen who says of herself that she lives in Saint Louis, irrespective of the legal facts on the ground (which may make it the case that she lives in Clayton), and to the external observer who sees an almost seamless whole where the law has established boundaries.

The conception of what a city is that I will be presupposing here cannot be captured in the terms offered by legal positivism about cities. But this should not be taken to imply what would clearly be an equally fallacious view, which would be that cities exist preinstitutionally. Cities result from a congeries of forces, many of them institutional. Transportation systems, the designation of sports teams, the reach of media, and many other forces are responsive to facts on the ground, but they also in turn create and solidify the sense that people share of belonging to the same city. What is needed in order to resist legal positivism about cities is not that cities are preinstitutional but that there is a sense of the term "city" that corresponds to ordinary usage, and according to which cities so understood are independent of the kind of institutional determinations that make the question of how cities ought to be incorporated into federal arrangements meaningless. That cities (like nations) result from the play of institutional forces does not determine their legal status, and so the question of what that status ought to be remains meaningful and pertinent.

Having disposed of the challenge posed by the position I termed "legal positivism about cities," I can now restate the question that began this section with a bit more precision. What are the main definitional features of what I have called the "folk conception" of cities?[20] Conscious of the prescription according to which

one should never seek for greater precision in definitional matters than what the subject matter allows, I suggest that there is a city where four conditions obtain to a sufficient degree. First, a city is spatially integrated. Spatial integration is typically instantiated by the presence of a dense network of commerce (where this term is understood as encompassing such technologies as communication and transportation) linking the different parts of a territory. The density exhibited by this network is considerably greater than that which is exhibited by the networks linking the territory thus specified with areas outside of it. Second, a city must be of a certain scale. A city is an agglomeration that meets a certain threshold in terms of population and area. Third, a city must exhibit a certain minimal degree of population density. Fourth, the inhabitants of a city are capable of leading—and in large proportion do—the major aspects of their lives (work, leisure, education, residence) within the confines of the city. Bringing these elements together, we can say that a city is an integrated and organized territory of a certain scale and density within which most residents lead the major aspects of their lives.

This definition in my view captures what I have termed the "folk conception" of cities fairly well. This conception looks to the manner in which space is organized, and to the way in which the people within a certain kind of space lead their lives, rather than to the way in which law establishes boundaries, in order to determine what cities there are. Admittedly, the conception is fuzzy-bounded. It does not allow us to distinguish cities from surrounding noncities with neat lines. I will argue in the final section of this chapter that this is a virtue of the account rather than a vice: cities do not end brusquely to give rise to noncities, and so any definition that made it seem as if they did would be at least in one sense faulty.

4. The Subsidiarity Claim

Let me begin to examine the justifications for the two claims that in my view underpin the city's claim to constitutional status.

The subsidiarity claim is to the effect that the application of the rule of subsidiarity should not stop, as it does in both theoretical discussions about, and in the practice of, real-world federal

arrangements, at the level of provinces, länder, U.S. states, and the like, but should extend to cities as well.

It seems clear that the values that are commonly invoked in order to justify the setting up of a rule of subsidiarity would be promoted by such an extension. Bringing decision-making authority over issues of local concern closer to the people who are directly affected by them would better realize the "all-affected principle" than would more centralized decision making, and it might have the effect of promoting the democratic engagement of citizens in public affairs, at least if philosophers such as John Stuart Mill are right in thinking that people are more motivated to take part in politics the closer at hand are the stakes under discussion and the forums where the decision making takes place.[21] To the extent that individual liberty is better protected in states marked by a multiplication of levels of partially overlapping jurisdictions rather than in unitary states, the addition of the level of the city to multilevel federal arrangements would be normatively attractive for that reason as well.

But as we have seen, subsidiarity is not just concerned with the realization of abstract moral and political values. The jurisdictional levels to which authority to decide over certain matters attach must possess properties that give us reason to think that including them in federal arrangements will be effective. What claim do cities have to being not just morally, but also practically, qualified to figure in subsidiarity schemes? What reasons do we have to think that conferring decision-making powers to them will result in effective policy making?

Obviously, part of the answer to this range of questions is irreducibly empirical. Some cities will have better political elites than others. Some will put in place better decision-making institutions and consultative practices than others. But it seems to me that there are structural features of cities that can be pointed to as qualifying them for participation in subsidiarity schemes that do not depend on such empirical considerations.

Adverting to the attempt at a definition of cities that was provided in the foregoing section, it seems clear that what marks cities off from other forms of human settlement has to do with their spatial characteristics. Cities are densely populated, integrated spaces in which citizens can—and typically do—pursue all the main as-

pects of their lives. If this is the case, then perhaps we can answer the question to do with the qualification of cities to figure in subsidiarity arrangements by considering their spatial characteristics.

I will approach this hypothesis by way of two sets of contrasts.

First, consider the way in which policy making is thought about among political philosophers focusing on the nation-state, or on political entities that in many ways mimic the nation-state in their way of construing political issues. A great deal of contemporary political philosophy has had to do with the mutual adjustment of different kinds of rights. Discussion of these issues, as fascinating and important as it often is, tends to take the form of a kind of moral geometry. How can the right to free expression be made compatible with the right of security, in cases where certain kinds of speech can be reasonably deemed threatening? How can property rights be reconciled to the existence of welfare rights? In both of these cases, and many others, philosophers proceed by defining the extension of rights in ways that show them to be more logically compatible than might have appeared at first glance, or by justifying limitations on rights that permit the values underpinning different kinds of rights to be realized to some satisfactory degree despite prima facie tensions and apparent incompatibilities.

The discussion of these complex issues, when construed as being problems for "the state," occurs in conceptual rather than in physical space. That is, thought is rarely given to the way in which rights are to be realized and embodied in the physical and institutional spaces that people inhabit.[22] This lacuna might be justified by the thought that once the hard conceptual work has been done, considerations having to do with how to embody the conclusions of this work in institutions and in physical spaces are just an administrative matter, the settling of which involves no further conceptual or ethical work. I believe that this way of imagining the division of labor in political thinking between purportedly purely "conceptual" work and the purely administrative work of implementation is mistaken, and it is in particular mistaken in the case of what might be termed "spatial implementation." The question of how to realize the results of abstract moral and political argument in spatial contexts raises new, complex normative questions that only appear when we begin to think of how to realize values in specific spatial sets of circumstances.[23]

To give just a few examples: considering how to protect women's right to security with the expressive rights of pornographers and the liberties of sex workers gives rise to the question of whether and how to zone the sex trade.[24] Abstract questions of a "right to health" give rise to considerations of spatial access to health care, and of how to balance the gains of efficiency that are according to some achieved by concentrating health care in a small number of "mega-hospitals," with considerations of equal access, where equal access is a question not just of resources but also of spatial organization.[25] Questions having to do with the most normatively attractive ways of governing a culturally and religiously diverse polity shade into questions to do with whether and how to encourage social mixing in neighborhoods and schools.[26] And so on.

Thus, many of the issues that are dealt with by political philosophers at the level of the nation-state in terms of abstract goals and orientations must be given spatial instantiation at the level of cities. If this is the case, then perhaps the answer (or, more modestly, one of the answers) to the question of why cities ought to be incorporated in subsidiarity schemes has to do with their privileged position with respect to the spatial dimensions of policy. This privileged position can be expressed in at least two ways. First, to the extent that they are more greatly impacted by decisions to do with the various ways in which a given abstractly formulated policy can be realized spatially, the "all affected principle," according to which people should have democratic say in policy decisions in the proportion that they are affected by them, suggests that the lion's share of decision-making authority over the spatial dimensions of policy should be vested in cities.

A second, and related, reason to think that cities should be vested with decision-making authority over the spatial dimensions of policy is epistemic. To make this point, let me introduce the idea of what I would term "normatively informed consequentialist reasoning" (NICR). NICR involves, first, a commitment toward viewing values as goals that need to be realized through public policy, rather than as deontic constraints upon public policy. To adopt a distinction made by Philip Pettit, it involves a commitment to "promoting" values rather than simply to honoring them.[27]

As a result of this commitment, NICR implies, second, a commitment to fact-sensitive investigation into the complex interactions

between policy and the empirical settings in which policies are implemented, with a view to identifying, for example, unintended consequences and perverse incentives that can sometimes result from an excessively "deductive" view concerning the relationship between value and policy. It involves accepting that the promotion of a value might in certain contexts best be pursued through strategies of indirection, and at times through policies that seem at first glance as if they were contrary to the value purportedly lying at the basis of the policy. For example, a defender of women's equality might (deductively) think that a commitment to that value militates for a banning of certain forms of dress that betoken a belief in the inferiority of women. A proponent of NICR who believes in the same set of values will by contrast at least be sensitive to the possibility that a more permissive attitude may over time better realize the value of women's equality because, for example, of the predictable impact that the fact of sharing social space with a diversity of other kinds of people and associated sartorial practices might have upon the commitment of religious women to certain kinds of purportedly religiously mandated attire.[28]

I would suggest that NICR is in general preferable to more deductive styles of moral reasoning. Independent of the question of whether or not it is preferable in general, I venture that it is well-nigh inevitable in the area of public policy. The very moral justification of public policy rests upon its ability to generate normatively desirable results in the real world. It can only achieve this result if it attends to the manner in which public policy ideas that may seem warranted when considered in the abstract are to be achieved given real-world constraints.[29]

A modest epistemic claim justifying the inclusion of cities in schemes of subsidiarity would be that inhabitants of cities have more direct access to facts about how to realize desirable public policy ends in the particular spatial contexts that cities represent than do others. In virtue of the experience and knowledge obtained simply by inhabiting and negotiating the specific spatial characteristics of the cities in which they live, they are better situated than outsiders to engage in fine-grained evaluation of the manner in which policy proposals will interact with the constraints and opportunities presented by these characteristics to generate normatively desirable results. According to this modest claim, city

dwellers are thus epistemically better situated than are others for the purposes of determining how spatially to realize such results.

A more ambitious claim is that urban dwellers are not just in virtue of the foregoing considerations better situated to access facts relevant to the application of policy to their particular spatial contexts, they are more motivated to do so as well. City dwellers have to bear the consequences of attempts at implementing well-meaning policies in ways that do not attend sufficiently to the spatial contexts in which they will be applied, and so, according to this hypothesis, they not only have privileged access to relevant facts but are more willing to integrate them into moral reasoning about the best ways in which to realize a given policy objective spatially. In other words, they are—at least in the specific context of policy deliberation pertaining to the cities in which they live—more likely to engage in NICR.

Now, it might be replied that this range of considerations does not pick out cities specifically for inclusion in subsidiarity schemes. After all, there are spatial dimensions to all public policy decisions, and local knowledge about the way in which these policies will interact with spatial characteristics will be useful regardless of whether or not the characteristics in question are distinctively urban. Suburban contexts (neighborhoods, boroughs, etc.) may sometimes be relevant, as may nonurban contexts.

The view I am developing here need not deny that there is prima facie plausibility to the claim that the subsidiarity principle can extend both beneath and beyond the level of the city. I see no reason in principle why a priori limitations should be set on the scope of the principle.

There may be fairly deeply rooted a posteriori reasons to do so, however. Remember that the principle of subsidiarity is grounded in a number of evaluative considerations, and it is possible that extending the reach of the principle to too great a degree might end up undercutting them rather than promoting their realization. For example, NIMBYism might be encouraged by extending the principle to the level of neighborhoods. In general there may be a threshold in terms of the fragmentation of the decision-making arena that may make it difficult for anything like a conception of the common good to emerge.

What's more, considerations of effectiveness are integral to the

principle of subsidiarity. It is possible that the institutional capacity of political entities beneath a certain scale will be insufficient to carry out the kind of fact-finding, broad-based consultation, and implementation that is integral to successful policy making.

Finally, the density and completeness that characterize cities, the fact that cities are places where people typically engage in all aspects of their lives in very close proximity to one another, make it the case that the spatial challenges attending the realization in urban contexts of worthwhile policy objectives will be particularly acute. So while spatial dimensions attach to just about all policy decisions, those that have implications for the way in which (limited) space is organized and apportioned in cities may make the case for the democratic rightness and practical effectiveness of an urban voice in policy making even more compelling than it might be in other cases.

I conclude that there are epistemic and (arguably) motivational reasons to include cities in subsidiarity schemes, especially with respect to the spatial dimensions of public policy decisions. While these reasons may apply to other types of political spaces as well, there are contingent reasons having to do with effectiveness that would target cities particularly for such inclusion.

5. The Self-Determination Claim

If the arguments that have just been developed have some plausibility, then a strong case exists for claiming that cities ought to have status within federal arrangements governed by the rule of subsidiarity. As we have seen earlier, however, what that means is that it makes sense for cities to have some say over policy areas that have an impact on urban affairs, and in particular on the spatial dimensions of those policy areas. What it does not mean is that cities should have any say over the matters over which they have say. In other words, while the subsidiarity claim would grant cities some areas of jurisdiction, it has nothing to say about whether or not cities should in any sense be self-determining.

The claim that cities might be able to claim self-determination might strike the reader as odd, because of the almost definitional link that sometimes gets drawn between the notion of self-determination and that of statehood. For a collective agent to be

self-determining according to this conception, it must "have" a fully sovereign state, or at least it must be seen as having a right to one.

Granted, there are city-states. However, it seems clear that attempting to show that cities may have claims to self-determination on the basis of a conception that makes statehood criterial is a doomed enterprise. Indeed, it has been repeatedly demonstrated that such a conception of self-determination would be both impracticable (restricting the right to nations only would still yield a potential crazy quilt of states too numerous to be manageable) and self-defeating (given that the intermingling of populations makes it impossible to imagine how the map might be redrawn for boundaries and nations to be even roughly congruent). But self-determination can be understood differently: according to a more plausible conception that avoids the problems just mentioned, the right to self-determination should be thought of as the right to fair terms of inclusion in multilevel governance structures such as federations (self-determination as statehood would thus appear as a limit case of a more general conception), and the right to negotiate what those terms might be.[30]

More concretely, the claim is that cities possess properties that qualify them as constitutional partners in federal constitutions that include an enumeration of the powers and prerogatives of constitutional partners, powers and prerogatives that include the power to participate in the amendment of the constitution through an appropriate constitutional amending formula. A constitution that incorporated cities as partners might be asymmetrical.

Thus, the claim under investigation in this section is that cities possess properties that qualify them as constitutional partners in federal constitutions.

How do we determine whether a collective entity should be granted a right to self-determination? Let me begin to address this question by setting aside two strategies that might at first glance seem tempting, but that are in my view fraught with peril.

A first approach should be familiar to those who have attended to the debates joined in recent years around the issue of the rights to self-determination of national minorities, a debate that has been profoundly marked by the pioneering early work of Will Kymlicka.[31] In that work, Kymlicka argued that national groups

that have been involuntarily incorporated into larger states should for impeccably liberal reasons be granted some measure of self-determination within these larger entities because of the role they perform in allowing individuals to lead lives as autonomous choosers. According to his well-known account, nations are societal cultures that provide their members with "contexts of choice" within which they can exercise their capacity to choose.

A problem with this approach is that it produces a problematic lack of fit between, on the one hand, the justificatory basis underpinning the distribution of rights to self-determination and, on the other, the set of national groups that find themselves in the set generated by the application of the justificatory principle.[32] There are some groups that would be excluded from the set, for example, because they do not privilege the exercise by their members of their capacities as autonomous choosers, and which are instead organized around more tradition-based or communitarian understandings of the relationship between individuals and their communities, but which nonetheless instantiate worthwhile conceptions of the good. What's more, to the extent that what is wanted is to give institutional protection to groups that promote individual autonomy, the theory may also militate for the granting of self-determination rights to groups that are not nations.

There are two problems with an approach such as Kymlicka's, which should give us pause in our search for a method with which to investigate the question of whether to grant self-determination rights to cities. First, and perhaps most obviously, the theory is monistic in nature. It does not allow for the possibility that there may be several, quite different kinds of grounds that might lead us to wanting to grant rights of self-determination to different kinds of groups.

Second, and perhaps less obviously, the theory is tacitly foundationalist and ideal-theoretical. That is, much of the argument is organized around the assumption that we can build a theory of multinational federalism from the ground up on the basis of a decontextualized appreciation of the values that this kind of political arrangement should serve to realize.[33]

A more fruitful approach to the determination of the kinds of entities that should be granted some degree of self-determination would, in my view, be pluralist and non-ideal-theoretical. It would

recognize that there may be many different kinds of reasons to grant different kinds of groups a measure of self-determination within federal arrangements. The method of discovery of these different kinds of relevant normative considerations would moreover embrace the idea that we identify the normative reasons to put in place or to amend political arrangements not only by thinking very hard about the kinds of political agents that there are but also by attending to the risks and advantages of different institutional options in the specific set of historical circumstances in which political agents find themselves. Pluralism allows us to appreciate that there may be different kinds of reasons to grant different kinds of groups self-determination rights. A non-ideal-theoretical method helps us to appreciate the fact that many of these reasons only become apparent to us when we attend to the predicaments that groups currently find themselves in. Contrary to a current of political theorizing that has grown out of one dimension of Kymlicka's work on group rights, I suggest that the investigation into the putative self-determination rights of cities be governed by a pluralist, and non-ideal-theoretical method.[34]

A second pitfall to avoid, and one which I fear bedevils some of the writing that has begun to emerge from political theorists who have turned their attention to the city, could be termed "romanticism." Many theorists have begun to identify the values that are realized in the life of cities in ways that (though they may resonate very deeply with urban intellectuals) represent a distorted view of city life, both because it presents a one-sidedly positive view of what city life is like, and because it fails to attend to values that, though they may be less congenial to urban intellectuals (among which I decidedly count myself!) are nonetheless perceived as values by many urban dwellers.

Romanticism as I am thinking of it here can be seen in the recent work of Daniel Bell and Avner de-Shalit. In their recent book, *The Spirit of Cities*, Bell and de-Shalit argue that cities are characterized by distinct "ethoses," which they define as "a set of values and outlooks that are generally acknowledged by people living in the city."[35] Now, clearly, an ethos needn't be normatively admirable, but Bell and de-Shalit view such ethoses as lying at the basis of what they term "civicism," a term they use to "express the sentiment of urban pride."[36] They argue that civicism is valuable

because it allows people to express their sentiments of attachment to specific places and to undertake unabashedly perfectionist projects and collective conceptions of the good life, without giving rise to some of the more unsavory dimensions of other forms of collective identification such as nationalism. Romanticism is also present in the work of Iris Marion Young, who sees city life as the site most conducive to the realization of tolerance, inclusion, and "eroticism," which she identifies with the kinds of unplanned and unscripted encounters that city dwellers routinely engage in simply by negotiating a city's streets and public spaces.[37]

Though attractive, these normative renderings of city life are problematic because they do not account sufficiently for the contestation and conflict that are often integral to city life. Cities as I understand them are large-scale integrated spaces in which people are able to live most aspects of their lives and access essential services (like health and education). As such, cities encompass both what theorists have termed "central cities" (the densely populated urban cores in which people [at least in theory] can get from place to place on foot or by using public transport and engage in a lot of daily social mixing [even when they do not live in particularly integrated neighborhoods] and chance encounters in public spaces) and suburban peripheries (where transportation is governed to a far greater degree by the logic of the automobile and marked by fewer public spaces, and thus less of the fortuitous social mixing that is clearly integral to Young's vision of the city). If (as I have argued we should) we view cities as encompassing both urban cores and suburban peripheries, cities are marked by a great deal of ethical conflict and pluralism rather than by the kinds of homogeneity that are suggested by Bell and de-Shalit's definition of an ethos as being widely acknowledged.[38]

Putting these two sets of concerns together, I arrive at the conclusion that our investigation into the kinds of grounds that might underpin an argument for the self-determination of cities should be pluralistic (there may be different reasons to grant self-determination to cities, some that apply to a greater degree to some cities rather than others). It should be based on a consideration of the problems that are faced by cities today, and that may be helped (or hindered) by a change in their constitutional status (rather than on decontextualized foundational reflection on the

kinds of entities that cities are), and on the properties that warrant their inclusion within federal arrangements. Finally, they should avoid the romanticism that would result from identifying all of the univocally wonderful things that cities would do if only they were left alone.

So with these methodological and philosophical safeguards in place, what are the features of cities and of their real-world predicaments that might justify granting them constitutional status within federal arrangements? Clearly, the methodological precautions I have just argued for militate against coming up with anything like a generally applicable theory. The situations of cities around the world are different from each other in a variety of ways, so that taking these precautions seriously would involve adopting something like a case study methodology. I will nonetheless throw caution to the wind and hazard a few very general remarks about the kinds of features that may be found in a large enough range of urban contexts to warrant being mentioned even in the absence of such case studies.

First, it seems to be quite clear that many cities have political cultures that are in important ways distinct from those of the broader society within which they are geographically and politically located. I do not mean to imply by the invocation of the concept of "political culture" anything quite as unified or positive as what Bell and de-Shalit imply. Rather, I would suggest that cities have sets of political concerns, debate, and dispute that are simply different from those of the broader society. To use a parochial example: Montreal is a multilingual city located in an otherwise largely Francophone province, which is itself a part of a federation that is otherwise largely Anglophone. As Bell and de-Shalit make plain, language looms large in political debates in Montreal, to a degree that might seem exaggerated when one is located elsewhere in the country. Linguistic issues are also central to the political lives of other multilingual cities, especially in countries that have been or that continue to be sites of conflict between groups speaking different languages (think of Brussels, Kiev, and Riga, to name just three). I use the language issue as an illustration only: my broader point is that city dwellers tend to think and argue about issues that are quite different from those that tend to mobilize the attention of other citizens.

Second, cities tend to be affected by international migration to a greater degree than other regions are. Immigrants have tended to cluster in cities, and this tendency is self-reinforcing. Later generations of immigrants come to cities because they have relatives who have already settled there, and because they are members of ethnic groups that have set up associations and networks, both semiformal and informal, of mutual support and aid that make integration easier. What's more, as Young has justly pointed out, people often choose to live next to people with whom they share a culture and a history, even in circumstances where no external obstacles stand in their way of their "mixing." Some "global cities" (to employ the term made famous by Saskia Sassen)[39] are also home to the transnational migrants who make up the world's financial, academic, and diplomatic elites. These groups often have multiple domiciles, sharing their time between cities divided by national boundaries but rarely coming into contact with non-urban cultures in any of the countries in which they are domiciled.

Because they are more intensely involved in international migration flows than are other regions, cities are culturally different from the regions that surround them in ways that do not reduce to differences in purely political culture. The urban culture of cities with high levels of immigration results from daily contact with the physical environment of cities but also from the interaction of people whose patrimonial cultures contribute to their seeing the world in quite different ways. There are myriad implications to the cultural distinctiveness of cities, but I would like to isolate two such implications that connect this distinctiveness with the differences at the level of political culture described earlier. First, the fact that cities are culturally more diverse than other regions means that the political debates that occur there will be carried out in quite different ways. There may be fewer shared political assumptions and less of a shared political vocabulary in a city than in a more culturally homogeneous region, quite naturally leading to differences at the level of the democratic life of cities.

Second, and perhaps most obviously, the cultural diversity of cities itself generates a wide range of social and political debates and discussions that are largely foreign to more culturally homogeneous places. These questions are quite numerous: should policies be put in place to encourage social mixing and break up ethnic

enclaves, and, if so, what form might such policies take? How accommodating should the public spaces of the city be to overt displays of religious difference, especially where such difference is associated in the eyes of many with values that are deemed problematic, to do, for example, with gender equality?[40]

Another feature that seems to characterize the political situation of many cities is that they are part of states—either subnational provinces or länder—or sovereign states that view it as part of their legitimate purpose to engage in nation building. Some states engage in nation building because they view the state as the vehicle and the protector of what are taken to be distinctive national values deeply inscribed in the nation's history. Others engage in nation-building around purportedly universally shareable "civic" values. Some substate national governments engage in nation building as a bulwark against what they perceive as the corrosive nation building engaged in by the federal state.

The nation building engaged in at the federal or at the substate level represents a potential problem for cities for at least two reasons. The distinctive political problems of cities tend to be perceived by national governments through the lens of their nation-building enterprise, and to mobilize nonurban majorities to impose decisions premised upon these perspectives upon cities. Second, to the extent that cities are marked by the kind of cultural diversity that I have just described, a more permanent tension—one that does not simply hinge upon a specific policy decision—can emerge between the state and cities. Nation-building exercises aim at a certain degree of cultural homogeneity that is both impracticable and unattractive when imposed upon cities. It is impracticable in virtue of the constantly changing population that results from successive waves of immigration. It is unattractive because in the context of a culturally plural and fluid population, nation building can succeed only by means of the use of illiberal, repressive methods.[41]

Putting these remarks together, we arrive at a characterization of the predicament faced by at least many modern cities. They have distinct political cultures, in that they are concerned with issues that are distinct from those that characterize other groups, and also in that they are culturally more diverse than the surrounding regions. The nation building engaged in by the states that, in

the absence of federal bulwarks, have unchallenged authority over them creates a source of potential conflicts—sometimes issue-specific and often general, and having to do with the homogenizing lens through which states engaged in nation building tend to see the political problems that cities are faced with. In such a context, it does not seem outlandish to suggest that granting cities constitutional status will create bulwarks that will allow cities to protect their distinctive political spheres, and to increase the probability that the political problems and questions that emerge there will be debated and resolved in ways that are responsive to the needs and interests of city dwellers, and at least partially immune to the distortions that a national perspective tends to impose upon them.

6. Conclusion: Some Objections

If the foregoing considerations are at all plausible, then it would seem that there are reasons to grant cities constitutional status within federal arrangements, whether those arrangements are thought of as governed by the rule of subsidiarity or as bringing together self-determining collective agents. I am aware of the fact that this suggestion will meet with puzzlement by political theorists who are used to thinking of federations as bringing together nation-like entities. In closing, and as a way of sparking further discussion, I would like to mention, and to offer preliminary responses to, a number of possible objections to the claims that have been developed here.

First, some might argue that I have in fact been arguing for a thesis somewhat different from the one that I have officially announced. Whereas I claim to have established that cities should be incorporated within federal arrangements, it might be that I have in fact unwittingly been arguing for a much stronger thesis, which might be termed "localism," namely, the position according to which any collective subject can in principle make an analogous claim for constitutional status.[42]

I believe that there are resources in my argument to resist what might be seen by some as a reductio ad absurdum of the position I am defending. First, as was already mentioned in the section on subsidiarity, considerations of effectiveness, that are integral to the rule, will argue against the inclusion of political entities that are

not of a certain minimal scale and that do not possess a minimal degree of institutional capacity. The kinds of cities that are at issue in this chapter clearly clear this practical hurdle. It is unclear that smaller entities would.

Second, and perhaps more controversially, I would argue that one aspect of the practical predicament that many modern cities find themselves in positions of conflict with national governments does not characterize other regions of contemporary states. In particular, rural regions do not find themselves in the same predicament. To the degree that the structural tension I have been pointing to—between the cultural diversity of the city and the homogeneity aimed at by the nation-building measures enacted by the state—is central to my argument that cities require status within federal constitutions in order to right the balance that would otherwise obtain between the power of the national or subnational state and the relative powerlessness of cities, it would seem that there are reasons to ascribe federal status to cities that do not obtain for nonurban areas.

The complaint might still be voiced that these are both contingent reasons to exclude collective entities other than cities from inclusion in federal arrangements, and thus that they are insufficient to ward off the reduction. Surely, according to this complaint, any account that does not provide categorical reasons to include certain types of agents rather than others is ipso facto ruled out.

Given the methodological position that I have defended, I view this aspect of my account as a virtue rather than as a flaw. Federal arrangements should not, according to this view, be seen as bringing into political union a predetermined set of political actors, cast in stone for all time. Rather, they should be thought of as tools that are responsive to facts on the ground, to the particular kinds of political predicaments that people find themselves in as a result of the evolution of their communal lives.

A second concern has to do with the impossibility of demarcating cities clearly. In the early part of this chapter, I offered the admittedly vague criterion of spatial integration as determinative. But the application of this criterion would lead to the boundaries of cities being quite vague. Cities would not so much end (as nation-states do at their borders) as taper out. Spatial integration might be greatest at a city's core, but there might very well still be

morally relevant spatial integration as between core and periphery. Given that I have argued earlier that actual municipal boundaries should not constrain us in identifying cities, how might clarity in the identity conditions be achieved here?

Far from being a flaw, I take this built-in vagueness to be a virtue of my account. Indeed, as Brighouse and Fleurbaey have recently argued, if the all-affected principle is one of our normative guides in the delineation of jurisdictions, it follows that the attribution of voice should be proportional rather than all-or-nothing.[43] As difficult as it might be to institutionalize this principle, we should nonetheless be guided in our design of subsidiarity by the idea that people should have say over an issue in proportion to the degree to which they are affected by it. This will make for quite messy divisions of power, since people are affected to different degrees by political decisions. Moreover, they might also be affected by different aspects of a given policy area. (For example, all members of a nation-state are affected by immigration policy because immigration has an impact on the economy of the receiving country, as it does on the economy of the country of origin. But they are not all equally affected by integration policies, since immigrants tend not to distribute evenly across the territory of a nation-state.) But this messiness might cut at the moral joints more accurately than do our present accounts of federalism and jurisdiction.

A related concern has to do with the fluidity of urban populations. With some exceptions, cities do not formally police entry. In other words, admittance to a national territory allows one to enter and exit a city located within that territory at will. How, it might be argued, can cities exercise self-determination, when the stability of self presupposed by this concept is lacking?

A number of points should be made in response to this concern. First, one could well imagine membership in a city requiring not just that one find oneself in a given city at the moment, say, of an election, but that one have established residence there. This problem has in practice been solved by many localities that allow nonnational residents to vote in local elections if they can prove that they have established stable (even if temporary) residence.

Second, nation-states, the entities viewed by most political philosophers as the privileged locus for self-determination, do not possess the kind of stability that the concept presupposes. National

membership changes every day as new members are inducted through naturalization or through the attainment of the age of majority. Conversely, memberships lapse, through death or emigration. This lack of stability in membership does not seem qualitatively different from the kind of instability one observes at the level of cities.

Third, it is possible that linking membership to residence is morally preferable to linking it to nationality (as construed according to the dominant *ius soli* and *ius sanguinis* models). Indeed, residents are affected by, and thus have a morally relevant stake in, decisions taken in the cities in which they live, whereas many holders of national membership do not have comparable stakes in the elections that they have a right to participate in. Many countries allow expatriate nationals to vote in elections for years after they have left the country.[44] Some countries (e.g., France) do not even require that citizens have lived in the country in order for them to have the right to vote.

A final concern has to do with whether self-determination for cities undercuts national solidarity in a morally objectionable way. I want to suggest that it need not. On the contrary, the institutionalization of national solidarity that involves the illegitimate suppression of claims for the self-determination of cities puts a strain on solidarity that might be eased were urban dwellers able to exercise the authority over matters pertaining to the city that their moral and epistemic position warrants.

There are probably other obstacles to my principal claim in this chapter going through. And I have clearly only gestured at the responses that one would need to make to the objections that I have canvassed. But if I have succeeded in giving political philosophers pause with respect to their often unexamined fixation on the rights and prerogatives of the nation-state, and with respect to their neglect of cities, then I will have achieved my purpose.

NOTES

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1. For the American context, see R. C. Martin, *The Cities and the Federal System* (New York: Arno Press, 1965); and Gerald Frug, *City-Making: Building Communities without Building Walls* (Princeton, NJ: Princeton University Press, 1999). For the status of cities within the Canadian constitutional setting, see Thomas Courchene, "Citistates and the State of Cities: Political-Economy and Fiscal Federalism Dimensions," *IRPP Working Papers Series*, 2005-03; Thomas Courchene, "Global Futures for Canada's Global Cities," in *IRPP Policy Matters* 8 (2007). For a perspective on European trends, see Liesbet Hooghe and Gary Marks, " 'Europe within the Regions': Channels of Regional Representation in the European Union," *Publius* 26 (1996): 73, 92.

2. See, e.g., the important work of Richard Sennett in *The Uses of Disorder: Personal Identity and City Life* (New York: Norton, 1992); Sennett, *The Conscience of the Eye* (New York: Norton, 1992).

3. See Frug, *City-Making*; Hoi Kong, "Toward a Federal Legal Theory of the City," *McGill Law Journal* 56 (2012): 473–517.

4. Clarissa Hayward, "The Difference States Make: Democracy, Identity, and the American City," *American Political Science Review* 97 (2003): 501–14.

5. David Harvey, *Social Justice and the City* (Athens: University of Georgia Press, rev. ed. 2009); Edward Soja, *Seeking Spatial Justice* (Minneapolis: University of Minnesota Press, 2009).

6. Susan S. Fainstein, *The Just City* (Ithaca, NY: Cornell University Press, 2010).

7. The work of Thad Williamson, who shows how abstract theories such as utilitarianism and liberal egalitarianism can illuminate the debate over policies that should be adopted in order to address the issue of urban sprawl, is exemplary in this regard. See Thad Williamson, *Sprawl, Justice and Citizenship: The Civic Costs of the American Way of Life* (Oxford: Oxford University Press, 2010).

8. Hayward, "The Difference States Make."

9. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990).

10. Williamson, *Sprawl, Justice and Citizenship.*

11. Rainer Bauböck, "Reinventing Urban Citizenship," *Citizenship Studies* 7 (2003): 139–60.

12. Andreas Føllesdal, "Subsidiarity," *Journal of Political Philosophy* 6

(1998): 190–218. See also Andreas Føllesdal, "Competing Conceptions of Subsidiarity," in this volume.

13. Robert Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs* 35 (2007): 40–68; Harry Brighouse and Marc Fleurbaey, "Democracy and Proportionality," *Journal of Political Philosophy* 18 (2008): 137–55.

14. Robert Goodin, "What's So Special about Our Fellow Countrymen?," *Ethics* 98 (1998): 663–86; Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2007).

15. For an analogous point, see Jacob Levy, " Self-Determination, Nondomination, and Federalism," *Hypatia* 23 (2008): 60–78.

16. I am grateful to Jacob Levy for having posed this challenge to me.

17. See, e.g., the work of Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995).

18. I have developed this line of argument in greater detail in Daniel Weinstock, "Building Trust in Divided Societies," *Journal of Political Philosophy* 7 (1999): 287–307; and Daniel Weinstock, "Four Kinds of (Post-) Nation Building," in *The Fate of the Nation-State*, ed. M. Seymour (Montreal: McGill-Queens University Press, 2004), 51–68.

19. Clarissa Hayward and Todd Swanstrom, "Introduction: Thick Injustice," in *Justice and the American Metropolis*, ed. Clarissa Hayward and Todd Swanstrom (Minneapolis: University of Minnesota Press, 2011), 1. The point has also been made in Frug, *City-Making*; and Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000). For a slightly divergent point of view, however, see Loren King, "Public Reason and the Just City," in *Justice and the American Metropolis*, ed. Hayward and Swanstrom, 59.

20. Cf. Daniel Weinstock, "Self-Determination for (Some) Cities," in *Arguing about Justice: Essays for Philippe Van Parijs*, ed. Axel Gosseries and Yannick Vanderborght (Louvain-la-Neuve: Presses Universite de Louvain, 2011), 377–86.

21. John Stuart Mill, *Considerations on Representative Government* (1861), in *Complete Works of John Stuart Mill*, ed. J. M. Robson (Toronto: University of Toronto Press, 1977).

22. For a critique of an affirmation of rights that is devoid of a consideration of the conditions for the implementation of rights, see Richard Thompson Ford, *Universal Rights Down to Earth* (New York: Norton, 2011).

23. Daniel Weinstock, "Pour une philosophie politique de la ville," *Rue Descartes* 63 (2009): 63–71.

24. Legal scholars and urbanists have paid a great deal of attention to the spatial logics of the sex trade. See, e.g., Stephanie Lasker, "Sex and the City: Zoning Pornography, Peddlers and Live Nude Shows," *UCLA Law*

Review 49 (2001): 1139; and Phil Hubbard, "Cleansing the Metropolis: Sex Work and the Politics of Zero Tolerance," *Urban Studies* 41 (2004): 1687–1702.

25. M. A. Powell, "Territorial Justice and Primary Health Care: An Example from London," *Social Science and Medicine* 10 (1986): 1093–1103.

26. Ruth Lupston and Rebecca Tunstall, "Neighborhood Regeneration through Mixed Communities: A 'Social Justice' Dilemma," *Journal of Education Policy* 23 (2008): 105–17.

27. Philip Pettit, "The Consequentialist Perspective," in *Three Methods of Ethics: A Debate*, ed. M. Baron, P. Pettit, and M. Slote (London: Routledge, 1994), 92–173.

28. The most thorough treatment of the veil controversy can be found in Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008).

29. Note that the consequentialism being advocated here eschews economic reductionism. For some congenial thoughts on this issue, see Jonathan Wolff and Dirk Haubrich, "Economism and Its Limits," in *The Oxford Handbook of Public Policy*, ed. M. Moran, M. Rein, and R. E. Goodin (Oxford: Oxford University Press, 2006); and Jonathan Wolff, *Ethics and Public Policy: A Philosophical Inquiry* (London: Routledge, 2011).

30. The foregoing summarizes what has become a fairly standard view among liberal political philosophers. See, for instance, Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, CO: Westview Press, 1991); and Kymlicka, *Multicultural Citizenship*.

31. Kymlicka, *Multicultural Citizenship*.

32. Daniel Weinstock, "How Can Collective Rights and Liberalism Be Reconciled?," in *Blurred Boundaries: Migration, Ethnicity, Citizenship*, ed. R. Bauböck and J. Rundell (Burlington, VT: Ashgate, 1994).

33. This aspect of Kymlicka's work coexists uneasily in his early work with a much more historically sensitive, non-ideal-theoretical approach that sees federalism as a response to (contingent) historical injustice. The two aspects of the theory do not make for a coherent whole. I believe that over time, and certainly by the time of writing *Multicultural Odysseys*, Kymlicka has tacitly eschewed the more foundationalist dimension of his earlier work. See Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007). But here is not the place to develop this exegetical point.

34. This approach obviously has a great deal of affinity with Young, *Justice and the Politics of Difference*.

35. Daniel Bell and Avner de-Shalit, *The Spirit of Cities* (Princeton, NJ: Princeton University Press, 2011), 2.

36. Ibid., 4.

37. Young, *Inclusion and Democracy.*

38. This has been expressed very clearly in King, "Public Reason and the Just City."

39. Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton, NJ: Princeton University Press, 2nd ed. 2001).

40. For an example of the ways in which two hugely multicultural Canadian cities have fashioned multicultural municipal policy, see Kristin R. Good, *Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (Toronto: University of Toronto Press, 2009).

41. Among the pathologies that have emerged from this tension is the demographically disproportionate weight that is attached to urban—and therefore to minority—votes in some jurisdictions. For the case of Canada, see Sujit Choudhry and Michael Pal, "Is Every Ballot Equal? Visible Minority Vote Dilution in Canada," *IRPP Choices* 13 (2007): 1.

42. This objection has been expressed to me both by Jacob Levy and by Philippe Van Parijs.

43. Brighouse and Fleurbaey, "Democracy and Proportionality."

44. Rainer Bauböck, "Stakeholder Citizenship and Democratic Participation in Migration Contexts," in *The Ties That Bind: Accommodating Diversity in Europe and in Canada*, ed. John Erik Fossum, Paul Magnette, and Johanne Poirier (Brussels: Peter Lang, 2009), 105–28.

10

CITIES, SUBSIDIARITY, AND FEDERALISM

LOREN KING

1. Introduction

My aim here is to use the city as an analytic category, a lens through which to examine the principle of subsidiarity and the justification of federalism. I will argue that two powerful justifications for subsidiarity seem as if they should be mutually supporting but in fact pull us in different directions with respect to the justification of particular institutional strategies for realizing autonomy for distinct groups. I conclude by drawing out some implications of my analysis for the justification of federalism. I begin by explaining the ideas of subsidiarity and federalism, and explaining my chief aims more fully, before turning to cities to advance my analysis.

2. Subsidiarity and Federalism

Subsidiarity, when applied to politics, counsels that decisions be made at the lowest feasible scale of organization. As a principle, the idea admits of several distinct formulations and is often taken to be consonant with federalism.[1] To see why, consider the argument—although doing so will first require clarification of what is meant by "federalism," and then reflection on why subsidiarity might be thought of as a complementary idea.

We can usefully distinguish, as several scholars have, between *federalism* as describing a normative commitment to nonunitary

territorial political arrangements, and *federal systems* or *federal arrangements* as descriptive categories subsuming particular ways of realizing federalism, such as federations, confederations, leagues, and other kinds of unions that involve territorially variegated structures of authority.[2] Under federal arrangements, powers and responsibilities are distributed, by constitution or treaties, between a central authority and smaller territorial authorities, and the latter have more than merely administrative functions: they possess distinct governments with legislative and executive powers. The latter condition is constitutive: a state with a highly decentralized administrative apparatus is not a federation if regional authorities are merely administrative conveniences, possessing no independent legislative and executive powers.

Scholars have found in Western political thought several distinct rationales for federalism: facilitating harmonious and mutually supportive relations between the several vital spheres of human association (Althusius, Montesquieu); preserving liberty against authority, or worse, tyranny, while also enjoying the security of a larger state (Montesquieu, the American Federalists); the enhancement of democratic virtues and their exercise, by bringing power closer to the people (Tocqueville); and securing peace between peoples and republics (Kant, Mill).[3] Among one tradition of scholarship, federalism is chiefly about limiting government excesses and promoting efficient service provision. For others, particularly comparative political scientists and some theorists, federalism is often considered as a promising way to address significant group differences that play out territorially, such as national, ethnic, and linguistic identities concentrated within a particular geographic region.[4] In some cases, groups with territorially distinct identities have their own civic associations and governing institutions, and might find themselves considering union with other groups. The stories of American and Canadian federation roughly fit this narrative. In other cases, whether by legacies of conquest or past treaties, a distinctive group finds itself within a broader political union and may seek more autonomy, recognition, or redress for past injustices.[5]

Now, if you think that many political issues typically matter at different spatial scales and for different constituencies, and if you further believe that political decisions ought generally to be made

as close as possible to those most directly and persistently affected by them and who have a legitimate claim to have influence over those decisions—which is to say, you affirm subsidiarity as an attractive ideal—then you will likely also affirm federalism as a rough approximation of that ideal. Issues of local and regional concern are dealt with by states or provinces (or länders, or cantons, etc.), while issues of broader import are left to the central authority.

A reasonable approximation, perhaps, but federalism, as typically studied and practiced, is insensitive to a glaringly obvious feature of the world. Cities are ubiquitous to every human civilization, and they are vital to the culture and economies of existing national states. Cities and their surrounding regions are the spatial scale at which a great many people experience the consequences of political decisions most directly. Yet cities are rarely given their due in existing federal arrangements and are rarer still in scholarly treatments of either federalism or subsidiarity.

I am interested in the relationship between cities and subsidiarity. In exploring that relationship, I hope to cast some light on what may at first blush seem to be a curious, even paradoxical, property of this principle: implementing subsidiarity under conditions of social complexity and diversity will typically require coordination and oversight at broader scales of organization. Moving authority closer to those most affected will, to be effective, typically require authority applied at some distance from those directly affected. Thus, to the degree that subsidiarity mandates decentralization of authority, efforts to implement that mandate will generally require counterbalancing that pulls authority back toward a recognizable center, or at the very least toward overarching levels of authority.

I say that this property of subsidiarity may seem at first blush paradoxical, but it comes as no mystery to those who study various federal arrangements and the many ways in which groups can and do coordinate to regulate common property and provide public goods. One of the great insights in ongoing research on complex polycentric systems has been to show that the debate between centralization and decentralization is often miscast. The really interesting questions tend to be about what gains and costs attend (de)centralization for which sorts of goods, at which scales; how benefits are harnessed, and costs contained, through coordination and cooperation across multiple and often-overlapping

spatial and institutional scales.[6] While decentralization is certainly not synonymous with federalism, we should probably expect something similar to be true of federal systems more broadly. Still, I will suggest that, while uncontroversial among social scientists, this property of complex polycentric systems may have frustrating implications for any normative-theoretic justification and application of subsidiarity.

Having made this case, I then suggest that the property of subsidiarity I examine in cities may have implications for a morally plausible normative account of institutions and jurisdictions, and in particular, for the justification of federalism.

This suggestion may seem curious to those who study federalism, as well as to those who look at particular implementations of the subsidiarity principle, such as in the European Union. These scholars study politics and law as they are, and so the question of justifying particular institutional arrangements and legal principles is rarely foremost in their minds. When it does surface, the question of legitimacy is normative, to be sure, but often largely empirical—studying "legitimacy deficits" in the European Union, for instance.[7] In this literature, philosophers and theorists are often cited in passing, but deeper moral-philosophical justifications are not typically on the agenda.

For most political theorists, however, moral justification looms large. Are there decisive moral reasons for federal rather than more unitary arrangements? For particular federal forms? What are the moral grounds for favoring subsidiarity as a guiding principle in designing and evaluating institutions? Can a principle of subsidiarity justify federalism? Particular federal arrangements? If not, then how does the argument fail? These are the questions that motivate me here.

3. A Curious Absence of Cities

Before making my case, I should justify my earlier accusation: if political theorists and philosophers pay too little heed to the city, then this is even more apt a concern about scholars of federalism and subsidiarity.[8]

Theorists in sociology, geography, and urban studies have long been preoccupied with the city, exploring themes—power, citizen-

ship, inequality, exclusion—that are of great interest to political philosophers and theorists.[9] Political theorists and philosophers, while less attentive to the city than their colleagues in other disciplines, do pay heed on occasion, although interest has in the past ebbed and waned.[10] In studies of federalism, however, and certainly in the practice of federal politics, cities are virtually absent: they are the forgotten stepchildren of both federal politics and scholarship.

Think of any political system that is recognizably federal in structure: how many have formal, durable provisions that recognize the city or municipality as a distinct level of government, with considerable autonomy—comparable to a Canadian province, for example—to collect taxes and other revenues, and to legislate a range of laws and policies particular to the city and its surroundings?

Exceptions here prove the rule. There are a smattering of formally recognized capital cities and urban regions such as Addis Ababa, Berlin, Buenos Aires, Brasília, Brussels, the capital territory of Delhi, Moscow, and Washington, DC. We can find a few historically or economically significant cities distinguished in federal constitutions, such as Dire Dawa in Ethiopia, Saint Petersburg in Russia, and the old Hanseatic city of Bremen and its port city Bremerhaven, which together constitute a distinct (if topographically awkward) federal state in Germany. For the most part, however, existing federations are overwhelmingly the descendants of the Westphalian moment in European history,[11] imagining the sovereign territorial state as variegated along ethnic and linguistic cleavages and historical patterns of conquest, settlement, and economic activity. Aside from highly urbanized capital regions, cities are rarely recognized as a significant part of those geographic patterns.

Thus, unsurprisingly, scholarship and policy debates mirror these territorial and imaginative realities. While it is true that local and regional governments feature prominently in certain academic literatures and legal debates about certain federal systems (largely in public economics and related work in political science and policy studies), those studies—usually of fiscal decentralization and public services[12]—rarely imagine the city as a coherent, historically durable spatial and imaginative scale of civic life and political organization. Indeed, when this literature looks

specifically to local and metropolitan governance, it is more often than not concerned with patchworks of jurisdictions that subsume and surround existing urban centers. These debates recognize municipalities, not *cities* as such.[13]

Beyond this vast but specialized and often very technical literature, scholarship on federalism is by and large preoccupied with the sovereign territorial states of modernity. The single great exception is the burgeoning literature on the European Union as itself a species of federation,[14] rooted in shared principles of subsidiarity[15] and proportionality. In countless studies and entire journals[16] devoted to federal politics, the abiding focus is on the legal and legislative features of sovereign federal states and, increasingly, of broader associations, such as the EU. Formal theoretical work on decentralization and federalism has attended to the structure of incentives involved in devolution of authority from a central power to territorial subunits,[17] and there is growing attention in normative political theory to the moral dimensions and justifications of federal arrangements.[18] Here again, however, the dominant geographic and imaginative scale is the sovereign Westphalian state.[19]

Given that subsidiarity and federalism are often taken as complementary, and given that cities have been a durable and vital part of human civilization through the ages, it is tempting to amend these historical oversights by arguing—as some city charter and regional secession movements have, and as Weinstock might be thought to imply in his analysis[20]—that cities, or perhaps municipalities, ought to be formally recognized as a distinct level of authority within many federal systems. Indeed, and again, some federations do concede such status to one or a few prominent cities in their domain. Other federations, for a variety of idiosyncratic reasons, have formally recognized some local governments.[21]

My analysis in what follows is certainly consonant with attention —evident for some time in certain areas of federalism scholarship —to the institutional complexity of existing federations, especially the varied relationships between local, regional, and federal institutions, and how these de facto relationships evolve and are codified within existing de jure constitutional constraints—most of which leave cities and localities as utterly dependent wards of state or provincial governments. Cities feature prominently in

some of this literature.[22] In Canada, this orientation is evident in the rising prominence of scholarship on multilevel governance,[23] and the complexities of a "deep federalism"[24] that takes cities and municipalities seriously, as distinct from a long-standing scholarly focus on provincial-federal government relations.[25] Some voices in the United States have evinced a similar shift in scholarly attention toward local powers and their relations with other levels of authority, and the complexity within, and interplay between, federal and state law and policy.[26]

Still, while this scholarly attention is a welcome recognition of real-world complexities in actual federal systems and of the critical importance of cities and their regions therein, I think the idea of simply adding cities or municipalities as distinct levels of government is not clearly justified by appeal to subsidiarity. An implication of my analysis in what follows is that the political temptation simply to renegotiate the terms of federal constitutions, inserting urban centers or their broader regions as a distinct "third tier" of authority, would likely often be frustrated by a careful understanding of what cities are and how they are important in arguments about subsidiarity. The problem is not simply that cities, while historically ubiquitous, tend to resist clear legal and territorial demarcation—although this is true: cities are not especially stable categories in time or space.[27] As will become clear in what follows, the philosophical problems that cities pose go beyond this and are not likely to be resolved merely by constitutional tinkering. I do find, however, that another prominent justification of federalism, also critical of subsidiarity, may in fact recommend constitutional recognition of some cities or urban regions.

4. What Is a City?

I have promised to use cities as a lens to examine the principle of subsidiarity and the moral terrain of federalism, and I mean to use Daniel Weinstock's contribution in this volume, and his related recent work, as an anchor for these efforts. What do he and I mean by *cities*?

Historians, geographers, economists, and sociologists have offered various refinements on the rough intuition that cities are dense and complex human settlements, characterized most

obviously by *centrality* and *density*. Operant social-scientific definitions tend to emphasize spatial concentration of settlement, but also the emergence of spatial and associated socioeconomic differentiation and specialization. Throughout the *longue durée* of human history, cities have often had ceremonial significance, as the site of sacred places and rituals. Indeed, cities have sometimes been only this: the sites of grand monument and spectacle, evidence of the might of emperors and kings, inscribed into place. Closely related, cities have often been defined by their political centrality as capitals of countries, kingdoms, and empires. As often they have been vital military centers, the home of garrisons, and centers of command and control for empires.[28]

Cities have almost always also been commercial centers. Indeed, even when cities are primarily ceremonial or military sites, they inevitably also serve vital economic functions. For many modern observers, most notably Jane Jacobs, but also Max Weber and the great Belgian historian of Europe, Henri Pirenne, the economic roles of cities in the West were of special interest. Cities saw the emergence of a distinct commercial class and powerful merchant associations; they were the sites of innovations in products and processes;[29] they were the sites of commerce and thus concentrations of capital and attendant innovations in banking; and they were often, in Jacobs's famously evocative phrase, "natural generators of diversity."[30] Today these economic roles, and a range of associated social and political consequences (many would say pathologies), remain a focus for many scholars of cities, especially those studying neoliberal trends in major and especially so-called global or world cities.[31]

Notwithstanding these conceptual refinements and rich empirical categories, our interest here is primarily philosophical and normative-theoretic, so I begin simply, as Weinstock does, by taking cities to be characterized by a sufficiently high degree of spatial integration. "There is a city," Weinstock writes, "where the inhabitants of a certain area exhibit a density of spatially mediated interaction with one another in their work, leisure and patterns of residence that mark them off from other areas."[32]

Intuitively this definition makes a great deal of sense. Still, it may be worth clarifying how these demographic and relational features coalesce into a widely shared idea of a particular city. We

know cities in this way not when we categorize them by population, or extant political boundaries, or various economic measures. Rather, we *experience* cities as durable yet dynamic sites of dense integration—of people, practices, sites, traditions. Benedict Anderson famously argued that nations are "imagined communities," and something like this is surely true of cities.[33] For Anderson, what is striking about the nation as a durable source of identification is that it truly is an imagined thing: we feel solidarity with people we will never meet, and whose lives will touch ours, if ever, in only the most ephemeral ways.[34] In contrast, when we imagine the coherence of a city, and when we identify with that city and fellow residents, our imagined coherence and identity are grounded in visceral experiences of elements of the city. True, we many never meet most of our fellow city dwellers, but our imagination is spurred here by features that ultimately supervene on *dense integration* that is far less ephemeral than the influences that conationals typically have on one another in a modern sovereign territorial state.

Drawing on some of the definitional richness we find in the historical and social-scientific literatures on cities, then, I would add to the *dense integration* criterion two further, related factors and a consequence: the spatial integration typical of cities is not merely dense but multifaceted and often characterized by subtle forms of *interdependence*, both of which help to establish an imagined coherence, even a widely accepted identity of some sort, to *the city* as such.

The imagined coherence of such a complex and fluid thing as a city is at once a tantalizing and frustrating social fact, inviting us, as theorists and philosophers, to make claims about the moral and political substance and consequences of that imagined coherence, and especially of any particular identifying features that come to be durably associated with that widely shared imaginative construct. We should, however, be exceedingly cautious in doing so, as evidenced by one such recent effort. Daniel Bell and Avner de-Shalit argue not only that several famous cities have distinct identities but also that each such identity constitutes a distinct and coherent ethos of sentiments and values—Paris and romance, New York and ambition—amounting essentially to a way of life. They further claim that these distinctive ways of life are widely shared

across diverse national, ethnic, and socioeconomic class divisions in each city; that these "spirits" are likely the source of the widespread appeal of these cities; and that, so long as the prevailing ethos is consistent with a certain moral threshold of openness and basic rights, dissenting residents ought to respect and obey the "spirit" of their city.

While Bell and de-Shalit labor mightily to avoid uncritical acceptance of obvious clichés and to explain carefully the complex histories of the cities they dwell on, their efforts nonetheless begin with a well-established prior sense of what characteristics define a particular city, and they then seek to amass evidence that these characteristics indeed constitute a prevailing ethos in terms of which many residents understand their city, all the while freely admitting that other ethos-defining narratives may well be constructed for each of their cases. More troubling is that, in one glaring case, they seem to dismiss their own evidence that a particular ethos is obviously not widely shared.[35] To be sure, there is much of interest in Bell and de-Shalit's explorations in their chosen cities. My inclination, however, is to understand how people come to imagine cities as coherent things, not to seek confirmation that a city is indeed widely imagined as it has been constructed, most often by strong state actors and dominant economic and cultural elites.[36] The aim, rather, is to identify imaginative constructs of actual people: cities as they are experienced, in all their messy diversity and fluidity, by those who imagine a coherent city, but not always, or primarily (or even at all), in terms set by the allegedly definitive ethos.

Cities, as imagined coherent things (whether bound by an allegedly shared ethos or not), are characterized by dense patterns of *complex integration* and thus considerable *interdependence*—think here of daily activity in any city, whether it be pedestrian traffic around a broken water main or a damaged section of sidewalk, or the seemingly mundane fact that downtown farmers' markets happen at all, without much by way of overt coordination and regulation. We become integrated into one another's lives in cities, but in ways that sometimes mask the extent of our interdependence: stop suddenly in a crowded thoroughfare, or fail to put your garbage in the right place for weekly pickup, and those subtle patterns of interdependence are suddenly (but often only fleetingly) broken. The city typically seems simply to repair these minor

and momentary rifts in the urban fabric, as crowds make way for obstructions, or neighbors step in to help injured or harried fellow residents, or subtly (and sometimes not) express frustration and direct gentle (and sometimes not so gentle) penalties at persistent violators of established norms of everyday life in the city.

The temptation here for political theorists is to focus on the part of our definition of the city most obviously germane to our academic interests: the moral dimensions of various forms of integration and interdependence, and the normative lessons we might draw from understanding these moral features. This is important, but I think we also need to take seriously the other part of this definition of cities: the *spatial* features of these forms of interaction. The subjective experience of the spatial integration that Weinstock and I take as defining cities will, I believe, be dramatically different depending on where we stand in particular spatial relations. Furthermore, those experiences—and the material and institutional structures that mediate them—may profoundly affect the moral and epistemic features of cities, features vital to any use of cities for arguments about subsidiarity, jurisdictional autonomy, and institutional design.

5. Subsidiarity and Epistemic Features of City Life

To see this, consider two rationales for subsidiarity. One rationale appeals to personal autonomy and liberal-democratic legitimacy: leave political decisions at the institutional scale closest to those affected by those judgments, just because legitimate authority rests—in the first and most critical instance—with the free and informed consent of those moral agents most obviously affected by political decisions. Political decisions are always ultimately backed by coercion, and such coercion can only be legitimately authorized by reasons that are responsive to each citizen's equal moral standing as at once both the subject and the final author of that coercion. Decisions made closest to those most affected are more likely to satisfy this criterion of legitimacy, treating us as properly autonomous citizens.

Another rationale is (moderately) communitarian in spirit. Our most cherished relationships tend to be in our families and communities, churches and neighborhoods—a variety of associations

we are either born and raised into or sometimes choose to enter on the basis of our considered values and aspirations. It is typically within such communities that our broader conceptions of justice and the good life are formulated and affirmed. This associative richness is to be applauded, and if government must interfere with civic or nonpublic associations, best that it do so in ways that are least intrusive and most carefully tailored to achieve whatever public purposes necessitated interference in the first place. This degree of informed and judicious interference is more likely, the argument goes, if decisions are kept as close to those affected as is feasible, given the nature of the public interest at stake.

There may be other rationales for subsidiarity, but I conjecture that many, perhaps most, of them can be framed in light of these broad justificatory categories. The "liberal autonomy" and "moderate communitarian" arguments seem to capture much of what intuitively appeals about subsidiarity: attention to freedom from domination under, and inefficiencies resulting from, indifferent, ill-informed, or corrupted distant authorities; but also recognition of the social conditions necessary for the meaningful exercise of such freedom.[37] They also converge—albeit for different reasons—on something like a *spheres of concern* principle,[38] and are consistent with moral individualism. This latter consistency claim may seem suspect for the communitarian rationale, but while that argument gives much weight to our varied relationships and associations, it is not a strong claim about the ontological or moral priority of the group over the individual. Rather, the moderate communitarian rationale merely accepts the uncontroversial sociological thesis that who we are and what we value are deeply implicated in our formative and chosen relationships with significant others, and that these relationships are most often rooted in durable place-bound communities and their characteristic traditions and associations.[39]

I also emphasize these two rationales because they converge on another important argument: the alleged *epistemic superiority* of individuals—situated in their families, neighborhoods, and various associations, in contrast to distant legislators and bureaucrats—in deciding matters that affect them directly (jurisdictional autonomy), and perhaps even deciding what matters those generally are (metajurisdictional autonomy).

So, insofar as different relationships create distinct spheres of concern and associated patterns of benefits and burdens, the subsidiarity principle tells us how to organize political authority in light of these spheres of concern. Furthermore, by virtue of being situated in particular spheres of concern, we are likely to possess important epistemic advantages over more distant actors who might reflect on our political concerns.

I admit the structure of my analysis here is somewhat convoluted: I take the two rationales detailed earlier—"liberal autonomy" and "moderate communitarianism"—to converge on the two arguments for subsidiarity: "epistemic superiority" and "spheres of concern." The idea is that the rationales together constitute a broad set of distinct but complementary assumptions and arguments about the value of both personal autonomy, on the one hand, and the structure and consequences of our background of relationships, on the other—all of which can provide support for the two arguments for subsidiarity. The methodological analogy here is a Rawlsian overlapping consensus: there are many paths from a range of reasonable views about persons and their social embeddedness that lead to the two arguments for subsidiarity.

6. Cities Clarify Mechanisms, but Also Reveal Problems

Facts about city life can help us illustrate in sharp relief the key mechanisms identified in each argument. Take each argument in turn.

1. Spheres of Concern. If you think cities are defined by complex patterns of spatial integration and interdependence, then it is uncontroversial to assume that some—indeed, probably many—of those relationships will be quite closely bounded in physical space. That is not to deny that there are (perhaps just as many) ways that city dwellers affect distant others, and vice versa. I simply mean to note, following Weinstock's argument, that many of the cultural and economic forms of integration and interdependence that characterize city life will give rise to similarly bounded claims of concern, specific to those spaces and characteristic activities therein. Facts about city life, then, make clear a powerful argument for subsidiarity: to the extent that cities generate spatially bounded patterns of benefits and burdens, fairness demands that

residents have some meaningful say over the laws, policies, and institutions that disproportionately matter to them as city dwellers.

2. Epistemic Superiority. The second argument appeals to the kinds of information and motivations that these urban dwellers can reasonably be expected to possess by virtue of living in the city. The idea is that proximity to some issues gives us better information and makes us more likely to reason through the consequences of relevant actions and policies in light of these facts, rather than simply appealing to prior ideological commitments.

The two arguments do seem as if they should hang together nicely. The issues most important to us are often (although of course not always) the ones closest to us in time and space. These are the issues that we are most likely to understand well, and that we will be motivated to think about in light of relevant facts and arguments. Together, then, these arguments amount to a powerful justificatory framework for subsidiarity.

Weinstock presents the epistemic argument as premised on an empirical hypothesis[40]—call it the *proximity conjecture*—but there are actually two empirical hypotheses at work here: the first is *informational*, the second *motivational*. First, we hypothesize that proximity has the expected epistemically favorable effect: we are more familiar with what we experience directly, and so we have better information about these matters. Second, we suppose that those epistemic capabilities are more likely to be expressed in constructive rather than divisive ways by those closest to the relevant issues and problems.

What do I mean by *constructive exercise* of our knowledge and capabilities? Weinstock doesn't use the constructive/divisive distinction, but I think it better suits his purposes than his chosen contrast of "ideological distortion," on the one hand, versus "correctly appreciating the impact of different policy options on the real-world realization of the relevant principles," on the other.[41] This is because, for many disputes over policy, there may be several plausible ways to implement shared normative principles, yet those several policy options may have secondary consequences that offend other principles, on which there is no such agreement. In these cases, policy disputes are ultimately rooted in principled disagreement, but not in a way that reflects incorrect reasoning about consequences. Indeed, the fact that we can reason correctly about

the full gamut of likely consequences is precisely what motivates such principled disagreement: we share a correct understanding of the full consequences of implementing our shared values into particular policy options, but we disagree on how we ought to weigh the importance of the sweep of consequences that attend each candidate policy.

Yet we can still imagine ways of approaching these disagreements that are more or less divisive. Simply asserting my favored interpretation and ordering of normative principles seems divisive, whereas attempting to find interpretive convergence, and perhaps some shared metaprinciple, that together minimize the scope of normative disagreement, seems constructive. Indeed, the latter approach may reveal less contentious policy options that we hadn't given much thought to beforehand. It seems to me, then, that the constructive/divisive distinction correctly distinguishes cases of ideological distortion from normatively informed consequentialist reasoning (the former will always be divisive, on my definition), yet accounts for the likelihood that normatively informed consequentialist reasoning can be consistent with divisive disputes rooted in principled normative disagreement.

We can now formulate the proximity conjecture in light of my favored distinction. Again, the conjecture has two parts, one informational, the other motivational: *proximity to an issue ought to make us better informed and more likely to reason about policy in constructive ways*.

Are these plausible expectations? They seem obviously plausible at first blush. How could proximity and relevance *not* influence our knowledge of a given issue and affect our desire to use that knowledge in constructive ways with those who are also affected by the issue at hand? Matters may, however, be more complex than they at first seem.

Consider a set of policy issues as mundane as they are ubiquitous in cities: local public services. Is it safe to assume that residents—simply by virtue of proximity and use—will be reasonably well informed about the effectiveness of, say, different road surface treatments? Damage repair protocols? What about the optimal location of fire stations, or police road and foot patrols? School catchment boundaries? Curriculum design? Will residents of given neighborhoods be equally likely to become informed on

these issues and contribute to public discussion and judgments in constructive ways in light of these varied facts?

Clearly, even for residents roughly equidistant to specific urban facilities, our level of familiarity, and our desire to learn the relevant information, will be strongly affected by a variety of factors: our patterns of use; our age and professions; whether or not we have school-age children; our ethnicity and socioeconomic class. On these latter distinctions, think of the dramatic difference in how Black or Middle Eastern citizens subjectively assess their informal encounters with police officers in urban settings, or how single working mothers experience the school system compared with affluent parents. What modest evidence is available on citizen evaluations of, and satisfaction with, public service quality suggests that the matter is complicated and ambiguous.[42]

Now, consider situations where these complicated questions of local public policy inevitably provoke contentious disputes over moral principles—the use of public school facilities by religious groups, for example, or the question of regulating traditional practices in public spaces if they offend norms of gender equality or child rights. On the latter sorts of issues: How many of us have been deeply ambivalent when seeing a parent physically disciplining his or her child while walking through a park or pedestrian thoroughfare? Class, race, culture, and reasonable disagreements about best practices in parenting all conflict in such fleeting moments.

Still, suppose we assume—with the preceding caveats in mind—that proximity to, and relevance of, an issue roughly correlate (at least on average) with residents being more informed and more motivated with respect to that issue. Is it reasonable to further assume that we will then be more likely to reason in constructive rather than divisive ways about that issue? Think again of the parent slapping their misbehaving toddler in a playground: What would a constructive and morally principled approach be in these instances? Is there such a thing? Again, it's complicated.

There is some evidence from diverse urban settings that citizens can be encouraged to inform themselves about complex issues, to reason carefully about the facts, and to engage in constructive argument with fellow citizens to clarify disputes and find points of agreement on both principles and policies. These tend, however,

to be carefully regulated deliberative settings, and the informational and practical material costs for citizens are high, comparable to the demands of jury duty.

Consider that the most famous favorable results from small-group deliberations on complex political issues—those associated with James Fishkin's deliberative polls[43]—are carefully crafted settings, in which statistically representative groups of citizens are given carefully balanced evidence, vetted by experts and stakeholders, and their deliberations are moderated to avoid well-known pathologies associated with small-group dynamics.[44]

More generally, the structure and regulation of citizen deliberation—how they become informed, and how they interact with one another when discussing issues—certainly seem to matter a great deal in some of the prominent cases of constructive group deliberations leading to effective policies or policy reform. For example, consider the increasingly prominent participatory budget movement, precipitated by the successes of several Brazilian cities.[45] In these cases, success seems largely to rest on the careful integration of local participation into well-structured networks of representation and accountability. Furthermore, citizen judgments are limited largely to determining funding priorities with respect to basic public services with which they are already familiar in their everyday activities (rather than, for instance, demanding judgments on more substantive and potentially controversial policy issues or detailed technical questions).[46]

All of this suggests that we should not move too quickly from the presumed epistemic superiority of city dwellers to the institutional expression of that presumed superiority in jurisdictionally autonomous institutions. The epistemic argument depends on the proximity conjecture, which turns out to be far more complicated than we might at first have suspected.

To elaborate: the presumed epistemic gains associated with the informational and motivational hopes of the proximity conjecture may only be realized, or may better be realized, when some overarching authority can foster inclusive and productive local deliberations, and provide rapid dissemination of reliable information about how particular policies and initiatives actually work in a variety of urban settings. Think here of another study of small-group deliberation: Archon Fung's pioneering work on

community decision making in Chicago, which suggests how appropriately structured community institutions can be given considerable authority—in that case, to formulate and monitor school curricula and community policing practices—but within particular overarching institutional settings that provide what Fung and his collaborators have aptly called "accountable autonomy." The core theoretical intuition here is that "realizing autonomy"—understood less as local independence from a central authority, and more as the effective power of local actors to achieve their constructive public aims—"requires the sensitive application of external guidance and constraint."[47]

By virtue of its political history and rich tradition of neighborhood activism, Chicago provided Fung with a kind of natural laboratory to trace how an especially participatory and effective form of citizen engagement took hold, allowing residents—even in very poor and historically marginalized areas—real influence over their neighborhood schools and community policing. This influence is mediated, however, within a citywide system of "bottom-up, top-down accountability" in which "local groups enjoy wide discretion in setting priorities and developing strategies to achieve them" but are also required "to produce plans that document their deliberations."[48] City authorities monitor the activities of local groups and hold them accountable for their stated plans, but these broader agencies also help coordinate and disseminate information across local groups and, more generally, provide "resources for mobilization, training, and facilitation to maintain the integrity of deliberations" at the local level.[49]

Chicago is in several ways a very special case for neighborhood and city politics, and Fung is candid about that history, and the path dependence and contextual specificity of some of his findings. Still, his results resonate with earlier and subsequent studies of effective local deliberation, and it seems plausible to expect that the epistemic superiority of city dwellers concerning urban issues may typically require just the kinds of overarching institutions he identified in Chicago, the workings of which will likely blur any straightforward drawing of autonomous jurisdictions in terms of either issues or territories. If we think that epistemic considerations justify the lines of jurisdictional autonomy for cities, then we need to account for the role (and jurisdictional scope) of

institutions that make those epistemic gains not only possible but likely. That seems to me to complicate our view of what jurisdictional autonomy involves.

So, rather than being mutually supporting, the two arguments for subsidiarity—appealing to spheres of concern and epistemic superiority—seem to pull us in different directions with regard to spatial scales and considerations of jurisdictional independence. An appeal to spheres of concern and differential burdens and benefits—whether on "liberal autonomy" or "communitarian" grounds—pulls us toward jurisdictional autonomy not only for cities but for even smaller communities of concern: whenever it can be shown that a stable constituency, bound to particular places, is directly and routinely impacted by decisions made on some issue disproportionately relevant to those places and those agents, then the subsidiarity principle asks that we tailor political arrangements to ensure that, so far as is feasible, the relevant decisions are made at the scale appropriate for that constituency.

In contrast, the epistemic argument allows that, as an empirical matter, the actual practice of jurisdictional autonomy based on those spheres of concern may depend critically on how overarching institutions sort information, monitor practices, and motivate citizens to actually exhibit the epistemic superiority we are attributing to them. Where the first argument pulls us inward and invites us to demarcate complex and overlapping spheres of influence and concern, the second argument complicates matters by revealing the degree to which effective subsidiarity will be a messy affair, spanning several spatial and institutional scales and fostering considerable interdependence across jurisdictional lines to foster and nurture the epistemic promise of city dwellers.

Let me draw out this contrast more starkly with an example provided by Weinstock.[50] Suppose you argue that longtime residents of Montreal or Paris have a far better sense of how cultural policies will actually play out once implemented. Better to let those residents decide these matters—of who may wear what in public, say—rather than some distant gaggle of judges appealing to constitutional principles and statistical data. To be sure, the values behind those principles are important; that's understood, and accepted. But the longtime city dwellers will have a better sense of how to implement those values in the places where these issues

most often play out for the people most closely affected by them. This is how the "epistemic" and "spheres of concern" arguments for subsidiarity are supposed to work together.

Complicating matters, however, is a growing body of empirical research suggesting that city dwellers may not in fact be more likely to reason in constructive ways about just the sorts of dilemmas they are allegedly best situated to address. There is mounting evidence from several countries—but especially Robert Putnam's surveys of U.S. communities—that city dwellers have fewer close friends, vote less, watch more television, read fewer newspapers, and generally avoid people who don't look, act, and think like themselves.[51] Given these unsettling trends, we cannot safely assume that mere proximity and relevance are likely to make urban residents approach complex policy issues in constructive ways. Granted, they are the people most directly affected by the issue in question, but there is no compelling evidence that they can or will think through the issues more carefully than judges and scholars—at least not without considerable oversight and assistance.

By appealing to facts about cities, then, and citing either liberal concerns for autonomy and legitimacy, or communitarian concerns for the situatedness of those same moral agents, we can clarify an argument for subsidiarity based on spheres of concern. There are also, however, good reasons to think that any epistemically favorable implementation of the subsidiarity principle—based on the issues and territories defined by durable spheres of concern—will be a complicated matter, involving considerable interaction and interdependence across several spatial and institutional scales. Clarifying the assumptions of the epistemic argument makes this clear. Thus the justificatory framework for subsidiarity that at first seemed so promising in fact pulls us in two different spatial directions and complicates our endorsement of autonomy for those within some particular sphere of concern, be it a city or some broader region, say, within a federation.

7. Federalism?

Let me conclude by attempting to deliver on an ambitious promise made at the outset: that these reflections about subsidiarity and

cities might tell us something useful about normative-theoretic justifications of federalism.

I have argued that most any feasible implementation of the subsidiarity principle under conditions of social complexity and diversity will require coordination and oversight at broader scales of organization. Focusing on cities—specifically, on subsidiarity-based arguments for cities being more autonomous than they generally are under existing federal arrangements—makes this relationship clear. The same reasoning seems to hold, however, when we look outward, to subsidiarity-based arguments for federalism.

Recall an intuitive motivation for the thought that subsidiarity and federalism may be complementary commitments: many political issues typically matter at different spatial scales, and for different constituencies. This is almost trivially true. For instance, many of the issues of greatest concern to professional residents in the heart of a major city are simply not relevant to rural farmers far from that city. Similarly, the issues that animate coastal communities in Eastern Canada and the United States are not those of prairie farmers, Alberta tar sands communities, Houston suburbanites, or Montana ranchers. The famous difficulty for advocates of federalism is to explain why some sort of union is desirable given communities with distinct and not always compatible interests, yet not so unified as to be an undifferentiated sovereign state. Jacob Levy states the attendant theoretical problem succinctly:

> We have political theories based on ideas of equality before the law and consistent treatment that push toward unitary states. We have political theories based on ideas of jurisdictional competition or democratic participation that push toward more-radical decentralization. We do not, however, have a political theory to match the real federalist practice of a large share of the world's constitutional democracies.[52]

Levy demonstrates that a range of plausible approaches to generating such a theory ultimately fail to satisfy. Efficiency-related arguments, appealing to competitive or market-preserving federalism, on the one hand, and Tiebout sorting, on the other, seem well suited to prescriptions about the structure of local jurisdictions and service provision but do not seem to justify the kinds of territorial

divisions we find in existing federations. These approaches certainly can make a plausible case against a unitary and strongly centralized regime, but they don't tell us much else about what the resulting system should look like or provide much by way of justificatory resources for distinguishing between a decentralized unitary state and a federal system. Arguments from participation and voice fail in a similar way, failing to justify the contours of actually existing federations, instead drawing the boundaries of meaningful citizen engagement at rather modest territorial scales.[53]

Advocates of either approach could reply that existing federal arrangements are not in fact justifiable, and that jurisdictions should be much, much smaller, so as to encourage efficient and responsive government to self-selecting communities organized around shared values and preferences, with considerable independence at jurisdictional scales where residents have a reasonable expectation of political influence. I agree with Levy, however, that this is not a promising way for theorists to proceed: there really may be something morally attractive about actually existing federal arrangements, most obviously the tendency to entrench in constitutions the boundaries and powers of provinces (cantons, länders, states, etc.). At the very least, our normative-theoretic efforts ought to take that likelihood seriously.

A thought here is that the arguments already marshaled for subsidiarity could provide an elegant theoretical solution that avoids the pitfalls Levy identifies with extant approaches. Political power both reflects and defines spheres of concern for particular constituencies and specific issues. Authority ought to rest as close as possible to those whose interests and agency help determine particular spheres, because that is where agents (be they citizens or various offices and agencies) will be sufficiently informed and motivated to engage constructively in political problem solving. In this way, decisions that emerge from an appropriately variegated political system will be epistemically superior to those that would emerge from a more unitary regime. Where several of those spheres of concern are territorially limited in roughly the same way, there will be a distinct jurisdictional threshold. Where the sphere is broad (military security, coordinated regulation to capture various externalities, such as in policing and environmental standards), there will be another threshold. Practical considerations may dictate

imposing certain thresholds somewhat arbitrarily, but it is easy to imagine this way of thinking settling on two or three distinct jurisdictional scales, within which governing arrangements are relatively independent with respect to the issues that define their spheres of concern.

To be sure, the same complexity and ambiguity that complicated our arguments when applied to cities will likely apply as well to the case for subsidiarity as grounds for federal arrangements. Here too we ought to expect spheres of concern to overlap and to change in complex and dynamic ways; furthermore, the epistemic performance of particular actors—be they citizens, representatives, or entire offices and agencies—will likely be just as dependent on a range of complicating factors as in the case of city residents. Yet perhaps we have been misconceiving the significance of this complexity? Perhaps the ways in which the "epistemic" and "spheres of concern" arguments pull us in different directions are a virtue of these arguments paired as a justification of subsidiarity, not an unwanted complication? Whereas spheres of concern are myriad, and invite recognition of several distinct and sometimes-overlapping territorial jurisdictions, the epistemic argument balances this fragmenting tendency by requiring that jurisdictional boundaries and related powers be regulated in ways that ensure epistemic competence. If anything, the social-scientific literature on polycentricity is hopeful here that multiple stable equilibria may be attainable.

I think Levy gives us strong grounds to doubt any such hope. As he suggests, and the empirical literature attests,[54] the one great case of implementing a subsidiarity principle in practice, the European Union, should give us grave reservations: the principle is stated and interpreted in several distinct and conflicting ways within the EU, and it seems often to generate as much disagreement and hostility among Member States as it clarifies and resolves. Further, in Levy's assessment, subsidiarity makes extraordinary demands on the time, resources, and competence of various government actors bound by the principle; a similarly heroic demand for impartiality is placed on the overarching authority that must moderate disputes and ultimately decide, for each issue at hand, which jurisdiction is best able to discharge the relevant regulatory function.[55]

There are good reasons, Levy suggests, for federations to opt, as they often have historically, for constitutional entrenchment of rigid territorial boundaries and associated divisions of powers. Levy's argument, drawing on passages of the *Federalist Papers* rarely cited by the extant literatures on federalism, points to the virtues of divided loyalties between state and federal governments: "[T]he core thought is that authority can be safely vested in the central government in part because, and perhaps just to the degree that, the people are inclined to be loyal and attached to their states rather than to the center." This makes sense, Levy thinks, of the sizes and rigidity of states and provinces as they tend to arise in existing federations: "Provinces that are large enough, stable enough, and aligned with cleavages of sentiment and loyalty can usefully counterbalance the central state. Localities without those traits cannot."[56]

This is a powerful rationale for just those applications of federalism prominent in much political science, and certainly in theories of nationalism that make a normative case for federal strategies of multinational accommodation.[57] Territorially concentrated ethnic and linguistic groups seem to have just the kind of loyalty that Levy identifies as essential to balancing against commitment to a central regime. Furthermore, they are loyal in this way just because of how ethnocultural and linguistic identities evolve in place, and how national identities emerge out of both ethnocultural identities and distinct civic traditions and policies. Whether we are considering the federation of already-established civic communities with reasonably clear territorial settlements, or the establishment of boundaries that roughly track linguistic or ethnocultural groups, Levy's approach seems to find normative purchase in thinking about the design of a federal constitution.

We might think that Levy's argument only solves half of the normative puzzle: it explains why federations that look roughly like many existing federal states ought not to be unitary, but it does not yet justify federal union in the first place. Why shouldn't every community of loyalty have its own state? Here, however, I think the normative stakes are less pronounced. There are the classic reasons for federation offered by Montesquieu and the American Federalists in the more familiar passages of the *Federalist Papers*: greater security, curbing the mischiefs of faction. Furthermore, the

promise of economies of scale in public works and capturing externalities are perfectly sound instrumental justifications for some kind of union among distinct communities or already-sovereign states that share a greater territory. The more difficult puzzles are, once such a union is obviously attractive, how to achieve it, and on what terms? Commitment to some sort of union is loyalty of a sort, just of a different kind and degree than the more bounded affective loyalties central to Levy's approach.[58]

So I find Levy's argument largely persuasive, and consonant with the skepticism that emerges from my urban-focused analysis of the "epistemic" and "spheres of concern" arguments for subsidiarity.[59] Here again, however, I think attention to cities and their regions might complicate the picture in interesting ways.

8. Loyalties, Cities, and Federations

The critical empirical assumption motivating Levy's approach is that some territorial region—at the scale of, say, a German länder or Canadian province—is likely to be the site of loyalty sufficient to allow union with other such groups, but not so complete a union as to threaten or forfeit outright those distinctive loyalties. On the face of it, cities are too local, and too easy to exit, to ground the sort of loyalty Levy has in mind. What is needed, he suggests, is something on a spatial scale of Kymlicka's societal cultures, or Rawls's relatively closed society that, for many, is entered by birth and left by death, with only occasional departures.[60]

Cities are indeed unbounded and open: we move in and out of them relatively freely, and their characteristic spaces are constantly in flux. Indeed, new uses of established places have always been part of the vitality of cities, and a source of both subversive and revolutionary change. Yet the imagined coherence of cities, and those visceral physical parts of them that provide "secure contexts of choice"[61] for those raised in and around them, are often quite durable over generations, even when they see changes in how particular places are used, and buildings augmented and reshaped. Think here of the great buildings that come to define cities in the imagination of residents and outsiders alike. These are sometimes corporate legacies, to be sure, monuments to the vanity of the rich and powerful—the Carnegies and Trumps of the world, but also

the conceits of Napoleon III and Baron Haussmann, and Al Smith and Robert Moses. These dramatically shaped the built form of great cities, for considerable public benefit but also at great monetary, civic, and cultural costs that continue, so many years later, to inspire both admiration and fury in roughly equal measure. As often, they are public works such as the museums, galleries, and libraries of the world's great cities. Sometimes, they are historically complicated combinations of commercial and public efforts and aims.

We don't have to go all the way with Bell and de-Shalit's "urban ethos" thesis to agree with them that many major cities do in fact amount to sites of considerable and enduring loyalty for residents, who spend much of their lives in, or in the spatial and imaginative orbits of, *their* city. While I have grave reservations about their methodological approach to grounding normative political-theoretic arguments in the complex realities of cities, I do think that they are on exactly the right path in this respect: many of the features that liberal nationalists and multicultural liberals cite as defining a societal culture—features that would also be critical to generating the kind of loyalty Levy considers—are intimately bound up with city life. Bell and de-Shalit usefully demonstrate that urban environments form a backdrop of symbols, routines, and expectations against which residents come to define their own identities. Cities provide many of the institutions, the actual physical sites—schools, churches, unions, museums, parks, and the like—that constitute secure contexts of choice. Even when elements of a societal culture are tied to much broader processes of nation building, cities feature prominently.[62]

As clusters of towns and cities come to define massive urban regions in many advanced industrial (but also many rapidly industrializing) societies, the distinction between city-based and other kinds of loyalties are further blurred. If there are cities—and especially urban regions anchored around a major city (or city-pair) and satellite towns and smaller cities—that inspire durable loyalty of the sort Levy describes; and if, furthermore, these regions are vital engines of economic security and vitality for their broader surrounding populations—indeed, for entire national states and multistate regions—then presumably they would be candidates for recognized membership as distinct parties to a federal union.

Perhaps curiously, then, while Levy's analysis gives us further reasons to question subsidiarity as the chief grounds for justifying federalism, his "bulwarks" argument from the separation of loyalties might, in some cases, be rather friendly to the idea that certain cities and their regions can be legitimate candidates for formal constitutional recognition in the design of a federation.

NOTES

1. Indeed, one recent survey finds subsidiarity "at the heart of federalism" (Jean-Michel Josselin and Alain Marciano, "Federalism and Subsidiarity," in *Handbook of Public Finance*, ed. Jürgen G. Backhaus and Richard E. Wagner [Boston: Kluwer, 2004], 477–520), although that may be more rhetorical flourish than sober assessment. Daniel Elazar suggests a tension between federalism and the historical purpose of subsidiarity, as it originated in Catholic doctrine, to "soften hierarchy by vesting and protecting the powers of its lower levels." Daniel J. Elazar, "The United States and the European Union: Models for Their Epochs," in *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, ed. Nicolaidis Kalypso and Robert Howse (Oxford: Oxford University Press, 2001), 42. In contrast, federalism is often framed as a challenge and alternative to hierarchical structures of authority, asking us to think in terms of " 'orders' not 'levels' of government, each of which is sovereign in its own competencies." Wayne J. Norman, "Towards a Philosophy of Federalism," in *Group Rights*, ed. Judith Baker (Toronto: University of Toronto Press, 1994), 77. Elazar overstates the tension, however: subsidiarity may well have been articulated in Catholic doctrine for this purpose, but plausible formulations of the principle are entirely consistent with—and, indeed, supportive of—federalism thus understood. Indeed, one of the earliest rationales for federal arrangements seems surprisingly consonant with the later Catholic doctrine, yet without any sense of hierarchy as being fundamental to political life. After elaborating the fundamentally symbiotic understanding of human associations that grounds Johann Althusius's account of federalism, Thomas Hueglin characterizes this as pointing "to a subsidiary organization of political power: the more limited associations submit themselves to the broader ones only to that degree which is necessary and useful to fulfill the purpose for which the broader association has been established." Thomas O. Hueglin, "Johannes Althusius: Medieval Constitutionalist or Modern Federalist?," *Publius* 9 (1978): 36.

2. See Ronald Watts, "Models of Federal Power Sharing," *International*

Social Science Journal 53 (2001): 23–32, following Preston T. King, *Federalism and Federation* (London: Croom Helm, 1982), and also consider Thomas O. Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Toronto: University of Toronto Press, 2006), esp. chs. 2 and 4.

3. On these antecedents, see Delba Winthrop, "Tocqueville on Federalism," *Publius* 3 (1976): 93–115; Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Waterloo, ON: Wilfrid Laurier University Press, 1999); Daniel Weinstock, "Towards a Normative Theory of Federalism," *International Social Science Journal* 53 (2001): 75–83; and Andreas Føllesdal, "Federalism," *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2010), http://plato.stanford.edu/archives/spr2010/entries/federalism/.

4. In my judgment, Jacob Levy, "Federalism, Liberalism, and Separation of Loyalties," *American Political Science Review* 101 (2007): 460–77, is the first normative-theoretic effort to take both of these traditions seriously in thinking through justifications for federalism, although Andreas Føllesdal's careful treatment of subsidiarity in Føllesdal, "Survey: Subsidiarity," *Journal of Political Philosophy* 6 (1998): 190–218, is also a unified analysis in this same sense.

5. The territorial condition is useful for distinguishing federalism from other ways of accommodating difference, particularly those that have no clear territorial dimension, such as group-differentiated rights schemes or various consociational arrangements. On group-differentiated rights in multinational and multicultural societies, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon, 1996), who has voiced considerable skepticism about federalism as a viable approach in just these settings in Kymlicka, "Is Federalism a Viable Alternative to Secession?," in *Theories of Secession*, ed. P. Lehning (London: Routledge, 1998). On consociational arrangements, see Arendt Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, CT: Yale University Press, 1977); Lijphart, "Non-majoritarian Democracy: A Comparison of Federal and Consociational Theories," *Publius* 15 (1985): 3–15; and Lijphart, "Constitutional Design for Divided Societies," *Journal of Democracy* 15 (2004): 96–109. Norman provides a succinct overview of the distinction in "Towards a Philosophy of Federalism," 77–79. For my purposes here, I need not distinguish the various ways in which the electoral and administrative structures of federal systems vary—for instance, the many distinctions evident between "parliamentary" or "executive" federalism versus federal systems with separation of legislative and executive functions and powers (see, e.g., Ronald L. Watts, "Executive Federalism: A Comparative Analysis" [Institute of Intergovernmental Relations, Queen's University, 1989], available at http://www.queensu.ca/iigr/pub/archive/

researchpapers/Researchpaper26ExecutiveFederalismWatts.pdf). Nor do I worry much about the distinctions (prominent especially in U.S. studies but also apparent in comparative research) between cooperative, dual, competitive, or coercive features of various federal arrangements (see, e.g., John Kincaid, "From Cooperative to Coercive Federalism," *Annals of the American Academy of Political and Social Science* 509 [1990]: 139–52; Robert P. Inman and Daniel L. Rubinfeld, "Rethinking Federalism," *Journal of Economic Perspectives* 11 [1997]: 43–64), or the various dimensions of asymmetry—i.e., of spatial scale, population, degrees of autonomy, special rights—that characterize various federal systems. In practice, efforts at precise categorization of federal systems tend to be confounded by the messiness and fluidity of actual political institutions, their histories and fluidity, but analytic clarity is certainly possible and helpful. Again, see Hueglin and Fenna, *Comparative Federalism*. Finally, on this point of historical complexity: I will not be engaging with the rich and growing body of historically informed empirical work in comparative federalism that takes path dependence seriously, e.g., Nicholas Aroney, "Formation, Representation and Amendment in Federal Constitutions," *American Journal of Comparative Law* 54 (2006): 277–336; Jorg Broschek, "Historical Institutionalism and the Varieties of Federalism in Germany and Canada," *Publius* 42 (2011): 662–87.

6. I refer here to Elinor and Vincent Ostrom's long-standing Workshop in Political Theory and Policy Analysis at Indiana University and the rich bodies of work that have either emerged from, or been informed by, that research group—see, e.g., Elinor Ostrom and Roger B. Parks, "Neither Gargantua nor the Land of Lilliputs: Conjectures on Mixed Systems of Metropolitan Organization," in *Polycentricity and Local Public Economies: Readings from the Workshop in Political Theory and Political Analysis*, ed. Michael McGinnis (Ann Arbor: University of Michigan Press, 1987); Elinor Ostrom, "How Types of Goods and Property Rights Jointly Affect Collective Action," *Journal of Theoretical Politics* 15 (2003): 239–70; and Ostrom, "Nested Externalities and Polycentric Institutions: Must We Wait for Global Solutions to Climate Change before Taking Action at Other Scales?," *Economic Theory* 49 (2012): 353–69. The concept of *accountable autonomy*, developed by Archon Fung to examine how local participation can be effectively integrated into broader regulative structures in Fung, *Empowered Participation: Reinventing Urban Democracy* (Princeton, NJ: Princeton University Press, 2006), also reflects this sophisticated approach. On this, more shortly.

7. See, e.g., *Legitimacy and the European Union: The Contested Polity*, ed. Thomas F. Banchoff and Mitchell P. Smith (London: Routledge, 1999); on this, see a helpful review by Andreas Føllesdal, "The Legitimacy Deficits of the European Union," *Journal of Political Philosophy* 14 (2006): 441–68.

8. One of the great scholars of federalism, Daniel Elazar, did, however, address urban themes on several occasions, most notably Elazar, "Urban Problems and the Federal Government: A Historical Inquiry," *Political Science Quarterly* 82 (1967): 505–25; and Elazar, "Urbanism and Federalism: Twin Revolutions of the Modern Era," *Publius* 5 (1975): 15–39.

9. The literature here is vast and diverse, but very roughly, we could align a great many contributions around two centers of attraction: Marxist scholars, on the one hand, and more radically critical scholars of a postmodern orientation, on the other. Classic contributions from the first camp include Henri Lefebvre, *Le droit a la ville* (Paris: Economica, 3rd ed. 2009 [1968]); Manuel Castells, *The Urban Question: A Marxist Approach*, trans. Alan Sheridan (London: Edward Arnold, 1972); and David Harvey, *Social Justice and the City* (London: Blackwell, 1973). In the latter, far more diverse and cacophonous camp, we might notice Edward Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989); Engin Isin, *Being Political: Genealogies of Citizenship* (Minneapolis: University of Minnesota Press, 1992); and A. Roy, "Post-liberalism: On the Ethico-Politics of Planning," *Planning Theory* 7 (2008): 92–102, to name but a few. Other important contributions fit less easily into this mapping: Richard Sennett, *The Uses of Disorder: Personal Identity and City Life* (New York: Norton, 1992); Ira Katznelson, *City Trenches: Urban Politics and the Patterning of Class in the United States* (Chicago: University of Chicago Press, 1982); David M. Smith, *Geography and Social Justice* (Oxford: Blackwell, 1994); Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford, 2003); Ash Amin, "The Good City," *Urban Studies* 43 (2006): 1009; Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2008); David Imbroscio, *Urban America Reconsidered: Alternatives for Governance and Policy* (Ithaca, NY: Cornell University Press, 2010); Susan Fainstein, *The Just City* (Ithaca, NY: Cornell University Press, 2010); Gordon MacLeod, "Urban Politics Reconsidered: Growth Machine to Post-democratic City?," *Urban Studies* 48 (2011): 2629–60—again, to name only a few important works drawn from a vast body of scholarship.

10. Here the literature is more manageable in scope, although it quickly becomes less so if we include the many political theorists and philosophers who have attended to moral questions about community, and who are then often drawn to the fabric of city life to explore such themes as, for instance, civic education and neighborhood schools—Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); possibilities for inclusive and effective local deliberation—in Fung, *Empowered Participation*; race, class, and power in housing and education—in Owen M. Fiss, *A Way Out: America's Ghettos and the Legacy of*

Racism (Princeton, NJ: Princeton University Press, 2003); Clarissa Rile Hayward, *De-facing Power* (Cambridge: Cambridge University Press, 2000); the privatization of public space—in Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (New York: Routledge, 2004); and the civic consequences of sprawling suburban developments—in Thad Williamson, *Sprawl, Justice, and Citizenship: The Civic Costs of the American Way of Life* (Oxford: Oxford University Press, 2010). Those who have looked explicitly at the city to illuminate political-theoretic and related moral-philosophical questions include Lawrence Haworth, *The Good City* (Indianapolis: Indiana University Press, 1966); Richard Dagger, "Metropolis, Memory, and Citizenship," *American Journal of Political Science* 25 (1981): 715–37; Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); Alan Ryan, "Justice and the City," in *Cities in Our Future: Growth and Form, Environmental Health and Social Equity*, ed. Patrick Geddes (Washington, DC: Island Press, 1997); Susan Bickford, "Constructing Inequality: City Spaces and the Architecture of Citizenship," *Political Theory* 28 (2000): 355–76; Loren King, "Democracy and City Life," *Politics, Philosophy and Economics* 3 (2004): 97–124; King, "Liberal Citizenship: Medieval Cities as Model and Metaphor," *Space and Polity* 14 (2010): 123–42; Sharon M. Meagher, "Philosophy in the Streets: Walking the City with Engels and de Certeau," *City* 11 (2007): 7–20; Bart van Leeuwen, "Dealing with Urban Diversity: Promises and Challenges of City Life for Intercultural Citizenship," *Political Theory* 38 (2010): 631–57; Michael J. Shapiro, *The Time of the City: Politics, Philosophy and Genre* (London: Routledge, 2010); Williamson, *Sprawl, Justice, and Citizenship*; Daniel A. Bell and Avner de-Shalit, *The Spirit of Cities: Why the Identity of a City Matters in a Global Age* (Princeton, NJ: Princeton University Press, 2011)—again, not an exhaustive list, and drawn from a literature that is slowly but steadily growing.

11. This is a historical oversimplification for the sake of a pithy label: there was no "moment" of the sovereign territorial state so often associated with the peace at Westphalia, and the territorial and imaginative architectures of those states were well established long before the legal principles that emerged after 1648. On this, see, for instance, Henrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton, NJ: Princeton University Press, 2006).

12. See, e.g., James M. Buchanan, "Federalism and Fiscal Equity," *American Economic Review* 40 (1950): 583–90; Charles M. Tiebout, "An Economic Theory of Fiscal Decentralization," in *Public Finances: Needs, Sources, and Utilization* (Princeton, NJ: National Bureau of Economic Research, 1961); Wallace E. Oates, "The Theory of Public Finance in a Federal System," *Canadian Journal of Economics* 1 (1968): 37–54; Oates, "An Essay on Fiscal Federalism," *Journal of Economic Literature* 37 (1999): 1120–49; John

E. Chubb, "The Political Economy of Federalism," *American Political Science Review* 79 (1985): 715–37; Barry Weingast, "The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development," *Journal of Law, Economics, and Organization* (1995): 1–31; Inman and Rubinfeld, "Rethinking Federalism"; Pranap Bardhan, "Decentralization of Governance and Development," *Journal of Economic Perspectives* 16 (2002): 185–205; Jonathan Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (Cambridge: Cambridge University Press, 2006); Christopher Berry, "Piling On: Multilevel Government and the Fiscal Common-Pool," *American Journal of Political Science* 52 (2008): 802–20; Barry Weingast, "Second Generation Fiscal Federalism: The Implications of Fiscal Incentives," *Journal of Urban Economics* 65 (2009): 279–93.

13. A selective sampling from this vast and multifaceted literature yields Vincent Ostrom, Charles M. Tiebout, and Robert Warren, "The Organization of Government in Metropolitan Areas: A Theoretical Inquiry," *American Political Science Review* 55 (1961): 831–42; Elinor Ostrom, "Metropolitan Reform: Propositions Derived from Two Traditions," *Social Science Quarterly* 53 (1972): 474–93; Elinor Ostrom, "Size and Performance in a Federal System," *Publius* 6 (1976): 33–73; Norton E. Long, "Federalism and Perverse Incentives: What Is Needed for a Workable Theory or Reorganization for Cities?," *Publius* 8 (1978): 77–97; Paul Teske, Mark Schneider, Michael Mintrom, and Samuel Best, "Establishing the Micro Foundations of a Macro Theory: Information, Movers, and the Competitive Local Market for Public Goods," *American Political Science Review* 87 (1993): 702–13; William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (Cambridge, MA: Harvard University Press, 2005); Richard C. Feiock, "Metropolitan Governance and Institutional Collective Action," *Urban Affairs Review* 44 (2009): 356–77.

14. E.g., Fritz Scharpf, "The Joint-Decision Trap: Lessons from German Federalism and European Integration," *Public Administration* 66 (1988): 239–78; Lars C. Blichner and Linda Sangolt, "The Concept of Subsidiarity and the Debate on European Cooperation: Pitfalls and Possibilities," *Governance* 7 (1994): 284–306; Thomas O. Hueglin, "Federalism, Subsidiarity and the European Tradition: Some Clarifications," *Telos* 20 (1994): 37–55; Kees van Kersbergen and Bertjan Verbeek, "The Politics of Subsidiarity in the European Union," *Journal of Common Market Studies* 32 (1994): 215–36; Jenna Bednar, John Ferejohn, and Geoffrey Garrett, "The Politics of European Federalism," *International Review of Law and Economics* 16 (1996): 279–94; Jonathan Golub, "Sovereignty and Subsidiarity in EU Environmental Policy," *Political Studies* 44 (1996): 686–703; Rey Koslowski, "A Constructivist Approach to Understanding the European Union as a

Federal Polity," *Journal of European Public Policy* 6 (1999): 561–78; Michael Burgess, *Federalism and European Union: The Building of Europe, 1950–2000* (London: Routledge, 2000); Jean-Michael Josselin and Alain Marciano, "How the Court Made a Federation of the EU," *Review of International Organizations* 2 (2007): 59–75; Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009).

15. Although in this case, subsidiarity is not necessarily a principle that anyone can precisely agree upon. See, e.g., John Peterson, "Subsidiarity: A Definition to Suit Any Vision?," *Parliamentary Affairs* 47 (1994): 116–32; Føllesdal, "Subsidiarity"; Andreas Føllesdal, "Competing Conceptions of Subsidiarity," in this volume; and Nicholas Aroney, "Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire," *Law and Philosophy* 26 (2007): 162.

16. These journals are, most obviously, *Publius* but also *Regional and Federal Studies* and the *Journal of Common Market Studies*.

17. See, e.g., Timothy Besley and Stephen Coate, "Centralized versus Decentralized Provision of Local Public Goods: A Political Economy Approach," *Journal of Public Economics* 87 (2003): 2611–37; Mikhail Filippov, Peter C. Ordeshook, and Olga Vitalievna Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge: Cambridge University Press, 2004); Roger B. Myerson, "Federalism and Incentives for Success of Democracy," *Quarterly Journal of Political Science* 1 (2006): 3–23; Jenna Bednar, *The Robust Federation* (Cambridge: Cambridge University Press, 2009).

18. Norman, "Towards a Philosophy of Federalism"; Wayne J. Norman, *Negotiating Nationalism* (Oxford: Oxford University Press, 2006); Kymlicka, *Multicultural Citizenship*; Mark Rosen, "The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory," *Virginia Law Review* 84 (1998): 1053–1144. Andreas Føllesdal, "Federal Inequality among Equals: A Contractualist Defense," *Metaphilosophy* 32 (2001): 236–55; Weinstock, "Towards a Normative Theory of Federalism"; King, "Democracy and City Life"; Levy, "Federalism, Liberalism, and the Separation of Loyalties"; Helder de Schutter, "Federalism as Fairness," *Journal of Political Philosophy* 19 (2011): 167–89; see also Heinz H. F. Eulau, "Theories of Federalism under the Holy Roman Empire," *American Political Science Review* 35 (1941): 643–64; Hueglin, "Johannes Althusius"; and Hueglin, *Early Modern Concepts for a Late Modern World*, on important historical antecedents to, and implications for, contemporary normative analyses of federalism.

19. And not without some plausible justification, as Levy suggests in "Federalism, Liberalism and the Separation of Loyalties": the expansive

territorial states of modernity solve several problems of scale that attend other plausible attempts at either explaining or justifying federal arrangements as they exist in the world.

20. Daniel Weinstock, "Cities and Federalism," in this volume; and also Weinstock, "Self-Determination for (Some) Cities?," in *Arguing about Justice: Essays for Philippe Van Parijs*, ed. Axel Gosseries and Yannick Vanderborght (Louvain-la-Neuve: Presses Universite de Louvain, 2011), 377–85.

21. See, e.g., the contributions to Nico Steytler and John Kincaid, eds., *Local Government and Metropolitan Regions in Federal Systems: A Global Dialogue on Federalism*, vol. 6 (Montreal: McGill-Queens University Press, 2006). The reasons behind federal recognition of some cities and local governments, especially capital cities and districts, are not, however, obviously predicated on commitments to subsidiarity as a guiding principle of institutional design.

22. See, e.g., Elazar, "Urban Problems and the Federal Government"; Stephen David and Paul Kantor, "Urban Policy in the Federal System: A Reconceptualization of Federalism," *Polity* 16 (1983): 284–303; Robert D. Thomas, "Cities as Partners in the Federal System," *Political Science Quarterly* 101 (1986): 49–64; Roger Gibbins, "Local Governance and Federal Political Systems," *International Social Science Journal* 53 (2001): 163–70; Jeffrey M. Sellers, *Governing from Below: Urban Regions and the Global Economy* (Cambridge: Cambridge University Press, 2002); Harriet Bulkeley and Michele M. Betsill, *Cities and Climate Change: Urban Sustainability and Global Environmental Governance* (London: Routledge, 2003); Harvey Lazar and Christian Leuprecht, eds., *Spheres of Governance: Comparative Studies of Cities in Multilevel Governance Systems* (Montreal: McGill-Queens University Press, 2007).

23. See, e.g., Robert A. Young, "Canada," in *Local Government and Metropolitan Regions in Federal Countries*, ed. John Kincaid and Nico Steytler (Montreal: McGill-Queens University Press, 2009); Andrew Sancton and Robert Young, eds., *Foundations of Governance: Municipal Government in Canada's Provinces* (Toronto: University of Toronto Press, 2009); Martin Horak and Robert Young, eds., *Site of Governance: Multilevel Governance and Policy Making in Canada's Big Cities* (Montreal: McGill-Queens University Press, 2012).

24. Christopher Leo, "Deep Federalism: Respecting Community Difference in National Policy," *Canadian Journal of Political Science* 39 (2006): 481–506; Christopher Leo and Jeremy Enns, "Multi-level Governance and Ideological Rigidity: The Failure of Deep Federalism," *Canadian Journal of Political Science* 42 (2009): 93–116.

25. Roger Gibbins in particular anticipates that "local communities and their governments will play a larger role in the lives of citizens in federal

political systems. The continued neglect of this reality in the institutional design of federal systems therefore threatens the normative appeal of federalism as a system of government, the legitimacy and relevance of federal institutions, and the efficiency of federal public policy." Gibbins, "Local Governance and Federal Political Systems," 169.

26. See, e.g., Gerald E. Frug, "Empowering Cities in a Federal System," *Urban Lawyer* 19 (1987): 553–68; Ronald J. Oakerson and Roger B. Parks, "Local Government Constitutions: A Different View of Metropolitan Governance," *American Review of Public Administration* 19 (1989): 279–94; Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (Chicago: University of Chicago Press, 2009); Erin Ryan, *Federalism and the Tug of War Within* (Oxford: Oxford University Press, 2012).

27. Andrew Sancton makes his case against the viability of autonomous city-regions largely on this ground in Sancton, *The Limits of Boundaries: Why City-Regions Cannot Be Self-Governing* (Montreal: McGill-Queens University Press, 2008).

28. Astute readers will notice that these are essentially variations and elaborations of Max Weber's famous distinctions of ancient, oriental, and occidental city forms. See Max Weber, *The City*, trans. and ed. D. Martindale and G. Neuwirth (Glencoe, IL: Free Press, 1921). On the significance of cities in early civilizations, see Norman Yoffee, *Myths of the Archaic State: Evolution of the Earliest Cities, States and Civilizations* (Cambridge: Cambridge University Press, 2004).

29. Weber, *The City*; Henri Pirenne, *The Medieval City: Their Origins and the Revival of Trade*, trans. F. D. Halsey (Princeton, NJ: Princeton University Press, 1923); Jane Jacobs, *The Economy of Cities* (New York: Vintage Random House, 1969); Jacobs, *Cities and the Wealth of Nations* (New York: Vintage Random House, 1984).

30. Jane Jacobs, *The Death and Life of Great American Cities* (New York: Vintage Random House, 1961).

31. See, e.g., Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton, NJ: Princeton University Press, 2nd ed. 2001); Engin Isin, ed., *Democracy, Citizenship, and the Global City* (London: Routledge, 2000); Peter J. Taylor, *World City Network: A Global Urban Analysis* (London: Routledge, 2004).

32. Weinstock, "Self-Determination for (Some) Cities?," 378. See also Weinstock, "Cities and Federalism."

33. Thomas Bender and Alev Çinar develop this parallel in their contributions to *Urban Imaginaries: Locating the Modern City*, ed. Alev Çinar and Thomas Bender (Minneapolis: University of Minnesota Press, 2007). It is usefully applied by several of the contributors to this collection.

34. For Anderson, the emergence and eventual ubiquity of certain

technologies are critical in this respect, allowing simultaneous encounters, over vast distances, with the same images, ideas, and debates. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, rev. ed. 1991), chs. 2–3.

35. I am thinking here of their chapter on Oxford, which concludes with an informal interview of several residents of the troubled council estate at Blackbird Leys, one of Oxford's poorest outlying neighborhoods. The results are predictable (Bell and de-Shalit, *The Spirit of Cities*, 188–89), with the residents associating "Oxford" with a litany of problems familiar to any scholar of urban issues, and never confirming the authors' thesis that Oxford's prevailing ethos ("the city of learning") is a significant part of how these marginalized residents imagine the city. Yet the implications of these findings are roundly ignored by the authors, dismissed with a few unanswered questions ("Is it possible that Oxford is not that bad for immigrants, not so bad for the working classes? But can they see that?"), after which the discussion quickly moves on.

More generally, it is strange that Bell and de-Shalit claim their method as data-driven rather than hypothesis-driven. Bell and de-Shalit, *The Spirit of Cities*, 10. They suppose that their encounters with ethos-related evidence in each city are random (although this is debatable), but their selection of cities is most certainly not. As they readily admit, their sample selection was largely based on their personal experiences as comparatively affluent, well-traveled academics, intimately familiar with famous urban centers steeped in just the historical, literary, and political identities that they indeed find upon closer examination. Their methodological approach to case selection and hypothesis formulation is essentially confirmatory, not exploratory. To be clear, this is not a complaint about qualitative methodologies or insufficient detachment from one's subject matter: there is nothing wrong with participant observation, ethnography, or engaged research, and Benjamin's flaneur really could tell us interesting and important things about Paris and capitalism. The worries, rather, are about selecting cases for reasons intimately related to conclusions that one actively seeks rather than discovers; not thinking carefully about what sorts of control cases would be appropriate comparisons with one's test cases; and then simply interpreting countervailing evidence in light of one's favored conclusions.

36. Indeed, Bell and de-Shalit offer some of these historical facts as one of the enabling conditions for cities to have an ethos, i.e., a history of a strong independent planner to shape the city's built form. Bell and de-Shalit, *The Spirit of Cities*, 13. The legacy of giving planners and architects either state- or market-sanctioned reign to shape the city is, however, hardly without moral controversy, especially for those whose neighborhoods are

trammeled to make way for great monuments or other ethos-fostering features of the urban built form.

37. The most rigorous systematization of justifications of subsidiarity available is provided by Føllesdal ("Subsidiarity," 198ff.). See also Føllesdal, "Competing Conceptions of Subsidiarity." I leave it to interested readers to either confirm or challenge my conjecture against the arguments from liberty and efficiency ably elaborated there. In my judgment, the conjecture holds.

38. More precisely, by "sphere" I mean the scope of relevance or influence, over space and across agents, with respect to some issue or action. Burdens and benefits attending to these issues and activities tend to be differentially distributed roughly along these lines as well. Why this clumsy formulation? Why not simply call this an *affected interests* principle? I avoid this popular phrasing because I am largely persuaded by Saunders, who suggests that we worry less about trying to define democratic membership in terms of who is affected by some decision and focus instead on the consequences of, and reasonable constraints upon, democratic agency. Ben Saunders, "Defining the Demos," *Politics, Philosophy, and Economics* 11 (2012): 280–301. The question of whose interests are affected is less helpful, Saunders suggests (and I agree), than asking when group decisions should be constrained because of unjustifiable burdens imposed on others. Also, see Song on problems with the principle of affected interests as the basis for an account of democratic membership and franchise. Sarah Song, "The Boundary Problem in Democratic Theory," *International Theory* 4 (2012): 39–68.

39. I think this distinction between moderate sociological communitarianism and stronger variants may address some of the concerns raised by Føllesdal about the communitarian features of an Althusian justification of subsidiarity. Føllesdal, "Subsidiarity," 203.

40. Weinstock, "Self-Determination for (Some) Cities?," 379ff.; Weinstock, "Cities and Federalism."

41. Weinstock, "Self-Determination for (Some) Cities?," 379ff.

42. Many of these studies are plagued with severe data problems and curious, sometimes questionable, statistical judgments related to model specification and interpretation. That said, a plausible and interesting recent study finds that residents do respond sensibly to information quest about service quality. See Oliver James, "Performance Measures and Democracy: Information Effects on Citizens in Field and Laboratory Experiments," *Journal of Public Administration Research and Theory* 21 (2011): 399–418. Relevant to the causal complexity of citizen service evaluations is Ruth Hoogland DeHoog, David Lowery, and William E. Lyons, "Citizen Satisfaction with Local Government: A Test of Individual, Jurisdictional,

and City-Specific Explanations," *Journal of Politics* 52 (1990): 807–37. So far as I am aware, there are no empirical studies of the various causes of degree of *motivation* to become informed about the quality of particular local public services. There is a long tradition of studies—Ostrom, "Size and Performance in a Federal System," is an early instance—that attempt to determine whether or not residents' reported satisfaction with some service can be used as a reliable indicator of the quality of that service. The chief difficulty in this empirical literature has been finding plausible measures of competence for assessing citizen evaluations, as this requires some objective measure of the actual quality of the service being evaluated. For this reason, what research there has been on this question has focused on services where citizen satisfaction reports provide an uncontroversial quantitative measure of the service (such as police response time to distress calls), and where the agency in question also measures that quantity. So, for example, citizen satisfaction with police and fire response times can be compared with actual dispatch data from agencies and service vehicles. For some sense of the conceptual and empirical murkiness that attends even this very limited range of citizen evaluations, see, for instance, Stephen L. Percy, "In Defense of Citizen Evaluations as Performance Measures," *Urban Affairs Quarterly* 22 (1986): 66–83; and—especially serious methodological reservations notwithstanding—Janet M. Kelly, "Citizen Satisfaction and Administrative Performance Measures: Is There Really a Link?," *Urban Affairs Review* 88 (2003): 855. A careful study of parent knowledge and information-seeking about school performance is Mark Schneider, Paul Teske, and Melissa Marschall, *Choosing Schools: Consumer Choice and the Quality of American Schools* (Princeton, NJ: Princeton University Press, 2000), who find among other things that, predictably, concerned low-income parents face considerable hurdles in finding reliable information about school quality.

43. See, e.g., James S. Fishkin, *The Voice of the People: Public Opinion and American Democracy* (New Haven, CT: Yale University Press, 1997); James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (New York: Oxford University Press, 2009), 132ff.

44. See, e.g., Susan C. Stokes, "Pathologies of Deliberation," in *Deliberative Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 1998), 123–39; Cass R. Sunstein, "Deliberative Trouble? Why Groups Go to Extremes," *Yale Law Journal* 110 (2000): 71–120.

45. The great success story is Porto Alegre, after which other cities adopted the model, including Belo Horizonte and São Paulo, and now many others, with more modest results. See Leonardo Avritzer, "New Public Spheres in Brazil: Local Democracy and Deliberative Politics," *International Journal of Urban and Regional Research* 30 (2006): 623–37.

46. Again, see ibid., and also Leonardo Avritzer, *Democracy and the Public Space in Latin America* (Princeton, NJ: Princeton University Press, 2002). Important in the São Paulo case in particular are the ways in which the interests of the poor and disenfranchised are represented by civic organizations, and the relationships of those organizations to conventional political actors. See Adrián Gurza Lavalle, Arnab Acharya, and Peter P. Houtzager, "Beyond Comparative Anecdotalism: Lessons on Civil Society and Participation from São Paulo, Brazil," *World Development* 33 (2005): 111–50; see also Esther Hernández-Medina, "Social Inclusion through Participation: The Case of the Participatory Budget in São Paulo," *International Journal of Urban and Regional Research* 34 (2010): 512–32.

47. Fung, *Empowered Participation*, 8.

48. Ibid., 79.

49. Ibid., 86ff., 224.

50. Weinstock, "Self-Determination for (Some) Cities?"

51. One might plausibly think that exposure to diversity is likely to foster solidarity within ethnic and racial groups, and to increase conflict among them (the "conflict" conjecture). More hopefully, we might suspect that diversity will diminish the significance of group distinctions, as people become familiar with those who look and act differently from themselves, finding common ground across these differences (the "contact" conjecture). Instead, strikingly, Putnam finds little support for either the contact or the conflict conjecture. See Robert D. Putnam, "E Pluribus Unum: Diversity and Community in the Twenty-First Century," *Scandinavian Political Studies* 30 (2007): 137–74. Racial diversity instead seems to inspire a generic withdrawal from public life and social ties, and pessimism about political leaders and public agencies. Insofar as racial and ethnic diversity are likely often associated with a diversity of beliefs and practices, this seems consonant with Diana Mutz's findings about ideological diversity and the deliberation/participation trade-off. In a careful study of both survey data and experimental results, Mutz found that those political activities which encourage participation do not seem to foster civil and constructive argument about competing opinions and challenging evidence. In contrast, when citizens are exposed to a diversity of beliefs, viewpoints, and arguments, they tend to participate less in politics. See Diana C. Mutz, *Hearing the Other Side: Deliberative versus Participatory Democracy* (Cambridge: Cambridge University Press, 2006). None of this bodes well for citizens in diverse urban settings either possessing special epistemic powers or, if they do, being motivated to use them in constructive ways with fellow city residents.

52. Levy, "Federalism, Liberalism, and the Separation of Loyalties," 459.

53. On this point, consider Eric J. Oliver, "City Size and Civic Involvement in Metropolitan America," *American Political Science Review* 94 (2000): 361–73, testing Dahl's conjecture about the likely maximum size of a community in which citizens have meaningful influence over, and engagement in, democratic politics; Robert A. Dahl, "The City in the Future of Democracy," *American Political Science Review* 61 (1967): 953–70.

54. Levy cites Føllesdal, "Subsidiarity"; and again, see Peterson, "Subsidiarity"; and Aroney, "Formation, Representation, and Amendment in Federal Constitutions."

55. Invoking a different analytic vocabulary, we might say that the subsidiarity advocate is too optimistic about transaction costs, and far too sanguine on the likelihood of agency capture.

56. Levy, "Federalism, Liberalism, and the Separation of Loyalties," 465. See also Jacob T. Levy, "The Constitutional Entrenchment of Federalism," in this volume.

57. See, e.g., Norman, *Negotiating Nationalism.*

58. It need not be of a different kind and degree: we may have comparably intense loyalties to the idea of Quebec as a nation, but also Canada as a federation; similarly for Belgium and Walloon, say. In arguing for federalism as fairness, de Schutter makes good use of this likelihood in de Schutter, "Federalism as Fairness."

59. Largely persuasive, but one might reasonably question Levy's claims that subsidiarity "fails as an institutional decision rule" and that trying to allow subsidiarity-inspired flexibility in the design of federal regimes renders pointless "the attempt to constitutionally entrench a federal system." Levy, "Federalism, Liberalism, and the Separation of Loyalties," 462. Courts and constitutions are, of course, institutions, and the question of how a constitution might be rendered more flexible to changing spheres of concern, and the institutional requirements of epistemic competence, seems worth asking, and a clear understanding of subsidiarity, its strongest grounds and possible formulations, can help us here. Still, I think Levy is entirely correct that, even if this qualification is cogent, subsidiarity cannot stand alone as a justification of federalism. After all, "a formally unitary state is as capable as a formally federal one of creating subordinate jurisdictions, of giving them authority and then taking it away again." Ibid., 463.

We could, I suppose, frame this less as a contest between arguments—Levy's bulwarks and separation of loyalties versus subsidiarity-based justifications—and more as a clarification of available choices. We can favor either, on the one hand, a subsidiarity-inspired conception of federalism predicated on meaningful but flexible boundaries and distributions of authority, and with attendant ambiguities and likely frustrations and instability; or, on the other hand, constitutional entrenchment of boundaries,

functions, and responsibilities for two or three distinct tiers of government, securing stability and certainty through a balancing of loyalties, but at the cost of rigidity, and thus potential difficulties in adapting to changing demographic, ethnocultural, and socioeconomic realities.

60. See, e.g., Levy, "Federalism, Liberalism, and the Separation of Loyalties," 474: "[L]arger provinces may feel more like complete regional economies, and so 'communities of shared fate,' in Rawls's phrase. They may have cultural and political-cultural characteristics that are more distinctive, and durably distinctive. And they will certainly have greater institutional and organizational resources."

61. This is a term of art introduced by Will Kymlicka to explain the importance of societal culture to liberal freedoms. Societal cultures provide the institutional and imaginative contexts of choice for their members. We all need such contexts to make meaningful judgments in life—about who we are, who we wish to be, what values we ought to affirm, and what ends are worth pursuing.

62. It is no accident, for instance, that the processes Eugen Weber uncovers, of transforming peasants into Frenchmen, were rooted in a national vision of French history and identity firmly centered in modern Paris; nor that the financial and cultural energies of Quebec's "quiet revolution" were anchored largely in Montreal. On the former, see Eugen Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870–1914* (Palo Alto, CA: Stanford University Press, 1976).

11

THE CONSTITUTIONAL ENTRENCHMENT OF FEDERALISM

JACOB T. LEVY

1. Introduction

One of the most striking developments in the past ten years of constitutional theory has been the partial or wholesale critique of judicial review among those traditionally identified as "legal liberals" or "liberal legalists." In its moderate versions, this critique encompasses Cass Sunstein's account of judicial minimalism and Mark Tushnet's call to "take the Constitution away from the courts."[1] Its least moderate version is the sweeping critique Jeremy Waldron has offered over almost twenty years of all constitutional judicial review in well-functioning democratic systems.[2]

These debates in recent political, legal, and constitutional theory about the idea, and legitimacy, of constitutional entrenchment have mainly focused on the entrenchment of substantive normative commitments and, especially, of bills of judicially enforceable rights. American constitutional theory has been preoccupied with cases like these since at least the Warren Court; Canadian constitutional theory has followed a similar path since the enactment of the Charter of Rights and Freedoms; and the relevant debates in Britain have centered on whether that country ought to have such a bill of rights.

But most entrenched constitutional provisions—which is to say, most constitutional provisions in most states with written consti-

tutions—concern institutional arrangements. In this essay I try to draw attention to such institutional arrangements, and particularly to the arrangements surrounding federalism. While the constitutional entrenchment of federalism and federalist arrangements is, I think, defensible and perhaps even indispensable,[3] it is *not* somehow outside the scope of the criticisms of entrenchment that have been made in other contexts. Indeed, federalism is a centrally important instance of the phenomenon under debate, and I do not think we can understand the phenomenon without attention to it. If, as I think, entrenchment is legitimate with respect to rules of federation, then that may tell us something about the legitimacy of the entrenchment of rights.

2. The Concepts in Play

"Constitutional entrenchment" admits of variation; even within a given constitutional order, some provisions may be amendable by weaker action than others. I'll refer to any rule or provision as entrenched which cannot be altered by the same rules as ordinary legislation of the central government (i.e., parliamentary majorities, with presidential acquiescence in presidential systems). Such entrenchment can take the form of requiring amendment by legislative supermajorities, by popular (majoritarian or supermajoritarian) referenda, by the concurrence of center and provinces or of legislature and electorate, or any combination of these. But it is important to note that some entrenched provisions are avowedly unamendable without discarding the constitutional order altogether, such as the German Bill of Rights; and some are effectively so, such as the rule guaranteeing equal representation for each state in the U.S. Senate.

For purposes of this essay I will mainly elide one potentially important distinction concerning entrenchment: between the *entrenchment* of a constitutional provision and *its enforceability by means of judicial review*. That is, I will assume that entrenchment and judicial enforcement do go together—whether the enforcement is by a regular court or a specialized constitutional one, and whether the judiciary has the last word (prior to constitutional amendment) or other actors may override the judiciary (as in the Canadian notwithstanding clause). A constitution that is nominally

entrenched but declaratory in its effects—one that tries to provide a focal point for public deliberation about matters of foundational importance but that does not offer any institutional restraints on the central legislature—falls outside the scope of this essay, even if that declaratory constitution is entrenched in the sense of being difficult or impossible to amend.

The judicial override of legislative enactments does not exhaust the actions that a constitution may authorize in its own defense, of course. I take it that the core of constitutional entrenchment, indeed the core of the link between constitutional rights and the judiciary, is the defense of procedural, rule of law rights against *executive* action. Habeas corpus is fundamental to the rule of law and thence to constitutionalism. Judicial limits on legislatures represent a kind of late extension by analogy of the core judicial-constitutional function of ensuring that persons are only imprisoned and punished in accordance with enacted, prospective, promulgated laws.[4] But this kind of thing is uncontroversial among the theorists with whom I am concerned here; Waldron, whose skepticism of judicial review is probably the most radical of the leading participants in the debate, explicitly distinguishes between restraints on lawless executive action and restraints on legislative lawmaking.[5] By "constitutional entrenchment," I refer only to the latter, taking the former for granted.

The most obvious subject matter for *federalist* entrenchment in particular is the division of powers, authority, and responsibilities between the center and the provinces—which of them has jurisdiction over what kind and scope of questions, when and whether authority is shared concurrently between the provinces and the center, and so on. In the disputes about the judiciary and federalism this is sometimes assumed to exhaust the problem. But more fundamental is the entrenchment of the very existence of the provinces—the question of whether the state is to be a federal one at all—and the entrenchment of the identity, continuity, and borders of the provinces. The formal allocation of authority is likely to be a dead letter if the center can threaten to dissolve a recalcitrant province, or to gerrymander it into a more pliable shape, or to carve it up or lump it in with a larger neighbor. Closely related is the guarantee of the provinces' self-governing autonomy from the center—the guarantee that a province's government will be

chosen by provincial elections and not by central appointment. (Again, the formal allocation of authority can't matter very much if the province is governed by an apparatchik central appointee.) I'll refer to the division of powers and the guarantee that provinces have some independent legislative authority under the rubric of provincial *autonomy*, and the guarantee of provinces' existence, their immunity to gerrymandering, and so on as pertaining to their *integrity*.[6]

Conceptually quite distinct from either the allocation of regulatory authority or the existence and integrity of the provinces are questions of the provinces' institutional *participation* in the government of the center—the status of the German Bundesrat as the direct representative of the governments of the länder, the province-based representation in the U.S., Australian, Argentine, Mexican, or Spanish Senate, or the U.S. Electoral College, and so on.[7] I also include in this category rules about general constitutional amendment that depend on the provinces—three-fourths of state legislatures, a majority of the voters in a majority of the states, and the like.[8] Sometimes constitutional amendments must first be approved by a bicameral legislature where one chamber represents the provinces in some form, and then are subject to approval by the provinces themselves or by the electorate divided provincially, so the provinces participate in amendment both separately and jointly at the center. (American amendments must be passed by the state-based Senate but then must also be ratified by the states severally.) Such provincial participation in the center and in constitutional amendment is ubiquitous; I'm not sure that any federation lacks it entirely. It might well be necessary to the effective stability of a federal constitutional order—if the provinces lack any share of a governing say at the center, they may not be de facto able to protect their de jure integrity and autonomy. It might be better understood as a mechanism for the protection of federalism rather than as constitutive of federalism as such. If the provinces have no independent legislative authority and no guarantees of their own stability, then they are effectively local governments in a unitary state; direct provincial participation in the government of the center is not similarly constitutive of federalism.[9] Still, I will treat the entrenchment of these forms of provincial participation as part of the category "federalist entrenchment," along with the

entrenchment of the integrity of the provinces and the entrenchment of the division of authority between provinces and center.

Note that these types of entrenchment sharply differentiate federalism from other kinds of decentralization, including those sometimes discussed under the rubric of "subsidiarity." The allocation of responsibility within a regime of subsidiarity is supposed to be flexible and sensitive to context. Authority over a given subject is supposed to lodge in the smallest or most local level that is appropriate to the question—a standard of evaluation that requires ongoing judgments about the merits of what each level of government could and would do, about what is at stake in decisions of a particular kind, and over social-geographic evolution in what units are affected by what questions.

Within debates over federalism, there has sometimes been a tendency to peel these kinds of entrenchment apart. The "political safeguards of federalism" approach associated with Herbert Wechsler[10] emphasizes participation at the expense of autonomy (and tends to overlook integrity altogether)—and thereby, I would say, reduces the states or provinces to a kind of especially advantaged interest group in a system of lobbying for benefits. By contrast, the competitive federalism approach—recently given a powerful restatement by Michael Greve[11]—is primarily concerned with autonomy, with some analysts also noting the importance of integrity, but with little or no attention to participation. Greve offers a thought experiment about rival moments of constitutional choice: one in which individual citizens contract to create a whole federal constitutional order, and another in which "states as states" bargain with one another to create a federal structure. In the first, citizens would choose "a competitive order, one in which we had the ability to leave one regime for another, one in which the taxation and spending authorities would be divided in such ways that we could escape the tax by one state to extract all of our surplus, one in which regulatory systems could vary in one state to another, such that we might migrate to the most attractive among them." In the second, the "states as states" would arrange for cartelization rather than competitiveness, arranging things not to the advantage of free individual citizens but rather to ensure the power of the "states as states." The latter, he suggests, is unworthy of choice; and he argues at length that the whole intellectual

apparatus in the Supreme Court's jurisprudence concerned with the dignity and status of "states as states" is a sign of the decay of American federalism.[12]

Greve's model, it seems to me, runs into difficulties. It lacks precisely what the "political safeguards" model offers: a mechanism for the political stability of the underlying competitive order. There is, I suspect, a reason of institutional stability why we find entrenched autonomy, integrity, and participation clustered together so routinely in federal constitutions. If one thinks that the competitiveness provided by autonomy protects individual freedom, there is sound, albeit second-order, reason to want the protection for "states as states" provided by integrity and participation. As Justice Anthony Kennedy has put it, looking from the other direction and asserting an individual interest in vindicating the authority of states:

> Federalism secures the freedom of the individual. . . . The individual liberty secured by federalism is not simply derivative of the rights of the States. Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.
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> The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States.[13]

3. The Critique(s) of Entrenchment

Constitutional entrenchment in its current form dates to developments in constitutional theory and practice in the American states in the 1770s and 1780s. Fundamental charters and written statements of founding laws were much older, as was a so-called ancient constitutionalism that viewed the traditional and inherited fundamental laws of a polity as binding on governors and beyond their ability to alter. But the founding charters of the

newly independent American states were recent creations, having none of the veneer of antiquity, and they were typically created by the very legislatures they were meant to authorize and legitimate. As Jefferson complained in *Notes on the State of Virginia*, they tried unsuccessfully to escape the reality and rule that no legislature could bind its successor.[14] Even the procedure of supermajority rule for certain kinds of lawmaking was, if passed by one legislature, vulnerable to repeal by a simple majority of its successor. The innovations of constitutional conventions, outside the legislature, to draft constitutions, and popular rather than legislative ratification, seemed to solve these difficulties, legitimating supermajority rules and binding constraints on legislatures. When joined to the old but partly inchoate institutional idea that courts might enforce more fundamental laws against legislative violations—that is, to the institution of judicial review that crystallized in the states in these decades—constitutional entrenchment took on a roughly recognizable form. Some laws passed at time 1 by a special procedure would be designated fundamental and superior to ordinary legislation and executive action (and, so, constraining of such legislation and action). This superiority would authorize judges at time 2 to enforce the fundamental laws, as laws, against other, illegal, government action. And these fundamental laws could not be altered save by some combination of legislative supermajorities and direct popular approval.

The key critiques of and complaints against constitutional entrenchment are nearly as old as the phenomenon itself. It is understood as antidemocratic and countermajoritarian; as representing a kind of intergenerational tyranny; and as improperly empowering the judiciary at the expense of the legislature. Note that the first and third critiques are not identical. Madison was an *advocate* of constitutional entrenchment on countermajoritarian grounds, but he opposed the tendency of judicial review to make the judiciary the supreme interpreter of that entrenched constitution. One of the critiques might be blunted with an elected judiciary, the other not; one is blunted by the existence of a partially nonmajoritarian branch of the legislature (e.g., the U.S. Senate), the other not. The two critiques are linked; Madison never could reason out a way for the Constitution to constrain the legislature that didn't in effect mean that the courts could do so. But they are

different in principle. The countermajoritarian critique is incompatible with entrenched constitutionalism as such. Even if a constitution could somehow be made self-enforcing, it would constrain the choices made by democratic majorities. The same is not true for the specific institutional critique of the judiciary.

Jefferson himself, insisting that "the dead have no rights," held that it was unjust for one generation to legislate over later ones.[15] If few have taken up his proposal that all laws (fundamental and otherwise) be repealed and institutions restarted every generation, many more have thought that subsequent generations ought to be free to reform, undo, or repeal inherited rules if they wished. That one generation could enact a rule that a majority of their grandchildren could not repeal seemed to him, and has seemed to many since, a kind of tyranny.

Moreover, since constitutional entrenchment (more or less) necessarily empowers judges at the expense of legislatures, it has been vulnerable to attack as antidemocratic, antimajoritarian, and so on. Again, this is an enduring complaint. Even Madison himself, though he embraced entrenchment and was unable to solve the paradox of how the constitution could be legally superior to legislation *without* giving too much power to the judiciary, was never comfortable with that power. Insofar as the judiciary was made up of ordinary human actors, and was not the Constitution incarnate, constitutional entrenchment seemed to yield judicial review that seemed to make the judiciary superior to the legislature, "which can never be proper."[16]

As noted earlier, after some decades in which the main debates in constitutional theory about judicial review and entrenchment seemed to concern *how they might best be defended and construed*, judicial review has met with serious academic skepticism in the past several years. Theorists and scholars including Jeremy Waldron, Mark Tushnet, Cass Sunstein, and Adrian Vermeule have fleshed out and refined both the countermajoritarian and the intergenerational critiques of entrenchment. Waldron and Vermeule, for example, both stress the idea of *comparative institutional evaluation*. They suggest that the traditional case in favor of constitutional entrenchment with judicial enforcement has come from a comparison of idealized judges with legislatures that are viewed through much more gimlet eyes. A putatively unacceptable legislative outcome is

remembered or posited; the punch line is assumed. "Surely you don't think a legislature should be allowed"—passive voice—"to do that?" But judges are just as real, just as human, actors as legislators—and just as prone to errors. Philosophers and legal theorists may imagine themselves as Herculean judges, sure that they would reach better, more-right answers on the one or two questions of most concern to them than the real legislatures they see in the world. But judges have limited time, limited information, limited moral knowledge, and limited virtue, just like everyone else. Waldron stresses cases of moral judgment and philosophical argument: rights, such as the right to freedom of speech, have uncertain parameters and boundaries; they are the subject of serious moral dispute among persons of good faith who believe in the rights. Constitutional provisions about those rights are surrounded by interpretive uncertainty, vagueness, or emptiness. Given all of that, a five-out-of-nine majority of the U.S. Supreme Court has no special claim to expertise or certainty compared with a majority of democratically elected representatives offering a competing interpretation of the right in question.[17] Vermeule tends to stress questions of technical knowledge and expertise, in which the issues are less epistemic and more technocratic, but the upshot is more or less the same: really existing judges are poorly situated to substitute their judgment for that of legislatures.[18]

And, according to the critique of entrenchment, we must always remember that it is *judges*, not the *constitution*, that will be limiting the legislature. A constitution is not self-interpreting or self-enforcing, and there is no way to make it so. This means that we never face the abstract question—should it be unconstitutional for legislatures to do X?—but only the mundane question—would it be better for judges to be able to decide, in the name of preventing X, whether and when to block legislative action?

To all of this Waldron in particular adds a substantive normative defense of democratic legislation and legislative decision making. He intends his comparative institutional evaluation to include a comparison between *best-case* legislatures and judiciaries (whereas, e.g., Vermeule is primarily concerned to compare really existing legislatures and judiciaries; they share a sense that Dworkin and his intellectual kin have mainly compared best-case judiciaries with really existing legislatures). In particular, he argues that there

is something deeply normatively *appropriate* about democratic majorities acting through their legislatures to decide contested questions of rights and rights-interpretation. He stresses that this is not, as it has traditionally been viewed, simply a capitulation to majority tyranny and majoritarian deprivation of minority rights:

> The point to remember here is that nothing tyrannical happens to me merely by virtue of the fact that my opinion is not acted upon by a community of which I am a member. Provided that the opinion that is acted upon takes my interests properly into account along with everyone else's, the fact that my opinion did not prevail is not itself a threat to my rights, or to my freedom, or to my well-being. None of this changes necessarily if I am also a member of the topical minority whose rights are at issue.[19]

Instead, he suggests that the same image of individuals as autonomous moral agents that underpins liberal rights theory also requires respecting our fellow citizens as *interpreters* of rights—and so respecting the legitimate claims of majorities of persons to settle arguments about such interpretations. We will return to these points later.

4. Federalism and the Critiques

Federalist entrenchment in all its forms runs afoul of at least some of the critiques. Ruth Gavison, in one of the only articles to broaden the question of constitutional entrenchment beyond questions of individual rights, holds as follows:

> Only unitary states have the luxury (or burden) of debating the question whether governmental structure should be included in the constitution. All states must have provisions regulating these subjects, but in unitary states these may evolve, and be enforced in part as constitutional conventions. This is precisely what has happened in England, and Dicey is still a powerful spokesperson for the desirability of this way of regulating the structure of government. However, federal governments cannot make this choice, since it is a central issue of such governments that the division of powers between sub-units and the central government is determined in a way that will be beyond the unilateral change of either states or the central government. . . . If the state is a federal one—

> the relations between central and local government must be made in a formal constitution, which cannot be changed unilaterally by the member parts.[20]

Now Gavison is not obviously right about the relationship between federalism and written constitutions. If relations among various branches of a single government can be regulated by evolving, unwritten, constitutional customs and conventions with occasional acts of legislation—as has been the case for relations among Commons, Lords, cabinet, and Crown in Britain—then relations between a center and provinces might well be regulated the same way. Indeed, Great Britain itself has never been quite the simple undifferentiated unitary state imagined by Dicey even before the recent decentralizing reforms.[21] Unwritten or unentrenched constitutional norms governed Anglo-Scottish relations before the Act of Union; such norms plus the Act itself governed the continuing constitutional differences between England and Scotland (in their legal systems, established churches, banking and university laws, and so on) afterward; and the relationship of Ireland to Westminster was always complicated but hardly ever simply that of being part of the territory of a unitary state governed by a unitary legislature. (And this is to say nothing of even more complex cases such as the Channel Islands.) Constitutional divisions of power between center and provinces predated written constitutions throughout Europe; and if the so-called ancient constitutions of France and Spain more or less collapsed into de facto unitary states even before the Revolution, the Holy Roman Empire endured as a kind of federation without a modern written constitution for centuries, and the Dutch and Swiss confederations had written treaties at their founding but were effectively governed by unwritten constitutions thereafter.

In the modern world, so few states lack written constitutions that it is difficult to get any traction on the question of what can and what cannot happen under an unwritten constitutional order. Every modern democratic federation has a written constitution, but so does every modern democratic state besides the United Kingdom and Israel. Every modern democratic federation has an entrenched constitution, but so does every modern democratic state besides the United Kingdom, Israel, and New Zealand. Given

Britain's unique institutional continuity and Israel's and New Zealand's tiny sizes, I doubt that we can safely generalize about the conditions that would allow a modern liberal democracy to persist without a written or entrenched constitution. The question of federalist entrenchment cannot be short-circuited so easily.

Gavison, moreover, tries to treat institutional entrenchment generally as outside the scope of the debate:

> It is important to note that, in distinction with the situation concerning rights and credos, there is no serious argument against judicial review of the "institutional" part of constitutions. This consensus is based on the fact that the provisions of the constitution in these matters are relatively clear, and that there is a necessity that there will be an authoritative arbiter of the disputes that do arise.[22]

But this won't do either. There is and has been tremendously serious argument against judicial policing of the institutional boundaries between the legislature and the executive in the United States, and the judiciary itself has often been extremely reluctant to act as that authoritative arbiter. (The "provisions in the constitution in these matters" are anything but "relatively clear"!) More appositely, the question of whether the American federal judiciary could police the allocation of authority between the center and the states has been a terribly vexed one in American constitutional history. Since 1937 the dominant view has been that it is better for Congress to unilaterally decide what lies within the scope of its power to regulate interstate commerce and what lies outside of it than for the courts to do so. That this doctrine's edges were nibbled a bit by the Rehnquist Court and now the Roberts Court does not change its real force. In *Gonzales v. Raich*,[23] the question at stake was not really *whether* the noncommercial growth of marijuana for intrastate personal use qualified as "interstate commerce," but rather *whether it lay within Congress's authority to decide whether it so qualified*. The Supreme Court opted for deference to congressional authority, which is to say that it declined to genuinely review the question of whether the boundary around "interstate commerce" had been crossed or not. The "authoritative arbiter" remains Congress, judging in its own case about how far its power extends and how little legislative autonomy is left to the states.[24]

It seems to me that we are left with no choice but to agree with Waldron's suggestion on this point:

> Many of the challenges to rights-oriented judicial review can be posed to other forms of constitutional review as well. In recent years, for example, the Supreme Court of the United States has struck down a number of statutes because they conflict with the Supreme Court's vision of federalism. Now, everyone concedes that the country is governed on a quite different basis so far as the relation between state and central government is concerned than it was at the end of the eighteenth century, when most of the constitutional text was ratified, or in the middle of the nineteenth century, when the text on federal structure was last modified to any substantial extent. But opinions differ as to what the new basis of state/federal relations should be. The text of the Constitution does not settle that matter. So it is settled instead by voting among Justices—some voting for one conception of federalism (which they then read into the Constitution), the others for another, and whichever side has the most votes on the Court prevails. It is not clear that this is an appropriate basis for the settlement of structural terms of association among a free and democratic people.[25]

Moreover, the entrenchment of the autonomy and the integrity of provinces carries important costs above and beyond those associated with the entrenchment of rights. That is, federalist entrenchment may stand in *greater* need of justificatory work than the entrenchment of rights, not lesser. The wide variety of public goods, regulations, and policies would seemingly be most efficiently provided by similarly various levels of government. And social, economic, and technological change over time probably changes the level at which some policies are most efficiently provided. Provincial boundaries often fail to match up with either economic regions such as metropolitan areas or environmental ones such as watersheds; in both cases the best policy-fitting region may include parts of several provinces but not all of any province.[26] Federalist entrenchment picks out provincial units that may not be the right size for any particularly important kind of policy and grants them constitutional status that is denied to, for example, cities, counties, metropolitan regions, and watersheds.[27] Entrenchment, moreover, freezes a particular allocation of authority between provinces and the center that may well become inappropriate as

time goes on. The alternative to federalist entrenchment, in short, need not be unitary centralized government; it might be decentralized government with more flexibility about what levels of government performs which functions when.

The difficulties involved might greatly exceed fiscal or regulatory inefficiency. As the cliché has it, the oak that does not bend may break, whereas the willow's lack of rigidity can prove to be a strength. Consider the attempts to stave off constitutional crisis in Canada by the Charlottetown and Meech Lake Accords—what Michael Lusztig has called the "constitutional paralysis" of the Canadian federation.[28] The status quo is sufficiently entrenched that it seems impossible to reform the constitutional order in ways that would make it more palatable to Quebec. The final 1992 breakdown of reform efforts that would recognize Quebec as a "distinct society" and formalize asymmetrical federalism came within a hair's breadth of prompting Quebecois secession in 1995. If entrenchment offers certain kinds of guarantees and stability, it by the same token yields inflexibility. We have seen that some federalist entrenchment, such as the allocation of authority between provinces and the center, is prone to the same interpretive difficulties as the entrenchment of rights. But those federalist rules that *aren't* prone to interpretive uncertainty may entrench procedures, institutions, and distributions of power and authority that eventually become unacceptable to some province(s) that have the capacity to break the state but that are not effectively reformable—a set of risks not ordinarily associated with the entrenchment of rights.

5. Constitutions, Procedures, and Institutions

Constitutional entrenchment has often been defended as a kind of precommitment strategy: the people, like Ulysses, bind themselves (or rather "itself"; conceiving of the people as a corporate actor matters for the coherence of the view) against a predictable future temptation, passion, or weakness of will. Precommitment views are meant to be relatively immune to the charge of countermajoritarianism or antidemocracy, since the constitutional constraint is both self-imposed (the constitution being democratically enacted) and autonomy-enhancing rather than autonomy-limiting (the principle being the more fundamental popular will than the

exception). Waldron, unsurprisingly, dismisses all versions of precommitment defenses of entrenchment.[29] Some of his critiques are well-taken; the people don't make up a unified actor at the time of the enactment of the principle; later disagreements about interpreting the principle may well be good-faith arguments, not evidence of panic or weakness of will; a majority vote of a judicial body is not obviously more capable than a majority vote of a legislative body of correctly divining the meaning behind the original restraint; and a constitutional restraint can't meaningfully be understood as "self-imposed" à la Ulysses and the Sirens when it binds later generations.

Waldron distinguishes between precommitment mechanisms that rely on external causal mechanisms—say, Ulysses handcuffs himself and throws the key overboard—and those that rely on the judgment of another actor, such as Ulysses' crew. I might purchase a mechanism that disables my car from starting if my breath reveals excessive alcohol consumption; or I might give my keys to a trusted friend. Waldron notes the obvious disadvantage of mechanical models: they do not admit of exceptions. (It might be better to drive while slightly drunk than to refrain from driving a sick child to the hospital.) He continues:

> Clearly, if constitutional constraints are regarded as forms of democratic precommitment, they operate more on the model of the friend's judgment than on the model of a causal mechanism. Except in rare cases (like "dual key" controls of nuclear weapons) constitutional constraints do not operate mechanically, but work instead by vesting a power of decision in some person or body of persons (a court), whose job it is to determine *as a matter of judgment* whether conduct that is contemplated (say, by the legislature) at t2 violates a constraint adopted at t1.[30]

This is revealingly wrong.

The disadvantages of mechanistic precommitment strategies are matched by an advantage: they are very reliable. If they guarantee that there will sometimes be type II errors (false negatives, times when an action is disallowed that should be allowed), they also guarantee that there will be no type I errors (false positives, when an action is allowed that should be disallowed). Which is preferable, and whether either is preferable to refraining from precom-

mitment, is entirely dependent on the probability, frequency, and consequences of these errors, not on any a priori rule. For any heavy drinker who does not, for example, have a child in the house who has a condition that predictably and regularly needs lifesaving emergency room treatment, I suspect that the Breathalyzer in the steering wheel is a *much* better precommitment strategy than giving keys to friends who might themselves get drunk, or who might be susceptible to persuasion, emotional blackmail (Ulysses' curses and threats), or even drunken violence to give keys back. Trusted friends may make mistakes in judgment; they may also be prevailed upon to relax their vigilance, one way or another. So far this seems to tell in favor of Waldron's broader argument; if the demos really were like a passionate drunk, willing and able to run roughshod over minorities, then it might also be willing and able to run roughshod over the judiciary or the constitution.[31] For judgment-based precommitment to be a sound strategy, a principal (P) at t1 must have reason to think both that the agent's (A) judgment at t2 will be much better, by P's own t1-lights, than P's; and that the reasons for P's impaired judgment at t2 aren't so likely to lead P to induce A to give over as to neutralize the advantage in judgment.

But *if* mechanical precommitments can be found, then the quality of decisions might rise. True, there will be few cases in law or politics that are *strictly* mechanical, on analogy with handcuffs and keys thrown into the ocean. But there are plenty of such cases in which the constraint operating at t2 is not merely some agent with temporarily better judgment on the merits of the question. The U.S. Constitution prohibits expenditures for a standing army more than two years in advance—this is a precommitment.[32] It denies to future Congresses the ability to do something that they might deem preferable on the merits when the time comes. And while one could imagine a case being litigated, that litigation would not just be a request for judges to decide whether a longer-term appropriation was desirable on the merits.

Waldron's focus on bill of rights–style cases has misled him here. Most constitutional rules aim to improve decision making relatively mechanically, not through mere agent-substitution. Agent-substitution asks someone else to decide the merits of the contested question; relatively mechanical solutions aim to alter the question, procedurally avoid it, or make some outcomes rather

than others more likely by giving actors with predictably different interests or opinions some power over it. The rule against long-term military appropriations prejudges particular disagreements, substituting relatively mechanical questions (two years or less? standing army?) for the substantive one. If other agents are called in, it is to settle the mechanical questions, not the substantive ones; and for the most part other agents aren't called in at all.

This is all done because the outcomes of some kinds of errors are considered worse than the outcomes of others, or because some errors are deemed likelier than others, or some combination of these. In this case, rather than encouraging legislators to decide the merits of the question each time, the constitutional designers opted to fend off the risk of a legislature mistakenly authorizing a permanent standing army under the control of a no-longer-accountable executive. That increases the risk of some other kinds of errors, of course—perhaps not only the risk of underfunding but also the risk of misallocations of funding because some military allocations are made inefficiently frequently. Elsewhere Waldron critiques this kind of outcome-oriented constitutional design as well:

> But a citizenry who disagree about what would count as the right results are not in a position to construct their constitution on this basis. . . . Using a result-driven approach, different citizens will seek to design the constitution on a different basis.[33]

This, it seems to me, proves too much—perhaps vastly too much. Its intuitive power is blunted by all of our experience of institutional and constitutional design. We cannot get very far in designing any decision-making procedures, democratic or otherwise, with *no* reference to results. Arguments about procedural fairness as such run out much too quickly, and anyway seem insufficient. Constitutional designers and ratifiers have, and perceive themselves to have, *some* level of Weberian responsibility for attention to consequences. They want to create institutions that will enable a state to defend itself effectively without being dominated by its own military, for instance—a pair of concerns that runs right through *The Federalist*.

Waldron means to rule out, for example, the libertarian move of assuming that the common law baseline of contract and property

law is basically just and efficient, and therefore proposing procedures that simply slow and impede legislation in a general way in order to prevent economic regulation. This, he thinks, violates respect for other persons as rights interpreters, or as bearers of the Arendtian "right to have rights." We disagree about what rights persons as owners and contractors and consumers and producers have; and that disagreement is the stuff of politics among persons who have the right to argue and interpret questions about rights. And surely there is *something* correct here. Procedures meant to help us manage our disagreements should not beg the question and take a side in those disagreements. When we have agreed to flip a coin to settle a question, if I were to call heads and then say, "Let's use my weighted coin; it comes up heads 60 percent of the time, and my view is right," I would have missed the point of the procedure. It can't be a good reason to adopt an electoral rule that it would help one's preferred party.[34]

But that can't be all there is to say. Shared political life isn't like coin flips all the way down. Even in the face of good-faith disagreement about ends, institutions are designed with an eye toward the ends they will promote as a matter of course. We try to avoid designing them to get particular outcomes *in particular cases*; but we choose electoral rules to promote two-party stability or multiparty representativeness; judicial rules to promote accuracy or overprotect the innocent; faculty hiring rules to encourage rapid hiring or waiting for ideal candidates or reinforcing expertise or building breadth. And we do so knowing not only that we will disagree about particular cases but also that we disagree about the balances between or among these various considerations.

To put it a different way, in the face of disagreement about particular cases, and disagreement about the reasons for deciding cases in general, *we do not simply adopt the decision rule to decide each case one at a time, or to reargue the reasons each time.* We do some of each of those things; the procedures we adopt are not carved in stone, and they come under pressure when they seem to generate a sufficient number of wrong outcomes. But we also devise rules to keep any number of questions from being considered, and other rules that tend to favor one or another of the contested reasons. We overweight the avoidance of some kinds of mistakes that we (or a majority of us at the time of rules adoption) consider more

serious, or harder to undo, or more likely to engender further mistakes in the future.

In constitutional theory about entrenchment and judicial review, it may be that no line between substance and procedure will be particularly stable, because procedures are adopted in order to advance substantive outcomes; our proceduralist commitments themselves will always be underdeterminate with respect to the shape of institutions. The line could only be stable if one believed in a preinstitutional Rousseauian general will, which Waldron (rightly) does not. Otherwise the democratic will is always in part a product of procedures, not something neutrally or transparently transmitted through them. So we will always have process-defining constitutional provisions (legislatures cannot bootstrap their own legitimacy), and the choice among them will, at least very often, be driven by substantive ends. While Waldron doesn't need the same substance-procedure distinction that, for example, John Hart Ely[35] does—he does not think that substantive and procedural *rights* fall into different categories—he does need a fairly stable distinction in order to defend the purity of his democratic-legislative procedures from smuggled-in substantive ends. Once it is thought legitimate to frame procedures with an eye on their substantive outcomes, overweighting against some kinds of errors and not others, then it seems that the freedom of majorities to interpret contested rights-claims free from interference by other agents is no trump.

6. Federalism as Precommitment and Substantive Procedure

Federalist entrenchment offers the sort of institutional rules described in the last section. Assuming that we may elide the distinction between the people as constitutional enacters and the later legislative representatives of later people, it is a kind of precommitment—not a precommitment to avoid madness or drunkenness or running a ship aground on the rocks or any of the traditionally colorful metaphors invoked to make precommitment an opposition between reason and unreason, but a relatively mechanical set of decision rules, adopted to affect the likelihood of some outcomes rather than others. Federalist entrenchment prevents later statewide majorities from making certain kinds of changes

to the decentralization of the society's governing institutions. It weights the prevention of excess centralization more heavily than it weights the risk that needed centralization will be resisted.[36]

Why not allow the central legislature to decide for itself, on an ongoing basis, how much decentralization is needed, and where the boundaries should lie?[37] I think that part of the answer lies in path dependence. To a substantial extent Waldron and Vermeule alike treat fundamental political decisions as independent from each other: one decision one year, another the next. Errors are inevitable, but that is true no matter what we do, so pointing to legislative errors is no reason to limit legislative authority. But in some areas of political life it's unlikely that serial decisions can be wholly or even mostly independent of one another—the precommitment to avoid long-term military expenditures rests on the thought that an error in one direction (too much funding of too strong an army under too unconstrained an executive) might have long-term institutional consequences that make it uncorrectable.

If federalist entrenchment guards against errors that are less dramatic, it is nonetheless similar in kind. It rests on the thought that the inevitability of error in deciding the details of decentralization is not good enough reason to leave such decisions up to new case-by-case decision every time. Some decisions would have long-term consequences, making themselves difficult to correct, and some kinds of errors are more likely than others. Some degree of decentralization is desirable, but unconstrained central legislatures may well decentralize too little. And if they do, the error will snowball, in the face of the powerful tendencies in modern states toward centralization. To identify just a few reasons for this:

1. The center, as the usual site for armed service and wartime loyalty, tends to attract a permanent degree of political attachment from those who have served in the military and periodic increases in attachment during wars and international crises, undermining the energy and enthusiasm citizens have for maintaining the potentially oppositional provinces.
2. The center's typically greater command of resources gives it the ability to co-opt or corrupt provincial officials, or simply to undermine their policy autonomy with selective expenditures.

3. The center's (ex hypothesi) unconstrained ability to alter the boundaries of or abolish provinces leaves the provinces both as too unstable to engender citizen loyalty and as vulnerable to manipulation by temporary national majorities, jeopardizing the ability of the provinces to remain oppositional. In short, the absence of federalist entrenchment risks making decentralized levels of government partisan playthings on the model of congressional districts in many U.S. states.

Waldron has for years offered a critique of the "I expect you'd like to know what I would do if I were a philosopher-king or a Supreme Court justice" mind-set of political theory.[38] The critique is a powerful one—more powerful, I think, than he recognizes. There is a parallel critique to be leveled at the idealization of uniformity and fixity in legislation; the legislature, like the philosopher, may show an unhealthy impatience for letting things unfold over time and may suffer from a hubristic sense of having all the answers already in hand. Of course, judges may suffer from this error, too—this is what ties Waldron's methodological critique of much applied normative political philosophy to his critiques of Dworkin and of judicial review. But federalist entrenchment only empowers *judges* at a couple degrees of remove. In the first instance it tends to empower provincial legislatures, allowing both for the operation of a jurisdictional competition that can operate as a market-like discovery procedure for best policies and for a peaceful coexistence of disagreeing political groups without *always* requiring that disagreements be settled by unified majority opinion. Philosophers may presume too much when they think that they can settle deeply contested questions of rights and justice in ways that should be binding on societies filled with Arendtian rights-bearers. But the representatives of those rights-bearers may presume too much, too; they may be too impatient of disagreement or of the time required for jurisdictional competition to result in discoveries. The wisdom of the multitude[39] that Waldron contrasts to the hubris of the judge is not found only in large numbers of voters reaching one-off decisions. It may also be found in *processes*.[40] And, when we compare the institutional option of a uniform central all-powerful legislature with the institutional option of legal competition, rather than with the institutional option of

an all-powerful judiciary, we see that virtues Waldron claims for democratic processes may be found in other processes as well. And federalist entrenchment may protect these processes.

It may be particularly desirable in the frequent case of ethnocultural federalism.[41] There is a deep consistency between Waldron's democratic critique of constitutionalism on one hand and his critique of multiculturalism, special consideration for indigenous peoples, and treaties on the other.[42] Indeed, I think they are two strands of an argument that Waldron had formulated almost twenty years ago, with his "Rights and Majorities: Rousseau Revisited,"[43] an argument that majoritarian *decision making* was fully compatible with respect for the moral rights of minorities, and that what had traditionally been viewed as entrenchments of minority rights should be reunderstood as claims for excessive minoritarian decision-making power over what *all* will do. In addition to a defense of majoritarianism, the two strands share a present-and-future orientation. Decisions about how we are to live are decisions *we* must make, *now*, and the dead have no rights to control them, whether through the Constitution of the United States or the Treaty of Waitangi or the original act of federation between Quebec and Ontario. We should make them (at least mainly) with respect to the rights and interests of those living now and those to come, not with respect to either the agreements reached or the injustices committed by our ancestors.

But in cases of ethnocultural divisions between majorities and minorities, errors on the part of majoritarian procedures may be both especially likely and especially difficult to reverse. To think this, we need not think that majorities are intentionally rapacious or bigoted or vicious, or that minorities have as a matter of moral or constitutional fact the rights that they think they have—the views of "majority tyranny" that Waldron has disputed so vigorously. We need only think that majorities are prone to ordinary kinds of mistakes for ordinary reasons: they know their own circumstances best and generalize from them, their opinions about hard moral questions are subtly influenced by their interests, and so on. The mistakes majorities can make in ethnoculturally divided democracies are moreover especially likely to spiral and snowball—a bit of unjust assimilation makes living in the minority language that much less appealing to the younger generation than it would have

been, a bit of excessive centralization of decision-making authority undermines the political institutions and authority that the minority might have used to check the next bit of excessive centralization, a bit of policy making that privileges majority interests a bit too much alienates and radicalizes the minority and hardens distrust between the two groups. I think that all of this is related to the fact that almost every peaceful and stable multinational democracy is federal to some substantial degree; federalism is surely not sufficient for multinational democratic coexistence but may be necessary, because where it is absent the majority tends to centralize decision making in a way that is self-reinforcing and eventually makes things more or less intolerable for the minority.

7. CONCLUSION

I have said much that involves "may" and "might" and contingent and empirical matters, of course. I do not say that federalist entrenchment is always constitutionally desirable all things considered—a silly claim anyways, since federalist entrenchment admits of so much variation that all the possibilities can't simultaneously be good ideas. I mean only to suggest that these are the kinds of considerations that encourage people to adopt decision rules that are not neutral among outcomes, even in the face of disagreement. If they are sociologically plausible in a given society, then *some* degree of federalist entrenchment may well be desirable.

Citizens of democratic societies will disagree with one another at almost every level of generality; it has been one of the strengths of Waldron's work to drive this point home. Our disagreement about conceptions of the good cannot be end-run around by imagining agreement about principles of right; we disagree about those principles, and about their interpretations and meanings even when we think we agree on the principles. We will disagree about what good policies are, about what level of government should decide policies, and about how flexible we should be on both those questions. Constitutional entrenchment cannot be legitimated by imagining universal agreement on procedures or decision rules, any more than by imagining such consensus on rights.

But it does not follow that we may not enact decision rules, that we may not make predictions about our own or our successors'

errors and try to stave them off. Decisions in politics are often *not* independent of previous decisions; it would be foolish to insist that in institutional design we pretend that they are. Forestalling especially serious or likely or irreversible errors, including the errors of foreclosing future discoveries, is the kind of thing that people do in institutional design *even in the face of disagreement.* Forestalling military dictatorship, or the shutdown of the policy discovery process provided by jurisdictional competition, or the elimination of dissent by temporary majorities or executives—these are moves that can be defended even in the knowledge that they guarantee some kinds of errors, and even in the knowledge that the agents they empower, such as judges, but also such as provinces—are not free from error themselves.

NOTES

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1. Cass Sunstein, *One Case at a Time* (Cambridge, MA: Harvard University Press, 1999); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 2000). See also Larry Kramer, *The People Themselves* (Oxford: Oxford University Press, 2004).

2. See, inter alia, Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13 (1993): 18–51; Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115 (2006): 1346. As an aside, it seems to me that part of what makes Waldron's challenge such a powerful one is that he has taken what is perhaps the most important jurisprudential theory of this generation, Joseph Raz's analysis

of legal authority, and done what Raz has never convincingly managed: joined the jurisprudential theory to a normative political theory.

3. I have developed my positive account of federalism and entrenchment in Jacob T. Levy, "Federalism, Liberalism, and the Separation of Loyalties," *American Political Science Review* 101 (2007): 459–77; Levy, "Federalism and the Old and New Liberalisms," *Social Philosophy and Policy* 24 (2007): 306–26; Levy, "National Minorities without Nationalism," in *The Politics of Belonging: Nationalism, Liberalism, and Pluralism*, ed. Alain Dieckhoff (Lanham, MD: Rowman and Littlefield, 2004); Levy, "Indigenous Self-Government," in *NOMOS XLV: Secession and Self-Determination*, ed. Stephen Macedo and Allen Buchanan (New York: NYU Press, 2003); and Levy, "Literacy, Language Rights, and the Modern State," in *Language Rights and Political Theory*, ed. Will Kymlicka and Alan Patten (Oxford: Oxford University Press, 2003). I examine some consequences of decentralization without entrenchment in "Three Perversities of Indian Law," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921470. The present essay is one of two planned to defend the theory developed across these essays against two lines of criticism—the critique of constitutional entrenchment in this case, and the charge that the theory requires violations of the publicity principle in the other.

4. See, of course, Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969). See also George Kateb, "Remarks on the Procedures of Constitutional Democracy," in *The Inner Ocean* (Ithaca, NY: Cornell University Press, 1994); Judith Shklar, "Political Theory and the Rule of Law," in *Political Thought and Political Thinkers*, ed. Judith Shklar and Stanley Hoffmann (Chicago: University of Chicago Press, 1998); Montesquieu, *The Spirit of the Laws*, ed. Anne Cohler et al. (Cambridge: Cambridge University Press, 1989 [1748]).

5. Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," *Columbia Law Review* 105 (2005): 1681.

6. "Autonomy" and "integrity" are both terribly loaded concepts when discussing natural persons and their freedom or identity. I don't mean to import any of the baggage from those discussions; here the terms are merely shorthand.

7. While the U.S. Senate obviously represents by states, it is sometimes overlooked that the U.S. House does as well. The House does not represent *population*, but *states on the basis of population*, with each state, no matter how small, guaranteed one representative, and only whole numbers available. As of the 2010 census, the American population of approximately 308 million divided by 435 representatives yields about one representative per 708,000 constituents. But Wyoming has one representative for its roughly 500,000 people, whereas Montana has one for more than 900,000.

8. By "general constitutional amendment," I mean to exclude the amendment of those constitutional rules that entrench either existence or the scope of authority of the provinces. The boundaries of American states or Canadian provinces may not be altered without their consent.

9. Jenna Bednar treats "geopolitical division, independence, and direct governance [the ability of both the center and the provinces to legislate over their constituents directly]," and the entrenchment of these, as constitutive of federalism, but not "inter-level appointment." See Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2008).

10. See Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54 (1954): 543–60.

11. Michael Greve, *The Upside-Down Constitution* (Cambridge, MA: Harvard University Press, 2012).

12. See, e.g., ibid., 22, 309, 324–25.

13. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (Kennedy, J., for the Court).

14. Thomas Jefferson, *Notes on the State of Virginia*, ed. Frank Shuffleton (New York: Penguin, 1998 [1785]).

15. Letter from Thomas Jefferson to Samuel Kerchival (July 12, 1816), in Memoir, Correspondence, and Miscellanies, from the *Papers of Thomas Jefferson*, vol. 4, Letter CXXXV (Thomas Jefferson Randolph, ed., 2nd ed. 1830) (from Project Gutenberg: http://www.gutenberg.org/files/16784/16784-h/16784-h.htm#link2H_4_0135).

16. James Madison, Observations on the "Draught of a Constitution for Virginia," in *The Writings of James Madison*, ed. Gaillard Hunt (New York: Putnam, 1904), 5:284, 294.

17. Waldron, "The Core of the Case against Judicial Review."

18. Adrian Vermeule, *Mechanisms of Democracy* (New York: Oxford University Press, 2007).

19. Waldron, "The Core of the Case against Judicial Review," 1398.

20. Ruth Gavison, "What Belongs in a Constitution?," *Constitutional Political Economy* 13 (2004): 89–105, 91–92.

21. Note Gavison's telling mistake of referring, in this context, to "England." Ibid., 91.

22. Ibid., 93.

23. *Gonzales v. Raich*, 545 U.S. 1 (2005).

24. I describe it this way while remaining mindful of Waldron's powerful Hobbesian-cum-Razian complaint that "[a]lmost any conceivable decision-rule will eventually involve someone deciding in his own case. Unless we envisage a literally endless chain of appeals, there will always be

some person or institution whose decision is final. And of that person or institution, we can always say that because it has the last word, its members are ipso facto ruling on the acceptability of their own view. Facile invocations of *nemo iudex in sua causa* are no excuse for forgetting the elementary logic of legitimacy: People disagree, and there is need for a final decision and a final decision procedure." Waldron, "The Core of the Case against Judicial Review," 1400–01. The only way to prevent Congress judging in its own case how far its powers extend is to leave the Supreme Court endlessly judging in *its* own case about the scope of its own authority.

25. Ibid., 1357.

26. For a rich account of and call for a "remapping of federalism" to reflect such phenomena, see Judith Resnik, "Federalism(s)' Forms and Norms: Contesting Rights, De-essentializing Jurisdictional Divides, and Temporizing Accommodations," in this volume.

27. For consideration of whether to accord constitutional status to cities, see, e.g., Daniel Weinstock, "Cities and Federalism," in this volume, and Loren King, "Cities, Subsidiarity, and Federalism," in this volume.

28. See Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail," *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 27 (1994): 747–71.

29. Following an account of disagreement at the time of constitutional enactment, disagreement about constitutional interpretation at the time of legislation, and that disagreement reappearing among judges at the time of adjudication, Waldron writes, "[M]y theme in all this is reasonable disagreement, but I cannot restrain myself from saying that anyone who thinks a narrative like this is appropriately modeled by the story of Ulysses and the sirens is an idiot." Waldron, *Law and Disagreement*, 268.

30. Ibid., 261–62.

31. And, of course, in practice it has been very difficult for judiciaries to resist democratic majorities in just those cases that we're most prone to see as analogous to drunken panics: the Red Scare, *Korematsu*, and the like.

32. At least it is as much of a precommitment as any of the other standard cases such as the First Amendment, even though neither it nor the standard case involves an agent (the *pouvoir constituante*) literally binding *itself*; but the gap between the legislature and the electorate can't be very significant for Waldron, since legislative majorities are morally legitimate ways to resolve popular disagreements on his account.

33. Waldron, *Law and Disagreement*, 294.

34. It is, of course, an entirely *common* reason for doing so, and this turns out to be tolerable in a relatively balanced party system; democracies don't collapse as a result. But the rampant hypocrisy around this is telling.

35. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

36. This is a simplification and shorthand; many of the entrenched constitutional rules about federalism *limit* provinces and empower the center. But these are more rarely the objects of constitutional controversy except to determine where they run out (e.g., the U.S. Commerce Clause). In the case of federations formed out of preexisting polities—the United States, Canada, Australia—the constitutional limits on provinces may be the more important constitutional rules in early decades, as the provinces learn to live with their reduced status. But this tends to change over time; eventually, it is the center rather than the provinces that is more likely to overreach.

37. Remember that in general federalist entrenchment does not predetermine policy disputes (what regulations shall we have?) but rather rules about determining such disputes (what level of government may decide what regulations we will have?). Again, this is not substantively neutral, but it is a proceduralist precommitment *about procedures*, one step removed from questions of substantive policy. In short, federalist entrenchment is more concerned with limiting the ability of democratic majorities *to decide who will decide* various questions than it is with directly limiting their decisions about the questions; it is this that makes it a relatively mechanical precommitment.

38. In addition to all the works on constitutionalism already cited, see Jeremy Waldron, "What Plato Would Allow," in *NOMOS XXXVII: Theory and Practice*, ed. Ian Shapiro and Judith Wagner Decew (New York: NYU Press, 1996).

39. Jeremy Waldron, "The Wisdom of the Multitude," *Political Theory* 23 (1995): 563–84.

40. See, inter alia, Friedrich Hayek, "The Use of Knowledge in Society," *American Economic Review* 35 (1945): 519–30; and Hayek, "Competition as a Discovery Procedure," *Quarterly Journal of Austrian Economics* 5 (2002): 9; the link between Hayekian discovery procedures and information-aggregating processes more generally has been explored by Cass Sunstein, most prominently in Sunstein, *Infotopia* (Oxford: Oxford University Press, 2006).

41. I have attempted to show that ethnocultural federalism should be understood as part of the normal case of federalism, not as a strange exceptional one, throughout the essays cited above, as well as in Jacob T. Levy, "Montesquieu's Constitutional Legacies," in *Modernity in Question: Montesquieu and His Legacy*, ed. Rebecca Kingston (Albany: SUNY Press, 2009).

42. See Jeremy Waldron, "Minority Cultures and the Cosmopolitan

Alternative," *University of Michigan Journal of Law Reform* 25 (1992): 751; Waldron, "What Is 'Cosmopolitan'?," *Journal of Political Philosophy* 8 (2000): 227; Waldron, "Superseding Historical Injustice," *Ethics* 103 (1992): 4; Waldron, "Cultural Identity and Civic Responsibility," in *Citizenship in Diverse Societies*, ed. Will Kymlicka and Wayne Norman (New York: Oxford University Press, 2000); Waldron, "Indigeneity: First Peoples and Last Occupancy," *New Zealand Journal of Public and International Law* 1 (2003): 55; and Waldron, "Redressing Historic Injustice," *University of Toronto Law Journal* 52 (2002): 135.

43. Jeremy Waldron, "Rights and Majorities: Rousseau Revisited," in *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993).

PART IV

REMAPPING FEDERALISM(S)

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12

FEDERALISM(S)' FORMS AND NORMS: CONTESTING RIGHTS, DE-ESSENTIALIZING JURISDICTIONAL DIVIDES, AND TEMPORIZING ACCOMMODATIONS

JUDITH RESNIK

My interest is in the sources of identity and norms in federations and the methods for mediating conflicts. In contrast to many accounts of federalism, which assume the stability of the political units that constitute a federation and which posit that subject matter authority flows either to the central government or to its subunits, I argue that the domains of authority are not fixed but renegotiated as conflicts emerge about the import of rights and the content of jurisdictional allocations. Federalisms regularly create mediating mechanisms, including what I term "discounts"—temporizing accommodations in which either the rights claimed or the subunit's identity is given less than full weight. What costs or benefits those accommodations impose depends on future events, such as providing a wider berth for rights' dilution or a subunit's willingness to provide protections it initially rejected.

Moreover, the relevant actors in federalism are more than the state and its subunits. Translocal organizations of government actors (TOGAs) have created a web of connections that require

enlarging the focus beyond grids of horizontal and vertical authority to capture the diverse arenas generating and homogenizing policies. Once the "who" of federalism is no longer limited to the federal government and its subunits, the federalist virtues of voice, exit, autonomy, and diversity become more difficult to realize. Further, once jurisdictional powers are understood not to be essentially fixed, and discounts are acknowledged as undervaluing some rights or subunit identity in an effort to moderate conflicts, the importance of social and political movements comes to the fore in shaping the boundaries of permissible accommodations and the doctrines that result.

1. Federalism(s)' Attractions

Why is federalism interesting, and why especially so in the first decades of the twenty-first century? Federalism is attractive because it offers an analytic and a history of practices demonstrating the capacity to sustain toleration within polities of plural legal norms. The effort to respect variations while adhering to certain specified legal obligations is increasingly familiar as a burgeoning number of multilevel and transnational institutions aim to mediate differences while developing shared commitments.

Federalism's appeal is enhanced because it is normatively liberal in one sense: federalism is predicated on the propositions that more than one legal regime is permissible, that individuals have multiple political affiliations and layered citizenship identities, and that sources of law are plural. Given contemporary as well as historical examples of political regimes seeking to exercise totalizing power, federalism's innovative toleration of legal pluralism—that can reconfigure and diffuse sovereign powers—deserves (once again) admiration.[1]

Appreciation of federalism's pluralism ought not, however, be translated into complacency that federalism is a mechanism that will result in the production of other norms central to liberalism, such as equality, dignity, and fair treatment of all persons. The consequences of federalism's toleration—and sometimes its celebration—of differences through the endowment of authority to various political sectors (be they states, provinces, länders, cities, indigenous nations, or linguistic or other minorities) does

not, intrinsically, produce liberal commitments or preclude illiberal outcomes.[2]

The obvious example from the United States is slavery,[3] but the point is neither dated nor particularistic. Countries with a wide range of political commitments fall under the category of federalism.[4] Within those counted as democratic, subunit autonomy has been used to obtain permission to underprotect or differently define rights.[5] In the multilevel government of Europe, for example, Member States argue that their judgments ought to be accorded a "margin of appreciation;" when detaining individuals alleged to be threats to national security; when mandating that crucifixes be displayed in classrooms; when prohibiting access to abortions; and when precluding prisoners from voting. In the United States, federalism values have been advanced in support of bans on same-sex marriages, gun regulation, and the use of "foreign" law in court judgments. (Subunits have likewise invoked federalism for the opposite ends, when seeking to expand forms of marriage, to limit gun ownership, and to welcome law from abroad.)[6] In short, subunits can generate distinctive policies that run across the political gamut and have imposed subordinated statuses that endure, absent social and political efforts garnering sufficient power to undo them.

Federalism's plural legal sources generate another feature—conflict. The authorization of many points of law production through layered and redundant legislative, executive, and judicial systems enables norm entrepreneurs to shop systems to persuade similarly situated actors (such as executive officials, judges, legislators from different levels) about the wisdom or the legality of particular points of view—for or against, for example, openness toward new immigrants, state mandates for health care, or environmental regulations. Because concurrency is permissible, disagreements can easily emerge (as can consensus) about particular rights. Instead of aspiring to "the tranquility of the state" (to borrow from Thomas Aquinas),[7] federalism admits discord as a predicate to the state. As Robert Cover explained long ago, confirmation of the strength of legal commitments may be evidenced through reiterative outcomes from distinct political units, just as disuniformity identifies the depth of disagreement about what norms should be.[8]

Mechanisms to resolve the resulting conflicts are another facet of federalism. Federated systems are simultaneously committed to subunit participation in the creation of the larger norms and to some specified norms so foundational that deviation is not permitted. Resolutions are needed either because individuals and entities cannot simultaneously comply with differing regimes or because the variation is seen as diverging too far from membership obligations of the larger political unit. The conflicts that emerge are often cast in terms of jurisdiction but need to be understood as bilevel controversies in which jurisdictional arguments are entangled in high-stakes commitments to particular rules. To respond, federations rely on institutions and on practices understood to be legitimate by the various stakeholders.

The issues are how the norms of the larger and smaller political units are generated, what constitutes a deviation, when divergence becomes intolerable, and how authority to make, contest, and insist on norms is distributed.[9] Responses stem in part from constitutions, conventions, treaties, statutes, judicially crafted doctrines, and commentary that, at times, seem to offer fixed answers. Texts enumerate powers or provide residual clauses that may specify particular rights and assign competencies over certain subject matters to subunits or to the federation itself. Reflecting such allocations, many discussions of federations presume a singularity of entities and rights, and that the power over a given domain or kind of right belongs either to subunits or to the federal government; a few arenas are defined as concurrent; and the jurisdictional entities are posited to be unilateral actors.[10] To borrow from critical theory, this approach relies on *essentializing* rights, roles, and jurisdictional allocations.

At both a descriptive and a normative level, this framing is misguided. The content of rights set forth in constitutions and conventions changes, and the identities of both the subunits and the federated government do not remain fixed. Indeed, the identities of all are forged through relationships over time and in part as differences become visible when conflicts over authority emerge. Those exchanges are not only dynamic within federations but shaped by a host of world events, including shifting interactions with other governments, federated or not.

Furthermore, the autonomy of subunits is overstated. To con-

ceptualize states, cities, and other subunits as lone rangers, in sui generis acts of self-rule, is to miss that their lawmaking, even when claimed to be constitutive of a particular locality's identity, is embedded in and related to translocal and transnational social movements. Agreements across subunits within a given federation (sometimes termed "horizontal federalism") are increasingly commonplace, as are translocal-transnational accords in which subunits of more than one federation co-venture with each other across national boundaries.

Power likewise does not move in only one direction but can flow back and forth as well as diagonally. Moreover, the resolutions produced by institutional mediators (be they courts or other branches of government) are frequently temporizing, as contestation and negotiations continue despite (and sometimes because of) stipulated outcomes. As a result, what seems to have been settled through constitutional adjudication or political negotiations may be reconfigured.[11]

"Voice" and "exit" are standard-bearers in federalism discourse, modeling territorial subunits presumed to enhance democratic participatory opportunities by enabling individuals to express their preferences through participating or leaving. Long-standing critiques of those accounts point out that jurisdictions have a variety of policies that make a decision to exit over a particular disagreement more complex. The exit option is also freighted by the difficulties of shopping as well as the costs of relocation, not only for those with limited resources but also because lives and businesses are a bundle of connections, embedded in communities.[12]

In addition, what I argue here—that policies are shaped and reshaped through and across translocal-transnational subunits—renders the federalism virtues of autonomy, diversity, voice, and exit yet more difficult to actualize. When policies are made translocally, where does one participate? And if replicated from subunit to subunit, to where should one move? Translocal policy formation makes all the more plain that neither preferences nor identities are exogenous but formed through interactive and multifaceted exchanges.

The burdens of this essay are, therefore, threefold. First, I sketch variations across federations to undermine *federalism-essentialism*—that rights have fixed relationships to jurisdictional lines. In

Europe, some refer to the movement of power toward the center as "competence creep";[13] my point is that competencies are always in motion, and in more than one direction, as the import of rights and the functions of government shift. Revision is needed of presumptions that rigid delineations (such as "domestic" versus "foreign" affairs, "family" versus "property" rights) are mapped onto competencies.[14] The exemplar I explore is the changing understanding of the import of violence against women, once seen as a local matter and now understood to be a central method of generating gendered subordination to be redressed by national and international law as well.

Second, I focus on what I term *federalism discounts*, mechanisms on both sides of the Atlantic and in international law that license deviations from legal obligations. Examples from the United States include a mix of statutes and doctrines that circumscribe federal power in favor of state authority and permit underenforcement of federal law. A parallel in Europe is what is termed the "margin of appreciation," invoked when evaluating whether Contracting Parties can vary implementation of the European Convention on Human Rights. Moving from federation and union to international law, states that join treaties may impose reservations, understandings, and declarations (RUDs) to temporize their affiliations by specifying limited compliance with particular provisions of treaties.[15] In each instance, either the subunit community identity or the right asserted is given less than the full value argued by the claimants, as one assertion trumps the other. Despite important distinctions in the political construction of these three sites,[16] each has developed accommodating practices responsive to core challenges of federalism—how to produce shared commitments while respecting differences and when to insist on particular obligations, unmodified.

To understand and parse the work that federalism discounts do, these different federating practices should be understood as a genre, and their costs and utilities catalogued. As I detail, applications in particular cases undervalue either rights or subunit identity. The scope of the impact turns on later events. Federalism discounts imagine—and count on—a future, in which either the temporizing accommodation produces gradual realizations of

shared commitments to particular forms of rights or the content of those rights is reduced. The burdens imposed cannot be fully assessed at the time; in retrospect, a particular discount could be seen as appreciating subunits' roles in community formation and law implementation, as an innovative moment of fuzzing rights, or as the beginning of the redefinition or the deterioration—depending on one's vantage point—of central norms.[17]

As an empirical matter, federalism discounts are an artifact of the pluralism of federalism. As a normative matter, federalism discounts need to build in their own function as a way-station. When discounts are given, they should be accompanied by acknowledgment of the costs that they impose through insisting on their contingent status as *temporizing accommodations*, which leave open the possibility of changing evaluations of both the rights in contest and the subunit's commitments to them. When sanctioning gaps between norms and subunit activities or if according little weight to subunit commitments, federalism discounts should specify that the lines drawn in the moment are subject to reconsideration.

Constraining the breadth and durability of federalism discounts is also fitting because complex redundancy (rather than straightforward lines of authority) permeates federated systems, always in the process of renegotiating the boundaries of authority and the import of rights. That renegotiation is readily apparent in the context of Europe, with its relatively recent Convention on Human Rights, the growth in membership in the Council of Europe, and the expanding role of the European Union.[18] Yet in the much older U.S. federation, conflicts about federal power and subunit autonomy also continue unabated, as social movements make new claims on the meaning of constitutional rights and on the import of jurisdictional boundaries.

Thus, and third, I seek to dislodge state-centered federalism by discussing the degree to which geographic boundaries have become porous, requiring an accounting of different configurations of power that do not match territorial borders.[19] The units of analyses need to focus beyond the subunit and the federation so as to include the translocalism and the internationalism that alter the meaning of power, participation, voice, jurisdiction, rights, and exit in domestic settings.[20] Whether the focal point is the city,

the state, or the federation, territorial boundaries ought not to be equated with legal boundedness. Law migrates, and federations in particular permit multiple sources of entry.

During the last century, translocal and transnational activities have proliferated. Such exchanges are often facilitated by translocal organizations of government actors; "TOGAs" is the acronym I have proffered.[21] Examples include the Uniform Law Commission and the National Governors' Association in the United States; the Federation of Canadian Municipalities; the Committee of the Regions in Europe; and the International Council for Local Environmental Initiatives, which was created by the International Union of Local Authorities and the United Nations Environmental Program. Such organizations are policy entrepreneurs, both contributing to the shape of legal rules and affecting their implementation. Rather than lawmaking authority that is "truly local" or "truly national" (to borrow terms from U.S. case law, discussed below), norms travel horizontally, vertically, diagonally and diffuse irregularly, with subunits and their officials often functioning as co-venturers rather than as solo actors.

TOGAs serve as a reminder that the "voice" of subunits ought to be heard as "voices." TOGAs disaggregate and reaggregate policy prescriptions, as state actors from the same subunit may take different positions, individually or as part of a collective (such as attorneys general, city mayors, or judges) than do the subunits of which they are officials. Because federalism discounts are often proffered in the name of recognizing the autonomy of a subunit and its commitments to particular views, policies made by TOGAs raise questions about whether such deference is due. Further, the many voices within and across subunits complicate the task of deciding what is *state-regarding* or *state-protective*—terms I prefer to "federalism," which describes the configuration but not which way power ought to be directed in a particular case, why, or by whom.

In short, in addition to de-essentializing federalism by appreciating concurrent and changing competencies and to understanding and cabining the work that federalism discounts do, discussions about federalisms need to take the diverse and proliferating institutional structures into account. The insightful three-part schematic of federalism provided by Andreas Auer[22]—identifying autonomy, participation, and superposition as the key elements of

federalism—therefore requires expansion. My account adds two additional elements: *translocal-transnationalism*, to capture fluid, disaggregated reconfigurations across boundaries, and *temporizing accommodations*, to acknowledge that the discounts federalism begets require revisiting regularly.

The dynamic features within federations, coupled with important variations among federated forms and over time, are reflected in my term "federalism(s)." The plural form can be understood as appreciating the many modifiers—administrative federalism, cooperative federalism, competitive federalism, creative federalism, cultural federalism, dialectical federalism, dialogical federalism, dual federalism, fiscal federalism, intrastatutory federalism, noncategorical federalism, polyphonic federalism, territorial federalism, and the like—while remaining hesitant to assume that any one of them provides a stable and general account. Below, I explain the parallels among mediating mechanisms developed in federated and international systems to create spaces for variation in legal norms, how analyses of jurisdictional interactions and interdependencies undermine essentialism, and why a rejection of assumptions about defined subject matter competencies and bounded subunits need not dim interest in exploring federalisms' generativity.

2. De-essentializing Federalism

It is commonplace in layered legal regimes to assign tasks by the nature of the government actors (courts, legislatures, the executive, administrative agencies of the larger and smaller units) and by certain subject matters. But which arenas reside at what level, what issues fall within the designations, and whether all subunits have the same authority vary across the set of federations and over time. The reasons to use federalism(s) are to denote these diverse forms, their fluidity, and as a buffer against essentialist presumptions that federalism per se does the work of siting, allocating, and legitimating power.

Below, I provide windows in the variety of allocations of authority and in the degrees of symmetry among subunits; my focus is not only across different federations but also within, as understandings of the import of particular legal regimes and their normative

implications shift over time. In the United States, for example, "family law" is often assumed to be the special (and sometimes the exclusive) competence of states and then presumed to be a "natural" allocation that would be reflected elsewhere. If family law is equated with regulation of actors authorized to perform marriages and the rules of divorce, that description is largely true.[23] But once "family law" is understood to include property, citizenship, and equality rules, then the federal laws of bankruptcy, pensions (ERISA), tax, and immigration all come into play. Moving from the statutory to the constitutional level, federal family law has prohibited racial barriers to marriage,[24] regulated procedures by which states determine parental rights,[25] and insulated custodial parents from state rules conferring rights on grandparents.[26] Federal family law was further inscribed in 1996 when Congress enacted the Defense of Marriage Act (DOMA), which insisted that for purposes of federal law, "marriage" can only occur between a man and a woman, a proposition now contested in both state and federal courts.[27]

Family law in the United States is, in short, both state and federal, laced as well with international precepts, such as the Hague Convention on the Civil Aspects of International Child Abduction.[28] At times, the layered regimes can produce conflicts, sometimes resolved by resort to characterizations of legal regulations. For example, if the Supreme Court decides that a rule is "about" marriage, state law generally controls, while if the same rule is categorized as "about" pensions, federal law will likely be applied.[29]

The law of marriage and divorce offers other insight into federalism(s). While a good deal of the regulation of marriage and divorce is, in the United States, undertaken by states, the very same activities are, in Canada, the subject of national jurisdiction, with a similar mix of overlaps; child support is a federal issue, but other marital property issues are assigned to provinces.[30] Comparisons between the United States and Canada yield other examples of divergent practices among federations. In the United States, foreign affairs and migration powers are posited as paradigmatic examples of functions of the national government, and not their subunits.[31] In contrast, Canadian provinces have some powers over immigration.[32] Enlarging the set to consider other federations, the constitutions of many Swiss cantons have provisions

"aimed at cooperation . . . with foreign regions, with foreign states, and even with international organizations."[33] Swiss municipalities have authority over the naturalization of citizens, and the function includes not only the implementation of federal norms but also the capacity to make legal judgments about the propriety of individual applicants for citizenship.[34] German länders are in direct relationship with the European Union and, more generally, many substate units are participants in a wide array of "diplomatic activity."[35]

Another set of distinctions arises from considering the idea of symmetry across subunits. In the United States, doctrines insist that each state is on "equal footing," to be treated for constitutional purposes the same as all others.[36] Similarly, regardless of population, each state has two seats in the Senate. The United States is thus posited as exemplifying federalism symmetry, entailing "conformity and commonality in the relations of each separate political unit of the system to both the system as a whole and to the other component units."[37]

But other federalist systems rely on asymmetrical arrangements, sometimes to reflect distinctive histories and capacities of subunits, the political settlements that take such divergences into account, and renegotiations of a federation's parameters. For example, the Indian Constitution makes special provisions for one state (Kashmir), but not others, to have its own constitution.[38] In Canada, statutory set-asides assure that three out of the nine seats on its Supreme Court are allocated to Quebec.[39] Further, Canadian pension law provides that, if conflicts emerge, provincial law can prevail over federal law; Quebec can thus maintain its system while other provinces can opt into the federal regime.[40] The United Kingdom has structured an asymmetrical federalism[41] through, for example, the differential authority of its Supreme Court, which has jurisdiction over criminal appeals from England, Wales, and Northern Ireland but not from Scotland.[42] And, as I discuss below, further tailoring comes when courts permit subunits to vary norm enforcement under doctrines such as the margin of appreciation.

Moreover, federations do not remain invariable over time, and, depending on the factors assessed, a federation could be rated more or less symmetrical at different points in time. One example comes from the account by Arthur Benz, examining the evolution

of Germany's federation; he outlined how flexibility in Germany's political institutions enabled its federalism structure to become asymmetrical in response to dynamics within (the unification of Germany in 1990) and without (the expansion of Europe's authority).[43] Returning to the United States, statutes and regulations may carve out special rules for certain states. For example, given its challenges with air quality (and its political clout), federal law provides California with a waiver from the Clean Air Act to create its own different (and higher) standards for auto emissions.[44]

Even when, as a matter of law, power is allocated equally across subunits, asymmetries can arise from different forms of legal structures within subunits, varying resources, populations, land masses, and popular engagement.[45] At a descriptive level, one finds divergent uses of whatever "constitutional space" subunits enjoy.[46] Normatively, one could celebrate the variation or raise concerns about the risk of "horizontal aggrandizement" that can ensue, as some subunits become more powerful.[47]

By way of a summary, Anne Mullins and Cheryl Saunders offered the comment that in "reality, all modern federations are asymmetrical."[48] My point in proffering this smattering of examples, drawn from a growing literature on comparative federalism,[49] is to underscore not only the political will entailed in forming and maintaining federations—"coming together" or "holding together" in the parlance[50]—but also the fluid status of the agreements made. Divisions of authority are neither natural nor necessarily enduring.

Reconceiving Rights and Redefining Competencies

To illustrate the agency—rather than the naturalness—required to fix jurisdictional authority, I provide a brief overview of debates in the United States about the Supreme Court's role in federalism allocations and, specifically, its decision to preclude federal power from addressing aspects of violence against women. This example illustrates the many categorical frames into which human behavior can be put and the many judgments entailed in linking particular frames with certain sites of jurisdictional authority.

On a host of occasions, the Supreme Court has taken authority upon itself to determine the boundaries of federalism, a word that was not used in the Constitution and that did not appear regularly

as a justification in Supreme Court decisions until the second half of the twentieth century. Before then, questions of power between state and national government were generally discussed in terms of "states' rights." That phrase came to be equated with the segregationist positions rejected in *Brown v. Board of Education*[51] and, hence, fell into disuse. "Federalism"—a capacious word not obviously prejudging where power resides—became the nomenclature of choice,[52] and claims asserted in the name of federalism became the shorthand for an argument that authority resided with the subunit.[53] Better terms are *state-regarding* and *state-protective*, to prompt reflection on the criteria used and the identity of the actors, federal or state, TOGAs, or others, using that label for their claims.

Brown illustrates one fulcrum of U.S. federalism case law, in which individuals and groups bring Fourteenth Amendment claims, and their rights are pitted against state autonomy. Federalism case law emerges from other vectors, including the interplay between the powers constitutionally specified for Congress (such as commerce, bankruptcy, patents), the Tenth and Eleventh Amendments, and various implied authority such as over foreign affairs. States "qua states" have sometimes insisted on their immunity from congressional regulation and/or from obligations to individual plaintiffs alleging violations of federal rights. State-to-state exchanges are another template, framed through the "dormant" Commerce Clause and the Full Faith and Credit provisions of the Constitution.[54]

Case law and commentary debate both the Constitution's meaning and the Court's decision to take on the role of a federalism mediator. "The political safeguards of federalism" is Herbert Wechsler's famous description (written, like *Brown*, in 1954)[55] of his argument that courts ought generally to defer to Congress (composed of state-based elected officials) to decide when to use its federal authority to regulate or constrain state powers.[56] Wechsler's view was that, by definition, members of Congress would be state-regarding and, therefore, that the legislation they produced built in federalism accommodations. (Critics, discussed below, point to the degree to which state and government officials are nonetheless differently affiliated.)

Wechsler's admonition was ignored in 2000 when, in *United States v. Morrison*, the Court held unconstitutional one section of

the Violence Against Women Act (VAWA). Congress's passage of VAWA in 1994 had great political symbolism as a national response to a growing recognition that targeted violence undermined women's equality. The multi-pronged statute aspired to shift behavior in many locations—police, prosecution, courts, households, the streets, workplaces, college campuses, and Indian reservations.[57] The particular facet of VAWA at issue was a "civil rights remedy," providing victims of violence with a cause of action to seek damages in federal court as well as in state court.[58]

A five-person majority held that Congress lacked power (or what some jurisdictions call "competency") to create that remedy. The Court rested its holding on federalism ideology, that the "Constitution requires a distinction between what is truly national and what is truly local."[59] The majority then categorized violence against women as "local" by stipulating that "violence" was not "economic in nature"[60] but fell instead under the headings of crime and tort.

Morrison illustrates both the appeal of a categorical essentialist approach as well as its weaknesses. Clear and bounded categories—state versus federal, family and criminal law versus civil rights law—offer the potential in a democratic federation of enhancing accountability through the articulation of specific lines of authority. Yet *Morrison*'s tidy boxes ignored both the multiple forms that rights can take and the normative complexity and political contestation that give and change the meaning of rights and power. As detailed below, by sapping violence of its equality valence, the *Morrison* majority used federalism to refuse to recognize that remedies against such violence are simultaneously predicated on local law, national constitutional rights, and transnational human rights.

VAWA was the product of four years of negotiation that resulted in many state-regarding provisions. VAWA created an Office on Violence Against Women in the federal Department of Justice to administer grants flowing to state-based programs ("STOP"—Services, Training, Officers, Prosecutors). In fiscal year 2011, for example, grants totaled more than $450 million[61] and included a "base award of $600,000" to each state, followed by additional sums calibrated in relation to populations.[62] Law enforcement, prosecution, and victims' services were each guaranteed at least 25 percent of the funds.[63]

As noted, the issue in *Morrison* related to the "civil rights rem-

edy." A college student had filed a lawsuit in federal court against two athletes whom, she alleged, raped her and then bragged about their sexual aggressions against women.[64] VAWA's remedial structure was additional evidence that the statute was state-protective. The supplemental federal remedy (adding to, rather than displacing, state claims) did not—pace Wechsler—authorize lawsuits against state actors for failures such as states' and localities' inadequate policing and prosecutions, but rather only against the assailants, when a plaintiff could prove that they had committed gender-motivated crimes.

Participating in the debates before VAWA's enactment were many state actors, including translocal organizations of government actors—the TOGAs mentioned at the outset. The interactions among them underscore another facet of federalism, which is the need to disaggregate subunits to understand the disagreements within, as state actors split on various policy issues—in this instance, on the propriety of "making a federal case" out of what some called "domestic" violence. Lobbying against such a provision was an organization of state court judges—the Conference of Chief Justices, a private group composed of individuals from each state who hold the position of chief justice. In the early 1990s, the Conference of Chief Justices joined the United States Judicial Conference (a statutory body that includes the chief judges of the federal appellate courts, a few district court judges, and chaired by the Chief Justice of the United States) in objecting that VAWA's civil rights remedy, if enacted, would inappropriately relocate "family" disputes in the federal courts and that tens of thousands of cases would come flooding in.[65]

Yet other state actors were enthusiasts. Another TOGA, the National Association of Attorneys General, joined with individual attorneys general from thirty-eight states to register their support.[66] Why were these elected officials proponents? Not only did VAWA provide significant funds for state law enforcement while not targeting states as defendants in lawsuits, it was also politically popular.[67] A worldwide social movement had succeeded in reframing what once had been seen as interpersonal disputes or ad hoc crimes and had demonstrated that violence was a mechanism of subordination, cutting women off from full participation in economic and civic life. Pouring federal resources into violence

against women (the statute's "STOP" grants) and creating a new civil rights remedy, as long as state remedies remained intact, inscribed the wrongfulness of targeted, gender-biased violence.

The formal legal categories Congress invoked to launch the federal initiative mapped onto this understanding. Congress relied on its powers to implement the Fourteenth Amendment, prohibiting states from denying persons within their jurisdictions equal protection of the laws and due process. Supreme Court case law had long imposed a "state action" requirement for Fourteenth Amendment remedies, and Congress framed its provision as a response to sex-based state action—the history of state licensure, and then toleration, of violence against women. State laws had made "marital rape" an exception in criminal law, immunizing husband-rapists from prosecution. "Chastisement" of wives was also permissible under state laws. Even after most states had revised their statutes, prosecutions remained rare.

Congress therefore relied on the extensive documentation—produced at the behest of state judiciaries—of state underenforcement of crimes of violence against women.[68] Congress received many officially commissioned "gender bias" reports, providing "voluminous" evidence of "pervasive bias in various state justice systems against victims of gender-motivated violence" and "unacceptably lenient punishments" for those convicted of "gender-motivated violence."[69] State action and inaction were therefore the predicates for suits against private actors who targeted women and provided the authority for Congress to act under the Fourteenth Amendment.[70]

Congress also invoked its powers under the Commerce Clause, which appeared at the time to have been a safe haven, used in the 1960s as the basis for the civil rights legislation banning race discrimination in public accommodations. In the aptly named decision of *Heart of Atlanta Motel*,[71] the Supreme Court had agreed, reading the Commerce Clause to sustain regulation of interstate commerce and of activities burdening or having substantial effects on interstate commerce.[72] If African Americans could not readily find lodgings, their capacity to participate in commercial activities across the country was greatly impaired. VAWA's record seemed to meet that standard; Congress received evidence of the nationwide economic impacts of injuries to women in terms of dollars lost

in the workplace and dollars spent on the health care system, as well as the degree to which women tried to organize wage work to avoid heightening the risk of assaults.

The symbolism of opening an avenue to the federal courts was broader than the practical effect. Although federal judges had predicated opposition to VAWA's civil rights remedy in part on floodgate arguments, fewer than fifty federal cases relying on VAWA's civil rights remedy resulted in published decisions between 1994 and 2000, when the Supreme Court heard the constitutional challenge.[73] On the other hand, the *Morrison* decision to close off the access provided by Congress has had a profound impact—taking the federal courts out of national and transnational discussions about the relationship of violence to equality.

Rejecting arguments about effects on the economy (and thereby ignoring not only women's agency as wage workers but also their contributions as household workers to national prosperity), the Court reasoned that, were Congress constitutionally permitted via the Commerce Clause to regulate violence against women, Congress could "equally as well" regulate "family law and other areas of traditional state regulation" (tort and crime included) that likewise could be said to have effects on the national economy.[74] The majority assumed that jurisdictional barriers existed against federal regulation of "marriage, divorce, and childrearing," which could, like violence against women, have an "aggregate effect" on the national economy.[75] (As I discuss below, the Court's error was not in recognizing these possibilities but in ruling them outside federal authority.)

Likewise, the Court rejected the equal protection footings by insisting that Congress could not authorize such lawsuits against private persons in federal court. *Morrison* thus narrowed the meaning of state action, instead of taking up the thread of decisions reconsidering the parameters of the doctrine.[76] The *Morrison* majority invoked prior cases praising the "state action" doctrine for preserving "an area of individual freedom by limiting the reach of federal law and federal judicial power."[77] But the opinion came close to acknowledging that state action permeated violence against women, for the majority then turned to another question —the adequacy of the record for the congressional action. In then-recent cases, the Court had taken it upon itself to oversee

congressional fact-finding by assessing whether the evidence that Congress had used sufficed to support its action. Finding the civil rights remedy to be neither "congruent" nor "proportionate" to the record before Congress, the Court held unconstitutional the federal remedy for those alleging victimization on account of gender.

The majority's opinion could be read as joining Wechsler's critics, who have argued that he was mistaken in relying on members of the House of Representatives and of the Senate to be state-regarding. Even if elected by states, they are federal officials, with different lines of affiliation that could produce deals that might not forward state interests. Instead, the majority put itself into the role of speaking for states and read VAWA as a congressional trespass on constitutional state interests. But as I have outlined in *Morrison* (as in many other federalism cases), state officials were centrally involved in the political efforts that created the statute.

In addition to the thirty-eight state attorneys general who had, along with the National Association of Attorneys General, lobbied for VAWA's enactment,[78] thirty-six state attorneys general filed an amicus brief, urging the Court to uphold VAWA's civil rights remedy as a constitutional exercise of federal Commerce Clause powers.[79] (One state—Alabama—filed a brief arguing that the statute trampled on state prerogatives.)[80] The *Morrison* majority not only ignored Congress as the Wechslerian repository of state interests but ignored the express statements of politically accountable state actors that VAWA was federalism-friendly. As Justice Souter's dissent put it, "the States will be forced to enjoy the new federalism whether they want it or not."[81]

What were the sources for the majority's federalism imperative? The opinion is full of jurisdictional essentialism, linking states to women, violence, crime, and the family, and walling the federal courts off from sharing that work. The opinion does not provide an account of why states would have an interest in having exclusive remedial authority over damage actions filed by victims of violence. Nor is the opinion grounded in a textual analysis of the Commerce Clause and the Equal Protection Clause. Rather, the decision exemplifies a genre of federalism discourse that invokes the Court's own prior interpretations along with loose historical descriptions of patterns of regulation to create constitutional prohibitions. The opinion thus embraces what the Court had

rejected (again by a bare majority) in another line of cases—the idea that it could identify certain activities as "essential" state functions, immune from federal regulation.[82] *Morrison* resurrected that approach as it worried that, were VAWA sustained, "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority."[83]

Wechsler had advised that attention be paid to Congress. My criticism is that the Court's justifications did not explain how states could be harmed by the congressional action—the provision of a supplementary remedy that, as detailed, was both state-regarding and state-protective. The *Morrison* categorical distinctions fail at both descriptive and normative levels. State laws governing crime and families are not separate spheres, impervious to federal oversight; rather, overlapping and layered legal rules regulate crime and organize households. In terms of constitutional law, the *Morrison* decision ignored its own case law, such as the holdings I mentioned banning race discrimination in marriage, and those regulating how states can decide to terminate parental rights. Likewise, the *Morrison* Court took no account of the federal family laws, encoded in bankruptcy, pensions, tax, social security, and immigration, all of which give legal and economic import to certain family relationships.

Just as the jurisdictional divide unravels, so too does the categorization of the kind of injuries violence entails. The *Morrison* Court assumed (correctly) that violence can be both tortious and criminal. But violence can also be an attack on equality rights. The historical analogue proffered by VAWA proponents was the lynching of African Americans. Under slavery and its residue, those murders were rarely subjected to sanctions under criminal or tort law, let alone found to be a violation of civil rights. (Indeed, in the 1930s, a county courthouse in Idaho displayed a mural of an "Indian being lynched" as if that act were an appropriate decorative touch.)[84] Not until after the Civil War and well into the Second Reconstruction of the 1960s did lynching and other race-targeted violence come to be understood as torts, crimes, and civil rights violations.

Parallel shifts have taken place in the conceptualization of women and the violence they encounter. After the enactment of the Fourteenth Amendment, the Court rejected claims brought

by women that its protections endowed them with rights. In the 1860s and 1870s, the U.S. Supreme Court held that neither the Equal Protection Clause nor the Privileges or Immunities Clause of the Fourteenth Amendment prevented states from banning women from practicing law or voting.[85] The categorical competencies then in vogue meant that decisions about who could be in the professions or qualify to vote were matters for state, not national, law to decide.

But women's rights movements untied those jurisdictional knots. Just as in the nineteenth century, the question of slavery moved from the category of master-servant relationships to that of civil rights, so too in the twentieth century did women become "persons" protected by the Fourteenth Amendment. VAWA marked another of equality's frontiers by insisting that "domestic violence" cease to be a matter of "private" relationships and become a matter of equal treatment under national law.

A few milestones mark these reconceptions. In 1920, the Constitution was amended to recognize women as voters, which also began a process of a broader commitment to women as rights-holders.[86] Many decades later, in 1971, in *Reed v. Reed*, the Supreme Court held that state discrimination on the basis of sex was a Fourteenth Amendment violation that federal law had the power to address.[87] Congress was actively involved in this shift, as it prohibited gender-based workplace discrimination (which came to comprehend sexual harassment) and unequal opportunities for credit and financing.

During the latter part of the twentieth century, the disproportionate degree of violence visited upon women became the subject of local, state, national, and transnational law. The 1994 VAWA enactment in the United States came in the context of shifts around the world. Two years earlier, in 1992, the Committee empowered by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) issued a general recommendation, "Violence Against Women," outlining the degree to which violence contributed to women's subordination.[88] Thereafter, international criminal tribunals recognized rape as a war crime, and the treaty launching the International Criminal Court included gender-based violence within its definition of crimes against humanity.[89]

By 2011, the Inter-American Commission on Human Rights categorized gender-based violence as "one of the most extreme and pervasive forms of discrimination, severely impairing and nullifying the enforcement of women's rights."[90] The context was a case in which a woman had obtained a protective order against her estranged husband; she tried and failed to enlist police, working in the Town of Castle Rock, Colorado, to implement the order, and her husband killed their daughters. The Inter-American Commission held that the United States had violated "the State's obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration."[91]

In the same year, the Council of Europe promulgated a new Convention on Preventing and Combating Violence Against Women and Domestic Violence, to "[p]rotect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence."[92] In 2013, in *Valiulienė v. Lithuania*, the European Court of Human Rights (ECtHR) held that Lithuania's failure to provide remedies for a woman subjected to such violence breached Article 3 of the European Convention on Human Rights. Member States had "to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals."[93] Therefore, states had to have "effective criminal-law provisions . . . backed up by law-enforcement machinery."[94]

Violence, under this account, falls within another frame: inhuman and degrading treatment. In Convention terms, violence could also violate rights to autonomy, to privacy and freedom in one's personal life, and to equality, atop its valence as contravening tort and criminal law. Moreover, responsibility for protecting against and sanctioning violence rests with the state. Unlike the "state action" doctrine in U.S. law, Contracting Parties can be obliged—as the judgment against Lithuania illustrates—to respond to violence imposed by private as well as public actors.

In 2000, five members of the Supreme Court withdrew U.S. federal courts from joining this ongoing exchange about both the import of and the remedies for violence against women. *Morrison* insisted on frozen categorical meanings of violence, of

the authority of Congress, and of the boundaries of federalism. Because a majority of justices deemed what Congress called a "civil rights remedy" to be, instead, a law related to crime, torts, and family law, authority for remedies belonged, according to those justices, only to the states, even as state officials sought cross-jurisdiction cooperation and federal court involvement.[95] The conflict over meaning was not only about how to characterize acts of violence but also about the character of "the federal courts," which through the judgment became insulated from being identified as a venue dealing with this form of aggression as inequality.

3. Federalism(s)' Discounts: Reasonable Wrongs, Margins, and Reservations

I turn now to bodies of law in the United States and in Europe and practices in international law to explore the deployment of what at the outset I termed federalism(s)' discounts, tolerating underenforcement of specified legal precepts or underappreciation of the identitarian claims made by subunits. My example from the United States centers on post-conviction remedies. American habeas corpus law authorizes prisoners to seek relief if in custody in "violation of the Constitution," yet federal courts are now limited to correcting only state court judgments characterized as "unreasonably" wrong. This approach has parallels in the European doctrine of the "margin of appreciation," illustrated by cases addressing access to abortions and bans on prisoner voting. The use of reservations, understandings, and declarations (RUDs) in international law likewise authorizes treaty members to participate with less than full adherence to particular precepts. In the terms of federalism literature, RUDs could be understood as permitting the "bringing together" of subunits, while the doctrines accepting of "fair-minded disagreements" and providing a margin of appreciation are techniques for "holding together" subunits.

These three kinds of federalism discounts are mechanisms to deepen or relax commitments to particular policies by marking some as central to the identity of the subunits or the larger configuration. The three examples all entail balancing, in which values are traded off. When subunits are given discounts, asymmetries can result, as those who reside within the subunits have

less protection or opportunities than others. When rights claims prevail, questions of compliance and of backlash emerge. Terms such as "incrementalism" and "soft nudges" or "hard shoves" are sometimes deployed to talk about aspects of the interactions I discuss here. My concern is that such nomenclature may overstate the relevant actors' capacity to calibrate their (often negotiated) decisions and to predict the impact and subsequent course of events. Whether an action is a gentle nudge or a hard shove may be a conclusion ascertained after the event, not before. The phrase *federalism discount* aims to describe a loss, a lowering of some previously set norm, and to inscribe that, at the time the discount is given, one cannot know whether (to keep the economic metaphor) the price of the contested behaviors will go up or down thereafter.

Doctrines of Deference in the United States: "Well Understood" Errors and "Fairminded" Disagreements on the Meaning of Federal Law

Understanding the context prompting federalism discounts in the United States requires appreciation of how disparately situated state and federal systems are. State courts not only predate the creation of the federal system but continue to far outstrip federal courts in terms of the growth and breadth of their dockets. Windows into the dimensions of the difference come from a fast backward glance.

In 1850, the federal government owned about fifty buildings outside the District of Columbia, and none were federal courthouses. Fewer than forty lower court federal judges were spread around the country, and they did not need buildings of their own.[96] The end of the Civil War was followed by building spurts of all kinds. Federal laws multiplied, as did the girth of federal institutions.

Yet as of 2013, the federal judiciary remained a tiny workforce, with some 850 authorized life-tenured judgeships, assisted by about the same number of senior life-tenured judges and a comparable set of statutory judges (magistrate and bankruptcy) serving term appointments—all totaling some 2,000 to 2,500 judges. In contrast, more than 30,000 judges sit on state courts and do more than 95 percent of the adjudicatory work in the United States. Estimates are that 80 to 100 million cases, from traffic citations to family, contract, tort, statutory, and constitutional disputes, are filed

annually in state courts. Federal courts receive about 350,000 civil and criminal filings a year, plus more than a million bankruptcy petitions.[97] Thus, state judiciaries bear the primary responsibility for the implementation of both state and federal law. The quality of that enforcement and the relationships between the state and federal legal systems have prompted a host of accommodations, developed through statutes, the common law, and interpretation of the Constitution.

In addition to the categorical exclusions of federal court action exemplified by *Morrison*,[98] many other structures of U.S. law counsel deference to state actors so as to leave them relatively unsupervised. This approach can be rooted in philosophical commitments akin to the principle of subsidiarity,[99] in interpretations of the U.S. Constitution, in historic practices that freight altering patterns of authority, or in a functional analysis that a certain level of government has resources that another does not. Circularity of course can be the result, as competencies, presumptions, and resources can develop *from*, rather than be the sources *of*, such assignments.[100]

Several statutes embody directives that illustrate Wechsler's point about the ability of states to obtain solicitude from Congress, which has often left states relatively unfettered in their interpretation and application of federal law—thereby permitting what could be described as variation of or deviation from the underlying requirements. For example, statutes limit or structure federal court authority to issue injunctions against state taxes, state rate-setting for utilities, schools, and state prisons, even when potential defendants are alleged to have violated federal statutory and constitutional rights.[101] Common law doctrines likewise require that "Our Federalism" dictates deference to state criminal proceedings, again in the face of allegations that prosecutions or convictions violated federal constitutional rights.[102] Deference also takes form through immunities for states and their employees from certain kinds of lawsuits and liabilities,[103] as well as in the interpretative freedom over state and, at times, federal law.[104] An important caveat is the doctrine of preemption, predicated on the Supremacy Clause and used by federal judges to assess whether state law is in conflict with federal law and thereby precluded.[105]

Throughout, the questions are whether state decisions are insufficiently loyal to federal norms, or the norms are capacious, or

the norm is variation rather than uniform application. As I have suggested, the content and the centrality of particular norms to the federal government emerge through these interactions. An example comes by way of the law developed around the constitutional protection of the writ of habeas corpus, which Congress has implemented in a statute authorizing federal judges to entertain claims from prisoners alleging that their custody is "in violation of the Constitution or laws or treaties of the United States."[106] Unlike the template illustrated by *Morrison*, all agree that federal law can —and does—apply under a regime of layered concurrency.

In dozens of cases, that precept has prompted the Supreme Court to invalidate convictions and require retrial or release. In some of the major decisions, the relationship between the criminal justice system and race discrimination provided the backdrop, as habeas petitions make patent a variety of errors, some related to policing or prosecution, others to the failures to provide adequate counsel and related resources for the defense, and yet others based on flaws in the adjudicatory processes of state courts.[107]

Federal remedies flowed to individual defendants, leaving states free to shape methods to implement the rules prospectively—"dialectical federalism" in Robert Cover and Alexander Aleinikoff's term.[108] Illustrative is *Gideon v. Wainwright*, reading the Sixth Amendment in 1963 to require state-funded counsel for indigent felony defendants, and then applied in 1972 to persons facing jail or prison time based on criminal charges. The Court held the conviction in violation of this rule unconstitutional, but, under the habeas corpus procedure, the question of how to comply with the requirement devolved to states (most of which had, by then, put into place obligations under their own laws to provide counsel to indigent defendants).[109] Some state actors welcomed such exchanges. Yet, unlike the *Morrison* example, state officials regularly appeared before the Supreme Court to argue that, to be state-regarding, the Court ought to leave convictions standing and not oversee the results of their criminal justice systems.

In recent decades and akin to how the *Morrison* majority revisited the parameters of congressional Commerce Clause powers to cede arenas to states, the Supreme Court also altered its jurisprudence on the availability of federal post-conviction review. Beginning in the 1970s, the Supreme Court added layers of constraints

on federal court habeas jurisdiction. Fourth Amendment claims were barred if a defendant had had a "full and fair opportunity" to raise the claims in state court.[110] Failure to comply with state procedural rules could likewise result in preclusion, absent a showing of "cause and prejudice"; inept lawyering generally did not suffice to meet that standard.[111] Similarly, violations of the right to counsel were only actionable if, after the fact, the petitioner could establish not only ineffective assistance but also that prejudice resulted.[112] Further, habeas corpus cases could rarely be the basis for developing new readings of constitutional obligations.[113] These federalism discounts mix with concerns about crime control (the "sovereign power to punish offenders") such that post-conviction *federal* prisoners rarely fare better when seeking to obtain review of alleged violations of their constitutional rights by federal prosecutors, judges, or ineffective lawyers.

In 1996, Congress codified a good many of the judge-made restrictions and added some others. Included was the directive that federal judges accord finality to state court judgments denying prisoners relief on a claim if "adjudicated on the merits in State court proceedings unless the adjudication . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[114] What state court adjudications qualified became a subject of many decisions. In 2011, the Supreme Court explained that this provision ensures that federal review is limited to "extreme malfunctions in the state criminal justice systems" rather than "ordinary" errors.[115] Federal overrides are permitted only when "there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with the Court's precedents.[116]

Under this test, explained as avoiding intrusion on "state sovereignty"[117] as well as respecting states' "sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," a state prisoner has to show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[118] As a consequence, lower court judges are tasked with puzzling over what kinds of interpretations merit the characterization of "fairmindedness" and the differences

between "ordinary" errors and "reasonable" misapplications of federal law, as well as when to characterize processes or outcomes as "extreme malfunctions."[119] That charter became more demanding when the Supreme Court held that when state courts issue judgments without stating reasons for denying petitions (which is a common practice), federal judges must assume that reasons exist, supply them, and then accord them deference.[120]

How is one to assess the impact of these federalism discounts, in which federal law formally applies but states are given wide berth to act without federal oversight? Individual instances result in grievous injuries, leaving habeas petitioners with valid federal law claims incarcerated for life or subjected to the death penalty.[121] More generally, given the dialectical character of habeas, the decisions approve of underenforcement of federal rights; the Court's failure to require implementation of *Gideon v. Wainwright* is an oft-cited example.[122] Once convictions are entered or procedural errors exist, federal review becomes unavailable even when lawyers are absent or dysfunctional. The right to counsel becomes diluted. A more cheerful interpretation is that the right is not discounted, and that looking to local efforts shores up state court enforcement of federal obligations, while taking into account the heavy demands that the criminal justice system places on state resources. Yet the Court has not signaled that its efforts are temporary accommodations, to be revisited regularly.

Federalism discounts can be protective not only of the subunit but also of the body authorizing the deviation. The habeas discounts buffer federal courts in three respects—from the volume of potential filings, from the potential struggle with state systems over implementation, and from substantive engagement in the contours of the criminal justice system and the constitutional constraints on detention and conviction. More than 2.1 million people are incarcerated and another 5 million are under supervision in the United States. Moreover, the burdens of this system are not distributed evenly across the population. The Pew Foundation reported both the numbers (1 in 100 adults under state control) and the racialized impact: "While 1 in 30 men between the ages of 20 and 34 is behind bars, for black males in that age group the figure is one in nine."[123]

Many commentators have raised concerns about the wide array

of behaviors that have been criminalized, the lack of resources for criminal defense, overburdened judges, and few if any controls on prosecutorial discretion. The various federalism discounts that launch federal judges into searches for procedural compliance (framed by presumptions of "good-faith" adherence to federal law and demands that individual litigants demonstrate "extreme malfunction") shield the federal system from taking up the complex efforts of assessing implementation of federal constitutional rights and of facing, as William Stuntz counseled, the failings of its own pronouncements of rights.[124] Just as in *Morrison*, when the Court's ruling took federal courts out of addressing the relationship of violence to equality, the habeas doctrines cut off explorations of the Constitution's relationship to the system of criminalizing behavior and to the questions of when to term that process just.

European Analogues: Margins, Consensus, and Dissensus

A willingness to accede to fair-minded but potentially wrong state judges echoes a well-named (if complicatedly deployed) European doctrine, the "margin of appreciation," invoked with some regularity by the ECtHR. In its 1976 *Handyside* judgment, the ECtHR described itself as according a "margin" and a "power" of appreciation when the court permitted the United Kingdom to seize and destroy a Danish book, claimed to violate the United Kingdom's Obscene Publications Act, over objections from the publisher that doing so violated the European Convention's free expression rights.[125] The ECtHR's formal explanation of its deference was that the national government, acting pursuant to law, was better situated to assess the need to protect youths than was the European Court. As in the context of habeas corpus in the United States, the result could be characterized as changing the underlying norm of what constituted free expression or as acquiescing to a deviation from that Convention right. As with other federalism discounts, assessments depend on subsequent adjudications as well as on the individual instance.

Since the 1970s, the ECtHR has regularly resorted to "the margin of appreciation," often in conjunction with discussion of whether a "consensus" exists among the Contracting Parties (now numbering forty-seven members) about a particular issue.[126] The

margin/consensus analytics intersect with another technique of interpretation: proportionality, which launches a series of evaluative decisions about whether a right has been violated and, if so, whether the state did so in accordance with law, had permissible reasons to do so, and the intrusion was proportionate to the state's interests.[127]

A few details of the background of and the judgment in two cases, *A, B, and C v. Ireland* and *Hirst v. United Kingdom*, make plain the choices when characterizing rights, assessing jurisdictions' rules if searching for consensus, and calibrating the width of the "margin of appreciation."[128] In 1983, the Irish Constitution was amended to recognize a "right to life of the unborn,"[129] followed thereafter by legislative restrictions and challenges. For example, in 1992, the ECtHR applied its proportionality approach and decided that, although Ireland's prohibition on information about abortion permissibly regulated free expression rights to protect public morals, the absolute ban imposed was disproportionate to those ends.[130]

In 2005, two women (A and B) challenged Ireland's failure to provide abortions based on women's health and well-being.[131] A third (C) argued that Ireland had not implemented its own legal requirement that abortions be provided to protect a woman's life.[132] All had traveled to England and had abortions.[133] These women claimed that Ireland had violated their right to "private life" within the meaning of the Convention's Article 8,[134] a protection that, when ruling on their claim, the ECtHR described as encompassing "the right to personal autonomy and personal development" that included decisions about whether to have children.[135] Further, as the Court explained in *A, B, and C*, Europe had achieved a consensus about access to abortion, and Ireland was an outlier. In some "40 Contracting States," "health and well-being grounds" were a basis for obtaining abortions; only three states had more restrictive provisions than Ireland.[136]

Yet the Court concluded that "this consensus" did not "decisively narrow[] the broad margin of appreciation."[137] Rather, the Court shifted attention from the category of access to abortion to another, when "the right to life begins," about which the Court found that "no European consensus" existed.[138] That lack of consensus, coupled with the "moral and ethical issues" implicated, produced

a "broad margin of appreciation" that overcame (except as to petitioner C) the Convention claims of violation of women's privacy and autonomy rights.[139] For C, arguing that her life was at risk, Ireland had to provide "effective and accessible procedures."[140]

Above, I read *Morrison* as a rejection of women's equality claims. The *A, B, and C* judgment could likewise be understood as abandoning women who assert rights to decisions about their private lives. Further, the judgment could be read as opening the door to ending the consensus on abortion. Yet another possibility is that the Court positioned Ireland as an exceptional outlier (tempered by travel options for women) within a general framework reaffirming access to abortion rights and thereby temporized in the face of intense transnational opposition, much of it supported by the Catholic Church. Moreover, the meaning of *A, B, and C*, like the status of abortion, violence, equality, and criminal defendants' rights, is not fixed. In 2012, a woman in Galway, Ireland, died when miscarrying a nineteen-week pregnancy and after repeatedly asking doctors to end the pregnancy. In the controversy that followed, *A, B, and C* gained new currency, serving for some as insulation against criticism of the Irish restrictions and for others as a prompt for urging domestic revisions of statutes and regulations.[141]

The two examples thus far—*Handyside* and *A, B, and C*—both invoked the margin to defer to the subunit and thereby discount rights claims. Yet, just as the U.S. Supreme Court is regularly criticized for inconsistent or uneven application of jurisprudential federalism doctrines, the ECtHR's margin and consensus cases offer many instances in which the Court refuses to acquiesce in—and instead discounted—a practice claimed to be particularly important to the identity of a Member State. Illustrative is the ECtHR's refusal in *Hirst v. United Kingdom*[142] to accede to the United Kingdom's decision not to permit voting by incarcerated prisoners.

The European Convention on Human Rights protects the "free expression of the opinion of the people in the choice of the legislature," a formulation that the ECtHR has held to require that restrictions of this implied right-to-vote must be proportionate.[143] In 1983, the United Kingdom prohibited persons convicted of crimes and incarcerated from voting in "any parliamentary or local government election"; in 2000, the United Kingdom modified that

provision to exclude those detained pending trial.[144] In 1998, the United Kingdom enacted its Human Rights Act, making European Convention rights domestically applicable. In 2001, the English courts—relying on a proportionality analysis—denied a challenge to the prisoner voting ban, and in 2005, in *Hirst v. United Kingdom*, the ECtHR first ruled on whether the 1983 provision violated the Convention right to vote.

The United Kingdom explained that its voting restrictions were limited to those whose violation of the laws was "serious enough" as to result in incarceration, rather than applied to civil contemnors or pretrial detainees and, further, that the disenfranchisement lasted only during the period of incarceration.[145] The United Kingdom argued that it was owed deference in constituting its own electorate to exclude, temporarily, individuals imprisoned for violating its laws.[146]

As in *A, B, and C*, the ECtHR looked at practices around Europe, counting eighteen countries permitting prisoners to vote without restriction, thirteen in which prisoners could not vote, and twelve permitting voting with some limits.[147] The ECtHR also widened its lens, to consider court decisions in Canada and in South Africa, both of which had mandated that prisoners be permitted to vote.[148] As for the rights at stake, the ECtHR characterized the Convention right as "vitally important"[149] and chastised the English Parliament for providing no evidence of efforts to "weigh the competing interests or to assess the proportionality of a blanket ban."[150] Noting that "the margin of appreciation is wide, [but] it is not all-embracing,"[151] the Court held the United Kingdom in violation of the Convention.[152] The ECtHR then left "it to the legislature to decide on the choice of means for securing" the voting rights guaranteed by the Convention.[153]

Given that the statute at issue dated from 1983, that it was modified to exclude pretrial detainees in 2000, and that the United Kingdom had acquiesced in other high-saliency ECtHR judgments (such as the obligation to end discrimination based on sexual orientation in its navy),[154] one might have expected compliance. But resistance followed. In the years after the *Hirst* decision, political parties hesitant about involvement in Europe gained power in the United Kingdom, and groups within Scotland, arguing for greater independence, challenged the authority of the United Kingdom.

No new legislation moderating the prisoner voting ban was enacted, and other prisoners returned to the ECtHR to seek relief.

In 2010, the ECtHR ruled in *Greens and M.T. v. United Kingdom*, responding to applicants who asserted that the British ban had prevented them from participating in European Parliament elections in 2009 and that they would lose their opportunity in 2011 to vote in elections to the Scottish Parliament.[155] The ECtHR admonished the United Kingdom for its continuing violation of Convention rights and its failure "to abide by the final judgment."[156] The Court directed that, "in light of the lengthy delay in implementing that decision and the significant number of repetitive applications," the United Kingdom was, within six months, to propose legislation to amend its felon disenfranchisement laws to be "Convention-compliant" and thereafter to enact such legislation "within any such period as may be determined by the Committee of Ministers."[157]

Resistance continued. "Britain must stand firm against this growing abuse of power by unaccountable judges,"[158] as a member of Parliament put it. The press quoted the prime minister as saying that it made him "physically ill to contemplate giving the vote to prisoners. They should lose some rights including the right to vote."[159] Lord Neuberger (then the Master of the Rolls and the country's second most senior judge) was also quoted as adding that "the domestic courts would not interfere if Parliament chose to reject the controversial decision," as the issue was a " 'political decision' and if the Government chose to ignore a Strasbourg ruling there would be 'nothing objectionable' in British law."[160] Thereafter, the ECtHR gave the United Kingdom extensions in light of that Court's subsequent decision in *Scoppola v. Italy*, distinguishing *Hirst* and permitting the Italian prohibition on prisoners, serving sentences of five years or more, from voting.[161]

By 2013, critics in the United Kingdom argued for the repeal of its Human Rights Act of 1998 and for withdrawal from the jurisdiction of the ECtHR (a proposition that the United Kingdom's own federated state made complex, given that the devolution of powers to Northern Ireland, Scotland, and Wales also required that they comply with Convention and other international human rights obligations of the United Kingdom).[162] Further, U.K. officials led efforts that resulted in the "Brighton Declaration," a 2012 statement that, while reconfirming commitments to the European

Convention, admonished the ECtHR for its failure to respect the "sovereign equality of the States," to appreciate the importance of deference through subsidiarity, and to accord wide enough margins of appreciation.[163] Meanwhile, the ECtHR had shifted its own position by affirming, in May 2012, an Italian ban on voting by prisoners serving sentences of more than five years.[164] As the lone dissenting jurist in the *Scoppola* decision viewed his colleagues' judgment, the Italian rule was as "blunt" an "instrument" as the U.K. rule struck in *Hirst*; by affording a margin of appreciation to the Italian ban, it had "stripped the *Hirst* judgment of all of its bite as a landmark precedent for the protection of prisoners' voting rights in Europe."[165]

The details of *A, B, and C* and of the prisoner voting cases illustrate the layers of judgments—akin to those made in *Morrison* and the federal habeas cases—that federalism requires to categorize rights, assess their import, and analyze the relationship of limits on those rights to the identity of both the federation and its subunits. These cases also demonstrate that the turn to consensus offers no solace, for it does not buffer judges from making a series of choices about what legal precepts—in what regulations, statutes, or constitutions, and from which jurisdictions—are relevant and revelatory, or about how to evaluate the range of responses when variations exist. Had the ECtHR in *A, B, and C* maintained a focus on access to abortion, consensus ("40 Contracting States" using "health and well-being grounds") would seem to have carried the day. But by reframing the issue as about when "the right to life begins," the Court concluded that "no European consensus" existed. Similarly, dissensus would have seemed to give the United Kingdom options on how to deal with prisoner voting. The ECtHR tallied an 18–13–11 split, discounted the variation, and then looked abroad, to add judgments in Canada and in South Africa, to find the United Kingdom in breach.

Like the U.S. habeas law, this glimpse of European "margin law" shows the different kind of work that federalism discounts do and the degree to which their meaning depends on subsequent events. One could celebrate the margin, when applied, as a form of dialectical federalism leaving room for legal and political exchanges both within and across Contracting Parties. Given that the ECtHR is committed to reading the Convention as a "living" document,[166]

federalism discounts presume the desirability of spaces for debate and revision both within and across Contracting Parties. Moreover, the margin can shift, as demonstrated by a series of cases challenging the refusal to change birth records to reassign genders for transsexuals. In 1986, a challenge to a U.K. provision prohibiting revisions was denied, and by 2002, the ECtHR decided that the rule "no longer" fell within the margin.[167]

Further, and again paralleling the U.S. federalism discounts, the margin can be read as calibrating the institutional challenges that implementation could pose.[168] The ECtHR relies—like all courts—primarily on voluntary compliance for implementation of its orders, complemented by help from the executive branch, in this instance the Council of Ministers.[169] When the ECtHR deploys the margin to defer, it avoids facing the kind of resistance it met in the prisoner voting cases. Federalism discounts, under this approach, are once again *court* discounts, insulating judges from clashes that they may not win.

But how are courts to predict which decisions will put their authority into question? The puzzle is why Ireland's insistence on limiting abortion rights was able to elicit a discount but the United Kingdom's articulation of the importance of constituting its polity by excluding criminals serving prison sentences from voting did not. In retrospect, one can try to explain *A, B, and C* as acutely aware of the centrality of abortion bans to Ireland's polity. But the union of identity between Ireland and abortion bans may have been overstated. Over the last few decades, the supporters of abortion limits in Ireland lost various efforts to impose new restraints on abortions and, when they won, did so by very narrow majorities, with transnational input from the anti-abortion movement of which the Catholic Church is a major participant.[170] And since the death of a woman in Ireland under the procedures it had authorized, the Irish government has begun to revise its rules, despite opposition from the Catholic Church.

The ECtHR might have overestimated the power of the opposition in Ireland; had the Court held Ireland in violation of the Convention, the opposition might not have been as intense as expected. In contrast, the Court may not have anticipated the vehemence of the United Kingdom's response in the prisoner

voting cases. In 2005, when deciding *Hirst*, the Court might have assumed that its ruling on prisoner voting did not deeply implicate the United Kingdom's identity. The importance of resisting the judgment grew as parties interested in opposing Europe, and judicial adjudication of human rights, found it a means of expressing that hostility.

Reservations as a Federating Technique

A third exemplar of temporizing accommodations—leaving spaces for disagreement—is the international law practice of states entering into treaties with reservations, understandings, and declarations that acknowledge the shared legal commitments while limiting adherence on some aspects so as to preserve autonomy of a subgroup. RUDs fall, in my terms, within the rubric of federalism discounts because they permit formal affiliations, with a contextual attachment, to a particular regime.[171] RUDs mediate between the poles of a cosmopolitan internationalism and an isolationism —to reflect what Antoine Garapon (borrowing from Kant) has called a "cosmopolitical" stance,[172] which self-consciously incorporates differences among states that join while opening opportunities to develop shared or overlapping legal norms.

Like other federalism discounts, RUDs offer complicated opportunities. RUDs could be evidence of the seriousness with which a country takes its decision to join a treaty by pausing to clarify its capacity to commit, and on what issues.[173] Moreover, because other state parties to treaties can object to RUDs that they believe are "incompatible with the object and purpose of the treaty,"[174] RUDs also provide a route to trans-party exchanges about the meaning of treaty obligations.[175] When several states object to reservations by another, that coordinated signaling underscores concerns about the deviations proposed.[176] Yet, if too many countries apply too many RUDs, they can confuse treaty obligations by muddying the nature of agreements made, as well as permitting "cheap" talk. Further, the valences of RUDs may vary depending on the countries imposing them and the reservations advanced. In international law, as in federations, asymmetries of authority are common.

Putting RUDs into the category of federalism discounts facilitates a focus on their utilities in enabling political commitments to a transnational set of norms that can begin a process of affiliation and of change. Countries imposing RUDs are diverse, and an occasional RUD is imposed to permit greater protections than treaties provide. Further, according to one empirical analysis of RUDs in six international human rights treaties, "liberal democracies generally have more, not fewer, RUDs in place than other countries."[177] Here, I focus on the many countries—liberal and not—that announced RUDs as they became member parties of the Convention on the Elimination of All Forms of Discrimination Against Women—CEDAW, discussed above in the context of de-essentializing jurisdictional allocations. The Convention, which came into force in 1981, sought to cabin the burdens of gender by insisting that state parties undertake "appropriate measures" ranging across "all fields" (including "the political, social, economic, and cultural") so as "to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."[178] This ambitious document, ratified (as of 2013) by 187 nations, outlines many domains in which inequality exists and obliges state parties to seek to achieve substantive equality.[179]

About a third of the Contracting Parties have imposed RUDs when ratifying CEDAW.[180] Some countries have reserved on obligations to ensure equality in "marriage and family relations," employment, domicile, and social customs, as well as on commitments to implementation.[181] What is intriguing, however, is the political economy in which some formal commitment to women's equality is seen to confer capital, even in nonegalitarian political orders, arguing—albeit with RUDs—that their versions of life structures fit within a women's rights template.

Moreover, RUDs are neither static nor monovocal. Like other federalism discounts, their meaning develops over time. RUDs can be a means of beginning conversations and producing change, in a fashion akin to the processes that Jennifer Nedelsky termed "communities of judgment," in which self-reflection on a group's own practices comes by comparisons of the group to others, understood to be relevantly parallel.[182] Guidelines issued by the

committee charged with CEDAW's implementation have pressed for such reflections by requesting that states reconsider their reservations, and various states have, over the years, withdrawn their RUDs.[183]

For example, Brazil imposed many RUDs when it ratified CEDAW in 1984. A decade later, and six years after Brazil had amended its constitution to provide for gender equality, Brazil withdrew several of those RUDs as violating its own constitutional obligations.[184] Internal events enabled the reassessment of the degree to which the country could participate in external relatedness. In 1984, when Bangladesh joined, it recorded that it did not "consider as binding" aspects of the obligations under Article 13 (on economic and social benefits) and Article 16 (marriage and family life) to the extent that "they conflict with Sharia law based on Holy Quran and Sunna." In 1997, Bangladesh withdrew those reservations.[185]

Such shifts are not uncommon. In 1992, Jordan reserved on the independence of a woman's residence and domicile from that of her husband (Article 15); in 2009, it withdrew that caveat.[186] Several countries (including Australia, Austria, Cook Islands, Germany, New Zealand, Switzerland, and Thailand) that initially reserved to preserve sex-based differences in the military have since withdrawn those caveats.[187] Belgium's 1985 caveat to give men "royal powers" not permitted to women was withdrawn in 1998; Luxembourg imposed and withdrew a similar reservation between 1989 and 2008. Cyprus and Egypt were two of several countries to reserve on women's equal rights to confer nationality on their children. In 2000, fifteen years after subscribing, Cyprus withdrew that reservation; in 2008, twenty-seven years after signing, Egypt did as well.[188]

Thus, the choices in RUDs—like the conflicts in Europe over prisoner disenfranchisement and abortion and the debates in the United States about violence against women and criminal defendants' rights—provide information both within a state or federation and beyond about the arenas in which rights are most contested. The density of RUDs in certain areas ("family life"), the sharing of RUDs by countries from certain regions or religious or political orders, and the consistency (or not) of objections filed by members to others' RUDs, highlight arenas posing particular challenges to egalitarian aspirations and to political co-venturing.[189]

Mediating, Under-Enforcing, or Temporizing: The Institutional Utilities and Harms, Prospectively Imagined

The reason to detail these federalism discounts is to clarify the accommodations federalism entails, to display their vagaries, their costs, and the many institutional interests of which they are in service. Federalism discounts are simultaneously erratic failures of norm enforcement and responses to complex problems of norm implementation. In individual cases, discounts impose harms on rights claimants, undercut legal rights more generally, and create incentives for subunits to press for widening the permissible deviations. Further, federalism discounts sanction the differential endowment of rights of citizens, whose entitlements vary depending on where they reside.

But federalism discounts may also be efforts to commit to those very rights, by temporizing to avoid fissures, backlash, and conflicts through respecting the community whose identity is being proffered as importantly implicated. The discount could be titrating norms in the hopes that they will become entrenched at the subunit level, or the discount could be based on an assessment that subunit identity has greater value than the claimed right. Whether the temporizing is temperate or not often cannot be assessed immediately. Federalism discounts have both real-time effects and unclear potential, whose wisdom depends on what flows as a result.

The development of these practices is instructive for federalism(s). First, they are evidence that, in different settings, parallel mediating mechanisms have come into being to enable accommodations. Second, the nature of the harms or benefits that result from these accommodations becomes apparent only in hindsight, as future events make the discounts put into place earlier to be either temporizing accommodations or substantive revisions of underlying obligations and identities. Third, these discounts are institutionally self-serving. The institutions so served in my examples include courts, the political leadership promoting treaty ratification, opponents of particular rights, and the legal regime permitting such temporizing. Fourth, federalism discounts provide important (and sometimes disquieting) information about the distinctions among polities and subunits sharing legal relatedness but disagreeing deeply on stated dimensions of their commitments.

Federalism discounts gloss over differences as they reveal them, thereby enabling and often begetting ongoing debates about when and what legal rules ought to trump.

4. Remapping Federalism(s): Translocal and Transnational Porous Boundaries, within and across Federations

In many ways, federalism discourse remains located in categories—city, province, länder, state—that echo Thomas Aquinas (swapping empire, kingdom, and nation),[190] as if singular subunits interacted as independent actors in a zero-sum game. Rather than this state-centric account, the legal battles I have tracked about violence, abortion, and voting reveal that rules within one political structure are often developed through translocal exchanges among entities—from NGOs and TOGAs to multinational corporations and the Catholic Church—that are themselves border-crossing.[191]

I have argued that categories of human behavior do not map onto fixed jurisdictional lines, that a host of normative judgments are required when articulating the contours of rights—assigning them to particular authorities, acceding to requests for discounts—and that such decisions create identities for jurisdictions as well as for rights. Here my focus is on the formation of collectives, some by statutes and some sparked by private initiatives, and all composed of government officials who cross territorial lines to shape policies and take positions. TOGAs are participants in and exemplars of phenomena analyzed under rubrics such as new governance, experimentalism, and translegal orders.[192] Federalism(s)' discussions need to bring into view these new institutional structures, reflecting multiplying forms of connection (and sometimes community) and the multiple affiliations of government actors, as a distinct form from those networks generated by global commercial enterprises and by citizens holding more than one passport.[193]

The acronym TOGAs makes the delineation by denoting groups of transmunicipal, transregional, transcounty, trans-state organizations formed by officials or entities at a particular level of government (city mayors, for example) or organized by responsibilities (managing, for example, sanitation, policing, courts, government buildings, prisons, utilities, the environment). Unlike

NGOs, whose name—nongovernmental organizations—underscores that they are composed of individuals or entities working in concert to influence government policies,[194] TOGAs are sometimes artifacts of law (Europe's Council of Regions, discussed below) or, more often, private organizations. Because TOGAs' members are political actors or appointees, TOGAs marshal some authority from democratic legitimacy. Further, TOGAs lay claim to technical authority based on the positions their members hold. TOGAs aggregate their members' political capital for diverse reasons, such as seeking to expand markets for their localities, to teach skills and exchange information, to buffer against intervention from other levels of government, or to get funds from that government.

A few illustrations permit analyses of TOGAs' features and functions, their durability and impact, and how their very being informs federalism discussions. An example is the U.S. Conference of Mayors, founded in 1933, composed of elected officials from cities with populations of 30,000 or more,[195] and funded by a mix of public and private grants, corporate sponsorships, and taxpayer dollars. The Conference of Mayors is private in the sense that it is not part of local, state, or the federal government, and its pronouncements do not bind localities. Yet the conference speaks for and on behalf of public officials. A counterpart in Canada is the Federation of Canadian Municipalities, founded in 1901 and initially focused on local control of utilities.[196] By the twenty-first century, that Federation counted more than 2,000 localities as members, representing about four-fifths of the Canadian population.[197]

Moving across the Atlantic, Europe's Committee of the Regions (CoR), established in 1994 pursuant to the 1992 Maastricht Treaty, offers another template, again piercing the veil of subunit solitude through the creation of an "intergovernmental" organization to facilitate "multilevel" governance.[198] At a formal level, the Europe Union is "blind" to the internal arrangements of its Member States, in part through invocation of the idea that whatever forms of local government exist are "essential State functions," to be left to Member States.[199] Yet, responding to complaints of its failure to appreciate regional governance,[200] as well as recognizing its dependence on local implementation (whether in federations or not) of its directives,[201] the EU created the CoR to spawn direct relationships among and with subunits. Europe is obliged, on

some matters, to consult with the CoR, whose members (344 as of 2013) come from regions, counties, provinces, municipalities, and cities.[202] Further, Europe has also formed additional subgroups ("co-operative groups with legal personality")[203] around specific topics, such as transportation and environment, to facilitate interregional cooperation.

Once Europe brought the Committee of Regions into being, political dynamics within and across its subunits changed.[204] In the United States, Heather Gerken has offered the phrase "federalism all the way down" to focus on more facets of federalism by attending to its variegated geography.[205] In the European construction, terms denote processes moving in various directions—"top-down" from Europe; bottom-up via "uploading" perspectives from regions and other subunits through "upwards participation"; and horizontally, as regions work across borders.[206]

Yet horizontal and vertical planes suggest a symmetry and orderliness that miss relationships off the grid. For example, some regions have created mini–joint ventures, beyond those authorized, to "participate directly in the consultative procedures launched by the European institutions," and some dealing directly with Brussels.[207] Such initiatives, which just skim the surface of the many government networks and associations in Europe and elsewhere,[208] reflect that disaggregation and reaggregation are part of the lessons of the CoR, seen by commentators to have presumed a "false homogeneity" of interests that did not protect against horizontal aggrandizement by some cities and regions.[209]

Returning to the United States, some subunit crossings of state lines are structured (as in Europe) by law, and others through private action. State joint ventures may be formalized through the Constitution's Compact Clause, a provision rooted in anxiety that trans-state agreements could threaten national authority. To enter a compact, states need to obtain congressional statutory approval;[210] they have done so hundreds of times, with many focused on borders, water, and riverbeds. Yet the requirements of legislative approval ex ante (as well as ex post, if modifications are wanted) have prompted interest in alternatives free from congressional oversight. Examples include multistate executive orders and informal administrative agreements, both of which have come to play prominent roles in governance.[211]

Another work-around of the terms of the Compact Clause comes through state-by-state promulgations of the same "uniform law," such as enactment of the Uniform Commercial Code, the Interstate Agreement on Detainers, and the Uniform Deployed Parents Custody and Visitation Act. These acts, like dozens of others, are the product of another TOGA, a private organization called the Uniform Law Commission (ULC), founded in 1892.[212] Commissioners, who are required to be lawyers and appointed by each state's government, promulgate model statutes addressing particular issues; thereafter, jurisdictions may enact them, sometimes with variations.

The ULC's current tagline is "diversity of thought, uniformity of law,"[213] and it promotes the utilities of uniformity for state officials, for "individuals and businesses" (challenged by having to "deal with different laws . . . in different states"), and for "economic development" when "foreign entities" seek to work with U.S. businesses.[214] Thus, in addition to enabling horizontal federalism agreements to flourish outside the superintendence of Congress, the ULC also undermines various virtues attributed to federalism. Economic, public choice, and political theories posit that federalism enhances participation by providing more opportunities for voice and options to exit. But the ULC requires sophisticated participants to understand that the arena in which to give voice is when governors appoint commissioners, and thereafter at the ULC's meetings, as well as in state legislatures when model statutes are under consideration, and in courts when those statutes are interpreted. Exit becomes less useful if laws are uniform across states. Moreover, federalism is lauded for supporting "diversity of law" (as well as "of thought"), while the ULC's aim is to promote "uniformity in law."

The ULC is one of dozens of such U.S.-based TOGAs, many of which were forged in the twentieth century to seek rents from and to buffer against federal authority. Others include the National Association of Attorneys General, begun in 1907;[215] the National Governors Association, begun in 1908;[216] the National League of Cities, founded in 1924;[217] and the Conference of Chief Justices, founded in 1949.[218] Elsewhere I have detailed the role TOGAs have played in affecting city, state, national, and transnational policies.[219] Here I offer one example, in the arena of climate change policy.

In 2001, President George Bush withdrew support for the Kyoto Protocol, which called for countries to conform to targets for controlling local emissions of greenhouse gases. Soon after, a diverse set of cities responded through coordinated parallel action that produced uniform laws at the local level, akin to what the ULC does at the state level. In March 2005, a group of nine mayors agreed to a Climate Protection Agreement. The U.S. Conference of Mayors endorsed a modified version in June 2005, calling for cities to "meet or exceed the Kyoto Protocol targets . . . in their own operations and communities" through initiatives such as retrofitting city facilities, promoting mass transit, and maintaining healthy urban forests.[220]

By 2012, more than 1,000 mayors, representing towns and cities whose combined populations numbered more than 88 million people, had endorsed a Climate Protection Agreement.[221] Just as the ULC avoided the Compact Clause, the mayors avoided the Treaty Clause; although the U.S. Senate has not ratified the Kyoto Protocol, localities throughout the country have affiliated with its principles ("ratifying Kyoto at the local level," so to speak). Domestic policies on global warming have been shaped through iterative interactions among transnational lawmakers, the federal government, and hundreds of subnational entities.

City mayors working across their localities' borders have been central in climate policy making elsewhere.[222] In 2008, the European Commission established a Covenant of Mayors, inviting mayors, who were willing to create baseline emission inventories and to comply with reporting obligations, to join.[223] By 2009, some hundred mayors (whose cities had more than 167 million residents) had done so. This Covenant could be understood as a regulatory structure (albeit lacking some of the processes that surround administrative directives) aiming to generate programmatic reforms through its pressures that localities conform to its rules.[224]

My discussion thus far of TOGAs in the United States, Canada, and Europe needs to expand, in that some long-standing organizations also cross the boundaries of federations. For example, the International City/County Management Association, formed in 1914, seeks to help city managers function better, by comparing and modeling policies, as well as to augment the role of cities in policy making. More recently, regions within Mexico and Canada

have undertaken joint ventures with their counterparts in the United States to work on park services, wildlife, and protection of the Great Lakes. A relatively new arrival is the Forum of Federations, "an international governance organization that was founded in Canada and which is funded in partnership by nine other partner governments."[225]

Expansion of this discussion on another dimension is in order, as my injunction to de-essentialize jurisdictional authority applies in this context as well. TOGAs' "interests" are not fixed, but interactive; they often exist to speak in relationship to other entities and are sometimes the artifacts of a larger unit (the EU, the United States), creating subunit translocal organizations to gain support for policies and to diffuse criticism. TOGAs' agendas are products of such interactions, rather than a set of positions produced at one level and then promoted elsewhere.

Moreover, the stances that TOGAs adopt are dynamic, and translocal-transnationalism ought not be assumed to have a particular (and a liberal) political valence. For example, the National League of Cities gave its name to a case standing against federal regulation of state employees' wages and hours, and hence a position typically read as "conservative." More recently, the National League of Cities has supported a host of resolutions read as "liberal," including calling for progressive efforts on climate change and support for immigration reform that enabled undocumented immigrants to obtain legal status and that sought to buffer local personnel from being conscripted to participate in surveillance of migrants.[226]

Consider also the series of jurisdictions in the United States that have adopted laws directing judges not to use "foreign" law in their decisions. In 2010, 70 percent of Oklahoma voters supported a constitutional amendment instructing that state's judges not to "look to the legal precepts of other nations or cultures" and specifically not to consider either "international or Sharia law."[227] As of the spring of 2011, anti–foreign law prohibitions (some naming Sharia, the "legal precepts of other nations or cultures," or "international law") had been introduced in several states.[228] Kansas adopted its own version in 2012.[229] Another spate of enactments at the state and local level are hostile to immigrants.

These provisions are a form of "uniform state law," produced not

by the ULC but by the interaction between the movement "American Laws for American States"—supported (ironically, given the isolationist focus) by translocal NGOs such as the American Public Policy Alliance, the Center for Security Policy, ACT! for America, and Society of Americans for National Existence (SANE)—and Stop the Islamization of America, an entity related to Stop the Islamization of Europe.[230] Their work is facilitated because the Council of State Governments, a TOGA formed in 1933, provides a clearinghouse for information that spawns related networks of state legislators.

These brief details aim to catch some of the vibrancy and the density of translocal transnationalism, as well as to record concern about the lack of appreciation in many discussions of federalism of the regularity with which legal regimes inside a given federation are shaped through such cross-border, disaggregated exchanges. Those focused on federalism have yet to revise the modeling of voice and exit, rethink doctrines of standing, or assess concepts of participation so as to acknowledge TOGAs.[231]

For example, TOGAs could be viewed as improving deliberative democracy through enhancing the voice of subunit officials. But TOGAs also have a track record of generating policy replication. TOGAs therefore complicate several bedrock federalism premises, that subunits are autonomous, producing a diversity of views to which deference is owed out of respect for the *demos* that the subset's delineated law enables. Once "uniformity in law" (to borrow the slogan of the United States' Uniform Law Commission) is the sought-after goal, the rationale of doctrines such as "margins of appreciation" and "fair-minded disagreements"—justified as necessary to take difference into account—loses its force. Or perhaps, the press across some TOGAs for uniformity undermines this rationale for federalism; from the "bottom up," TOGAs provide evidence that diversity is less useful, at least in certain areas, than assumed.[232] If so, then the questions of federalism discounts return from this vantage point. Should discounts be afforded when diversity is not valued by the subunits?

Yet, perhaps respect is owed not for a diverse outcome but for a process that provides opportunities for members of subunits to have voice. That view reintroduces the question of whether TOGAs amplify or muffle the ability of subunits to make different sounds.

Here, conflicts within the Council of Regions and the disagreements between the Conference of Chief Justices and the National Association of Attorneys General on VAWA perhaps provide evidence for TOGAs as voice enhancers, making plain that states do not "speak with one voice," to borrow an oft-used phrase in American law on foreign relations and relied upon in Europe as well.

But the appeal of the one-voice rule is that it assumes the coherence of a government structure, whereas TOGAs thicken the puzzles of representation. Where is the idea of a *demos* in TOGAs' structures and work? Do the affiliations with identity-based groups (mayors, governors, prison administrators) trump affiliations with the city or state that elected or selected them? The challenges of bonding representatives to those represented and enabling the represented to monitor their named leaders are the grist of much organizational, political, and federalism theorizing. TOGAs again create bumps, in terms of transparency, accountability, and identity. For example, the National League of Cities has more than 2,000 dues payers—including some leagues of small cities—out of a total of 19,000 cities nationwide.[233] Thus, it is unclear what percentage of cities is "represented" in the National League of Cities in the sense that those entities are affirmatively affiliating with the organization's positions.

In the last several decades, federalism theory and practice helped to bring attention to ideas of competition, diversity, autonomy, *demos*, community, voice, participation, and exit—with governance mapped onto vertical and horizontal dimensions as well as centers and peripheries and puzzled about the relationship of federalisms to democracy. The new governance/experimentalism literature speaks in other terms—about the degrees to which processes are open, transparent, participatory, accountable, effective, and coherent. Once the diagonals and webs of that literature are added to the federalism grids, new inquiries are needed to assess—at the micro and macro levels—federalism discounts, jurisdictional assignments, and temporizing accommodations.

Federalism literature often aspires for more—a hope of a relationship between jurisdiction and justice. The pull to such a cheerful federalism is powerful, as its pluralism recognizes the value of community and of collective identities, and its liberalism attends to human flourishing through protection of dignity and equality.

Federalism(s) have generated the rights conflicts detailed here, and prompted the creation of the many TOGAs I have described. What federations can offer are an array of entry ports and many means of accommodating deeply held disagreements about the good, the right, and the just. My argument is not that federalism is content-free but rather that it is context-dependent.

NOTES

 Thanks are due to James Fleming and Jacob Levy for launching this volume and for their thoughtful help in shaping this essay and to my co-panelists at the *NOMOS* sessions on federalism and subsidiarity. I have also benefited from working with Reva Siegel in preparing the chapter "Dis-Uniformity of Rights in Federations and Unions" for the book *Law's Borders*, distributed in advance of Yale's Global Constitutionalism Seminar of 2012, and from drafting materials with Cheryl Thomas and Hazel Genn for the UCL symposium "Interpreting and Generating Rights in Multi-level Jurisdictions," as well as from the thoughtful research of Allison Gorsuch, Jenne Ayers, Caitlin Bellis, Shouvik Bhattacharya, Edwina Clarke, James Dawson, Samir Deger-Sen, Kevin Lamb, Matthew Letten, Travis Pantin, Andrew Sternlight, and Charles W. Tyler; from work with former students Adam Grogg, Joshua Civin, Joseph Frueh, Daphna Renan, and Ester Murdukhayeva; from the help of Yale Law Librarians Michael VanderHeijden and Sarah Kraus; and from ongoing discussions with Dennis Curtis, Seyla Benhabib, Abbe Gluck, Vicki Jackson, Colm O'Cinneide, Kim Scheppele, Joanne Scott, Reva Siegel, and Angela Ward.

1. Federalism has been in vogue more than once. As Ronald Watts explained, in the first half of the twentieth century, some commentators saw federalism as an antiquated form, reflecting national governments that were somehow less than intact or complete. After World War II, federalism appeared to hold out new promise, offering flexibilities in what was hoped to be a post-colonial and post-fascist world. Enthusiasm then dimmed again, to reemerge in the 1990s. See Ronald L. Watts, "Contemporary Views on Federalism," in *Evaluating Federal Systems*, ed. Bertus de Villiers (Cape Town: Juta, 1994), 1–29.

2. To assert that federalism begets liberal principles, outcomes, or institutions or is, per se, democracy-enhancing requires definitions of liberalism and democracy as well as accounts of the causal relationships claimed. See, e.g., Daniel Weinstock, "Towards a Normative Theory of Federalism," *International Social Science Journal* 53 (2001): 75. The theoretical arguments

about the kinds of social orders that federalism could generate are often rebutted through references to various political regimes that are federal and neither liberal nor democratic. As William Riker put the point in the 1960s, to assume that a guarantee of "provincial autonomy" was "a device to guarantee freedom" was an "ideological fallacy," making it "objectively false that federalism preserves freedom." See William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964), 14–15.

3. Federalism not only "protected slavery for the first seven decades" of U.S. history; it also provided for a century thereafter "a reliable fortress for the perpetuation of systematic racial segregation and discrimination." Harry N. Scheiber, "Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective," *Yale Law and Policy Review* 14 (1996): 227, 237.

4. By one count, "more than half of the world's space and nearly half of its population are governed by some form of federal arrangement." Thomas O. Hueghlin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Toronto: Broadview Press, 2005), 11. The number tallied, twenty-six, was contrasted with nine federations in 1906. Ibid., 55.

5. In addition to slavery, some state constitutions in the United States had "racist provisions dealing with voting, education, and marriage; the constitutions in California and Oregon discriminated against Asian immigrants, and those of other states against Mormons." G. Alan Tarr, "American State Constitutions and Minority Rights," in *Federalism, Subnational Constitutions, and Minority Rights*, ed. G. Alan Tarr, Robert F. Williams, and Josef Marko (Westport, CT: Praeger, 2004), 89. Further, in the twentieth century, state constitutions adopted anti-immigrant amendments, such as Arizona's and Florida's mandates of English as the official language and California's ban on benefits for undocumented migrants. Ibid. Twenty-first-century examples include bans on same-sex marriage. See California Constitution art. I, § 7.5, which was held unconstitutional by a lower federal court, and the U.S. Supreme Court thereafter held that, because the State of California did not pursue appellate review of the decision, the federal courts could not hear the case. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Many state constitutions also provide more and different rights than their federal analogues. See Tarr, "American State Constitutions and Minority Rights," 90, 92–100; Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton, NJ: Princeton University Press, 2013).

6. See Nicolas Schmitt, "New Constitutions for All Swiss Cantons: A Contemporary Challenge," in *Constitutional Dynamics in Federal Systems: Sub-National Perspectives*, ed. Michael Burgess and G. Alan Tarr (Montreal: McGill-Queen's University Press, 2012), 140, 161. "On 16 May 2004, when

the Catholic canton of Fribourg adopted its new constitution, it was the first in the world formally to recognize same-sex marriage!" Ibid.

7. See Nicholas Aroney, "Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire," *Law and Philosophy* 26 (2007): 161, 172.

8. Robert M. Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation," *William and Mary Law Review* 22 (1981): 639.

9. The issues central to a federation's identity vary. Redistributive equality across länders to achieve "fiscal equalization" through "transfer payments" between those wealthier and those poorer has been central to Germany. See Arthur Benz, "From Unitary to Asymmetric Federalism in Germany: Taking Stock after 50 Years," *Publius: The Journal of Federalism* 29 (1999): 55, 66. See also Charlie Jeffery, "German Unification and the Future of the Federal System," in *Evaluating Federal Systems*, ed. de Villiers, 268–72, 286–92. Such "social solidarity" (*Constitutional Dynamics in Federal Systems*, ed. Burgess and Tarr, 22) is not what has marked the United States' approach, which has permitted (and through some policies fostered) wide disparities in resources for those living in different states. Further, the commitment to the equal rights of all persons, today seen as a signature of the American federation in part through the script—Equal Justice Under Law—atop the Supreme Court building, came after that building's opening in 1935. See Judith Resnik and Dennis Curtis, "Inventing Democratic Courts: A New and Iconic Supreme Court," *Journal of Supreme Court History* 38 (2013): 233.

10. For example, Riker offered lists of arenas of authority he catalogued as belonging to either the state or the federal government in the United State and calibrated the "degree of centralization" through analysis of those "nineteen categories of action." Riker, *Federalism*, 81–83. See also Ronald L. Watts, *Comparing Federal Systems*, *Appendix A: The Distribution of Powers and Functions in Federations*, *A Comparative Overview* (Montreal: McGill-Queen's University Press, 1999), 125–30. Other examples come from three papers initially prepared for this volume: Sotirios A. Barber, "Defending Dual Federalism: A Self-Defeating Act"; Steven G. Calabresi and Lucy D. Bickford, "Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law"; and Daniel Weinstock, "Cities and Federalism," which debated how power is and should be allocated among cities, states, and the national government, and which offered accounts about why to prefer authority to flow either to units such as cities or states or to the national level.

11. In the United States, two examples of the radical changes in their remedial import are *Brown v. Board of Education* and *Roe v. Wade*. See Robert Post and Reva Siegel, "*Roe* Rage: Democratic Constitutionalism and

Backlash," *Harvard Civil Rights–Civil Liberties Law Review* 42 (2007): 373; Judith Resnik, "The Production and Reproduction of Constitutional Norms," *New York University Review of Law and Social Change* 35 (2011): 226.

12. See Jacob T. Levy, "Federalism, Liberalism, and the Separation of Loyalties," *American Political Science Review* 101 (2007): 459. For a spirited defense of the exit option, see Ilya Somin, "Foot Voting, Federalism, and Political Freedom," in this volume.

13. Stephen Weatherill, "Finding a Role for the Regions in Checking the EU's Competence," in *The Role of Regions and Sub-National Actors in Europe*, ed. Stephen Weatherill and Ulf Bernitz (Oxford: Hart, 2005), 131, 133.

14. See, e.g., Judith Resnik, "Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism," *Emory Law Journal* 57 (2007): 31.

15. See Vienna Convention on the Law of Treaties, May 23, 1969, 1115 U.N.T.S. 331, art. II, ¶ 1(d) (entered into force January 27, 1980). The Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Understandings typically explain how a state party interprets a particular provision, while declarations announce a state's policies or practices relevant to a treaty. Reservations may not be "incompatible with the object and purpose of the treaty." Ibid., art. 19(a).

16. One could posit a continuum from a unitary state through federalism to international confederal models. See Helder de Schutter, "Federalism as Fairness," *Journal of Political Philosophy* 19 (2011): 167, 168.

17. The result can resemble what Reva Siegel has termed "preservation-through-transformation." See Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49 (1997): 1111, 1113.

18. See, e.g., Joseph H. H. Weiler, "The Transformation of Europe," *Yale Law Journal* 100 (1991): 2403; Miguel Poiares Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism," *European Journal of Legal Studies* 1 (2007): 1; Neil Walker, "Europe's Constitutional Momentum and the Search for Polity Legitimacy," *International Journal of Constitutional Law* (2005): 221; Alec Stone Sweet, "The European Convention on Human Rights and National Constitutional Reordering," *Cardozo Law Review* 33 (2012): 1859.

19. My commentary parallels discussions in the international arena, in which some identify new orders emerging and others see disorder as the

new norm. Compare Sabino Cassese, *When Legal Orders Collide: The Role of Courts* (Seville: Global Law Press, 2010), and Gregory Shaffer, "Transnational Legal Process and State Change," *Law and Social Inquiry* 37 (2012): 229, with Neil Walker, "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders," *International Journal of Comparative Constitutional Law* 6 (2008): 373. See also Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2006).

20. See also Vicki C. Jackson, "Subsidiarity, the Judicial Role, and the Warren Court's Contribution to the Revival of State Government," in this volume; Judith Resnik, "The Internationalism of American Federalism: Missouri and Holland," *Missouri Law Review* 73 (2008): 1105.

21. See Judith Resnik, Joshua Civin, and Joseph Frueh, "Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)," *Arizona Law Review* 50 (2008): 709.

22. See Andreas Auer, "The Constitutional Scheme of Federalism," *Journal of European Public Policy* 12 (2005): 419.

23. Federal power was, however, recognized over family relations in the territories and as related to pensions to war widows and for newly recognized black citizens. See, e.g., Kristin A. Collins, "Petitions without Numbers: Widows' Petitions and Early Nineteenth-Century Origins of Public Marriage-Based Entitlements," *Law and History Review* 31 (2013): 1; Katherine E. Franke, "Becoming a Citizen: Reconstruction Era Regulation of African American Marriages," *Yale Journal of Law and the Humanities* 11 (1999): 251, 268–69. See generally Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Belknap Press, 1992).

24. *Loving v. Virginia*, 388 U.S. 1 (1967). "Family" may still provide a category of analysis sheltering state decision making from federal oversight related to race-based decision making. See Katie Eyer, "Constitutional Colorblindness and the Family," *University of Pennsylvania Law Review* 162 (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185728##.

25. See *Lassiter v. Dep't Soc. Serv.*, 452 U.S. 18 (1981); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982).

26. *Troxel v. Granville*, 530 U.S. 57 (2000).

27. A congressional statute defining marriage for the purposes of federal law provides another example of a federal family provision. See the Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2006). In *Windsor v. United States*, 133 S. Ct. 2675 (2013), the Supreme Court held the statute to violate equal protection rights.

28. Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, S. Treaty Doc. No. 11 (entered into force in the United States on July 1, 1988), codified at 42 U.S.C. § 11601 (2006).

29. An example of this kind of debate comes from *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), affirming a decision of the Virginia Supreme Court holding that the Federal Employees' Group Life Insurance Act preempted state law providing that, upon divorce, beneficiary designations were revoked. Additional analyses of the "federal laws of the family" can be found in Judith Resnik, " 'Naturally' without Gender: Women, Jurisdiction, and the Federal Courts," *New York University Law Review* 66 (1991): 1682, 1721–30.

30. Martha A. Field, "The Differing Federalisms of Canada and the United States," *Law and Contemporary Problems* 55 (1992): 107, 108. Aspects of family law, including property division on divorce, remain at the provincial level, while custody and child support are federal issues. See Claire L'Heureux-Dubé, "Economic Consequences of Divorce: A View from Canada," *Houston Law Review* 31 (1994): 451; D. A. Rollie Thompson, "Symposium: A Celebration of Canadian Family Law and Dispute Resolution," *Family Court Review* 42 (2004): 398, 399.

31. See *Arizona v. United States*, 132 S. Ct. 2492 (2012). Historically, states played a major role through regulations often denominated "labor" or "health" rather than "immigration." See Gerald L. Neuman, "The Lost Century of American Immigration Law (1776–1875)," *Columbia Law Review* 93 (1993): 1833. Whether states should continue to do so is debated. Compare Cristina M. Rodríguez, "The Significance of the Local in Immigration Regulation," *Michigan Law Review* 106 (2008): 567, with Michael J. Wishnie, "Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism," *Immigration and Nationality Law Review* 22 (2001): 51. Further, contemporary immigration law has incorporated many provisions that began as state laws, some of which were held to be preempted through an interpretation of federal law as preclusive of state laws. See Judith Resnik, "Bordering by Law," in *NOMOS LVI: Immigration, Emigration, and Migration*, ed. Jack Knight (New York: NYU Press, forthcoming).

32. The first Canadian constitution, from 1867, provided for concurrent jurisdiction. Constitution Act, 1867, 30 & 31 Vict. c. 3 §95 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.). Over time, each province has entered into multiple agreements with the federal government regarding immigration. See, e.g., Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens (1991), http://www.cic.gc.ca/english/department/laws-policy/agreements/quebec/can-que.asp.

33. Schmitt, "New Constitutions for All Swiss Cantons," 159.

34. That authority requires conformance with the criteria of cantons and the federal government; local integration can be considered at the level of communities. See Federal Act on the Acquisition and Loss of Citizenship of September 29, 1952, art. 12 ("[T]he ordinary naturalisation procedure enables persons to acquire Swiss citizenship by naturalisation in a canton and a commune."); 15a ("The procedure in the canton and in the commune is governed by cantonal law."); 15b ("The communal electorate may reject an application for naturalization only if a reasoned motion has been made that they should do so."). See *First Department I.S. Public Municipality Oberriet against Y. and Department of Home Affairs of the Canton of St. Gallen*, Bundesgericht [BGer] [Federal Supreme Court], June 12, 2012, 138 Entscheidungen des schweizerischen Bundesgerichts [BGE] 242 (Switz.), available at http://vlex.ch/vid/-428407490 ("Les assemblées communales disposent d'un large pouvoir d'appréciation et il peut être exigé du requérant une 'certaine intégration locale' "). One evaluation of the impact of this system identified municipalities as sources of discrimination against certain immigrant groups, with variations by group and time period. See Jens Hainmueller and Dominik Hangartner, "Who Gets a Swiss Passport? A Natural Experiment in Immigration Discrimination," available at http://www.mit.edu/~jhainm/Paper/hhpp.pdf. Thanks to Florian Engloff for bringing these materials to my attention.

35. David Criekemans, "Regional Sub-state Diplomacy from a Comparative Perspective: Quebec, Scotland, Bavaria, Catalonia, Wallonia and Flanders," *Hague Journal of Diplomacy* 5 (2010): 37.

36. See *Coyle v. Smith*, 221 U.S. 559 (1911). For a view that, although formally on an "equal footing," the preconditions to admittance imposed on states and the application of U.S. legal doctrine meant that "at no time since the formation . . . have all the states . . . been in the enjoyment of equal powers under the laws of Congress," see William A. Dunning, "Are the States Equal under the Constitution?," *Political Science Quarterly* 3 (1888): 427, 453.

37. See Charles D. Tarlton, "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation," *Journal of Politics* 27 (1965): 861, 865.

38. See India Constitution, art. 370 (1952) (entitled "Temporary provision with respect to the State of Jammu and Kashmir"). In practice, "de facto asymmetry [is] in abundance." See also Louise Tillin, "Unity in Diversity? Asymmetry in Indian Federalism," *Publius: The Journal of Federalism* 38 (2007): 45, 51.

39. See Supreme Court Act, R.S.C. 1985, c. S-26, §6 (Can.). The remaining seats are allocated by convention—three from Ontario, two from the western provinces, and one from the Maritimes. See Irwin Cotler,

"The Supreme Court Appointment Process: Chronology, Context, and Reform," *University of New Brunswick Law Journal* 58 (2008): 131, 136.

40. Watts, *Comparing Federal Systems, Appendix A*, 38; F. Leslie Seidle, ed., *Seeking a New Canadian Partnership* (Montreal: Institute for Research on Public Policy, 1994).

41. While not all "count" the United Kingdom as a federation, it falls functionally within that rubric. See *Constitutional Dynamics in Federal Systems*, ed. Burgess and Tarr, 26–27. Another description is that the United Kingdom is a "federalized polity." Stephen Tierney, "Quiet Devolution: Substate Autonomy and the Gradual Reconstitution of the United Kingdom," in *Constitutional Dynamics in Federal Systems*, ed. Burgess and Tarr, 196.

42. Gavin Drewry, "The UK Supreme Court—A Fine New Vintage, or Just a Smart New Label on a Dusty Old Bottle?," *International Journal of Court Administration* 3 (2011): 4; Peter Leyland, "The Multifaceted Constitutional Dynamics of UK Devolution," *International Journal of Constitutional Law* 9 (2011): 251.

43. Benz, "From Unitary to Asymmetric Federalism in Germany," 55.

44. See California State Motor Vehicle Pollution Control Standards, 78 Fed. Reg., 2112 (January 9, 2013) as authorized by 42 U.S.C.A. § 7543 (West 2013).

45. One could conceptualize the distinction as "de facto" versus "de jure" asymmetry. See Tillin, "Unity in Diversity?," 48–49.

46. *Constitutional Dynamics in Federal Systems*, ed. Burgess and Tarr, 14–20.

47. Lynn Baker, "Putting the Safeguards Back into the Political Safeguards of Federalism," *Villanova Law Review* 46 (2001): 951, 955. See also Gilliam E. Metzger, "Congress, Article IV, and Interstate Relations," *Harvard Law Review* 120 (2007): 1469.

48. See Anne Mullins and Cheryl Saunders, "Different Strokes for Different Folks? Some Thoughts on Symmetry and Difference in Federal Systems," in *Evaluating Federal Systems*, ed. De Villiers, 41 (quoting Max Frenkel in the epigraph to their essay). Their analysis of the evolution of the Australian system was that, despite a constitutional commitment to formal symmetry among states (see Section 99 of the Australian Constitution—"the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof"), the courts had come to tolerate various forms of asymmetry.

49. See, e.g., Watts, *Comparing Federal Systems, Appendix A*; Jorg Broschek, "Historical Institutionalism and the Varieties of Federalism in Germany and Canada," *Publius: The Journal of Federalism* 42 (2011): 1.

50. See Alfred Stepan, "Federalism and Democracy: Beyond the U.S.

Model," *Journal of Democracy* 10 (1999): 19. Stepan argued for the association, at an empirical level, between federalism and multinational democracies, and that federalism, a mechanism for "holding-together" groups, facilitated the development of a *demos* while tolerating asymmetries among subunits. Stepan thus took exception to claims, based on the U.S. experience, that federalism relies on three factors, a "coming together" of separate, preexisting political units, symmetry among the subunits, and the protection of individual rights from majoritarian rules. Cf. William H. Riker, "Federalism," in *Governmental Institutions and Processes*, vol. 5, *Handbook of Political Science*, ed. Fred Greenstein and Nelson W. Polsby (Reading, MA: Addison-Wesley, 1975), 93. Federations are also distinguished with terms such as "aggregative" as contrasted with "devolutionary" federalism, and by whether they are multinational, multilingual or not. See *Constitutional Dynamics in Federal Systems*, ed. Burgess and Tarr, 11.

51. 347 U.S. 483 (1954).

52. Vicki C. Jackson, "The Early Hours of the Post World War II Model of Constitutional Federalism: The Warren Court and the World," in *Earl Warren and the Warren Court*, ed. Harry N. Scheiber (Lanham, MD: Lexington Books, 2007), 137.

53. See Sylvia Law, "In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights," *University of Cincinnati Law Review* 70 (2002): 367.

54. Metzger, "Congress, Article IV, and Interstate Relations," 1472.

55. Herbert Wechsler, "The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government," *Columbia Law Review* 54 (1954): 543.

56. Riker made a related point, that courts focus on the "boundaries of areas of action," rather than on "their absolute size and importance," as he delineated federalist countries by the degree to which power was centralized or remained on the periphery. Riker, "Federalism," 51. Riker has since been joined by others criticizing a court-centered account. For example, Larry Kramer has argued that this focus misses the degree to which political parties, a-constitutional institutions tracking state lines, are keys to sustaining federalism's relevance and vitality in the United States. Larry D. Kramer, "Understanding Federalism," *Vanderbilt Law Review* 47 (1994): 1485. See also Larry D. Kramer, "Putting the Politics Back in the Political Safeguards of Federalism," *Columbia Law Review* 100 (2000): 215.

57. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 18 & 42 U.S.C.) ("VAWA"). VAWA, as amended in 2013, modified the Indian Civil Rights Act of 1968 (Pub. L. No. 90-284, 82. Stat. 81 (codified as amended at 25 U.S.C. § 1301 et seq.) to provide tribal courts, if complying with specified

procedures, to have expanded and concurrent criminal jurisdiction over non-Indians committing acts of domestic violence against Indians on tribal reservations. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–25.

58. See 42 U.S.C. § 13981 (1994).

59. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

60. Ibid., 613. The Court declared: "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." Ibid.

61. Specifically, Congress appropriated, and has reappropriated thereafter, funds for states under the Technical Assistance Program and three granting programs—"STOP" (Services, Training, Officers, Prosecutors), Sexual Assault Services Program (SASP), and the Grants to State Sexual Assault and Domestic Violence Coalitions Program. In fiscal year 2011, the Office of Violence Against Women in the Department of Justice administered the granting of more than 830 awards, totaling more than $450 million. See Office on Violence Against Women, *Biennial Report to Congress on the Effectiveness of Grant Programs under the Violence Against Women Act*, U.S. Department of Justice 9 (2012), available at http://www.ovw.usdoj.gov/docs/2012-biennial-report-to-congress.pdf. The STOP program provided a "base award of $600,000" to each state, followed by additional grants related to population. States therefore award subgrants. Office on Violence Against Women, S-T-O-P Program Report, U.S. Department of Justice 6 (2012), available at http://www.ovw.usdoj.gov/docs/stop-report-2012.pdf.

62. The states award subgrants. Office on Violence Against Women, S-T-O-P Program Report, U.S. Department of Justice 6 (2012), available at http://www.ovw.usdoj.gov/docs/stop-report-2012.pdf.

63. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40121, 108 Stat. 1796, 1910 (codified at 42 U.S.C.A. § 13981 (2006)). The Victims of Trafficking and Violence Protection Act of 2000 altered the distribution slightly to provide 30 percent to victim services. Pub. L. No. 106-386, § 1101, 114 Stat. 1464, 1494 (codified at 42 U.S.C. § 3796gg-1 (c) (3) (B) (2012).

64. See *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 827 (4th Cir. 1999) (en banc). The United States intervened when the defendants, Antonio Morrison and James Crawford, challenged the constitutionality of the statute.

65. Details of the positions and the decision by the judicial conference to move from opposition to taking no position on the civil rights remedy are in Judith Resnik, "The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act," *Southern California Law Review* 47 (2000): 269.

66. See Violence Against Women: Victims of the System, Hearing on

S. B. 15 before the Senate Committee on the Judiciary, 102nd Cong., 37–38 (1991); Crimes of Violence Motivated by Gender: Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103rd Cong, 34–36 (1993).

67. When first enacted in 1994, the House vote was 235 to 195, and the Senate vote was 61 to 38; reauthorization in 2000 was supported by a vote of 371 to 1 in the House and 95 to 0 in the Senate.

68. See generally Reva Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117.

69. *United States v. Morrison*, 529 U.S. 598, 619–20 (2000). Justice Souter described the record as "a mountain of data." Ibid., 629 (Souter, J., dissenting). The dissent discussed but did not decide whether the record sufficed for the Fourteenth Amendment. The dissenters all read Congress to have authority under the Commerce Clause.

70. *Morrison*, 529 U.S. at 620.

71. *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964).

72. The Supreme Court's retrenchment came in *United States v. Lopez*, 514 U.S. 549 (1995).

73. Brief of Law Professors as Amici Curiae Supporting Petitioners, *U.S. v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29) 1999 WL 1032805.

74. *Morrison*, 529 U.S. at 617, 613. The appellate decision likewise insisted that through the civil rights remedy, Congress had "punish[ed] noncommercial intrastate violence." *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 826 (4th Cir. 1999), *aff'd sub nom. Morrison*, 529 U.S. 598 (2000).

75. *Morrison*, 529 U.S. at 615–16.

76. *Morrison*, 529 U.S. 598 (2000) (opinion of Rehnquist, C.J., for the Court). That opinion endorsed the constrained interpretation taken by the Supreme Court soon after the Civil War. See *The Civil Rights Cases*, 109 U.S. 3 (1883). The Court there provided no remedy for segregated seating in theaters and the like. The question of what constituted state action returned in the mid-twentieth century, as several justices suggested revisiting the test so as to acknowledge the many roles played by states in creating fabrics of discriminatory actions. For example, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court had recognized that state enforcement of restrictive covenants on the sale of property between private parties constituted state action. See also *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *United States v. Guest*, 383 U.S. 745 (1966).

77. *Morrison*, 529 U.S. at 622 (quoting *Luger v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)).

78. See Violence Against Women: Victims of the System, Hearing on S.B. 15 before the S. Committee on the Judiciary, 102nd Cong., 37–38

(1991); Crimes of Violence Motivated by Gender: Hearing before the Subcommittee on Civil and Constitutional Rights of the H. Comm. Committee on the Judiciary, 103rd Cong. 34–36 (1993).

79. Brief of the States of Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin, and the Commonwealths of Massachusetts and Puerto Rico as Amici Curiae Supporting Petitioners, *U.S. v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1032809.

80. See Brief for the State of Alabama as Amicus Curiae Supporting Respondents, *U.S. v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1191432.

81. *Morrison*, 529 U.S. at 654. Justice Souter's dissent was joined by Justices Stevens, Breyer, and Ginsburg; Justice Breyer filed a dissent in which the others joined as well.

82. The Court embraced an essential functions test, applied to preclude application of the federal Fair Labor Standards Act to state and municipal employees in *National League of Cities v. Usery*, 426 U.S. 833 (1976); the Court reversed and abandoned the test in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

83. *Morrison*, 529 U.S. at 615.

84. Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courtrooms* (New Haven, CT: Yale University Press, 2011), 116.

85. *Bradley v. Illinois*, 83 U.S. 130 (1872); *Minor v. Happersett*, 88 U.S. 162 (1874).

86. Reva Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115 (2002): 947.

87. *Reed v. Reed*, 404 U.S. 71 (1971).

88. See Committee on the Elimination of Discrimination Against Women, General Recommendation 19: Violence Against Women, 11th Sess., U.N. Doc. 1/47/38 (1992). That recommendation declared that gender-based violence fell within the definition of discrimination against women in Article I of CEDAW because it "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions," including the rights to life, to be free from torture and other forms of cruel, inhuman, or degrading treatment, equal protection, liberty and security of the person, and equality in the family. Ibid., ¶¶ 6 and 7. Further, Contracting

Parties could be responsible for failures to prevent, investigate, or punish violence. Ibid., ¶ 9.

89. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9 (1998), art. 7, §1 & art. 7 §1(g).

90. *Jessica Lenahan* (*Gonzales*) *et al. v. United States*, Case 12.626 Inter-Am. C.H.R, Report No. 80/11,¶ 110 (2011), available at http://www.oas.org/en/iachr/decisions/merits.asp. States were obliged to "adopt measures to give legal effect to the rights," ibid., ¶ 118, and "can be held responsible for the conduct of non-State actors in certain circumstances," ibid., ¶ 119. Because the government "recognized the necessity to protect" the family but did not do so, it had failed to meet its "duty with due diligence," ibid., ¶ 160. The Commission's remedial recommendations included that the United States "offer full reparations" to Ms. Lenahan, as well as adopt "multifaceted legislation at the federal and the state levels" to reform existing processes and create mechanisms for better protection against violence.

91. *Lenahan* (*Gonzales*) *et al. v. United States*. Ms. Lenahan had earlier sought relief in the United States, but the U.S. Supreme Court ruled that Colorado's police failures, after issuing the protective order under a statute providing for mandatory arrests, to respond to her pleas for help had not deprived her of her due process rights. See *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005). Article II of the American Declaration provides: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed, or any other factor." American Declaration of the Rights and Duties of Man, Ninth International Conference of American States (1948), available at http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm.

92. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, art. 1 (a), May 11, 2011, Council of Europe Treaty Series No. 210 (2011).

93. *Valiulienė v. Lithuania*, Appl. No. 33234/07, Eur. Ct. H.R. March 26, 2013, ¶¶ 74, 75, 86.

94. Ibid., ¶¶ 74, 75, 86.

95. *Morrison*, 529 U.S. at 620.

96. See generally Judith Resnik, "Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist," *Indiana Law Journal* 87 (2012): 823.

97. See ibid., 827.

98. This approach returned in 2012, when the Court upheld the Affordable Care Act by reliance on the federal taxing power and in Chief Justice Roberts's opinion reiterated the categorical approach embraced in

Morrison for Commerce Clause analyses. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). On behalf of herself and Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg objected: "This rigid reading of the Clause makes scant sense and is stunningly retrogressive." Ibid., 2609 (Ginsburg, J., dissenting). Further, as Abbe Gluck has argued, the Court failed to appreciate the degree to which the Affordable Care Act was "state empowering." See Abbe R. Gluck, "Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble," *Fordham Law Review* 81 (2013): 1775.

99. See Andreas Føllesdal, "Competing Conceptions of Subsidiarity," in this volume.

100. The example often proffered in the United States is that state courts have services to help families that federal courts do not. But those services developed in response to litigants' needs, just as federal courts have developed institutional responses and special procedures for prisoner filings and habeas petitions involving the death penalty.

101. See Tax Injunction Act, 28 U.S.C. § 1341 (2006); Anti-Injunction Act, 28 U.S.C. § 2283 (2006); Johnson Ratemaking Act, 28 U.S.C. 1340 (2006); Prison Litigation Act, 42 U.S.C. §1997e (2006). All of these provisions qualify their own constraints, licensing federal jurisdiction if narrow, specified criteria are met.

102. The phrase is Justice Black's. See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

103. See, e.g., Vicki C. Jackson and Judith Resnik, "Sovereignties—Federal, State, and Tribal: The Story of *Seminole Tribe of Florida v. Florida*," in *Federal Courts Stories*, ed. Vicki C. Jackson and Judith Resnik (New York: Foundation Press, 2010), 329.

104. The "independent and adequate state ground" shields state court decisions qualifying from federal court review, even when they include judgments on federal rights. See Edward Purcell, "The Story of *Michigan v. Long*: Supreme Court Review and the Workings of American Federalism," in *Federal Courts Stories*, ed. Jackson and Resnik, 117–19. That doctrine helped to generate law as "state" versus "federal," and to sustain the identity of state courts as sources of law. In contrast, some federations—such as Canada—have a "unified" system, in which a federal court has the power to review and to correct a court of a subunit applying that subunit's own law.

105. A recent illustration of debates about preemption is *Arizona v. United States*, 132 S. Ct. 2492 (2012).

106. 28 U.S.C. §2254(a) (2006).

107. The district court decision in the case of *Henry v. Williams*, 299 F.Supp. 36 (N.D. Miss. 1969), on remand from *Henry v. Mississippi*, 379 U.S. 443 (1965), is one example. Aaron Henry was a local leader of the

NAACP. The police arrested him many times, and in the trial at issue, his two lawyers, both of whom were also African American, were told to use the water fountain reserved for "colored" people. *Henry v. Williams*, 299 F. Supp. at 41.

108. Robert M. Cover and Alexander T. Aleinikoff, "Dialectical Federalism: Habeas Corpus and the Court," *Yale Law Journal* 86 (1977): 1035.

109. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). At the time that *Gideon* was decided, thirty-seven states expressly required counsel for indigent defendants. See Brief for Petitioner at 30, filed in *Gideon*, 1962 WL 75206 (1962).

110. See *Stone v. Powell*, 428 U.S. 465 (1976).

111. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Coleman v. Thompson*, 501 U.S. 722 (1991). In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and in *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court identified a "narrow exception," when petitioners bring claims of ineffective assistance of counsel that necessarily require expanding the trial court record and hence are appropriately dealt with on collateral review, and a lawyer's ineffectiveness at that stage blocks federal review.

112. *Strickland v. Washington*, 466 U.S. 668 (1984). See also *Williams v. Taylor*, 529 U.S. 362 (2000).

113. *Teague v. Lane*, 489 U.S. 288 (1989).

114. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §2241 *et seq.*). See generally Mark Tushnet and Larry Yackle, "Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act," *Duke Law Journal* 47 (1997): 1.

115. *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quotations omitted).

116. Ibid., 786.

117. Ibid., 787.

118. Ibid.

119. See, e.g., *Ayala v. Wong*, 693 F.3d 945 (9th Cir. 2012); *Simpson v. Warren*, 475 Fed. Appx. 51 (6th Cir. 2012); *Garrus v. Secretary of Pennsylvania Dept. of Corrections*, 694 F.3d 394 (3d Cir. 2012); *Lewis v. Thaler*, 701 F.3d 783 (5th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 1739 (2013).

120. *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

121. See Stephen B. Bright, "The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies," *University of Pennsylvania Journal of Constitutional Law* 11 (2008): 23.

122. See Stephen B. Bright and Sia M. Sanneh, "Fifty Years of Defiance and Resistance after *Gideon v. Wainwright*," *Yale Law Journal* 122 (2013): 2150.

123. Pew Center for the States, *One in 100: Behind Bars in American 2008*

(February 2008), 3, http:www.pewstates.org/uploadedFiles?PCS_Assets/2008/one%20in%2010.pdf.

124. See William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Belknap Press, 2011).

125. *Handyside v. United Kingdom*, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) 737 at ¶¶ 47, 49 (1976).

126. A large literature ponders the consistency and legitimacy of the "margin." See, e.g., Dean Spielmann, *Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* (Centre for European Legal Studies, Working Papers Series, February 2012), available at http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf; Bilyana Petkova, "The Role of Majoritarian Activism in Precedent Formation at the European Court of Human Rights," in *The Fabric of International Jurisprudence: An Interdisciplinary Encounter* (Robert Shuman Centre for Advanced Studies, EUI Working Paper 2012/51, Antoince Vauchez, ed., 2012), available at http://cadmus.eui.eu/handle/1814/24095; Janneke Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine," *European Law Journal* 17 (2011): 80; John L. Murray, "Consensus: Concordance, or Hegemony of the Majority," *Dialogue between Judges* (European Court of Human Rights, Council of Europe, 2008), available at http://www.echr.coe.int/NR/rdonlyres/D6DA05DA-8B1D-41C6-BC38-36CA6F864E6A/0/DIALOGUE_2008_EN.pdf. See generally George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007); Luzius Wildhaber, "The European Court of Human Rights: The Past, the Present, the Future," *American University International Law Review* 22 (2007): 521. For a discussion of the work of consensus in the United States, see Roderick M. Hills Jr., "Counting States," *Harvard Journal of Law and Public Policy* 32 (2009): 17.

127. Proportionality analyses are, like those relying on margins and consensus, the subject of extensive debates. See, e.g., Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47 (2008): 72; Aharon Barak, "Proportionality and Principled Balancing," *Law and Ethics of Human Rights* 4 (2010): 1, 2; Vicki C. Jackson, "Book Review: David M. Beatty, *Being Proportional about Proportionality, review of The Ultimate Rule of Law* by David M. Beatty (New York: Oxford University Press, 2004)," *Constitutional Commentary* 21 (2004): 803.

128. My discussion in this section builds on Judith Resnik and Reva Siegel, "Dis-Uniformity of Rights in Federations and Unions," in *Law's Borders*, prepared with the assistance of Kevin Lamb and Travis Pantin.

129. Ireland Constitution art. 40, sec. 3, subsec. 3 (1983). These brief

details are drawn from Siobhán Mullally, "Debating Reproductive Rights in Ireland," *Human Rights Quarterly* 27 (2005): 78. See also Reva B. Siegel, "The Constitutionalization of Abortion," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andràs Sàjo (New York: Oxford University Press, 2012), 1057.

130. *Open Door & Dublin Well Woman v. Ireland*, App. Nos. 14234/88 and 14235/88, Eur. Ct. H.R. (1992). The European Court of Justice had also ruled that abortion services were "services" and information about them as commerce and sources of profit could not be barred. See *Society for the Protection of the Unborn Child v. Grogan and Others*, C-159/90, 1991 Eur. Ct. H.R. I-4685 (1991). In *Tysiac v. Poland*, the ECtHR held that Poland was liable for damages for not providing abortion access to a woman whose pregnancy was forecast to cause permanent damage to her sight. *Tysiac v. Poland*, App. No. 5410/03, Eur. Ct. H.R. (2007).

131. *A, B, and C v. Ireland*, No. 25579/05, Eur. Ct. H.R. ¶¶ 233–36 (2010). A, the mother of four children of whom she did not have custody, had become "pregnant unintentionally" and believed that an additional child would "jeopardise her health and successful reunification of her family." Ibid., ¶ 14. B, who had also become "pregnant unintentionally," had been told she was at risk of an ectopic pregnancy. Ibid., ¶¶ 19, 21.

132. C had cancer, and "she feared for her life as she believed that her pregnancy increased the risk of her cancer returning." Ibid., ¶ 250; see generally ¶¶ 22–26. In an earlier case, decided in 1992, Ireland's Supreme Court had held that abortion was permissible if a "real and substantial risk to life" existed; a pregnant fourteen-year-old, enjoined by the government from leaving the country for nine months, was at risk of committing suicide. *A, B, and C v. Ireland*, ¶¶ 39–44.

133. Ibid., ¶¶ 13, 18, 22.

134. Ibid., ¶¶ 167, 212–16, 250.

135. Ibid., ¶ 212.

136. Ibid., ¶ 235.

137. Ibid., ¶ 236.

138. Ibid., ¶ 237.

139. Ibid., ¶¶ 233–36.

140. Ibid., ¶ 263.

141. See Henry McDonald, "Limited Abortion Rights Introduced in Historic Irish Legislation," Guardian (April 30, 2013), http://www.guardian.co.uk/world/2013/may/01/limited-abortion-rights-ireland. And, despite "threats of excommunication," in July of 2013, the "privately devout Catholic prime minister . . . won the vote . . . 137 to 31 to legalise abortion in cases of medical emergencies as well as the risk of suicide." Women who were raped were not covered, and as of 2013, 4,000 women

had traveled in the past year to Britain for abortions. See Henry McDonald, "Ireland Passes Law Allowing Limited Rights to Abortion," Guardian (July 11, 2013), http://www.theguardian.com/world/2013/jul/12/ireland-law-abortion-rights. The legislation can be found at http://www.oireachtas.ie/documents/bills28/bills/2013/6613/b66b13d.pdf; Protection of Life During Pregnancy Act 2013 (Act No. 35/2013), available at http://www.irishstatutebook.ie/pdf/2013/en.act.2013.0035.pdf.

142. *Hirst v. United Kingdom* (No. 2), App. No. 74025/01 Eur. Ct. H.R. (2005).

143. *Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81 Eur. Ct. H.R. ¶ 52 (1987).

144. Section 3 of the Representation of the People Act, 1983, c. 2 Pt. I § 3 (Eng.) (amended by the Representation of the People Act, 2000, c. 2), authorizing individuals "detained on remand" to vote.

145. *Hirst*, ¶¶ 77 & 51.

146. Ibid., ¶ 47 ("The Government submitted that . . . the right to vote was not absolute and that a wide margin of appreciation was to be allowed to Contracting States in determining the conditions under which the right to vote was exercised.").

147. Ibid., ¶ 33. These numbers come from a survey by the United Kingdom, on which the court relied.

148. Ibid., ¶¶ 35, 38.

149. Ibid., ¶ 82.

150. Ibid., ¶ 79.

151. Ibid., ¶ 82.

152. Ibid. (The "1983 Act . . . imposes a blanket restriction on all convicted prisoners in prison . . . irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.").

153. Ibid., ¶ 84.

154. See *Lustig-Prean and Beckett v. The United Kingdom*, App. Nos. 31417/96 and 32377/96, 27 Eur. Ct. H.R. (1999); *Smith and Grady v. The United Kingdom*, App. Nos. 333985/96 and 33986/96, Eur. Ct. H.R. (1999).

155. *Greens and M.T. v. United Kingdom*, App. Nos. 60041/08 and 60054/08, 53 E.H.R.R. 21 (2011).

156. Ibid., ¶ 88, referencing Article 46's obligation that Contracting Parties abide by Court judgments in cases to which they are parties.

157. Ibid., ¶ 122. The court also awarded the applicants "5,000 Euros (£4,350) in costs and expenses for their loss." ¶ 101.

158. See Tom Whitehead, "European Court Gives Cameron Ultimatum on Prisoner Votes," *Telegraph* (April 13, 2011), http://www.telegraph.co.uk/news/uknews/law-and-order/8446557/European-court-gives-Cameron-ultimatum-on-prisoner-votes.html.

159. Ibid.

160. Ibid.

161. *Scoppola v. Italy*, App. No. 126/05 (GC), May 22, 2012.

162. See Colm O'Cinneide, "Human Rights, Devolution and the Constrained Authority of the Westminster Parliament," UK Constitutional Law Group Blog (March 4, 2013), http://ukconstitutionallaw.org/2013/03/04/colm-ocinneide-human-rights-devolution-and-the-constrained-authority-of-the-westminster-parliament.

163. High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (April 19, 2012), at ¶¶ 1, 2, 3, 7 and 11, available at http://hub.coe.int/20120419-brighton-declaration. The president of the ECtHR, Nicolas Bratza, responded that he too supported the "shared responsibility" for the Convention and its commitment to deference to "democratic processes," but such an approach could not result in "blanket immunity" from Convention obligations and court review. See Nicolas Bratza, "Speech at High Level Conference on the Future of the European Court of Human Rights," available at http://www.echr.coe.int/Documents/Speech_20120420_Bratza_Brighton_ENG.pdf.

164. *Scoppola*. Italy barred prisoners if sentenced from three to five years, from voting for five years, and if sentenced five years or more, from voting for their lives—with a mechanism to petition for relief in individual cases. Para. 109. The ban did not impose "disenfranchisement in connection with minor offenses." Para. 108. The ECtHR concluded that the ban was not "general, automatic, and indiscriminate." Ibid.

165. *Scoppola*, David Thór Björgvinsson, dissenting.

166. See Wildhaber, "The European Court of Human Rights."

167. See *Rees v. United Kingdom*, App. No. 9532/81 Eur. Ct. H.R. (1986); *Goodwin v. United Kingdom*, App. No. 28957/95 Eur. Ct. H.R. (2002). Thanks to Kim Scheppele for pointing me to this example.

168. Earlier I sketched the habeas context, and another discount comes by way of the doctrine of state sovereign immunity, sometimes explained as avoiding a direct clash between federal courts and states, which may not comply if ordered to pay money from treasuries or otherwise perform. See, e.g., Vicki C. Jackson, "The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity," *Yale Law Journal* 98 (1988): 1.

169. The Court imposes monetary sanctions and, more recently, has come to issue "pilot judgments" to apply across a set of cases. See *Broniowski v. Poland*, App. No. 31442/96, 2004-V, Eur. Ct. H.R. 1; Registry of the

European Court of Human Rights, Rules of the Court (as amended February 20, 2012), Rule 61, available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

170. The 1983 constitutional amendment included the obligation to have "due regard to the equal right to life of the mother." See Ireland Constitution art. 40, sec. 3, subsec. 3. After a decision in which a fourteen-year-old who had been raped invoked that provision, anti-abortion proponents unsuccessfully tried to repeal it. Further, pro-abortion advocates succeeded in obtaining protection of the right to travel for abortions, and the Irish Supreme Court also upheld the right to obtain information about health services. See Mullally, "Debating Reproductive Rights in Ireland," 85–100.

171. A view of the utilities of RUDs from the U.S. perspective comes from Curtis A. Bradley and Jack L. Goldsmith, "Treaties, Human Rights, and Conditional Consent," *University of Pennsylvania Law Review* 149 (2000): 399. RUDs typically explain deviation from a particular level of protection and, more rarely, protect a "higher domestic . . . standard." See Eric Neumayer, "Qualified Ratification: Explaining Reservations to International Human Rights Treaties," *Journal of Legal Studies* 36 (2007): 397, 406.

172. Antoine Garapon, "Three Challenges for International Criminal Justice," *Journal of International Criminal Justice* 2 (2004): 716 n. 1. The term, variously used, is generally associated with Kant. See Diane Morgan and Gary Banham, eds., *Cosmopolitics and the Emergence of a Future* (Hampshire, UK: Palgrave Macmillan, 2007).

173. The view that attachment of RUDs by the United States could be especially detrimental to certain treaties is explained in Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghosts of Senator Bricker," *American Journal of International Law* 89 (1995): 341.

174. Vienna Convention, arts. 19–20. A twelve-month period is provided for such filings before the reservations become final. Ibid., art. 20(5).

175. That exchange may not be symmetrical. One study of objections to RUDs imposed when countries joined CEDAW concluded that objecting parties may raise concerns about one country's reservations but not to another country's imposition of the same reservations. See Ester Murdukhayeva, "Renewed Affiliations: Using the Reservations Regime to Recommit to CEDAW," 9–10 (May 9, 2012) (unpublished manuscript, on file with author). Further, a subset of countries may dominate the filing of objections. In this instance, thirty-one objections were filed by the Netherlands, twenty-seven by Sweden, and twenty-four by Germany. Ibid.

176. For example, sixteen states objected to Qatar's reservations to CEDAW; twenty-one states objected to the reservations by Oman. See Murdukhayeva, "Renewed Affiliations," 39–40. Those attentive to the signals

can be groups within the state proposing amendments and prompting internal debates and revisions.

177. Neumayer, "Qualified Ratification," 420.

178. Convention on the Elimination of All Forms of Discrimination Against Women, art. 3, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981.

179. One assessment found that ratification of CEDAW had improved women's "access to basic education, to modern forms of family planning, and to employment opportunities," and evidence included case studies of Japan and Colombia. See Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), 202–55.

180. Hanna Beate Schöpp-Schilling, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: An Unresolved Issue or (No) New Developments?," in *Reservations to Human Rights Treaties and the Vienna Convention Regime*, ed. Ineta Ziemele (Leiden: Brill, 2004), 3–39. See also Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," *Virginia Journal of International Law* 30 (1990): 643. CEDAW's Optional Protocol, entered into force in 2000 and authorizing individual and group complaints about treaty violations, permits no reservations.

181. One count identified 62 of the then-186 members as imposing 108 "substantive" reservations on rights principles and 40 related to dispute resolution mechanisms in Article 29. In contrast, of the 173 members of CERD, 52 parties have imposed eighty reservations, of which fifty-eight were substantive limits on racial discrimination or its measurement. See See-Young Cho, "International Human Rights Treaty to Change Social Patterns—The Convention on the Elimination of All Forms of Discrimination Against Women," CEGE Discussion Paper 93, at 8–12 (2010).

182. Jennifer Nedelsky, "Communities of Judgment and Human Rights," *Theoretical Inquiries in Law* 1 (2000): 245. See also Judith Resnik, "Comparative (In)Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production," *International Journal of Constitutional Law* 10 (2012): 531.

183. See *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 49th Sess. ¶¶ 41–47, U.N. Doc. Supplement No. 38 (A/49/38) (April 12, 1994).

184. See Jodie G. Roure, "Domestic Violence in Brazil: Examining Obstacles and Approaches to Promote Legislative Reform," *Columbia Human Rights Law Review* 41 (2009): 67, 71–74.

185. Bangladesh maintained its reservation to Article 2's call for implementation by law. A complete record of reservations and withdrawals is

available through the United Nations Treaty Collection database at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

186. Ibid. The measure followed domestic legislative reforms that eliminated several discriminatory provisions in the civil status law, the personal status law, the penal code, and the passport law. UNIFEM, "CEDAW Success Stories," http://www.unifem.org/cedaw30/success_stories.

187. In 1996, Thailand was the first state to withdraw its reservation on military service. Austria and Australia withdrew in 2000, Germany in 2001, Switzerland in 2004, and New Zealand and the Cook Islands in 2007. See United Nations Treaty Collection, http://treaties.un.org/.

188. Ibid. Other countries that withdrew from similar reservations include the Republic of Korea (in 1991), Thailand (in 1992), Jamaica (in 1995), Liechtenstein (in 1996), Fiji (in 2000) and Algeria (in 2009).

189. For example, one count indicated that 20 percent of CEDAW's members are countries with Muslim majorities and that these countries represent half of the reservations to equality in family life (Article 16) and the requirement to undertake implementation measures. Cho, "International Human Rights Treaty to Change Social Patterns," 9–10.

190. See Aroney, "Subsidiarity, Federalism and the Best Constitution."

191. Some use the term "transnational legal order" (TLO) to denote these new regimes. While I share a sense of currents flowing in many directions, I am less clear that "order" is the descriptor. See Shaffer, "Transnational Legal Process and State Change"; and Walker, "Beyond Boundary Disputes and Basic Grids."

192. See generally Gráinne de Búrca and Joanne Scott, "Introduction: New Governance Law and Constitutionalism," in *Law and New Governance in the European Union and the United States*, ed. Gráinne de Búrca and Joanne Scott (Oxford: Hart, 2006), 1.

193. Translocal transnationalism is not new. Both the suffrage and abolition movements of the eighteenth and nineteenth centuries included translocal/transnational efforts, with city officials in places such as Birmingham, England, and Baltimore, Maryland, in coordination. See Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry," *Yale Law Journal* 115 (2006): 1564. As governments have grown, their services broadened, and technologies facilitated connectivity, the scope of such activity has broadened.

194. Resnik, Civin, and Frueh, "Ratifying Kyoto at the Local Level." Our acronym, TOGAs, harks back to the ancient Roman garb that denoted dignity and marked citizenship. See Caroline Vout, "The Myth of the Toga: Understanding the History of Roman Dress," *Greece and Rome* 43 (1996): 204, 214–16.

195. See United States Conference of Mayors, "About the U.S. Conference of Mayors," available at http://usmayors.org/about/overview.asp (last visited June 4, 2013).

196. Federation of Canadian Municipalities, "About Us," available at http://www.fcm.ca/home/about-us.htm (last visited June 4, 2013).

197. Marcia Valiante, "The Role of Local Governments in Great Lakes Environmental Governance: A Canadian Perspective," *University of Michigan Journal of Law Reform* 40 (2007): 1055, 1074–75.

198. A U.S. parallel is the Advisory Commission on Intergovernmental Relations, a "permanent bipartisan commission," founded in 1959. See Pub. L. No. 86-380, sec. 1, 73 Stat. 703, 703 (1959).

199. See Treaty on European Union, art. 4, ¶ 2, February 7, 1992.

200. See Stephen Weatherill, "The Challenge of the Regional Dimension in the European Union," in *The Role of Regions and Sub-National Actors in Europe*, ed. Weatherill and Bernitz, 1, 18–20.

201. Ornella Porchia, "Sub-national Units, Member States, and the European Union," in *Constitutional Dynamics in Federal Systems*, ed. Burgess and Tarr, 280.

202. See Fernanda Nicola, "The False Promise of Decentralization in EU Cohesion Policy," *Tulane Journal of International and Comparative Law* 20 (2011): 65, 80. A U.S. analogue, often termed "cooperative federalism," focuses on collaborations linking federal actors with state and local actors, often in relationship to national programs. See, e.g., Nestor M. Davidson, "Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty," *Virginia Law Review* 93 (2007): 959; Richard C. Schragger, "Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System," *Yale Law Journal* 115 (2006): 2542.

203. Porchia, "Sub-national Units, Member States, and the European Union," 291.

204. The CoR proved to be a platform for "regional mobilization" and also altered internal dynamics within countries. See John Loughlin, "The Regional Question, Subsidiarity and the Future of Europe," in *The Role of Regions and Sub-National Actors in Europe*, ed. Weatherill and Bernitz, 157–68. For example, in Italy, new internal structures shifted authority through the creation of a cabinet position for European affairs, and Europe's impacts alter the balance of power across the branches of the government. See Porchia, "Sub-national Units, Member States, and the European Union," 288–89.

205. Heather K. Gerken, "Foreword: Federalism All the Way Down," *Harvard Law Review* 124 (2010): 4, 38–39.

206. See, e.g., Porchia, "Sub-national Units, Member States, and the European Union," 287; Joxerramon Bengoetxea, "The Participation of

Infra-state Entities in European Union Affairs in Spain: The Basque Case," in *The Role of Regions and Sub-National Actors in Europe*, ed. Weatherill and Bernitz, 47–66.

207. Porchia, "Sub-national Units, Member States, and the European Union," 287; Catriona Carter and Aileen McLeod, "The Scottish Parliament and the European Union: Analysing Regional Parliamentary Engagement," in *The Role of Regions and Sub-National Actors in Europe*, ed. Weatherill and Bernitz, 66–88.

208. See Javier Sánchez, "Sub-state Networks and Regional Integration in the European Union and Latin America," Observatorio de Cooperación Descentralizada UE-AL, http://www.observ-ocd.org/sites/default/files/publicacion/docs/456_242.pdf.

209. Weatherill, "The Challenge of the Regional Dimension of the European Union," 19–20; Joakim Nergelius, "The Committee of the Regions Today and in the Future—A Critical Review," in *The Role of Regions and Sub-National Actors in Europe*, ed. Weatherill and Bernitz, 119–22. See also Nicola, "The False Promise of Decentralization of EU Cohesion Policy."

210. U.S. Const. art. I, § 10, cl. 3.

211. Ann O'M. Bowman, "Horizontal Federalism: Exploring Interstate Interactions," *Journal of Public Administration Research and Theory* 14 (2004): 535, 544. See, e.g., Metzger, "Congress, Article IV, and Interstate Relations"; Allan Erbsen, "Horizontal Federalism," *Minnesota Law Review* 93 (2008): 493. See, e.g., Wayne A. Logan, "Horizontal Federalism in an Age of Criminal Justice Interconnectedness," *University of Pennsylvania Law Review* 154 (2005): 257.

212. See Uniform Law Commission: The National Conference of Commissioners on Uniform State Laws, http://www.uniformlaws.org (last visited June 11, 2013).

213. See Uniform Law Commission.

214. See Uniform Law Commission, "About the ULC," http://www.uniformlaws.org/Narrative.aspx?title=About the ULC (last visited June 11, 2013).

215. See National Association of Attorneys General, "About NAAG," http://www.naag.org/about_naag.php (last visited June 11, 2013).

216. See National Governors Association, "About," http://www.nga.org/cms/about (last visited June 11, 2013). These TOGAs are, as noted, just a few of several, and the major ones, including the U.S. Conference of Mayors, the Council of State Governments, the National Association of Counties (founded in 1935), the National League of Cities, and the National Association of Towns and Townships (founded in 1976), are sometimes known as a group and coordinate lobbying efforts.

217. "Membership in the National League of Cities: Leading You and

Your City to Solutions, National League of Cities," 4, available at http://www.nlc.org/File%20Library/Utility%20Navigation/News%20Center/Media%20Relations/Membership-Brochure%202013.pdf.

218. See Conference of Chief Justices, "About CCJ," http://ccj.ncsc.dni.us/about.html (last visited June 11, 2013).

219. See Resnik, Civin, and Frueh, "Ratifying Kyoto at the Local Level." See also Resnik, "Law's Migration."

220. U.S. Conference of Mayors, "U.S. Conference of Mayors Climate Protection Agreement" (2005), http://www.usmayors.org/climateprotection/documents/mcpAgreement.pdf. In addition, the mayors called upon federal and state governments to comply with Kyoto targets and urged Congress to pass bipartisan legislation to create an emissions trading system and "clear emissions limits" for greenhouse gases.

221. See U.S. Conference of Mayors, "List of Participating Mayors," http://www.usmayors.org/climateprotection/list.asp (last visited June 11, 2013).

222. In Canada, for example, the Federation of Canadian Municipalities created a Green Municipal Fund to provide loans and grants for environmentally friendly municipal development projects. See Hoi Kong, "Sustainability and Land Use Regulation in Canada," *Vermont Journal of Environmental Law* 13 (2012): 553, 565. See generally Noah J. Toly, "Transnational Municipal Networks in Climate Politics: From Global Governance to Global Politics," *Globalizations* 5 (2008): 341.

223. See Covenant of Mayors, "The Covenant of Mayors," http://www.covenantofmayors.eu/about/covenant-of-mayors_en.html (last visited June 11, 2013).

224. See Veerle Heyvaert, "What's in a Name? The Covenant of Mayors as Transnational Environmental Regulation," *Review of European Community and International Environmental Law* 22 (2013): 78.

225. See Forum of Federations: The Global Network on Federalism and Devolved Governance, "Who We Are," http./www.forumfed/org/en/about/index.php (last visited June 11, 2013).

226. National League of Cities, "2012 National League of Cities National Municipal Policy and Resolutions," 27, 140, http://www.onehealthinitiative.com/publications/nlc-national-municipal-policy-book-2012.pdf.

227. State Question Number 755/Legislative Referendum Number 355, J.R. 1056, 2013 Sess. (Ok.) (enacted) (amending Okla. Const. art. 7, § 1) (May 25, 2010), available at http://www.owcc.state.ok.us/pdf/legchanges/HJR1056_ballot%20measure.pdf. The provision also required judges to "uphold and adhere to the law as provided" by federal and state law "and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial

decisions." Ibid. Within days of the Oklahoma enactment, Muneer Awad (a practicing Muslim, the executive director of the local chapter of the Council on American-Islamic Relations, and an Oklahoma resident) asked a federal judge to enjoin the provision. His lawsuit argued that the official condemnation of his religion was an unconstitutional stigmatization. He succeeded. See *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012). Statutes with similar enactments passed in Louisiana and in Tennessee. See 2010 La. Sess. Law Serv. Act 714 (H.B. 785); 2010 Tenn. Laws Pub. Ch. 983 (H.B. 3768).

228. Included are Alabama, Arizona, Indiana, Missouri, South Dakota, Texas, and Wyoming (constitutional amendments), and Alaska, Arkansas, Georgia, Kansas, Mississippi, Nebraska, and South Carolina (statutes). S.B. 62, 2011 S., Reg. Sess. (Ala. 2011); H.B. 88, 27th Leg., 1st Sess. (Alaska 2011); S. Con. Res. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S.B. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011); H.B. 45, 151st Gen. Assemb., 2011 Reg. Sess. (Ga. 2011); S.J. Res. 16, 117 Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.B. 2087, 84th Leg., Reg. Sess. (Kan. 2011); H.B. 301, 126th Leg., Reg. Sess. (Miss. 2011); H.J. Res. 31, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); Leg. B. 647, 102nd Leg., 1st Reg. Sess. (Neb. 2011); S.B. 444, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); H.J. Res. 1004, 86th Leg. Assemb., Reg. Sess. (S.D. 2011); H.J. Res. 57, 82nd Leg., Reg. Sess. (Tex. 2011); H.J. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011). As of this writing, proposed amendments in Alabama, Missouri, and Wyoming name "Sharia" or "Sharia law" as a prohibited source. The proposed amendments of Arizona, Indiana, South Dakota, and Texas ban the use of "religious laws," "law[s] . . . outside of the United States," "foreign religious code," and "precepts of other nations or cultures." Some of the provisions specifically apply only to decisions involving "natural persons" and not corporations. See, e.g., Tenn. Pub. Ch. 983 (H.B. 3768).

229. H. Sub. SB 79, 2013 Sess. (Ka.) (enacted), available at http://www.kslegislature.org/li_2012/b2011_12/measures/documents/sb79_enrolled.pdf.

230. David Yerushalmi, a founder of SANE and general counsel for the Center for Security Policy and Stop Islamization of America, drafted a model statute. See Law Offices of David Yerushalmi, P.C., "About Us," at http://www.davidyerushalmilaw.com/aboutus.php (last visited on June 11, 2013). Support for such resolutions come from the Foundation for Moral Law, United States Border Control Foundation, and the Conservative Legal Defense and Education Fund. Funding for some of the efforts comes from the William H. Donner and Sarah Scaife Foundations. See IRS Form 990-PF, William H. Donner Foundation (2009); Sarah Scaife Foundation, Annual Report 2 (2009), http://www.scaife.com/sarah09.pdf.

231. See Koen Lenaerts and Nathan Cambien, "Regions and the European Courts, Giving Shape to the Regional Dimensions of Member States," *European Law Review* 35 (2010): 609. In the U.S. context, see *Massachusetts v. EPA*, 549 U.S. 497 (2007), with its opinions debating standing for subunits.

232. See generally Edward L. Rubin and Malcolm Feeley, "Federalism: Some Notes on a National Neurosis," *UCLA Law Review* 41 (1994): 903.

233. National League of Cities, "Membership in the National League of Cities: Leading You and Your City to Solutions," 4, available at http://www.nlc.org/File%20Library/Utility%20Navigation/News%20Center/Media%20Relations/Membership-Brochure%202013.pdf.

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INDEX