

# Whose Interests Does Federalism Protect?

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## I. INTRODUCTION

In the Court's new federalism decisions,<sup>1</sup> the Justices have expressed an interest in returning to "first principles."<sup>2</sup> But where are federalism's first principles to be found? The Constitution's text is of little help: it embraces first principles that now conflict. The Tenth Amendment recognizes a principle of limited national power.<sup>3</sup> But it does not itself specify a standard for determining those limits, referring the reader instead to the scope of the national government's enumerated powers. The problem is that one such power, Congress's power to regulate interstate commerce,<sup>4</sup> is effectively all-encompassing in modern circumstances. The Commerce Clause is best read as giving Congress authority to address national economic problems.<sup>5</sup> Yet, in today's pervasively

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1. I use the term "new federalism" to refer to recent efforts on the part of the Justices to impose judicially enforceable limits on national authority in the name of constitutional federalism. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996); *United States v. Lopez*, 115 S. Ct. 1624 (1995); *New York v. United States*, 505 U.S. 144 (1992); *National League of Cities v. Usery*, 426 U.S. 833 (1976).

2. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting); *Lopez*, 115 S. Ct. at 1626. See also Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 17 (1995) ("The rhetoric of this Term's decisions does put one in mind of . . . returns to first—or very first—principles . . .").

3. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Even before enactment of the Bill of Rights, the principle of limited national power was an explicit part of the Constitution. The very first sentence of Article I states: "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." U.S. CONST. art. I, § 1 (emphasis added). Article I proceeds to enumerate certain subjects on which Congress has power to legislate. See U.S. CONST. art. I, § 8. Together with Article I's opening statement, the enumeration of such powers can only mean that Congress's constitutional legislative authority is not all-encompassing, but is instead limited to the granted powers. See *id.*

4. See U.S. CONST. art. I, § 8, cl. 3.

5. Although this is not the place for a full defense of this claim, it is perhaps important to indicate the outlines of such a defense. The overriding aim of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, is to give Congress authority to foster an effective interstate economy. This aim is apparent in the text and overall structure of Article I. Article I grants Congress authority to establish uniform bankruptcies laws, create a national currency, establish post offices and roads, and grant patents and copyrights. See *id.* art. I § 8, cls. 4, 5, 7 & 8. See also *id.* art. I § 10, cl. 1 (precluding States from issuing currency). It is quite implausible to think that these provisions have entirely disparate purposes and demarcate mutually exclusive regulatory spheres. In *Federalist No. 41*, Madison reduced Congress's various powers to six different categories. See THE FEDERALIST NO.

integrated economic world, any matter that Congress conceivably might want to regulate can be justifiably characterized as a national economic problem.<sup>6</sup>

Judicial and academic thinking about federalism must look behind the text if it is to respond intelligently to the deadlock that now exists between the Tenth Amendment,<sup>7</sup> which embraces limitations on national regulatory power, and the Commerce Clause,<sup>8</sup> which envisions national authority to address national economic problems. One promising strategy is to begin with the question of whose interests federalism is meant to protect. This question is asked in other constitutional contexts and its answer is thought to generate important implications, furnishing a

41, at 269 (James Madison) (Jacob E. Cooke ed., 1987). With the exception of the power to grant patents and copyrights, Madison assigned all of the powers mentioned in this paragraph to the category of powers designed to "provide for the harmony and proper intercourse among the States." *Id.* NO. 42, at 269 (James Madison); see also *id.* at 282, 287 (describing the bankruptcy power as "intimately connected with the regulation of commerce").

This same aim is apparent from the Commerce Clause's genesis. The perceived need for the Commerce Clause arose from the tendency of states to pursue their own parochial economic interests that thwarted the national economy. See, e.g., *id.* at 283 ("A very material object of this [commerce]power was the relief of the States which import and export through other States, from improper contributions levied on them by the latter."); *id.* NO. 22, *supra* at 137 (James Madison) ("The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaints to others . . ."); William N. Eskridge, Jr., & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 *VAN. L. REV.* 1355, 1369 (1994) ("In light of the nation's experience under the Articles of Confederation, there was a consensus after the adoption of the Constitution that the federal government should be able to exercise national authority to facilitate a national market."). These considerations, together with the generality of the Commerce Clause's text and with the Necessary and Proper Clause, see U.S. CONST. art. I, § 8, cl. 18, demand that the Commerce Clause be read to accommodate its aim of giving Congress authority to address national economic problems. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (stating "the Framers of our Constitution intended Congress to have sufficient power to address national economic problems"). Of course, this is precisely what modern Commerce Clause doctrine prior to *United States v. Lopez* does.

6. In the highly localized world of the founders, the principle of limited national authority and congressional authority to address national economic problems were perfectly compatible. When the Constitution became law, "[t]he vast majority of the colonists lived on small farms where they produced most of the food, clothing, firewood, and other goods themselves." BARRY W. POULSON, *ECONOMIC HISTORY OF THE UNITED STATES* 69 (1981). "In an era when interstate commerce represented a tiny fraction of economic activity and most goods and services were produced and consumed close to home, the interstate commerce power left a broad range of activities beyond the reach of Congress." *Garcia*, 469 U.S. at 583 (O'Connor, J., dissenting). Yet "[i]n the decades since ratification of the Constitution, interstate economic activity has steadily expanded. Industrialization, coupled with advances in transportation and communications, has created a national economy in which virtually every activity occurring within the borders of a State plays a part." *Id.* See Tom Stacy, *What's Wrong with Lopez*, 44 *U. KAN. L. REV.* 243, 248 (1996).

7. See U.S. CONST. amend. X.

8. See U.S. CONST. art. I, § 8, cl. 3.

justification for judicial review of constitutional civil liberties, for instance.<sup>9</sup>

Perhaps surprisingly, the Court's decisions and the scholarly literature on federalism furnish support for at least three different answers. One answer asserts that, like constitutional civil liberties, federalism protects the politically powerless from overbearing political majorities.<sup>10</sup> Another conceives of federalism as protecting state governmental entities.<sup>11</sup> A final answer sees federalism as ultimately concerned with protecting the interests of political majorities as they exist on the state and national levels.<sup>12</sup> These answers each carry substantially divergent implications respecting the nature and location of lines between state and national authority and the Court's role in policing their observance.

This Paper has two basic aims. The first is to call attention to the fundamental question of whose interests federalism protects and, by clarifying the major logical and doctrinal consequences of choosing one or another answer, to show that the question is of importance. The more ambitious aim is to show that federalism is best conceived as primarily protecting the interests of political majorities and that this conception, while not automatically and inherently requiring judicial abstention, very much tends to favor leaving matters of federalism to the political processes.

## II. PROTECTING THE POLITICALLY POWERLESS

According to one strain of judicial and academic thought, one of federalism's primary aims is the protection of liberty.<sup>13</sup> "Liberty," of course, has many different meanings. When judges and scholars say that federalism promotes liberty they sometimes use liberty to refer to governmental responsiveness to the preferences of political majorities, which may differ from state to state. This use of liberty conceives of federalism as promoting the interests of political majorities, not as protecting individuals from overbearing majorities. Liberty, however, is also used in a different sense, to convey the idea that, like constitutional civil liberties, federalism protects political minorities from overbearing

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9. See, e.g., ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 27-36, 86-87 (1987).

10. See *infra* notes 16-45 and accompanying text.

11. See *infra* notes 46-59 and accompanying text.

12. See *infra* notes 65-90 and accompanying text.

13. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring); *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1990); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 25 (1995). See generally Tom Stacy, *Does Federalism Promote Liberty?*, 5 KAN. J.L. & PUB. POL'Y 15 (1996).

majorities. Madison's famous argument in *Federalist No. 10*<sup>14</sup> fits into this category, as do the widespread assertions that federalism and individual rights are merely different mechanisms for promoting the same goal of liberty.

The notion that federalism promotes liberty by protecting the politically powerless from the politically powerful has important implications. First, it carries an obvious justification for countermajoritarian judicial review. If lines between state and national authority ultimately aim to protect the powerless from the powerful, then it makes little sense to leave the drawing of those lines to the political process, where the powerful reign supreme. Second, the notion potentially furnishes a methodology for deciding where the line between state and national authority ought to be drawn. If we can understand the mechanism through which federalism protects the politically powerless, then we can hope to draw the line between state and national authority so as to maximize that mechanism's effectiveness.

How might federalism promote liberty by protecting the politically powerless from the powerful? On its face, the whole idea seems implausible. The Commerce Clause, together with the Tenth Amendment, serves to allocate legislative authority between the state and the national governments. Legislative authority, of course, is exercised by political majorities. It seems odd to say that the politically powerless can be protected by allocating authority between political majorities on the state and national levels. Federalism nonetheless has been said to protect the interests of the politically powerless through three mechanisms: 1) by diffusing power and limiting government in a manner analogous to the separation of powers;<sup>15</sup> 2) by enlarging the size of the polity (Madison's argument in *Federalist No. 10*);<sup>16</sup> and 3) by enabling individuals to exit jurisdictions having unliked laws.<sup>17</sup> The sections below address whether these mechanisms actually help protect the powerless from oppression and, if so, conclusions follow regarding the proper locus of the line between state and national authority.

#### A. *Diffusing Power*

Judges and scholars routinely quote Madison for the proposition that, like the separation of powers, federalism promotes liberty by diffusing

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14. See THE FEDERALIST NO. 10, *supra* note 5, at 62-63 (James Madison) (arguing for the promotion of liberty by enlarging the size of the polity).

15. See *infra* notes 18-25 and accompanying text.

16. See *infra* notes 26-36 and accompanying text.

17. See *infra* notes 37-42 and accompanying text.

power among governmental entities.<sup>18</sup> As the separation of powers analogy suggests, the idea is that federalism promotes limited government and that limited government, in turn, inhibits oppression of the powerless by making it more difficult for the powerful to act. What force does this idea have?

We must be careful not to be misled by the analogy between the separation of powers and federalism. If lines between state and national authority promote limited government, they do so in a way that is quite different from the separation of powers. The separation of powers promotes liberty primarily by preventing a single branch from acting without the formal concurrence of another branch. For example, the President's veto power generally precludes Congress from enacting legislation without the President's concurrence.<sup>19</sup> A requirement that two or more branches concur before the government may act inhibits governmental action and, in doing so, at least arguably protects the powerless from oppression at the hands of the powerful; The less action that government takes, the smaller the chance that overbearing majorities will oppress powerless minorities.

In contrast, federalism does not require the concurrence of separate governmental entities as a prerequisite to governmental action. To the extent that federalism divides national and state authority into two mutually exclusive spheres, one level of government never needs the other's concurrence; it may act in the face of the other's express disapproval. Concurrence is not required when the national government acts in a realm of concurrent state-national authority. Instead of making the validity of national action depend on state approval, the Supremacy

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18. Madison first made the point in *Federalist No. 51*:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.

THE FEDERALIST NO. 51, *supra* note 5, at 351 (James Madison). For reiterations, see, for example, *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), holding that in the same way that "separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." See also REDISH, *supra* note 13, at 25.

19. See U.S. CONST. art. I, § 7, cl. 2. Other examples of such formal power-sharing include the Senate's role in confirming presidential appointments of executive officials, see U.S. CONST. art. II, § 2, cl. 2, the Senate's role in approving treaties made by the President, see *id.*, the President's role in nominating and the Senate's role in confirming federal judges, see *id.*, and Congress's role in funding the activities of both the executive and judicial branches, see generally U.S. CONST. art. I, § 8.

Clause<sup>20</sup> means that in a realm of concurrent authority national action always prevails, even in the face of express state disapproval. Regardless of whether state and national authority is exclusive or concurrent, federalism does not limit government in a manner analogous to the separation of powers.

In fact, federalism would not seem to promote limited government at all insofar as it diffuses authority into mutually exclusive state and national realms. It does not limit government to give either state or federal government exclusive and absolute power within a particular domain. In fact, in according state and national governments complete sovereignty within their own domains, the lines enforcing zones of exclusive authority will eliminate rather than create checks against the exercise of authority. In areas of concurrent authority, the electorate can check overweening exercises of state or national authority by shifting power vertically to and from state and national levels. A division of authority into zones of exclusive authority, however, eliminates this check. In so doing, such lines subvert limited government and whatever protection that limited government affords to the politically powerless. Judges and scholars are thus wrong to rely, as they routinely do, on Madison's separation of power analogy and diffusion of power point as support for a judicially enforceable zone of exclusive state authority.

Although exaggerated, there is some force to the diffusion of power point. The very existence of dual levels of government creates largely informal military and political checks against governmental overreaching. The founders expected that in the event that the national government became truly tyrannical, the electorate would vote it out of office.<sup>21</sup> By helping to mobilize and organize political opposition, state governments can play an informal role in the exercise of this electoral check.<sup>22</sup> The founders further thought that, in the exceedingly unlikely event that this political check failed, state governments would be able to use their militias to mount effective military resistance to the national government.<sup>23</sup> The founders thought that the national government also had a military check against tyranny on part of state governments. They meant for the Republican Guaranty Clause<sup>24</sup> to authorize the national government to use force against any state government attempting to dispense with popular elections.<sup>25</sup>

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20. See U.S. CONST. art. VI, cl. 2.

21. See THE FEDERALIST NO. 44, *supra* note 5, at 305 (James Madison); *id.* NO. 45, at 311-12 (James Madison); *id.* NO. 57, at 384 (James Madison).

22. See Akil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1500-03 (1987).

23. See *id.* at 1496-99.

24. See U.S. CONST. art. IV, § 4.

25. See THE FEDERALIST NO. 43, *supra* note 5, at 292 (James Madison).

The important point here is that these informal political and military checks are not so much mechanisms for limiting government, as for making government responsive to majority sentiment. Unlike the separation of powers, which makes governmental action more difficult, these checks may be used to spur the government into action. They can come into play when government ignores or defies the strongly held views of electoral majorities, whether those views favor governmental action or inaction. If, for example, partisans of the minimal state were to dominate national elections, then welfare state liberals could recruit leaders and ideas from state governments in which they hold power, submitting an agenda of activist government to the electorate.

On its face, talk about diffusion of power suggests that federalism protects the powerless by limiting government. Careful consideration of the mechanisms through which a diffusion of power actually works suggests something quite different. The informal political and military checks made possible by the existence of dual levels of government do not make it more difficult for majorities to act through government, thereby protecting the powerless. Instead, they encourage governmental responsiveness to majority sentiment. Such responsiveness, of course, is an important value and captures one's sense of liberty's meaning. However, it does not support the idea that federalism is designed to protect the powerless. Instead, it supports the competing idea that federalism aims to protect the interests of electoral majorities.

### B. *Enlarging the Polity*

In his famous *Federalist No. 10*, Madison argued that federalism promotes liberty by enlarging the size of the polity.<sup>26</sup> According to Madison, one of the greatest threats to liberty was the danger that permanent majorities on the state or local level would oppress minorities.<sup>27</sup> Madison's ingenious solution was not to make minorities more powerful but rather to dilute the power of state or local majorities by thrusting them into a national political process in which they would lose their majority status.<sup>28</sup> Lacking such status in the national political process, such groups could use the power of the national government only by forging coalitions with other groups.<sup>29</sup> Madison thought the necessity

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26. See *id.* No. 10, at 62-63 (James Madison); see also *id.* No. 51, at 351-53 (James Madison) (restating this argument).

27. See sources cited *supra* note 26.

28. See sources cited *supra* note 26.

29. See sources cited *supra* note 26.

and difficulty of building such coalitions would limit governmental action and inhibit majoritarian oppression of minorities.<sup>30</sup>

It is important to recognize that even if one accepts *Federalist No. 10* at face value, it cannot support a judgment that the *exclusive* function of federalism is to protect the politically powerless from the powerful. If this were the exclusive function of federalism, then Madison's argument in *Federalist No. 10* would imply that the enlarged national polity should have an all-encompassing regulatory authority. *Federalist No. 10* is thus the very antithesis of the Court's new federalism, which is partly premised on assertions that exclusive *state* authority promotes liberty. Madison's argument in *Federalist No. 10*, which advances a rationale for federal authority, must be supplemented with some rationale for state authority.

The problem, however, is this: Once Madison's argument is supplemented with the rationale for state authority, that argument cannot generate any identifiable line between state and national authority, and certainly not any line that lends itself to judicial enforcement. Diversity is one of the principal rationales for state authority.<sup>31</sup> When the preferences and values of majorities differ from state to state, state authority can better accommodate such diversity. For example, if eighty percent of the populace of Missouri desires the death penalty while eighty percent of the populace of Massachusetts opposes it, more voter preferences can be satisfied if the decision whether to adopt the death penalty is made at the state rather than the national level.<sup>32</sup>

The basic problem is that as the diversity rationale for state authority becomes stronger, so does the danger of majoritarian faction. When a given religious or economic faction represents a majority in all states, the logic of *Federalist No. 10* supplies no reason for wanting an enlarged national polity to have authority over a matter of interest to such a

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30. See sources cited *supra* note 26.

31. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987) (reviewing RAOUL BERGER, *FEDERALISM: EVALUATING THE FOUNDERS' DESIGN* (1987)); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 558 (1995); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 918 (1985).

32. Professor McConnell observed: "So long as preferences for government policies are unevenly distributed among the various localities, more people can be satisfied by decentralized decision making than by a single national authority." McConnell, *supra* note 31, at 149; See also James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1260 (1994) (noting that state authority "serves as a tool for assuring limited self-government to a geographically-based minority group"); Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1314 (1994).

faction. Even if the matter is shifted to the national level, such religious or economic factions would retain their majority status. At the same time, however, the diversity rationale for state authority would not apply because majoritarian preferences do not differ from state to state. In contrast, when some faction constitutes a majority in just a few states, Madison's reasoning in *Federalist No. 10* does point to the desirability of national authority. Such state majorities can be prevented from easily dominating minorities by shifting authority to the enlarged national polity in which they lose their majority status. By the same token, however, the diversity rationale for state authority also applies, pointing to the desirability of accommodating majoritarian preferences that differ from state to state. In other words, the same economic and religious factionalism that supports national authority under *Federalist No. 10* is also the source of the diversity rationale for state authority. Which is more important, curbing the power of factions on the state level or accommodating diversity? The question is not readily answered, especially in a way that lends itself to judicially enforceable rules.

When one takes into account the import of modern critiques of *Federalist No. 10*, its implications for judicially enforceable lines become even more uncertain. *Federalist No. 10* was written over two hundred years ago and its analysis has been cogently criticized as incomplete. Professor McConnell, for instance, observes that Madison's argument considers the likelihood of majoritarian oppression while overlooking the magnitude of oppression on the state and national levels.<sup>33</sup> Simply because an oppressive national law affects a greater number of persons, it is more oppressive than a state law having identical terms. Thus, even if Madison correctly thought that the enactment of oppressive laws is less likely on the national level, this lesser likelihood must be balanced against the greater magnitude of oppression accompanying an oppressive national law. The proper resolution of these competing tendencies is by no means obvious.

Madison's argument in *Federalist No. 10* also overlooks the possibility that oppression will result from an organized minority faction. Contrary to the teachings of modern political science on interest groups,<sup>34</sup> Madison's argument supposes that a group's status as a numerical majority or minority solely determines whether it possesses effective political power. Once one takes into account the danger that an organized minority interest group may wield disproportionate power and dominate unorganized majorities, Madison's conclusion that national authority will better protect the powerless becomes considerably less

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33. See McConnell, *supra* note 31, at 1503.

34. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 45 (1995).

certain. Professor Rapaczynski has argued that "the federal government may be more likely subject of capture by a set of special minoritarian interests, precisely because the majority interest of the national constituency is so large, diffuse, and enormously difficult to organize."<sup>35</sup> The empirical evidence tends to undercut Professor Rapaczynski's point, indicating that special interest groups possess more undue influence on the state than on the national level.<sup>36</sup> But the evidence is very general and impressionistic. A reliable answer to the question of whether organized interest groups possess more undue influence on the state or national level would require more finely-grained and context-sensitive analysis than is so far available in the literature. Courts should not allocate decision making authority to the state or national governments based upon impressionistic and speculative judgments regarding the comparative danger of undue interest group dominance.

In short, *Federalist No. 10* does identify a mechanism through which federalism protects the politically powerless and thereby promotes liberty. But Madison's argument does not yield a complete theory of federalism; it can only support the judgment that protecting the powerless is one of federalism's functions. Further, this function, as it is elaborated in *Federalist No. 10*, carries no real implications for judicial doctrine, especially when the insights of modern interest group theory are integrated into Madison's analysis.

### C. *Permitting Exit*

According to some modern theorists, state and local authority promotes liberty by enabling those who do or would lack effective political power to exit the jurisdiction or choose not to locate there in the first place.<sup>37</sup> National authority, in contrast, does not protect the politically powerless to the same degree because it is far more difficult to move from the United States to some other nation. Like Madison's argument in *Federalist No. 10*, the phenomenon of exit does identify a mechanism

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35. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 386.

36. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 206 (1980); RONALD J. HREBENAR, INTEREST GROUP POLITICS IN AMERICA 185-88 (1990); D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 N. U. L. REV. 577, 631 & n.310 (1986). Cf. SHAPIRO, *supra* note 34, at 45 n.110 ("Even adherents of public choice theory recognize, however, that private interest groups may often find it both easier and more useful to seek action at the state or local level than at the national level.")

37. See REDISH, *supra* note 13, at 25; Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 149 (1992); Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

through which federalism plausibly may be said to protect the politically powerless. But the exit argument suffers from problems that mirror those that surround Madison's enlarging-the-polity argument.<sup>38</sup>

First, like Madison's argument, the phenomenon of exit cannot support a judgment that federalism's sole function is to protect the politically powerless. Whereas Madison's argument in *Federalist No. 10* offers no rationale for state authority, the phenomenon of exit offers no rationale for national authority. Because exit always favors state authority and leaves no room for national authority, it cannot afford the basis for a complete theory of federalism.

Second, like Madison's argument, when the exit argument is made part of a more complete theory of federalism it furnishes no basis for judicially-drawn lines between state and national authority. To become part of a more complete theory, exit must be supplemented with an explanation of why it is sometimes desirable to accord the national government authority. One widely accepted explanation is that national authority furnishes a mechanism for responding to collective action problems precipitated by externalities and "races to the bottom."<sup>39</sup>

The problem is that any actual or potential exodus of persons, business, or capital can be viewed either as desirable exit, which favors state authority, or an undesirable race to the bottom, which justifies national authority. It is precisely because of exit—the movement of business, capital, and taxpayers across state lines to avoid unliked laws—that states are led into a race to the bottom that results in undesirably low levels of taxation and regulation. For courts to give states exclusive authority over matters as to which the mechanism of exit is most powerful would be to ignore the concomitant strength of the justification for national authority. Because choices as to desirable levels of regulation and taxation are largely political rather than constitutional, the Court should not get into the business of deciding whether the actual or potential exodus of business, capital, or persons represents desirable exit or an undesirable race to the bottom. For Richard Epstein, the flight of business from a state to avoid minimum wage laws represents liberty-promoting exit.<sup>40</sup> For others, such flight reflects a welfare-reducing race to the bottom.<sup>41</sup>

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38. See *supra* notes 26-36 and accompanying text.

39. See, e.g., *United States v. Darby*, 312 U.S. 100, 122 (1941); SHAPIRO, *supra* note 34, at 42-43; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1011-13 (1995); McConnell, *supra* note 31, at 1494-95.

40. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 76-77 (1991) (stating that the libertarian scholar Richard Epstein "makes no bones about the fact that his support for federalism is directly linked with his rejection of government regulation").

41. See *supra* note 39 and accompanying text.

It is hard to imagine that the Constitution compels adoption of one or the other of these competing viewpoints.<sup>42</sup>

For much the same reason, then, the phenomenon of exit and *Federalist No. 10* fail to produce any implications for judicial doctrine. When political majorities in different states have disparate preferences and values, this can be viewed either as diversity that justifies state authority or as majoritarian faction that justifies national authority. Similarly, the actual or potential flight from a jurisdiction can be viewed as reflecting liberty-promoting exit or a welfare-reducing race to the bottom. It is hard to see why judicial doctrine should, or how it could, dictate whether a given matter should be viewed as involving diversity or majoritarian faction, exit or a race to the bottom. The choice between these perspectives seems political, not judicial.

### III. PROTECTING GOVERNMENTAL ENTITIES

Yet another strain of thought conceives of federalism as protecting the interests of governmental entities. This strain is evident in the rhetoric of state sovereignty that one finds in some of the Justices' opinions<sup>43</sup> and in cases such as *New York v. United States*<sup>44</sup> and *National League of Cities v. Usery*,<sup>45</sup> which treat national regulation of state governmental entities as especially problematic.

The idea that federalism ultimately aims to protect state government is perhaps most clearly evident in the debate over the import of political process theory for federalism. According to political process theory, the main purpose of judicial review under the Constitution is to identify and remedy defects in representative political processes.<sup>46</sup> For instance, John Hart Ely argues that prejudice against African-Americans constitutes such a defect because it impedes African-Americans from forming coalitions with other groups and thereby protecting their interests through representative processes.<sup>47</sup> According to Ely, judicial intervention is needed and

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42. Cf. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*").

43. The Justices sometimes speak as though an ultimate aim of constitutional federalism is to identify and protect attributes essential to the sovereignty of state governments. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996).

44. 505 U.S. 144 (1992).

45. 426 U.S. 833 (1976).

46. The leading statement of this approach is found in JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). For useful explanations and critical discussions of the general theory, see ROBERT H. BORK, *THE TEMPTING OF AMERICA* 194-99 (1990); RICHARD A. POSNER, *OVERCOMING LAW* 198-207 (1995); MARK TUSHNET, *RED, WHITE, AND BLUE* 70-107 (1988); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L. J.* 1063 (1980).

47. See ELY, *supra* note 49, at 135-79.

justified to redress this defect in representative processes.<sup>48</sup> How one analyzes the implications of political process theory for federalism depends on whether one sees federalism as ultimately protecting the interests of state governments or the political majorities who control such governments. If one sees federalism as ultimately serving the interests of state governments, at least in part, then one would examine the degree to which state governments find effective representation in the national political process. If one sees federalism as ultimately serving the interests of the political majorities who control state governments, then one would examine the representation of such majorities in the national political process.

In debating the import of political process theory for federalism, the Justices and scholars have implicitly presumed that federalism ultimately seeks to advance the interests of state governments. They have focused exclusively on whether state governments are adequately represented in the national political process. In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>49</sup> for instance, the Court declared that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”<sup>50</sup> In assaying “[t]he effectiveness of the federal political process in preserving”<sup>51</sup> the interests of the “States as States’,”<sup>52</sup> the Court considered the ways in which state governments and state governmental officials participate in the national political process.<sup>53</sup> The Court also enumerated several pieces of federal legislation that supposedly reflect the state governments’ ability to protect their interests in the national political process.<sup>54</sup> The dissenters, for their part, discounted the efficacy of the formal and informal mechanisms through which state governments and officials participate in the national political process.<sup>55</sup>

Scholars, too, have focused on the adequacy with which state governments, not political majorities, are represented in the national political process.<sup>56</sup> A standard argument against deferring matters of

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48. *See id.*

49. 469 U.S. 528 (1985).

50. *Id.* at 550.

51. *Id.* at 552.

52. *Id.* at 554.

53. *See id.* at 550-54.

54. *See id.* at 552-53 (noting federal land grants, direct cash grants, and federal funding of services such as education, public health, and parks.)

55. *See id.* at 565 & n.9 (Powell, J., dissenting).

56. *See, e.g.,* CHOPER, *supra* note 36, at 171-259; REDISH, *supra* note 13 at 18; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-7, at 315 (2d ed. 1988); HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 49-82 (1961); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 857-83 (1979); Larry Kramer,

federalism to the national political process, for instance, observes that the role of state legislatures in determining voter eligibility and congressional districts has been substantially diluted by constitutional amendments, the Court's right-to-vote decisions, and federal voting rights legislation.<sup>57</sup> The focus, then, is on state governments and officials, not the majorities that decide who holds state office. If the focus were instead on political majorities, then constitutional amendments, the Court's right-to-vote decisions, and federal voting rights legislation would strengthen rather than weaken the case for a political resolution of federalism questions. While weakening the role of state governments, these developments enhance the representation of state political majorities on both the state and national levels.

The idea that federalism ultimately aims to protect governmental entities has important implications. If one accepts the general premises of political process theory, it makes the justification for federalism-based judicial review of federal regulation turn on the adequacy with which state governments are formally or informally represented in the national political process. This is precisely what the *Garcia* political-process debate is now about. The sizeable literature that has built up around this question makes sense only if federalism is ultimately concerned with protecting the interests of state governments, not political majorities.

The idea that the protection of state governments is an ultimate aim of federalism also has other implications. On the level of legal doctrine, it supports decisions such as *National League of Cities v. Usery*<sup>58</sup> and *New York v. United States*,<sup>59</sup> insofar as they treat federal regulation of state and local government, as more problematic than federal regulation of private entities. One can debate whether the ability to set the wages and working hours of firefighters and police (*National League of Cities*) or freedom from forced participation in federal regulatory programs (*New York*) are essential attributes of governmental sovereignty. But if the protection of state government is one of federalism's ultimate aims, then the question itself becomes extremely important and is worth debating. Under this view of federalism's underlying objectives, the Court, at the

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*Understanding Federalism*, 47 VAND. L. REV. 1485, 1506-14 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 15-16 (1988) (stating that while "Senators and Representatives undeniably represent the interests of the citizens in their states," "[n]othing in the structure of federal politics . . . guarantees that these representatives will promote the institutional interests of state and local governments").

57. See, e.g., Stephen G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 792-93 (1995); Kaden, *supra* note 56, at 860-61; Kramer, *supra* note 56, at 1506-07); see also CHOPER *supra* note 36, at 177-78 (responding to the argument); TRIBE, *supra* note 56, §§ 5-7, at 315 (approvingly stating the argument).

58. 426 U.S. 833 (1976).

59. 505 U.S. 144 (1992).

very minimum, must prevent the national government from depriving state governments of attributes that are constitutive of governmental sovereignty.

Despite the support that it finds in the Justice's opinions and the scholarly commentary, the idea that the protection of state governments is one of federalism's ultimate aims is, in the end, unpersuasive. It is incompatible with the bedrock principle that, in our system of government, the People have ultimate sovereignty.<sup>60</sup>

The sovereignty of the People requires that government be seen not as an end-in-itself but, rather, as subservient to, and controlled by, the People. Regular elections are the principal means through which government is held accountable to, and controlled by, the People. For the federal government, the Constitution itself requires regular elections.<sup>61</sup> In less specific terms, the Constitution requires that state governments hold regular elections for office as well. The Republican Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."<sup>62</sup> A, if note the, central aim of this Clause is to insure that each state government holds regular elections for office and thereby remains accountable to the People.<sup>63</sup> Because the People are sovereign, state governments must be seen as accountable to, and serving the interests of, electoral majorities.

This is not to say that "the People" should be simplistically equated with political majorities or that electoral accountability exhausts the meaning of a government that is accountable to the People. Those who lack effective political power are also part of the People. A government that is truly accountable to the People must respect the basic rights and humanity of all of its citizens. Countermajoritarian guarantees of civil

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60. The sovereignty of the People is such a well-known feature of our political ideology that it hardly needs support by citations. For those who nonetheless feel the need for citations, see, for example, U. S. CONST. preamble ("We the People of the United States . . . do ordain and establish this Constitution . . ."); *THE FEDERALIST NO. 22*, *supra* note 5, at 145-46 (Alexander Hamilton); *id.* NO. 37, at 234 (James Madison); *id.* NO. 46, at 315 (James Madison); New York, 505 U.S. at 181 ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States."); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 244-307 (1993) (indicating that federalists rejected the view of the Constitution as a compact among states in favor of popular sovereignty); Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333, 1340 (1994) (reviewing SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993)).

61. See, e.g., U.S. CONST. art. I, § 2, cl. 1.

62. U.S. CONST. art. IV, § 4.

63. As Professor Merritt has written, "[s]ince at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers. That control, moreover, is exerted principally—although not exclusively—through majoritarian processes." Merritt, *supra* note 56, at 23; see also *id.* at 32-34.

liberties, such as those found in the Bill of Rights and state constitutions, are thus fully compatible with, if not required by, the idea of a government accountable to the People.

The argument here does not hold that the sovereignty of the People requires direct democracy. Devices such as the separation of powers and a bicameral legislature, which exist on both the national and state levels, mark departures from direct democracy. They blunt the government's responsiveness to the immediate, day-to-day demands of political majorities. In part, such features are countermajoritarian. They serve to protect the politically powerless by making it more difficult for majorities to act through government. Such features also structure effective majoritarianism by facilitating deliberation on the part of political majorities about the accuracy of their immediate, short-term perceptions of their interests. Both kinds of limitations on direct democracy are fully consistent with a government that is accountable to the People.

The point here, then, is not that electoral accountability of government is the only feature that is required by the sovereignty of the People. The point is, rather, that electoral accountability is the principal requirement.

It follows that the protection of state government should not be seen as the or an ultimate aim of federalism. The *New York Court* was on the right track when it declared: "The Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States."<sup>64</sup> In principal part, state governments and federalism, instead, should be seen as a means of serving the political majorities to which state governments are and must be largely beholden.

#### IV. PROTECTING POLITICAL MAJORITIES

According to yet another prominent strain of judicial and scholarly thought, federalism ultimately must be seen as serving the interests of political majorities on the state level (the "Peoples" of the separate states) and the national level (the unitary "People" of the United States). According to Part III of this Paper, this conception of federalism is implied by the sovereignty of the People and the concomitant requirement of electoral accountability.<sup>65</sup> If it does indeed derive from so basic a source, then one would expect to find this conception expressed in a number of different contexts and in a variety of ways. This is, in fact, the case.

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64. *New York*, 505 U.S. at 181.

65. *See supra* notes 60-63 and accompanying text.

### A. Sources

The idea that federalism largely seeks to advance the interests of political majorities runs from the founding of the Constitution to modern times. Such an idea was embraced by no less influential a founder than James Madison. In *Federalist No. 46*, Madison began by stressing that ultimate sovereignty rests with the People and that the legitimacy of both state governments and the national government springs from this source.<sup>66</sup> He then declared that if the People come to favor the national government over state governments, they “ought not surely to be precluded from giving most of their confidence where they may discover it most due . . . .”<sup>67</sup> Madison thought it highly likely that the People would remain partial to state government “because it is only within a certain sphere, that the foederal power can, in the nature of things, be advantageously administered.”<sup>68</sup> Nonetheless, Madison believed that the People ought to be free to follow their judgment regarding the “proofs of a better administration.”<sup>69</sup>

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66. See THE FEDERALIST NO. 46, *supra* note 5, at 315 (James Madison). In *Federalist No. 45*, Madison also wrote:

Was then the American revolution effected, was the American confederacy formed, was the precious blood of thousands spilt, and the hard earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety; but that the Governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the old world that the people were made for kings, not kings for the people. Is that same doctrine to be revived in the new, in another shape, that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people is the supreme object to be pursued; and that no form of Government whatever, has any other value, than as it may be fitted for the attainment of this object.

*Id.* NO. 45, at 309 (James Madison).

67. *Id.* NO. 46, at 317 (James Madison). Although this is the view that Madison expressed in the *Federalist Papers*, he later suggested that the “judicial bench” was intended “as the surest expositor of . . . the boundaries . . . between the Union and its members.” 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 349 (Congress ed. 1884).

68. THE FEDERALIST NO. 46, *supra* note 5, at 317 (James Madison).

69. *Id.* For a discussion of Madison’s argument, see BEER *supra* note 63, at 302-03. Cf. *United States v. Bishop*, 66 F.3d 569, 577 (3d Cir. 1995) (“[T]he primary check upon Congressional action is its direct responsibility to the will of the people.”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (discussing primacy of the electoral check); Judith N. Shklar, *Publius and the Science of the Past*, 86 YALE L. J. 1286, 1294 (1977) (“Publius did have confidence in elections. The politician’s fear of losing his seat was the best guarantee of republican fidelity.”).

In *Federalist No. 17*, Alexander Hamilton expressed the view that political checks would be adequate to prevent the national government from improperly intruding on state authority. Hamilton first confessed himself “at a loss to discover what temptation the persons entrusted with the administration of the general government could ever feel to divest the States of” their proper authority. See

The point here has less to do with Madison than with the logical implications of the sovereignty of the People. Madison's ideas about federalism and other subjects changed over time and *Federalist No. 46* cannot be said to encapsulate Madison's entire thinking about federalism.<sup>70</sup> But Madison was a smart man and *Federalist No. 46* nicely illustrates that the sovereignty of the People logically implies the notion that federalism functions largely to protect the interests of the electoral majorities to whom the state and national governments must remain accountable. As Madison recognized, and as will be developed more fully below, this notion of federalism, in turn, strongly favors leaving matters of federalism to the political process so that the electorate can follow their judgment regarding "proofs of a better administration."<sup>71</sup>

Moving forward to modern times, recent descriptions of federalism's underlying values also appeal to this same majoritarian conception of federalism. State authority, the Justices and scholars have said, can promote values such as diversity, experimentation, participation, and accountability.<sup>72</sup> National authority, they have said, can promote values such as uniformity and efficiency.<sup>73</sup> It can also avoid the tendency of

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THE FEDERALIST NO. 17, *supra* note 5, at 105 (Alexander Hamilton). He went on to say that even if such usurpation "be admitted for argument sake, . . . the sense of the constituent body of the national representatives, or in other words of the people of the several States would controul the indulgence of so extravagant an appetite." *Id.* at 106. In *Federalist No. 33*, Hamilton wrote:

If the [Federal] Government should overpass the just bounds of its authority, and make a tyrannical use of its powers; the people whose creature it is must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify.

*Id.* No. 33, at 206 (Alexander Hamilton).

In the well-known *Federalist No. 78*, Hamilton took the position that the judiciary has authority to determine the scope of Congress' powers and invalidate legislation as beyond those powers. *See id.* No. 78, at 524-26 (Alexander Hamilton). If one reads *Federalist Nos. 17, 33, and 78* together, Hamilton's position appears to have been that political checks can be expected to safeguard the proper balance between national and state authority but, in the event that they fail, the judiciary has authority to intervene. *See generally id.* Nos. 17, 33, 78 (Alexander Hamilton).

In contrast, Madison, in *Federalist No. 46*, can be interpreted to have made the stronger claim that the People, speaking through the political processes, have authority to decide the proper balance between national and state authority. *See id.* No. 46, at 317 (James Madison).

70. Neither can *Federalist No. 10* be said to capture Madison's entire view of federalism. As Part II of this essay observes, Madison's argument in *Federalist No. 10* implies that the national government's authority should be all-encompassing. *See supra* notes 26-36 and accompanying text.

71. *See infra* discussion at Part III.B.1.

72. For discussion of federalism's underlying values, see, for example, *Gregory v. Ashcraft*, 501 U.S. 452, 457-59 (1990); SHAPIRO, *supra* note 34; McConnell, *supra* note 31; Chemerinsky, *supra* note 60.

73. *See CTS Corp v. Dynamics Corp. of America*, 481 U.S. 69, 80-89 (1987); SHAPIRO, *supra* note 34, at 133; Stephen A Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 781 (1994).

states to under regulate due to collective action problems precipitated by externalities and races to the bottom.<sup>74</sup>

These various rationales for state and national authority all conceive of the primary function of federalism as promoting the interests of political majorities, not powerless minorities or state officials. The claim that state authority better promotes diversity, for instance, does not refer to the ability of state governments to reflect the diverse views of state officials or powerless minorities. Rather, the claim pertains to exercises of legislative power by political majorities as they exist in the states. The point about diversity is that when there is considerable variation in the views of such majorities from state to state, state laws are more responsive to such diversity and the preferences of more persons can be accommodated. Similarly, when it is said that national authority can better promote uniformity, the message is not that national authority is needed to protect the politically powerless or the interests of state officials. Instead, the idea is that uniformity is broadly desirable and that the political majorities who will desire uniformity may better achieve it through the enactment of national law.

### B. Implications

As Madison recognized in *Federalist No. 46*, a conception that sees federalism as largely protecting the interests of political majorities points very strongly to the conclusion that matters of federalism should be left to the political processes.

#### 1. Political Process Theory

Viewed in light of such a majoritarian conception of federalism, the current debate over the import of political process theory asks the wrong question. Instead of focusing on the representation of state governments in the national political process, as does the current debate, the focus instead should be on the representation of the political majorities to whom state governments are subservient.

As currently framed, in terms of the representation of state *governments*, the political process argument for a political resolution seems quite strained and unpersuasive. In the original Constitution, state governments were formally represented in the national political process through a

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74. SHAPIRO, *supra* note 34, at 39-44; Caminker, *supra* note 39, at 781-82; McConnell, *supra* note 34, at 1495.

number of mechanisms.<sup>75</sup> State legislatures elected federal senators, determined the qualifications of voters in congressional elections,<sup>76</sup> drew congressional election districts,<sup>77</sup> and chose representatives to the electoral college that elected the President.<sup>78</sup> These formal structural protections, however, have little contemporary import.<sup>79</sup>

The Justices and commentators have also examined the efficacy of informal mechanisms through which state governments find representation in the national political process. This discussion, however, is essentially inconclusive. Proponents and opponents of a political resolution each have a list of informal mechanisms through which state governments can or cannot protect their interests.<sup>80</sup> They also have an accompanying list

75. For a discussion of these formal mechanisms and their import, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985) (majority opinion); *id.* at 565-66 & n.9 (Powell, J., dissenting); CHOPER, *supra* note 36, at 177; Kaden, *supra* note 56, at 858, 860-61; Kramer, *supra* note 56, at 1506-08.

76. U. S. CONST. art. I, § 2 (providing that the qualifications are those "requisite for Electors of the most numerous Branch of the State Legislature").

77. Professor Weschler writes:

State control of congressional districting derives from the constitutional provision that the "times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." The same clause provides, however, that "Congress may at any time by law make or alter such regulations . . ." Though the matter has been disputed, it seems plain that state control thus rests entirely on the tolerance of Congress.

Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 549-50 (1954) (citing U.S. CONST. art. I, § 4).

78. See U. S. CONST. art II § 1, cls. 2, 3. If the chosen electors are unable to produce a majority, then state delegations in the House of Representatives elect the President, with each state delegation having one vote. See *id.* art. II, § 1, cl. 3.

79. There are several reasons for this phenomenon. The Seventeenth Amendment provides for the direct election of U.S. Senators. See *id.* amend. XVII. The Court has invalidated restrictive voter qualifications. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (invalidating the poll tax). The Court and Congress have assumed substantial control of congressional districting. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring that congressional districts roughly adhere to the one-person, one-vote principle). Finally, state legislatures no longer choose electors to the electoral college, which is of limited modern significance in any event.

80. Informal mechanisms usually mentioned as increasing the sensitivity of the national political process to state government include efforts by state delegations to coordinate voting, the number of federal elected officials who previously served in state government, the influence of local political party organizations on presidential nominations, and the rise of state and local government lobbying groups. See CHOPER, *supra* note 36, at 176-81. The informal mechanisms usually mentioned as working in the opposite direction include the weakening of political parties on the state and local level, the rise of the national media, and the influence of national interest groups. See *Garcia*, 469 U.S. at 565 n.9 (Powell, J., dissenting); Kaden, *supra* note 56, at 862-67.

of illustrative legislative outcomes.<sup>81</sup> Absent a surefire demonstration that informal mechanisms never fail in protecting the interests of state governments, the argument for relying entirely on the political process becomes vulnerable and unpersuasive.<sup>82</sup>

Once the question is properly framed, in terms of the representation of state political majorities in the national political process, political process theory yields a clear answer. There are unquestionably ample formal mechanisms through which political majorities on the state level find representation in the national political process. State majorities, or subdivisions thereof, elect each of the 435 members of the House of Representatives. State majorities are represented equally in the Senate.<sup>83</sup> In combination, state majorities elect the President through the popular vote and also through the electoral college. Political majorities on the state level do not need judicial intervention to redress defects in the national political process that prevent them from protecting their interests. Instead of warranting judicial intercession, political process theory implies that the national political process should decide the appropriate mix of state and national authority.

The degree to which state governments and their officials find formal or informal representation in the national political process is not

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81. Compare *Garcia*, 469 U.S. at 552 (citing disbursement of federal funds to state and local government and state and local governmental exemptions from obligations imposed by numerous federal statutes as evidence of sensitivity) and *CHOPER supra* note 36, at 184-90 (citing instances of alleged sensitivity) with *Garcia*, 469 U.S. at 587-88 (O'Connor, J., dissenting) (citing examples of alleged insensitivity) and *Kaden, supra* note 56, at 868-83 (citing examples of alleged insensitivity).

82. Redish states:

[W]hether this argument [that informal mechanisms protect state interests] is empirically correct now, or will continue to be so in the future, is all but impossible to determine, especially by a body as limited in its fact-finding resources as the Supreme Court. Surely it is possible to conceive of a situation in which state interests, at least as the states themselves define them, would be ignored by Congress.

*REDISH, supra* note 13, at 18. See *Briffault, supra* note 32, at 1351 (describing as "dubious" the "argument that the representation of the states in Congress assures that the interests of state governments are taken into account by the national legislature"); *Kramer, supra* note 56, at 1488-89 ("The *Garcia* Court's efforts are certainly unsatisfying (to say the least).").

83. Alexander Hamilton, writing in *Federalist No. 17*, equated Congress with "the people of the several States . . ." *THE FEDERALIST NO. 17, supra* note 5, at 106 (Alexander Hamilton). Hamilton did so in the course of arguing that Congress would prevent national authorities from intruding into the proper domain of the states. He wrote that "the sense of the constituent body of the national representatives, or in other words of the people of the several States would controul the indulgence of so extravagant an appetite." *Id.* (emphasis added).

As Professor Wechsler has pointed out, state majorities are protected not only by their equal representation in the Senate, but also by the Senate's countermajoritarian procedural devices such as the filibuster, which increase the power of each Senator—and, hence, each state majority—to block national legislation. See *WECHSLER, supra* note 56, at 57.

completely irrelevant. Such representation reinforces the argument that state majorities are adequately represented in the national political process and that there is no process defect warranting judicial intercession. But if federalism's primary function is to advance the interests of political majorities, then the representation of state governments is not necessary to the success of the political process argument for a political resolution.

## 2. Normative Federalism

Not everyone agrees that the principal purpose of judicial review under the Constitution is to redress defects in representative processes. Critics have argued, *inter alia*, that political process theory untenably separates process from substance<sup>84</sup> and, contrary to *Marbury's* central teaching, sacrifices fidelity to the Constitution's text, history, and values.<sup>85</sup> Constitutional lines between state and national authority cannot be derived from the text because the Tenth Amendment and the Commerce Clause now conflict. But one might reasonably take the position that the values that underlie these conflicting textual prescriptions should determine where the constitutional lines ought to be drawn.<sup>86</sup> Even under such an approach, however, a conception that sees federalism as largely protecting political majorities tends to favor a political resolution of federalism questions.

The principal reason favoring such a political resolution is that political majorities are presumably in a better position than the federal judiciary to determine where their own interests lie. Given that such majorities are well represented in the national political process, the outcome of that process would seem to furnish a reliable indicator of those interests. It smacks of an arrogant paternalism for the federal judiciary to supplant the

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84. See TRIBE, *supra* note 56, §13-5 at 1068-71, § 13-6 at 1071-72; Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 134-37 (1981); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 783 n.153 (1991); David Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745, 752-56 (1987).

85. See BORK *supra* note 46, at 198-99. A number of scholars have criticized the standard political process argument for a political resolution of federalism issues as inconsistent with *Marbury v. Madison's* injunction that it is for the Court to say what the Constitution means. See REDISH, *supra* note 13, at 18, 20, 24 (describing Professor Choper's proposal that federalism issues be left to the national political process as the "judicial abdication model"); Calabresi, *supra* note 57, at 791 n.120; Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 90 n.46 (noting that although Professor Choper argues against judicial intervention, "he concedes that Congress might make constitutional errors with regard to what federalism requires"); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1732-33 (1985).

86. See Chemerinsky, *supra* note 60, at 1341-42 ("In any case concerning federalism, the Court should explicitly identify the values of federalism to be served—or compromised—by a particular judicial ruling.").

outcome of that process on the presumption that it is able to identify the "true" interests of state and national political majorities.

Several subordinate considerations support the competence of political majorities to allocate authority between state and national governments. To determine the proper balance among federalism's underlying values, one must make contestable judgments of policy and prediction that have an essentially political character. For example, while the actual or potential exodus of business from a state to avoid unwanted labor laws is viewed by a libertarian such as Richard Epstein as liberty-enhancing exit,<sup>87</sup> the same phenomenon may be viewed by a welfare-state liberal as an undesirable race-to-the-bottom. Ever since the demise of the *Lochner* Court, it is fairly well settled that the choice between these competing perspectives is political in nature.<sup>88</sup>

In addition, the interests of political majorities are best served if the lines between state and national authority are allowed to shift. Because the balancing of federalism's values requires contestable judgments of policy and prediction, and because such judgments can, do, and should change, there is a need for flexibility.<sup>89</sup> Judicial rules and outcomes inhibit the flexibility that the trial and error of political processes permit.

Finally, judicial lines thwart an important mechanism through which political majorities advance their interests and hold both state and national governments accountable. As Madison recognized in *Federalist No. 46*, the electorate's ability to shift power vertically to and from levels of government plays a crucial role in promoting efficient and responsive government.<sup>90</sup> The New Deal, the Great Society antipoverty programs, and the 1994 congressional elections attest to Madison's wisdom. The electorate uses such vertical power shifting as a potent vehicle for advancing its perception of workable government and, with that perception, federalism's underlying values.

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87. See *supra* note 25 and accompanying text.

88. See *supra* note 42. See also Briffault, *supra* note 32, at 1304 ("Although federalism suggests that courts ought to enforce federalism-based restrictions on national actions, the existence of equally important countervailing values that could be advanced by national action means that individual cases may entail intensely political judgments concerning these conflicting norms."); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 670 (1993).

89. See SHAPIRO, *supra* note 34, at 119 ("Unfortunately, clear answers, even if ascertainable in light of present conditions, are not immutable but rather are necessarily contingent on time and place. What may seem most appropriate today may seem foolishly out of tune with tomorrow's needs.").

90. See *supra* notes 66-71 and accompanying text.

## V. JUDICIAL LINES AND A MAJORITARIAN CONCEPTION OF FEDERALISM

The preceding parts of this Paper argue that federalism should be seen primarily as protecting the interests of the political majorities who wield legislative power at the state and national levels. Does such a majoritarian conception of federalism leave any room for judicially-drawn lines between state and national authority? The presumed capacity of political majorities to identify their own interests suggests a negative answer. However, a majoritarian conception of federalism is not necessarily incompatible with all judicial intervention: One might reasonably question the ability of political majorities to identify and protect their federalism-based interests. In fact, the case law and literature on federalism do question that ability.

This Part examines the concerns that the Justices and scholars have expressed, and some that they might express, about the capacity of political majorities to identify and protect their own interests. None of these concerns, it concludes, can justify the doctrines or the results of the Court's new federalism. A powerful argument can be made that the Court should have authority to invalidate federal legislation that is clearly contrary to federalism's underlying values. However, the doctrines of the new federalism are not well designed to identify such legislation, and none of the Court's recent cases has involved legislation fitting this description.

### A. Sources of Incapacity: Political Accountability

First, many Justices have taken the position that the political process, left entirely to its own devices, confuses voters about whether state or national officials should be held accountable for governmental action or inaction. In *New York v. United States*,<sup>91</sup> the Court suggested that the forced participation of state governments in federal regulatory programs blurs the lines of political accountability and thereby impedes the ability of the electorate to realize its interests through the political process.<sup>92</sup> In *United States v. Lopez*,<sup>93</sup> Justice Kennedy broadened the argument, suggesting that concurrent state and national authority to regulate private conduct likewise impedes accountability.<sup>94</sup>

In its form, this argument coheres with the majoritarian conception of federalism outlined above. The argument implicitly presumes that

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91. 505 U.S. 144 (1992).

92. See *id.* at 168-69; see also *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in part and dissenting in part); Kaden, *supra* note 56, at 857.

93. 115 S. Ct. 1624 (1995).

94. See *id.* at 1638-39 (Kennedy and O'Connor, JJ., concurring).

federalism's main purpose is to protect the interests of political majorities. But, the argument asserts, blurred lines of accountability will prevent political majorities from identifying their own interests effectively. It thus offers a reason for judicial intervention that is compatible with a majoritarian conception of federalism.

The problem with the argument is not with its form but rather with its content. As an argument against reliance on the political process to allocate regulatory authority over *private* conduct, the concern over lack of political accountability carries very little weight. When a state or the national government has actually regulated in a realm of concurrent authority, the source of the regulation is clear and it is extremely implausible to think that voters are confused about whom to hold accountable. Perhaps the argument is that voters will be confused about whom to hold accountable for a *failure* to regulate in an area of concurrent authority and that no such confusion can exist in an area of exclusive authority. As an empirical matter, however, such confusion hardly seems so widespread or significant as to merit judicial intervention. Indeed, the leading political science textbook on American democracy nowhere mentions the supposed problem.<sup>95</sup>

Beyond its lack of empirical support, the argument has two, more fundamental failings. First, the argument proves too much. It carries the radical implication that the Court should overturn the longstanding and uncontroversial general principle that Congress and the states have concurrent power over interstate commerce. If the political accountability argument discussed above holds true, such concurrency promotes voter confusion and diminishes accountability. Second, exclusive state (or national) authority actually inhibits rather than promotes political accountability by preventing power shifting. As a matter of theory and practice, shifting power vertically to and from levels of government is and has been one important mechanism through which voters hold national and state governments accountable.<sup>96</sup> Power shifting, and the accountability that flows from it, requires that the Court treat state and national authority as concurrent, not exclusive.

The *New York* Court's narrower argument that federal commandeering of state government blurs accountability also seems unpersuasive, as

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95. See ROBERT DAHL, *DEMOCRACY IN THE UNITED STATES* (4th ed. 1981). Since the Court had not invalidated any regulation of private activity in the name of federalism in nearly sixty years, voter confusion about the locus of political responsibility has had ample time to fester. Yet Justice Kennedy cited no empirical support whatever for the view that concurrent state and national authority to regulate private conduct leaves voters confused about whom to hold accountable. See *Lopez*, 115 S. Ct. at 1638-39 (Kennedy and O'Connor, JJ., concurring).

96. See *supra* notes 66-71, 90 and accompanying text.

Professor Caminker has nicely demonstrated in one of his Articles.<sup>97</sup> State officials have every incentive to point the finger at the national government to avoid being blamed for unpopular national mandates. Although there may be situations in which state and national officials make competing claims about who bears responsibility, voters routinely hear and resolve similar claims.<sup>98</sup> Especially in absence of empirical support,<sup>99</sup> it seems quite paternalistic for the Court to suppose that the political majorities whom federalism empowers are unable to sift through the competing claims and identify their own interests.

*B. Indications of Incapacity: Political Schizophrenia*

Second, in trying to argue that political majorities lack the capacity to protect their federalism-based interests, one might adopt a strategy that differs fundamentally from the political accountability argument. Whereas the political accountability argument seeks to identify a *cause* of such an inability, one might instead identify its *manifestations*. On this score, one might point to the divergence that sometimes exists between the views of a given state's elected state and federal representatives over the proper balance of state and national authority. It is not infrequent that a state's United States Senator will support a federal

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97. See Caminker, *supra* note 39, at 1081-87.

98. For instance, voters are routinely confronted with competing claims about whether, and to what extent, the state of the economy is attributable to the President, Congress, the Democratic or Republican parties, or forces beyond direct governmental control.

99. In support of its concern over political accountability, the *New York* Court cited articles written by Professors Merritt, *supra* note 56, and La Pierre, *supra* note 36. See *New York v. United States*, 505 U.S. 144, 169 (1992). On the cited pages, Professor Merritt asserts that when state or local officials enact a national mandate, voters will assume that they, rather than national legislators, "are responsible for the unwanted enactment, [and] will retaliate against those officials." Merritt, *supra* note 56, at 62. Professor Merritt did not support the assertion with empirical data, which seems implausible given that state and local officials have every incentive to blame Congress for unwanted national mandates. See *id.* Professor La Pierre, on the cited pages, asserts that political accountability is lost when Congress uses state government as its agent for the implementation of national law. See La Pierre, *supra* note 36, at 656-58. Such accountability is lost, he reasons, because such a use of state government does not impact private parties. See *id.* This is a logical, not an empirical, argument. Moreover, it seems flawed as a logical argument. Use of state government as an agent for the enforcement of national law does impose costs on private parties. If the national government fails to provide the funding, then the state's taxpayers must shoulder the cost. Even when the national government furnishes the requisite funds, state officials must take action that affects private parties. In *New York*, for instance, the location of nuclear disposal sites, which was to be decided by agreements among states, had an obvious impact on the persons living near such sites. See *New York*, 505 U.S. at 150-51. The issue, then, is not whether national use of state government as its agent imposes costs on private parties but whether those parties will be confused over which level of government to hold responsible. Professor LaPierre's article does not address this point, which is the one the *New York* Court made and attempted to support with the citation to Professor LaPierre's article.

regulatory program that the state's governor opposes as an unwise invasion of state authority. The fact that representatives elected by essentially the same political majority hold such disparate views might indicate that the electorate is unable to identify where its true federalism-based interests lie. The federal judiciary, it might be argued, should assume decisional authority.

Instead of justifying judicial intervention, however, the divergent views of a given majority's elected representatives can be seen to present an opportunity for public dialogue over the proper mix of state and national authority. The interaction of the rationales for state and national authority is quite complex. It is not too much of an oversimplification to say that the question boils down to which mix of state and national authority "works best." Given the complex normative and empirical judgments involved, the public is sometimes, and quite understandably, uncertain how to strike the balance between state and national authority. But it is difficult to understand how such uncertainty could justify judicial intercession that freezes a particular balance into the Constitution. Federalism largely serves the interests of political majorities, the issues at stake require contestable judgments of policy and prediction, and federalism concerns do form part of the political debate. In light of these considerations, the better view is that such uncertainty presents an opportunity for public dialogue and political experimentation, not judicial intervention.

### *C. Indications of Incapacity: Political Outcomes*

Whereas the approach discussed in the previous section sought to show the incapacity of political majorities to protect their federalism-based interests by pointing to the divergent views of the representatives elected by the same electorate, one instead might point to particular political outcomes. It should not be sufficient to point to political outcomes of the national political process that *arguably* run counter to federalism's underlying values. Federalism functions largely to protect the interests of political majorities. The proper balance between state and national authority requires that one assess and balance a host of competing considerations, such as the comparative desirability of diversity and uniformity or experimentation and avoidance of a race to the bottom. Due to the need to give political majorities sufficient leeway to resolve such contestable matters, the argument requires political outcomes that are *clearly* contrary to federalism's values—outcomes that defy any reasonable resolution of the values at stake. The existence of such outcomes would indeed indicate that political majorities lacked the capacity to protect their federalism-based interests. A compelling

argument can be made that the federal judiciary, acting in the name of federalism, should have authority to invalidate such outcomes.

The first thing to notice about this line of argument is that, while it can justify judicial intervention, it justifies intervention of a particular kind. It provides no support for the formalistic and categorical rules laid down in cases such as *Lopez*, *National League of Cities*, and *New York*, whose adoption, formulation, and application are in no sense the product of an explicit consideration of federalism's underlying values. Instead, the argument supports a case-by-case approach that would have courts examine the arguable rationales for state and national authority and ask whether the national action at stake reflects a defensible balance of the competing considerations.

In addition to failing to justify the doctrinal approach found in the Court's new federalism decisions, the argument sketched out above furnishes no support for the results the Court has reached. In each of the Court's new federalism decisions that strike down federal legislation, substantial justifications for national intervention existed and federalism's values did not clearly favor exclusive state authority. Consider *United States v. Lopez*,<sup>100</sup> where the Court invalidated the federal Gun Free School Zones Act.<sup>101</sup> Federalism's values offer little, if any, support for the conclusion in *Lopez* that states should possess exclusive authority to regulate guns in and around schools. Given that "over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds,"<sup>102</sup> exclusive state authority is not needed to accommodate geographically diverse values. Nor is exclusive authority needed to foster experimentation. The federal Gun Free School Zones Act did not preempt states from trying any of the alternative regulatory measures Justice Kennedy identified in his concurrence.<sup>103</sup>

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100. 115 S. Ct. 1624 (1995).

101. See 18 U.S.C. § 922(q) (1994).

102. *Lopez*, 115 S. Ct. at 1641 (Kennedy, J., concurring).

103. See *id.* (Kennedy, J., concurring). Although the Act left the states free to decide not to criminalize possession of guns in and around schools for purposes of their own criminal law, it obviously precluded the states from implementing a decision that such possession is not a crime at all, under either state or federal law. Yet, as Justice Kennedy implicitly conceded, none of the states wished to experiment with this alternative. The Act did not preclude states from using any of the alternatives Justice Kennedy discussed in his concurrence *in addition to* the Act's scheme.

It is worth noting that having both state and federal laws addressing the matter advances rather than frustrates the goal of experimentation in this context. As evidenced by the more than forty state laws addressing the problem, voters evidently regard it as serious and want it addressed. Given this goal, joint state and federal authority is better than giving states exclusive authority. One does not need an experiment to conclude that joint federal and state enforcement efforts will go further in stopping the problem than state enforcement alone. Further, the addition of national resources does not preclude one from evaluating whether one state's regulatory scheme, combined with the national scheme, is better than another state's alternative regulatory scheme, combined with the national

While offering essentially no support for exclusive state authority, federalism's underlying rationales offer considerable support for a concurrent national role of the kind *Lopez* rejects.<sup>104</sup> The costs of policing and prosecuting school violence implicates two kinds of collective action problems commonly recognized as supporting a national role. First, the possession of guns in and around schools to some degree produces adverse spillover consequences in other states,<sup>105</sup> which a state may not adequately consider in deciding the level of resources to devote to the problem. While confronted with all of the costs of policing and prosecuting such conduct, the state will not enjoy and will not consider the full benefits of its law enforcement efforts. A supplemental national role is arguably needed to insure that the level of law enforcement effort is commensurate with all of the effort's benefits, not just those concentrated in the enforcing jurisdiction.<sup>106</sup> Second, the problem of guns in and around schools implicates a race-to-the-bottom problem that at least arguably justifies a national role. It is widely recognized that, due to the competition among states to attract business, capital, and affluent taxpayers, states are poorly positioned to undertake measures that, however desirable, entail a redistribution of wealth.<sup>107</sup> Because the

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scheme. Of course, overlapping state and federal authority carries costs that might support a prudential judgment to have exclusive state authority over the matter. But it is hard to imagine that these costs can justify a constitutional rule that precludes voters from making the prudential judgment that the benefits of overlapping state and federal enforcement efforts are worth the costs.

104. For a more complete discussion, see Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y (forthcoming 1997).

105. In his dissenting opinion in *Lopez*, Justice Breyer noted some of the interstate consequences of gun-related school violence. See 115 S. Ct. at 1659-70 (Breyer, J., dissenting). The Court did not really deny the existence of such consequences, but rather relied on the principle that the Constitution limits Congress's regulatory authority. Compare this view with the following language from David Shapiro, who writes that

the fact of increasing mobility means that a state's commitment to quality public education may have substantial benefits beyond its borders, and that conversely, a state's own failure to provide adequate education to its residents may not harm it unduly if the state proves sufficiently attractive in other ways to draw trained and productive workers from other states. Thus, the Nation's total commitment to education, if left wholly to the states as individual polities, may well be suboptimal.

SHAPIRO, *supra* note 34, at 42.

106. See SHAPIRO, *supra* note 34, at 42; Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 567 (1994) (stating that "[a]ctivities that generate positive externalities will be undertaken in suboptimal amounts").

107. See ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT* 122 (1992); SHAPIRO, *supra* note 34, at 134; LeBoeuf, *supra* note 106, at 579 ("It is generally accepted by economists that redistributive policies cannot be successfully carried out locally."); Stewart, *supra* note 31, at 919 ("The mobility of capital and of persons may also deter state and local governments from providing adequate welfare and social services for the needy.").

problem of gun violence in schools is most acute in poor urban areas,<sup>108</sup> law enforcement efforts to effectively address the problem entail a redistribution of wealth. Such a law enforcement effort is funded by general tax revenues, for which business and affluent taxpayers account for a proportionate or even disproportionate share, to the disproportionate benefit of the poor. The disinclination of states to undertake such redistribution furnishes a reason, which the literature on federalism recognizes as acceptable, for a supplemental national role.

In *New York v. United States*,<sup>109</sup> the Court again invalidated a federal law in the face of a strong justification for national authority. In *New York*, the Court struck down the "take title" provision of the Low-Level Radioactive Waste Policy Amendments of 1985,<sup>110</sup> which had required a state government to take title and possession of radioactive waste if, by a specified date, it had failed to reach agreement with a regional compact of states to provide for disposal of all internally generated waste.<sup>111</sup> The problem at stake, the disposal of nuclear waste, furnishes a textbook example of the kind of negative externalities that justify national intervention.<sup>112</sup> While each state has an interest in taking advantage of whatever benefits nuclear power offers, each also has an interest in shifting the costs associated with disposal of nuclear wastes to other states. The parochial perspective of each state precipitated a collective action problem whose predictable result was an insufficient supply of waste disposal sites.<sup>113</sup>

The means Congress used to address this problem, mandating state governments to reach agreements concerning disposal sites, cannot be said to clearly infringe on federalism's values. Although federal mandates to state governments sometimes can displace their ability to set their own priorities,<sup>114</sup> they do not always do so.<sup>115</sup> The provisions at stake in *New York*, for instance, sought to implement priorities that state governments had themselves set but, due to collective action problems, found themselves unable to achieve absent national intervention. As Justice White's dissent observed, the Low-Level Radioactive Waste

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108. See Stacy & Dayton, *supra* note 104.

109. 505 U.S. 144 (1992).

110. See 42 U.S.C. § 2021e(d)(2)(C) (1994).

111. See *New York*, 505 U.S. at 177.

112. See Caminker, *supra* note 39, at 1013.

113. Thus, it is not at all surprising that, under the dormant Commerce Clause, the Court has had to invalidate a number of state laws concerning the disposal of various kinds of waste. See *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1680 (1994) (citing cases in which such invalidation occurred).

114. See *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in the judgment and dissenting in part); Caminker, *supra* note 39, at 1079-80.

115. See Caminker, *supra* note 39, at 1011-13.

Policy Amendments Act of 1985 essentially codified an agreement state governments had reached among themselves.<sup>116</sup> In fact, while the Court adopted a categorical rule against the forced participation of state government in federal regulatory programs, the Act's requirement that state governments reach agreements among themselves made it more, not less, sensitive to federalism's values. The involvement of state governments in the selection of waste disposal sites promoted the values of diversity, by heightening the sensitivity to variations in local conditions, and of participation, by making use of elected state officials rather than national bureaucrats alone.

Based on these cases,<sup>117</sup> one should not presume that Congress may never act in ways that are clearly contrary to federalism's underlying values. One must keep an open mind on the subject and each case must be addressed on its individual merits. If a particular piece of legislation can be shown to be contrary to the clear weight of federalism's values, then a compelling argument can be made that the Court should overturn it.<sup>118</sup> As the above discussion indicates, however, the Court's new federalism doctrines are not well designed to identify such legislation, and

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116. See *New York*, 505 U.S. at 188-200, 210 (White, J., dissenting); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 930-31 (1994).

117. Colorable justifications for the exercise of national authority also existed in another of the Court's principal new federalism decisions, *National League of Cities v. Usery*, 426 U.S. 833 (1976). There, the Court invalidated amendments to the federal Fair Labor Standards Act, requiring, inter alia, that state and local governments pay minimum wages to police and firefighters. See *id.* at 852. Like *New York*, *National League of Cities* involved an externalities problem. While the costs of higher wages for employees of a state or local government are borne entirely by taxpayers in the pertinent jurisdiction, Congress permissibly could conclude that the level of their wages can produce benefits in other states. See generally DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995). Thus, each state has an incentive to underregulate. *National League of Cities* also involved a colorable race-to-the-bottom problem. Because higher wages would be paid through increased tax revenues, competition among states to keep tax rates low would constrain their ability to pay such wages, even if each state wanted to do so. See FARBER & FRICKEY, *supra* note 40, at 76.

118. Although the argument for recognizing such authority is powerful, a plausible counterargument exists. The expected costs of such authority, it might be argued, outweigh its expected benefits. Due to the competence of political majorities to protect their own federalism-based interests and the leeway that courts must give to such majorities in resolving contestable issues of policy and prediction, courts will rarely be justified in overturning national legislation on the ground that it is clearly contrary to federalism's underlying values. Thus, judicial authority to invalidate national legislation would produce few benefits in advancing federalism's values. In addition to producing litigation costs, such authority arguably might endanger federalism's values by creating an opportunity for judicial manipulation and abuse. The Court, one might argue, will sometimes use its authority as a subterfuge for invalidating legislation based on its own disguised appraisal of the substantive merits of the legislation at hand.

none of the Court's new federalism cases has presented an appropriate occasion for judicial invalidation.

#### *D. Relationships Between Majorities*

One might concede that federalism mainly protects the interests of political majorities, but contend that deference to the national political process does not follow for reasons different from those explored above. The problem, it might be argued, is not that political majorities lack the capacity to protect their own interests, but rather that in the national political process, a majority of state majorities have authority to bind a minority of state majorities.

This argument would have force if federalism was designed to protect "minorities" in the sense of smaller states from "majorities" composed of larger states. It is true that the founders expressed substantial concerns that larger states would use the national political process to unfairly dominate smaller states. They voiced these concerns, however, in the context of interstate and foreign commercial regulation—the fault lines most sharply dividing smaller and larger states.<sup>119</sup> Further, despite the founders' worries about the unfair dominance of larger states in matters involving intrastate and foreign commerce, they gave the national political process authority over precisely these matters. The founders sought to protect the smaller states not by divesting the national government of authority, but rather by building protections into the structure of the national political process, such as the states' equal representation in the Senate. There is no indication that they meant to give states exclusive authority over certain matters because they thought small state oppression more likely or the national process's structural protections less availing with respect to those matters.

It is relevant, of course, that the exercise of national authority would override the judgment of a minority of state majorities. Such a situation implicates the diversity rationale for state authority. Diversity, however, is but one of federalism's values and it must be balanced against the rationales for national authority.

#### VI. CONCLUSION

Judges and scholars need to focus more clearly on whether and to what extent federalism protects the powerless from the powerful, promotes the institutional interests of state governments, and increases governmental

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119. See ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION* 97-99 (6th ed. 1983); Lance Banning, *The Constitutional Convention*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 112, 128-29 (L.W. Levy & D.J. Mahoney, eds. 1987); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 452-53 (1941).

responsiveness to political majorities. The contention here is that federalism should be seen as primarily advancing the interests of political majorities. The sovereignty of the People and the constitutional requirement of electorally accountable government imply this conclusion, as do most of the values that federalism has been said to promote. Such a vision of federalism requires that the Court reject notions of state sovereignty that are disembodied from state governments' subservience to political majorities. Such majorities, it may be presumed, are generally competent to determine their own interests. A majoritarian conception of federalism requires that the Court defer to the outcomes of the national political process, at least in the absence of a demonstration that such outcomes clearly defy any reasonable balancing of federalism's underlying values.

In his dissenting opinion in *Garcia*, Justice Powell wrote that the absence of judicial lines between state and national authority makes "federal political officials . . . the sole judges of the limits of their own power."<sup>120</sup> In this, Justice Powell was quite mistaken. The absence of judicial lines makes political majorities the judges of the limits of federal power. Why shouldn't the political majorities be able to use the national government to control the governments that, under the Constitution, are meant to serve their interests? Given that federalism functions to promote the interests of such majorities, why shouldn't they be able use the national government to tell local sheriffs across the nation to check the backgrounds of prospective handgun purchasers, command local governments to pay police minimum wages, or enlist the help of federal prosecutors in combating school violence? the Court's new federalism decisions thus far furnish no convincing answer.

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120. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting).

