

THE POPULIST SAFEGUARDS OF FEDERALISM

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Abstract

In the ongoing debate over the safeguards of federalism, the role of ordinary citizens has been woefully neglected. Scholars have assumed that citizens care only about policy outcomes and will invariably support congressional legislation that satisfies their substantive policy preferences, no matter the cost to state powers. Scholars thus turn to institutions – the courts or institutional features of the political process – to cabin congressional authority. I argue that ignoring citizens is a mistake. I propose a new theory in which citizens safeguard state prerogatives. The theory identifies several reasons citizens may reject congressional efforts to expand federal authority. First, they often deem state policy superior “on the merits.” Second, citizens fear that congressional action on one issue (however desirable) may pave the way for unwelcome federal action on related issues in the future. Third, most citizens prefer to have state, rather than federal, officials administer policies, both because they trust state officials more, but also because they can keep state officials on a shorter leash. Fourth, citizens value political processes; they may be willing to sacrifice desired policy outcomes out of respect for direct democracy and federalism. For all of these reasons, citizens are not as eager to federalize state policy domains as the conventional wisdom suggests. I discuss the implications of my theory for the ongoing debates over judicially imposed limits on congressional powers.

Note to UVA faculty: This is (truly) a work-in-progress. I plan to submit it to law reviews in a few weeks, so any comments you share will be very timely and much appreciated. Parts II-IV are the most complete; Part V (dealing with judicial review) needs the most attention, along with the Introduction and Conclusion. I am open to suggestions about any section of the paper, but I am particularly eager to hear your thoughts on Part V, including how (if at all) I should address standard textualist / originalist critiques of the political safeguards. I look forward to meeting you.

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I. INTRODUCTION

One of the most notable legacies of the Rehnquist Court is its revival of federalism jurisprudence. In the decades following the New Deal, the Court had declined to impose meaningful legal limits on federal power *vis a vis* the states, seemingly content to let the national political process determine the reach of congressional authority.¹ Over the past two decades, however, the Court has reclaimed the role as supreme arbiter of federalism disputes, striking down (or narrowly interpreting) various federal regulations in the name of states' rights.²

Yet this legacy has also proven controversial. Critics have blasted the Court's federalism rulings, suggesting, for example, that its decisions amount to "a set of indeterminate, largely incoherent rules."³ Still others claim that the Court has no business striking federal regulations in the name of states' rights, claiming instead that the Framers intended the people to decide for themselves the proper scope of congressional authority.⁴

Still, most commentators doubt whether people (or other *political* institutions) are up to the task, and whether they would adequately safeguard our federal system. Critics say that, given the opportunity, the people would transfer most state powers to the federal government, undermining the Framers' designs. This widely shared view presumes that ordinary citizens do

¹ *E.g.*, Kathleen Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 *FORD. L. REV.* 799 (2006) ("The Rehnquist Court dramatically revived the structural principles of federalism as grounds for judicial invalidation of statutes. For most of the twentieth century, the federal and state governments had been left to bargain or fight over their relationship in the realm of politics. The Rehnquist Court, by contrast, increasingly held that this relationship was a matter to be refereed in the courts.").

² *E.g.*, *United States v. Morrison*, 529 U.S. 598, 610 (2000) (civil remedy provision of Violence Against Women Act exceeds Congress's power to regulate interstate commerce); *City of Boerne v. Flores*, 521 U.S. 507, 527-28 (1997) (Religious Freedom Restoration Act exceeds Congress's power to enforce substantive guarantees of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 565 (1995) (Gun Free School Zones Act exceeds Congress's commerce power); *Printz v. United States*, 521 U.S. 898, 935 (1995) (Brady Handgun Violence Prevention Act commandeered state law enforcement officers to conduct background checks on prospective gun purchasers); *New York v. United States*, 505 U.S. 144, 188 (1992) (Low-Level Radioactive Waste Policy commandeered state legislatures to provide sites for disposal of waste).

³ Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 324 (1987).

⁴ LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* _____ (2005).

not care about government structure, they only care about its outputs, e.g., the policies it adopts.⁵ It is this single-minded pursuit of policies that makes citizens unreliable guardians of state prerogatives; after all, they have powerful incentives to turn to Congress, rather than their state governments, to provide the policies they desire, no matter the cost to states' rights. In particular, so the argument goes, citizens will attempt to wield federal power to impose their values on citizens living in other states, to trump home-state laws with which they disagree, to shift the costs of regulatory programs onto out-of-state taxpayers, and to take advantage of the economies of scale of national lawmaking.⁶ Indeed, the allure of federal power appears so strong that even proponents of the political safeguards readily concede that citizens are unable to resist it, and thus say that we must rely on political *institutions*, such as the political party system, to protect state prerogatives.⁷ Likewise, some of the most ardent critics of the Court's decisions

⁵ E.g., Darryl J. Levinson, *Empire Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 943 (2005) (suggesting that citizens "are concerned about the content of . . . law, not whether that law comes from the federal government or from the states"); John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L. J. 901, 931-32 (2001) (opining that "because [federalism] is a structural principle, citizens are largely indifferent to it when it conflicts with issues that stir their passions").

⁶ See Part 0 *infra*.

⁷ The three most often-cited proponents of the political safeguards of federalism include: JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). See also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Theory of Federalism*, 76 VA. L. REV. 265 (1990); Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329 (2003).

Critics of the political safeguards of federalism claim, however, that these political institutions simply does not protect federalism. E.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75 (2001); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Marci A. Hamilton, *Why Federalism Must be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069 (2001); John O. McGinnis & Ilya Somin, *Federalism v. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. L. REV. 89 (2004); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341; John Yoo and Sai Prakash, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

remain supportive of its underlying mission—that of cabining federal powers—given serious doubts about whether the political process will adequately safeguarding states’ rights.⁸

In this Article, however, I show that ordinary citizens may be relied upon to cabin federal power. I identify three main reasons, overlooked in the scholarly literature, why citizens may oppose efforts to aggrandize federal powers *vis a vis* the states. First, even assuming that citizens care only about policy outcomes, they will still safeguard state power because they often prefer the policies adopted by their state governments over the policies that (realistically) could be supplied by Congress. The states are smaller, more cohesive polities, utilizing lawmaking procedures (such as the ballot initiative) that make it easier for states to provide populist legislation—to more closely match the preferences of the people.

Second, citizens care about what happens after laws are enacted, thereby giving states another advantage over the federal government. For one thing, when Congress proposes to federalize an issue, some citizens may fear congressional mission-creep—the notion that the passage of one federal law (however appealing) opens the door to unwanted federal regulations in related policy domains. Similarly, citizens may worry about how Executive branch officials in the federal government may exercise their statutory authority. Congressional statutes are often vague, leaving it to the Executive to resolve key policy disputes. Since they trust state governments more than they trust the federal government, and since they generally exert more control over state executive officials (via direct election and recalls), citizens may prefer to have state officials administer the laws, and hence, may favor continued state preeminence in various policy domains.

⁸ *E.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 88 (2001) (acknowledging that the Court’s recent decisions “[do] not speak well for the judicial ability to develop doctrinal limits on national power that are at once meaningful and workable” but still defending judicial review of federalism).

Third, this Article contends that citizens also care about government processes. Some citizens value opportunities to participate directly in lawmaking at the state level (via ballot initiatives, etc.), and thus may resist efforts to federalize policy domains that crowd out such opportunities. Moreover, some citizens value federalism itself; that is, they have opinions about which level of government ought to control various policy domains, and these federalism beliefs may temper their support for congressional proposals which, though appealing on the merits, intrude into domains they believe in principle ought to be controlled by the states instead.

For all of these reasons, citizens can be relied upon to reject the federalization of state policy domains. Given the electoral ramifications of ignoring their constituents, members of Congress will comply – by defeating such attempts, not embracing them.⁹

One important implication of this new theory is that judicial review of federalism may be unnecessary, or at the very least, it could be more circumscribed than it is now, focusing, for example, on the situations in which the populist safeguards of federalism are most likely to fail. Indeed, several sitting Justices have criticized the Court’s recent federalism jurisprudence and remain committed (at least on the surface) to relying on the political process to safeguard state

⁹ Scholars suggest, federal politicians pursue several goals, the most dominant of which is re-election. *E.g.*, RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1978); MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d. ed., 1989); JOHN W. KINGDON, *CONGRESSMEN’S VOTING DECISIONS* (3d ed., 1989); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974). In order to maximize their chances of being re-elected, federal politicians (usually) act in accordance with the wishes of their constituents. *E.g.*, ROBERT S. ERIKSON & KENT L. TEDIN, *AMERICAN PUBLIC OPINION* 288 (6th ed. 2003) (“Because of the fear of electoral sanctions (or simply because they believe it to be what they ought to do), elected leaders play the role of ‘delegate,’ trying to please their constituents.”). In fact, as Geer argues, there is “mounting evidence to suggest that public opinion frequently *leads* policy.” JOHN G. GEER, *FROM TEA LEAVES TO OPINION POLLS: A THEORY OF DEMOCRATIC LEADERSHIP* 89 (1986). One example of this tendency is showcased in a body of political science research which has established a close link between popular opinion and policymaking, at both the state-level and at the national-level. *E.g.*, Larry M. Bartels, *Constituency Opinion and Congressional Policy Making: The Reagan Defense Buildup*, 85 *AM. POL. SCI. REV.* 457, 467 (1991) (finding a strong statistical relationship between congressional roll call votes on Pentagon spending and constituent preferences for defense spending, concluding that “public opinion was a powerful force for policy change”); ROBERT S. ERIKSON, GERALD C. WRIGHT, & JOHN P. MCIVER, *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* 244 (1993) (concluding that “public opinion is the dominant influence on policy making in the American states”); Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 *AM. POL. SCI. REV.* 175, 189 (1983) (finding a high level of congruence between occasions of public opinion change and the direction of ensuing policy change over five decades).

interests. Justice Stephen Breyer, for example, writing in his dissent in *United States v. Morrison*, a case in which the Court struck down a provision of the Violence Against Women Act on federalism grounds, suggested that “Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance.”¹⁰ The theory developed herein lends support to calls for reduced judicial oversight of federalism disputes. It also lends some support to recent scholarship claiming that the Framers of the Constitution envisioned allowing the people to allocate powers across state and federal governments as they deemed appropriate.¹¹ This Article is the first to elaborate a theory on why citizens are up to this task, and reviews the evidence from both political science and legal scholarship that supports that theory.

[The Article proceeds as follows . . . Part II. Part III. Part IV. Part V. Conclusion.]

II. THE VALUES OF FEDERALISM

The next Part examines why citizens are thought to favor the aggrandizement of federal powers. This Part briefly reviews why aggrandizement may be undesirable in the first instance. A central government is needed to handle many issues, ranging from air pollution to military defense. Lax emissions controls may permit factories in one state to foul the air of another; tough sentencing policies in one state may shift crime into neighboring communities; and so on. Collective action problems and related phenomena, such as externalities, may hinder the states, acting autonomously, from providing optimal solutions on such issues, suggesting that the federal government may be better suited to handle them.¹² Still, the dominant concern today is

¹⁰ *United States v. Morrison*, 529 U.S. 598, 660 (Breyer, J., dissenting). *See also* discussion *infra*, Part ____.

¹¹ *E.g.*, KRAMER, *THE PEOPLE THEMSELVES*, *supra* note ____.

¹² *E.g.*, ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 105-108 (2000) (discussing economic theory of how to assign power to state and central governments).

that the federal government will assume *too much* power, not too little, and assert control over issues that, at least arguably, do not call for coordinated policies.¹³

Preserving the states from federal encroachments is said to serve three important purposes.¹⁴ By establishing two independent sources of authority, and dividing power between them, federalism is thought to protect the people from the threat of a tyrannical centralized government. By maintaining a role for the states in the new Constitutional order, the Framers preserved a bulwark against federal tyranny. Alexander Hamilton in Federalist 28 commended this virtue of federalism: “Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.”¹⁵ Failing that, by limiting the scope of federal power, the Constitution would at least limit the reach of an oppressive central government. Although the states too might abuse their power over the citizenry, the Framers believed tyranny in the central government, rather than in the state governments, posed a more serious and durable threat to individual liberties.¹⁶

¹³ The essence of our federal system, in the words of political scientist William Riker, is that “each kind of government has some activities on which it makes final decisions.” William H. Riker, *Federalism*, in HANDBOOK OF POLITICAL SCIENCE 101 (Fred I. Greenstein & Nelson W. Polsby eds., 1975). The corollary, law professor Rick Hills explains, is that “there must be a limit to federal power and a corresponding reservoir of state power if federalism is to have any meaning at all.” Roderick Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and Dual Sovereignty Doesn’t*, 96 MICH. L. REV. 813, 816 (1998).

¹⁴ There are those who question the appeal of federalism. Ed Rubin and Malcolm Feeley suggest that many of the benefits attributed to federalism could be obtained by a decentralized national government instead. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

¹⁵ THE FEDERALIST NO. 28, at 178 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) (“[T]he 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 control each other, at the same time that each will be controlled by itself.”).

¹⁶ See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 388 (“Should the federal government ever be captured by an authoritarian movement . . . the resulting oppression would almost certainly be more severe and durable than that of which any state would be capable.”).

Federalism also enhances representation by preserving state control over certain policy domains. States are unique civil societies. They differ from each other in political culture, economic circumstances, industry, topography, urbanization, and demographic composition (race, ethnicity, age, citizenship, religion, education, income, etc).¹⁷ As a consequence, individuals in different states—that is, state constituencies—often desire different policy outputs from government. Citizens in one state might prioritize spending on agriculture, while citizens in another state might prioritize spending on urban revitalization. Citizens in one state might support same-sex marriage, while citizens in another state might oppose it. Decentralization of policymaking provides one means of enhancing the level of majority representation at the state-level—of improving the fit between a state’s policies and the preferences of that state’s people. Each state can adopt policies that match its citizens’ preferences better than uniform national legislation ever could.¹⁸ Citizens can also vote with their feet if they are dissatisfied with state policy; they can exit one state’s political system and enter another.¹⁹

A third, and related, benefit to federalism is policy innovation. States, when left to their own devices, can serve as laboratories for new policies to be tested and evaluated.²⁰ The view of

¹⁷ DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 112 (3d ed., 1984).

¹⁸ Charles Tiebout’s seminal work on the political economy of public goods provides a firm rationale for expecting a higher degree of correspondence between state public opinion and state policy, in comparison with national public opinion and federal policy. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956).

¹⁹ Law professor and federal judge Michael W. McConnell provides a useful illustration of the representation enhancing benefits of state control:

[A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A.

Michael W. McConnell, *Federalism: Evaluating the Framers’ Design*, 54 *U. CHI. L. REV.* 1484, 1494 (1987) (book review).

²⁰ The idea that states serve as “laboratories of democracy” is widely attributed to Justice Brandeis:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebman, 385 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

states as laboratories of democracy suggests that fifty state legislatures are more likely to experiment with and craft innovative solutions to common problems than is a single national legislature.²¹ Justice Sandra Day O'Connor, concurring in *Cruzan v. Director, Missouri Department of Health*, notes

[N]o national consensus has yet emerged on the best solution for [the] difficult and sensitive problem [raised by the refusal of medical treatment.] Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance.²²

Under this view, a wide range of policy solutions can be tried and tested, especially when no national consensus exists. Solutions that work are then adopted by other states.

Federalism presents several benefits. It serves as a check on tyranny. It enhances representation. And it stimulates policy innovation. Given these benefits, what mechanisms exist to maintain the balance of powers between the federal and state governments? It is to this question that I next turn.

III. THE PEOPLE VS. STATE POWER

Over the last two decades, the Supreme Court has asserted itself as the final arbiter of state / federal power disputes, delimiting congressional powers *vis a vis* the states in a number of

²¹ A large body of work on policy-diffusion focuses on the conditions under which states adopt policy innovations. For a seminal theoretical piece on policy diffusion, see Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969).

²² *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (citation omitted).

notable decisions.²³ Critics have blasted the Court’s rulings, suggesting, for example, that its decisions amount to “a set of indeterminate, largely incoherent rules.”²⁴ Nonetheless, many of these same critics remain supportive of the Court’s underlying mission—that of cabinining federal powers.²⁵ According to this view, judicial review of federalism remains necessary (in spite of its flaws) because, left to its own devices, Congress would usurp state authority over a wide range of issues – issues on which the states ought to have final say, thereby endangering the long-term viability of our federal system and the values attributed to it.²⁶

Under this view, Congress will usurp state powers because citizens demand too much federal legislation, and to keep their jobs, their representatives in Congress will oblige them by

²³ *E.g.*, *United States v. Morrison*, 529 U.S. 598, 610 (2000) (civil remedy provision of Violence Against Women Act exceeds Congress’s power to regulate interstate commerce); *City of Boerne v. Flores*, 521 U.S. 507, 527-28 (1997) (Religious Freedom Restoration Act exceeds Congress’s power to enforce substantive guarantees of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 565 (1995) (Gun Free School Zones Act exceeds Congress’s commerce power); *Printz v. United States*, 521 U.S. 898, 935 (1995) (Brady Handgun Violence Prevention Act commandeered state law enforcement officers to conduct background checks on prospective gun purchasers); *New York v. United States*, 505 U.S. 144, 188 (1992) (Low-Level Radioactive Waste Policy commandeered state legislatures to provide sites for disposal of waste).

²⁴ Friedman, *Valuing Federalism*, *supra* note _____, at 324.

²⁵ *E.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 88 (2001) (acknowledging that the Court’s recent decisions “[do] not speak well for the judicial ability to develop doctrinal limits on national power that are at once meaningful and workable” but still defending judicial review of federalism).

²⁶ *See* sources cited *supra*, note _____.

supplying it, whether or not federal action is really needed (or desirable).²⁷ Scholars say the people demand the same thing of all levels of government, namely, to adopt certain policies they favor—to legalize (or to proscribe) physician-assisted suicide, to recognize (or to ban) same-sex marriages, to adopt (or not adopt) elementary school textbooks that challenge Darwin’s theory of evolution, and so on. According to this view, the people recognize no jurisdictional limits to congressional power, and they seek to wield that power even when doing so jeopardizes the federal system.²⁸ Indeed, scholars claim that ordinary citizens have several reasons to seek legislation via Congress rather than state governments, even when the normative case for federal control of an issue is altogether weak.

One reason citizens may be tempted to aggrandize congressional powers *vis a vis* the states is that through Congress they can impose their preferred policies (including their morals) on people living in other states.²⁹ Consider recent efforts to pass a national ban on same-sex

²⁷ Historically, the threat to state power was thought to come from the federal government itself. Scholars suggested Congress would usurp state powers at the behest of its own members who desire to maximize their power “by occupying ever larger swaths of policymaking space”. Levinson, *supra* note ____, at 917 (discussing consensus view among scholars that the “national government will seek to expand the policy space it controls at the expense of the states” due to the empire-building ambitions of federal officials). The views of the people—their constituents—were of little consequence. More recently, however, commentators have dismissed empire-building as the *raison d’être* of elected federal officials, and instead consider re-election to be the paramount goal of politicians (either as an end in itself, or as a necessary means to some other end). *E.g.*, RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1978); FIORINA, *supra* note ____; JOHN W. KINGDON, *CONGRESSMEN’S VOTING DECISIONS* (3d ed., 1989); Levinson, *supra* note ____, at 929 (noting that “elected representatives are keenly interested in winning and keeping their offices . . . [and this] requires [them] to ingratiate themselves to their constituents); MAYHEW, *supra* note _____. In order to maximize their chances of being re-elected, politicians push for policies that accord with the demands of their constituents—the people. *E.g.*, ROBERT S. ERIKSON & KENT L. TEDIN, *AMERICAN PUBLIC OPINION* 288 (6th ed. 2003) (“Because of the fear of electoral sanctions (or simply because they believe it to be what they ought to do), elected leaders play the role of ‘delegate,’ trying to please their constituents.”); JOHN G. GEER, *FROM TEA LEAVES TO OPINION POLLS: A THEORY OF DEMOCRATIC LEADERSHIP* 89 (1986). In short, members of Congress do not usurp state powers to build an empire, but because their constituents demand they take action without regard to state power.

²⁸ *E.g.*, Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism* 46 *VILL. L. REV.* 951, 961 (2001) (concluding that “some states will harness the federal lawmaking power to impose their policy preferences on other states to the former states’ advantage”); Macey, *supra* note ____, at 265 (“Conservatives and liberals alike . . . [are] quick to wield the power of the supremacy clause . . . whenever a single national rule in a particular area furthers their political interests.”).

²⁹ Baker & Young, *supra* note ____, at 118 (citing Fugitive Slave Act as an example); Baker, *supra* note ____, at 962 (citing a national ban on polygamy); Macey, *supra* note ____, at 272 (suggesting citizens may prefer federal law because it is more difficult for others to avoid).

marriages. When a Massachusetts court recognized same-sex marriages,³⁰ it sparked a national outcry. Interest groups around the country sought to overturn the ruling by amending the federal Constitution, even though (arguably) the ruling would have no legal effect outside Massachusetts (or at least none which the states themselves could not address).³¹ Thus, when citizens seek to impose their preferred policies through legislation, Congress may be their instrument of choice, given the broader jurisdictional reach of its laws.³²

Similarly, citizens may back federalization to preempt the laws of their own state. When citizens are unhappy with the law of their own state, but cannot change it (say, because they are in the minority within the state), they may petition Congress to usurp control of the domain.³³ Suppose, for illustration purposes, that sixty-percent of the entire nation opposes physician-assisted suicide (PAS), but that only forty-percent of Oregon residents feel the same way. Oregon residents who oppose PAS may not be able to convince the state to ban it, so they may ask Congress to do so instead. Indeed, it seems reasonable to expect that the incentive to seek congressional action is even stronger when it is motivated by a desire to change the law of one's own state, rather than the law of another state, and may arise with respect to any sort of state law (and not just laws regulating morality). For instance, disgruntled state residents may ask Congress to reduce their property taxes, to mandate standardized tests for all elementary students, or to impose stiff punishment on criminals.

³⁰ *Goodrich v. Dept. of Public Health*, 798 N.E. 2d 941 (Mass. 2003).

³¹ Arguably, no other state could be forced to recognize a same-sex marriage performed in Massachusetts. For one thing, the Federal Defense of Marriage Act (DOMA) explicitly grants states authority to refuse to recognize same-sex marriages performed elsewhere. 28 U.S.C. § 1738C (2004). States may also refuse to recognize same-sex marriages on grounds of public policy. For a discussion of this exception to the Full Faith and Credit Clause (as well as DOMA), see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

³² The incentive probably exists only with respect to legislation regulating morals. It is easy to imagine an outsider wanting to ban same-sex marriages in Massachusetts; it is more difficult to imagine an outsider wanting to ban high property taxes or other economic policies there.

³³ *Cf. Friedman, Valuing Federalism, supra note _____*, at 373-74 (suggesting that “it has become common for those who have not prevailed in the state legislatures to leapfrog over their heads to Congress”).

A third reason citizens may opt for congressional action is that collectively they may find it cheaper—in terms of the political and / or financial capital required—to achieve some end via Congress than through multiple state legislatures.³⁴ For instance, imagine some new issue arises that requires the attention of Congress, or of the fifty state legislatures. Suppose as well that it costs \$1 million to lobby for legislative action on the issue, regardless of the size of the jurisdiction; citizens with a common agenda may pool their resources and seek the legislation they desire through Congress (at a cost of \$1 million), rather than through the fifty state legislatures (at a cost of \$50 million).³⁵

In a similar vein, citizens may seek to transfer control of a state program in order to shift a portion of its costs onto out-of-state taxpayers (creating a free-rider problem, in economics terms).³⁶ To illustrate, imagine a federation comprised of three states (A, B, C), two of which (A and B) are facing toxic spills that will cost \$100 million apiece to clean-up. If we assume federal taxes are apportioned evenly across all three states, the residents of A and B have an incentive to federalize the clean-up efforts since one-third of the total cost would be borne by state C's taxpayers. Residents of state C may object—after all, they have nothing to gain from

³⁴ Macey, *supra* note _____, at 271.

³⁵ Congress's lobbying cost advantage may be mitigated by three factors. First, some lobbying costs may vary according to the size of the jurisdiction. Second, federal lawmaking procedures, such as the Presidential veto, may increase the cost of lobbying Congress *vis a vis* lobbying state government. *See* Part ____, *infra*. Third, it may not be necessary to change the laws of all fifty states. Suppose, for example, that forty-nine states have already passed favorable legislation on some subject, such as PAS; it may be cheaper to lobby the fiftieth state to change its laws than to lobby Congress to pass federal legislation, given the two points raised above.

³⁶ Similarly, citizens may support conditional federal grants on the theory that some states will refuse the grants because they object to the conditions, leaving more federal funds for states supporting the conditions. *See* Baker, *Putting the Safeguards*, *supra* note _____, at 962-63 (suggesting that citizens may try to capture federal funds by placing conditions on federal grants that put other states at a disadvantage.); Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI 104, 108 (2001). For a discussion of the conditional spending power, see *infra* Part __.

federalization—but they may not control enough votes to block national legislation on the issue.³⁷

In sum, given the jurisdictional reach, preferred content, and cost advantages of federal law, ordinary citizens may demand congressional action on a wide range of issues on which the normative case for federal intervention (say, to overcome state collective action problems) is tenuous. This suggests citizens cannot be trusted to safeguard state prerogatives, for the temptation to wield congressional power is simply too great. Judicial review is thus necessary to prevent Congress from imposing uniform national solutions on many issues currently—and more properly—handled by the states.

IV. THE POPULIST SAFEGUARDS OF FEDERALISM

This Part develops the core contribution of the article. It suggests several, complementary incentives citizens have to reject federalization and protect state power from federal encroachments.

A. Citizens Prefer the Content of State Legislation

In this Part, I show that even assuming that citizens would seek congressional action on many issues that should be handled by the states, Congress often cannot oblige them satisfactorily. To be sure, members of Congress want to appease their constituents; they may campaign for, vote for, and even sponsor legislation sought by constituents, without regard to state prerogatives. Nevertheless, on many issues, they will be unable to

³⁷ *But cf.* Dean Lacy, *A Curious Paradox of the Red States and Blue States: Federal Spending and Electoral Votes in the 2000 Election* (Mar. 2002), available at <http://psweb.sbs.ohio-state.edu/faculty/hweisberg/conference/Lacy-OSUConf.PDF> (“It would make sense that . . . the states that gain [financially] from the federal government would support the candidate who would protect or increase federal spending . . . [but the] evidence shows that such a story is exactly backwards.”).

pass legislation.³⁸ First, due to the sheer size and diversity of the national polity, public opinion on many issues is fragmented at the national level, suggesting that many citizens would deem any congressional proposal—or more precisely, any proposal that stands a chance of passing—inferior to existing state policy. This gives citizens ample reason to oppose federalization and preserve state prerogatives. Second, structural features of the national government, such as the allocation of congressional seats and the Senate filibuster, hinder efforts to enact legislation at the federal level even when the national majority favors the same policy and could, absent these structural constraints, push satisfactory legislation through Congress.

On many important issues today national public opinion is fragmented; that is, no one position on the issue garners majority support. Consider opinion on the legal status of same-sex couples. In one recent poll, for example, public opinion was fragmented, with 25% of respondents supporting legal recognition of same-sex marriages, 35% supporting recognition of civil unions, but not marriages, 37% supporting recognition of neither, and 3% reporting no opinion.³⁹

Given the range of policy options available on these issues, legislation crafted by state governments often will satisfy more citizens than will uniform national legislation.⁴⁰ States are

³⁸ Consider that, of the 8,621 bills introduced in the 108th Congress, only 498 (or roughly 6%) were actually enacted into law.

³⁹ National Election Pool, Nov. 2, 2004, The Roper Center, University of Connecticut, Public Opinion Online, accession 1615384, *available at* Lexis Nexis, Polls and Surveys Database. *See also* CNN / USA Today, Mar. 18-20, 2005, The Roper Center, University of Connecticut, Public Opinion Online, accession 1621899, *available at* Lexis Nexis, Polls and Surveys Database (20% support same-sex marriages; 27% support civil unions, but not marriages; 45% oppose both marriages and civil unions; 8% expressed no opinion).

⁴⁰ Charles Tiebout's seminal work on the political economy of public goods provides a firm rationale for expecting a higher degree of correspondence between state public opinion and state policy, in comparison with national public opinion and federal policy. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

unique civil societies.⁴¹ Consequently, citizens in different states often prefer different policies from government.⁴² Citizens of one state might prefer to ban smoking in places of public accommodation, citizens of a second state might opt to require special smoking sections in such places, while citizens of a third state might prefer not to regulate smoking at all.⁴³ Indeed, one of the values of maintaining the federal system in the first place hinges on the notion that – compared to the federal government – states can adopt laws that more closely match citizen policy preferences.⁴⁴

When national public opinion is fragmented, states are likely to come closer to satisfying the policy preferences of their residents, and proponents of national legislation will be unable to muster enough votes in the Congress to preempt state authority. Any legislation introduced in Congress will face stiff opposition from members whose constituents (on the whole) prefer one of the various alternatives. After all, these constituents can always turn to their state (or local) government to adopt the policy they prefer; thus, they are likely to support federalization only when Congress can give them some policy that is superior to—or at least as good as—the policy offered by their state or local government; they do not need to accept compromises from Congress. A preference of the content of state legislation gives citizens an incentive to oppose usurpation of state authority in the domain. As Herb Wechsler explains:

[H]ostility to Washington may rest far less on pure devotion to the principle of local government than on opposition to specific measures which Washington

⁴¹ DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 112 (3d ed., 1984). Although public opinion varies from one state to the next, within any given state it is generally less fragmented than at the federal level. *Cf. id.* at ____ (suggesting that one of three political cultures tends to dominate within any given state).

⁴² E.g., ERIKSON, ET AL., *supra* note __ (finding that state policies differ widely on many issues).

⁴³ Kam & Mikos, *supra* note __, at ____ n. ____ (discussing how states have taken distinct approaches to regulation of smoking in places of public accommodation).

⁴⁴ E.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, ____ (1987).

proposes to put forth. This explanation does not make the sentiment the less centrifugal in its effects.⁴⁵

To illustrate, suppose citizens take three distinct positions regarding how, if at all, government should give parents a say when a minor under the age of eighteen seeks an abortion: one-third of the public supports a law that would require a minor to obtain her parents' consent before having an abortion; one-third favors a law that would require parental notification, but not consent; and one-third favors a law that would grant the minor an unrestricted right to an abortion. Some citizens may petition Congress for legislation, seeking to impose their view throughout the nation; but any proposal to require (or not require) parental consent or notification would be a non-starter at the federal level; the law would be seen as objectionable—or at least, as a second-best solution—by two-thirds of the public. But citizens might fare better at the state level. After all, there may be a majority position on the issue at the state level even if there is none at the national level.⁴⁶ In sum, citizens in many states may be happier with state policy; they may thus oppose attempts to enact preemptive federal legislation, whether or not they care about “federalism” as such.

⁴⁵ Wechsler, *supra* note ____, at 552. *See also* Macey, *supra* note ____, at 281 (opining that “the political-support-maximizing solution at the national level may differ from many, perhaps most, of the local solutions”). This assumes the congressional statute preempts state legislation; if Congress merely sets a floor or ceiling for the states, some citizens may support the adoption of a second-best policy at the federal level, as long as it does not interfere with any state laws they deem preferable on the merits.

⁴⁶ States have taken four distinct approaches to requiring parental consent / notification for abortions for minors, none of which has been adopted by a majority of states (suggesting that public opinion is more homogeneous within most states than it is at the national level). Twenty-one states require parental consent; twelve require parental notification; one requires both consent and notification; and sixteen states require neither consent nor notification. Furthermore, these tallies mask many subtle (and not so subtle) differences among state laws of any one type; for instance, some states require the consent of both parents, while other states require the consent of only one parent, or even allow grandparents (or other relatives) to provide the requisite consent instead. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (Sept. 2006), available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

Of course, national opinion is not always fragmented. There is majority support for the death penalty,⁴⁷ voluntary prayer in public schools,⁴⁸ and standardized testing,⁴⁹ among other issues. Nothing discussed so far blocks the majority from imposing its will on the entire nation on such issues.⁵⁰

Nonetheless, even when a national majority backs one policy approach and can be expected to rally behind congressional efforts to legislate, several structural features of the federal government may foil attempts to pass congressional legislation. That is, even if a majority of citizens demand legislation, Congress may be unable to supply it. Consider the allocation of seats in the House and Senate. Proponents of congressional legislation may have the backing of the popular majority, but that does not necessarily mean they control enough seats in Congress to enact the legislation. On the one hand, citizens in the majority may be heavily concentrated in a small number of congressional districts and thus may be unable to sway the votes of more than half of the seats in the House of Representatives. On the other hand, opponents of the proposal, though fewer in number, may yet control a majority of seats in the Senate, which are not allocated based on population; or, at the very least, opponents may control enough Senate seats (forty) to sustain a filibuster of the measure.⁵¹ Either way, by default of congressional inaction, the issue will remain in the hands of state governments. The system of

⁴⁷ *E.g.*, Pew Research Center, Dec. 7-11, 2005, The Roper Center, University of Connecticut, Public Opinion Online, accession 1638949, *available at* Lexis Nexis, Polls and Surveys Database (62% of respondents favor the death penalty for persons convicted of murder; 30% oppose it, and 8% were unsure).

⁴⁸ *E.g.*, CNN/USA Today, Aug. 8-11, 2005, The Roper Center, University of Connecticut, Public Opinion Online, accession 1632339, *available at* Lexis Nexis, Polls and Surveys Database (76% of respondents favor a constitutional amendment to allow voluntary prayer in public schools).

⁴⁹ *E.g.*, CBS/New York Times, Jan. 12-15, 2004, The Roper Center, University of Connecticut, Public Opinion Online, accession 0446891, *available at* Lexis Nexis, Polls and Surveys Database (71% of respondents support annual mandatory testing of students in public schools; only 25% opposed it).

⁵⁰ *See, e.g.*, Kramer, *supra* note _____, at 222-23 (“Preferences in Congress are aggregated on a nationwide basis . . . [If] interests in an area represented by a majority of these legislators concur, interests in the rest of the country will be subordinated.”).

⁵¹ Currently, it takes sixty votes in the Senate to end a filibuster. Rule 21 of the Standing Rules of the Senate, *available at* http://www.senate.gov/legislative/common/briefing/Standing_Rules_Senate.htm (last visited Dec. 1, 2006).

separation of powers—and perhaps most importantly, the Presidential veto—further reinforces the ability of minority interest groups to block popular national legislation.⁵²

By contrast, the structure of state governments is more conducive to passing populist legislation. To be sure, state governments must overcome some of the same obstacles that make it difficult to marshal populist legislation through Congress (e.g., all states employ bicameral legislatures (except Nebraska) and recognize gubernatorial vetoes), but the structural barriers are less daunting at the state level.⁵³ In thirteen states, for example, the legislature may override a gubernatorial veto with less than a two-thirds majority (indeed, six states require only a majority vote in the legislature).⁵⁴ More importantly, twenty-three states empower voters to enact legislation or constitutional amendments directly through ballot initiatives, bypassing the state legislature (and many anti-majoritarian procedural safeguards) *altogether*.⁵⁵ (It is worth noting that four more states allow voters to pass laws or amendments previously submitted to the state legislature, and all fifty states employ some version of the referenda process, thereby allowing voters to reject legislation or constitutional amendments passed by the legislature.⁵⁶)

In addition to empowering citizens to sidestep traditional lawmaking processes, direct democracy also enables state politicians to sidestep controversial issues without ceding authority over such issues to the federal government. State and federal politicians alike fear taking stances

⁵² Clark, *supra* note ____, at 1324 (suggesting that separation of powers principles, including bicameralism and presentment, help to safeguard state powers simply by making it more difficult to enact federal legislation). Wechsler posits a number of other features of the national political system that reinforce the ability of minority interest groups to block unfavorable national legislation, including state control over the drawing of congressional districts and the Electoral College. Wechsler, *supra* note ____, *passim*.

⁵³ For a brief overview of the structure of lawmaking in the fifty states, see Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE J. REG. 149, 162-71 (1996).

⁵⁴ COUNCIL OF STATE GOV'TS, BOOK OF THE STATES tbl.3.16, (2006).

⁵⁵ INITIATIVE AND REFERENDUM INST., I I&R FACTSHEET tbl.1, available at <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/Handout%20-%20What%20is%20IR.pdf> (collecting data on direct democracy practices used in all fifty states) (last visited Dec. 1, 2006).

⁵⁶ *Id.*

on controversial issues since doing so may cost them votes needed for re-election. Hence, they may attempt to shift responsibility for such issues onto some other government authority, perhaps another decision-maker within the same level of government (e.g., a court) or another level of government. Some have argued that state politicians willingly abet federalization for this reason—they would rather let federal politicians suffer the electoral consequences of taking stands on controversial issues like abortion, PAS, and so on.⁵⁷ (Of course, the same argument could be applied to *federal* politicians: they might abstain from legislating in order to leave thorny issues in the hands of their state counterparts.) However, state politicians in states utilizing direct democracy can duck controversial issues without necessarily federalizing them—namely, by passing the buck to the voters via the initiative and referenda processes. In other words, they do not need to cede control of the issue to the federal government to avoid taking a stance (though federal politicians *would* still need to cede control to state governments to duck such issues). Thus, even when state politicians attempt to dodge controversial issues, state prerogatives remain safe because the state (broadly defined to include the voters) continues to handle them.

Furthermore, pro-majoritarian state lawmaking procedures may lessen Congress's supposed lobbying-cost advantages over the states. For one thing, it may take more votes to pass legislation in Congress than to pass legislation in a comparably sized state legislature (i.e., one with 535 members) that does not use the filibuster and that can override a veto with less than a two-thirds majority. And, cynically speaking, securing more votes costs more money. What is more, it may be even cheaper to pass legislation via ballot measure than via legislature (state or federal), regardless of governmental structure. Hence, citizens in states utilizing direct

⁵⁷ Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 796-97 (1995).

democracy may prefer to spend their lobbying dollars at home rather than in Washington, where they get less bang for the buck.

* * *

To summarize, even assuming citizens care only about public policy—and recognize no jurisdictional limits on congressional power—the political process still safeguards state prerogatives, for two reasons. One is Congress’s (relative) inability to satisfy citizens’ policy preferences when national public opinion is fragmented. Given a preference for the content of state legislation, citizens may oppose federalization regardless of the benefits (the opportunity to shift costs, e.g.) it otherwise offers. Much of the allure of federalization – the broad jurisdictional reach of federal law, for example – is simply lost on citizens who deem congressional policy inferior to state / local policy.⁵⁸ Another constraint on congressional power is the anti-majoritarian design of the federal lawmaking process. The allocation of congressional seats, the Senate filibuster, and the Presidential veto (and two-thirds override requirement) may foil efforts to enact federal legislation even when the national majority would be pleased by its contents. Citizens face less daunting barriers to passing populist legislation at the state level.

B. Citizens Fear Federal Mission Creep

Up to now, we have assumed that the people take a stance on legislation without considering its impact on other issues. Thus, for example, a proposal to ban PAS is just that, and no more; it has no impact on other issues, such as the delivery of palliative care or the termination of unwanted medical treatment. But legislation on one issue often portends action

⁵⁸ It is easy to see why a citizen may sometimes want to impose her *preferred* policy on the entire nation, but it is more difficult to see why the same citizen would want to impose some second-best policy, particularly when some states (including her own, perhaps) have adopted her preferred policy.

on other issues as well.⁵⁹ A modest rule may serve as a launching pad for a far more ambitious (and perhaps unwelcome) regulatory program down the road. Hence, it seems reasonable to expect that when citizens formulate opinions on proposed legislation they will consider how that legislation could affect government policy on other, related issues in the future. Indeed, studies suggest that public opinion toward any given policy is often conditioned by public beliefs about what the government may (or may not) try to do *next* on related issues.⁶⁰ Some citizens, for example, may support government efforts to ban PAS, but *only if* they believe that government will not also attempt to restrict patient access to palliative care; if they fear that banning PAS will also curtail palliative care, they may prefer not to regulate PAS at all.

The fear that government action on one issue may pave the way for unwelcome government action on related issues (“mission-creep”) poses another obstacle for congressional efforts to federalize state policy domains. A large majority may favor federal control of an issue, but some members of the majority may fear that federalizing one issue will jeopardize state autonomy over other, related issues in the future—issues on which they might prefer the policy pursued by their *state* governments. To be sure, state legislatures may also spark fears of mission-creep (state governments may attempt to expand their authority), but congressional mission-creep is apt to trigger much more alarm among citizens. The reason is that if citizens must choose only one government—either state or federal—to handle *two* (or more) related

⁵⁹ The passage of one law may facilitate the passage of other laws for any number of reasons. For example, the government may need to establish some new bureaucracy to enforce the first law. It may be expensive to set up this bureaucracy—which will undermine support for the initial legislation, but once the bureaucracy has been established, the marginal cost of extending its jurisdiction over other, related subjects will be relatively low. A related concern is that the officials who are tasked with administering the initial regulation may extend their jurisdiction without any further action by the legislature. See Part _____, *infra*.

⁶⁰ This possibility is captured by what political scientists call “nonseparable preferences.” Dean Lacy, *A Theory of Nonseparable Preferences in Survey Responses*, 45 AM. J. POL. SCI. 239, 241 (2001) (“A person’s preference for the outcome of any single issue or set of issues depends on the outcome of—or her beliefs about the outcome of—other issues.”). Survey data suggest that non-separable preferences are quite common. *Id.* at 243 (finding that “on nearly all of the issues, a substantial percentage of respondents have nonseparable preferences”).

issues, they are even more likely to opt for their state government than they would if they were considering either issue alone. After all, Congress has a difficult enough time satisfying policy preferences on any one issue in isolation. Consider public opinion on the issues of PAS and the termination of medical treatment. The American public is evenly divided on the issue of PAS (one poll shows that 46% favor PAS, while 45% oppose allowing “doctors to prescribe lethal doses of drugs that a terminally ill patient could use themselves to commit suicide”), but it is strongly in favor of permitting patients to decline medical treatment (84% approve of “laws that let patients decide about being kept alive through medical treatment”).⁶¹ It is clear from the data that a large portion of those who favor a ban on PAS nonetheless oppose a ban on the termination of medical treatment. Citizens concerned about federal mission-creep may thus oppose congressional legislation on a narrow issue (say, PAS) in order to preserve state control over related issues (say, refusal of treatment), particularly if they expect Congress to adopt an objectionable approach on the second issue (recall the Terry Schiavo case).⁶²

To illustrate how concerns over mission-creep can defeat otherwise popular congressional legislation, suppose citizens in a three-state federation are considering whether to ban PAS. Each state has 100 citizens and, for ease of illustration, receives one vote in the national legislature. The first column of **Table 1** lists the percentage of citizens in each state who support a ban.

⁶¹ Pew Research Center, *supra* note ____.

⁶² On March 21, 2005, Congress passed a private bill transferring jurisdiction over the Schiavo case to the federal courts (which, like the Florida courts, ultimately refused to block the removal of Schiavo’s feeding tube). The congressional maneuver triggered a backlash from the public, nearly two-thirds of which supported the decision to remove the tube (and even among those who believed Schiavo should be kept alive, many objected to Congress’s intervention in the case, deeming it a state issue instead). See Jay Bookman, *Schiavo Case Shows Politics’ Perilous Side*, ATLANTA JOURNAL-CONSTITUTION, Aug. 17, 2006, at 15A.

Table 1. Policy Preferences Across Three States		
	Support ban on PAS	Support ban on termination of medical treatment
State A	60%	40
State B	60	60
State C	40	60
Total	53	53

As the table shows, large majorities in states A and B favor a ban. In the aggregate, a majority (53.3%) of citizens across the three states support the ban, suggesting one could be passed in the national legislature. Suppose, however, citizens fear that passing a national ban on PAS would facilitate passage of national legislation on other, related issues, such as the termination of life-sustaining medical treatment. The decision regarding whether to support the national law banning PAS thus becomes more complex; it depends on what the national legislature is likely to do next regarding the termination of life-sustaining medical treatment, and not just what the legislature is currently proposing regarding PAS.

The second column of **Table 1** lists the percentage of citizens who might hypothetically support a ban on the termination of life-sustaining medical treatment. Once again, majorities in two states support a ban on the merits, and in the aggregate, a majority (again, 53.3%) of the nation's voters supports it. This suggests such a ban could be passed in the national legislature. This time, however, the majorities reside in states B and C. Some citizens in state A who favor a ban on PAS oppose a ban on the termination of life-sustaining medical treatment. Citizens in State A may thus oppose national legislation to ban PAS because it jeopardizes their power to regulate (or not regulate) at the state level the termination of unwanted life-sustaining medical treatment as well. They may prefer leaving that power intact, even if it means foregoing the

opportunity to impose their values on the citizens of state C, who, in the absence of national legislation, would presumably allow PAS in that state. As a consequence of the package of preferences among citizens in State A, proponents lack majority support for a national ban on PAS.

Indeed, political elites often seek to rally public opinion against congressional proposals by evoking fear of expanded federal power. In other words, elites (elected officials, public intellectuals, interest group leaders, and so on) warn citizens that congressional proposals will open the door to federal oversight in related policy domains in the future—domains in which the public might prefer state policy on the merits. Two contemporary issues highlight use of this tactic. Congressional leaders have attempted to pass legislation that would trump Oregon’s Death with Dignity Act—the law legalizing PAS in that state. Opponents of the legislation have argued, however, that it could have far-reaching consequences. Senator Ron Wyden of Oregon, who opposes PAS and twice voted against state initiatives to legalize it (as a private citizen of Oregon), nonetheless lobbied (successfully) against one congressional proposal, invoking concerns over mission-creep:

[The bill] will allow the federal government to intrude in the doctor-patient relationship at one of the most personal and painful times of an individual’s life. Despite the language you include concerning the state’s role, the effect would be the same: physicians’ fear of being investigated by law enforcement and losing

their ability to practice medicine will result in less aggressive pain management for countless patients.⁶³

Other elites opposed the congressional ban on PAS because of the precedent that it would set in other areas, even beyond pain management. Representative Ron Paul, a Texas Republican, insisted that he opposed PAS, and yet he spoke against the congressional ban, reasoning that, “If we’re here saying we should undo the Oregon law, then what’s to prevent us from undoing the Texas [abortion] law that protects life?”⁶⁴

Similarly, opponents of the failed constitutional amendment to ban same-sex marriage have invoked fears of mission-creep to rally opposition to the measure in Congress. For example, Representative Paul, in explaining his opposition to the amendment to his (conservative) Texas constituents, opined on the long-term ramifications of the measure:

[A] constitutional amendment is not necessary to address the issue of gay marriage, and will only drive yet another nail into the coffin of federalism. If we turn regulation of even domestic family relations over to the federal government, presumably anything can be federalized.⁶⁵

Such appeals – coming from savvy political elites who know what resonates with their constituents – bolster my claim that fears of federal mission creep may reduce support for congressional legislation.⁶⁶

⁶³ *Proposed Amendment to the Pain Relief Promotion Act: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. (April 25, 2000) (testimony of Sen. Wyden). See also Jeff Kosseff, *Wyden Vows Fight on Bid to Ban Assisted Suicide*, THE OREGONIAN, Mar. 14, 2005, at A1 (quoting Sen. Wyden) (“such issues have historically been left to the states, and federal intervention would reach beyond assisted suicide and have a devastating effect on how doctors nationwide treat pain”).

⁶⁴ Mark O’Keefe & Dave Hogan, *House Votes to Block Suicide Law*, THE OREGONIAN, Oct. 28, 1999, at A1 (Oct. 28, 1999).

⁶⁵ Ron Paul, *Texas Straight Talk—Gay Marriage Quicksand* (Mar. 1, 2004), available at <http://www.house.gov/paul/tst/tst2004/tst030104.html>.

⁶⁶ The suggestion that elites choose arguments that resonate with ordinary citizens is discussed in more detail below in Part IV.DIV.D.2. See also Kam & Mikos, *supra* note _____, at _____.

In sum, one reason citizens may oppose otherwise popular federal legislation is that they fear the legislation opens the door for other congressional initiatives they would not necessarily welcome. When citizens form opinions on proposed legislation, they consider how that legislation will affect government policies on related issues. State and federal legislatures alike may spark fears of mission-creep, but given the comparative difficulty of satisfying policy preferences on a bundle of issues at the federal level, citizens are likely to perceive federal mission-creep as the greater threat, particularly given campaign claims stoking fears of congressional mission-creep. In short, citizens may oppose congressional legislation on one issue – even legislation they otherwise favor – in order to preserve state autonomy over a broader policy domain.

C. Citizens Prefer State Administration of Policies

Another reason citizens may oppose federalization, is that they prefer to have their state government *administer* policy. One of the shortcomings of the extant scholarship on the political safeguards of federalism is its narrow focus on the outputs of *legislatures* (state or federal) and corresponding neglect of the actions taken by officials who execute legislation. Legislation is often short on details, leaving many important and contentious policy decisions to be made by the executive branch.⁶⁷ For example, Congress may authorize the Food and Drug Administration to approve (or not) the so-called morning after pill, the Army Corps of Engineers to regulate (or not) dumping on isolated wetlands, the Environmental Protection Agency to set the precise limits on factory emissions, and so on. Hence, citizens have good reason to care about how officials

⁶⁷ *E.g.*, Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 306 (1988) (noting that “Congress resolves very few issues when it enacts a statute empowering an agency to regulate. Rather, Congress typically leaves the vast majority of policy issues, including many of the most important issues, for resolution by some other institution of government. Congress accomplishes this through several different statutory drafting techniques, including the use of empty standards, lists of unranked decisional goals, and contradictory standards.”) (internal citations omitted).

interpret and enforce legislation. Consequently, citizens also have good reason to care *who* interprets and enforces legislation. Contrary to an implicit assumption of the conventional wisdom, state and federal officials are *not* perfectly substitutable enforcement agents. Citizens, on average, believe state officials are more trustworthy and competent administrators than their federal counterparts. In addition, citizens have comparatively more control over executive officials in state government, many of whom they can elect (or recall) directly at the ballot box. For both reasons, citizens may oppose congressional legislation that places enforcement authority in the hands of federal officials.

Citizens may oppose congressional legislation due to concerns over how vague laws will be interpreted and enforced by federal officials. One misgiving arises because federal law enables unaccountable federal officials to exert control over issues that, arguably, drafters of the legislation did not intend to cover.⁶⁸ Consider *Gonzales v. Oregon*, a case in which the Supreme Court held that the United States Attorney General had overstepped his statutory authority. John Ashcroft had asserted authority under the Controlled Substances Act (CSA), a statute (arguably) designed to curtail recreational drug abuse, to issue an order banning PAS throughout the nation.⁶⁹ The Court held that when Congress passed the CSA, some thirty years before Ashcroft's order, it had not intended to give the Attorney General authority to ban this admittedly controversial practice.⁷⁰ Simply put, Ashcroft had overreached. And the CSA is hardly the only statute on which federal officials have arguably overstepped the limits of their

⁶⁸ This is similar to the concern discussed above over mission-creep, only here it is the Executive branch, rather than the Congress, that may enlarge the jurisdiction of the federal government.

⁶⁹ 126 S.Ct. 904, 925 (2006).

⁷⁰ *Id.* Despite the fact that the Court blocked the Attorney General's order, citizens normally will not be appeased by the prospect of judicial review. The result in *Gonzales v. Oregon* was somewhat atypical, given that federal courts usually defer to Executive interpretations of statutory authority. See generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

delegated authority, at the expense of state prerogatives.⁷¹ The possibility that federal officials, sometimes decades after a statute is enacted and following several changes of administration, may invoke statutory authority in unexpected and unwelcome ways thereby mitigates public support for federalization.

A related problem arises even when the Executive's statutory authority is more circumscribed. Under almost any statute, Executive branch officials have at least some discretionary authority to decide how to enforce the law. Consider a hypothetical statutory ban on PAS: "Any person who knowingly causes or aids another person to attempt suicide is guilty of a felony."⁷² Unlike the CSA, such a statute clearly prohibits PAS, but officials must still decide how to administer the law. Should they enforce the ban strictly and prosecute every case in which a doctor has prescribed a lethal dosage of medication? Or should they show leniency in exceptional cases? If leniency is called for, what cases should they deem exceptional? If resources are limited, what cases should be prioritized? Should authorities prosecute doctors who prescribe lethal doses ostensibly to alleviate the patient's chronic pain (the dilemma of double effect)? Or should they dismiss such cases in order to preserve the patient's access to palliative care? The PAS ban raises such issues but does not resolve them; citizens may worry, for example, that federal officials would enforce the ban too vigorously, prosecuting well-intentioned doctors under the statute.⁷³ Hence, citizens may consider how federal officials would handle these issues before they endorse any congressional proposal to ban PAS.

⁷¹ *E.g.*, *Solid Waste Ag. of Northern Cook Cty. v. Army Corp. of Eng.*, 121 S. Ct. 675, 683-84 (2001) (invalidating Corps of Engineers assertion of authority over isolated bodies of water as exceeding its mandate under Clean Water Act).

⁷² This statute is identical to the state law upheld by the Supreme Court in *Washington v. Glucksberg*. 521 U.S. 702 (1997).

⁷³ Indeed, the federal Drug Enforcement Agency has recently prosecuted doctors who have over-prescribed painkillers for manslaughter or even murder. Tina Rosenberg, *Weighing the Difference Between Treating Pain and Dealing Drugs*, N.Y. TIMES, Mar. 26, 2005 at A12 (discussing cases).

In theory, of course, state executive officials may also abuse their statutory authority. Nevertheless, delegations of authority to federal officials are likely to be seen as more risky, thereby giving the states an advantage. For one thing, compared to many state legislatures, Congress is able to delegate much more policy-making authority. The non-delegation doctrine articulated by the Supreme Court places virtually no limits on Congress's ability to delegate law-making power to the Executive.⁷⁴ Congress need only lay down an "intelligible principle" for the Executive to follow.⁷⁵ By contrast, most states enforce a more rigorous non-delegation doctrine, one that requires the state legislature to provide specific standards to guide agency policy-making.⁷⁶ Open-ended directives that would pass muster under federal constitutional law may fail as a matter of state constitutional law. As a consequence, citizens have less to fear from the agents of state government because their discretionary authority—and hence their ability to overreach—is more constrained than that of their federal counterparts.

In any event, citizens on average trust their state and local governments more than they trust the federal government, suggesting that they would also prefer to delegate any quantum of policy-making authority to state and local officials. In relevant part, trust denotes citizens' expectations about how government (state or federal) will utilize the power at its disposal.⁷⁷ In deciding how much to trust one level of government, citizens consider several variables,

⁷⁴ The doctrine has not been used to invalidate a congressional delegation since 1935. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁷⁵ *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

⁷⁶ Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1189 (1999) ("Most states require the legislature to provide specific standards to guide agency discretion in the statute delegating authority to an agency."). Six states employ a weak non-delegation doctrine (similar to the federal doctrine), upholding delegations without specific standards so long as various procedural safeguards are in place. *Id.* at 1192. Twenty states employ a strong non-delegation doctrine, striking down state laws that do not provide specific standards. *Id.* at 1196-97. The remaining twenty-four states employ a moderate non-delegation doctrine, but one that still requires more specificity than the federal non-delegation doctrine. *Id.* at 1198-1200.

⁷⁷ *E.g.*, Jack Citrin & Samantha Luks, *Political Trust Revisited*, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 12-13 (John R. Hibbing & Elizabeth Theiss-Morse, eds., 2001). For a helpful review of the political science literature on trust in government, see Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 2000 ANN. REV. POL. SCI. 475.

including the government’s competence, its responsiveness to ordinary citizens, and its integrity.⁷⁸ On these and related matters, the public holds state governments in greater esteem. On average, citizens have more faith in state government to “do the right thing,” they have significantly higher confidence in the ability of the state government to solve problems effectively, they believe they get more “bang for the buck” from state government, they see the state government as significantly more responsive than the federal government, and they see state government as less corrupt.⁷⁹ These findings are consistent across nationally representative surveys.⁸⁰ In short, citizens believe state government does a better job handling policy—of executing policy honestly, competently, more efficiently, and in accordance with their preferences. In other words, citizens trust state governments more for many reasons that have nothing to do with the policies adopted by their state legislatures.⁸¹ Hence, citizens who trust

⁷⁸ E.g., Virginia A. Chanley et. al, *Public Trust in Government in the Reagan Years and Beyond*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 76-78 (John R. Hibbing & Elizabeth Theiss-Morse, eds., 2001) (suggesting that the competence of a government’s leaders—and not the policies it adopts—is one of the most important determinants of trust in that government); M. Kent Jennings, *Political Trust and the Roots of Devolution*, in *TRUST AND GOVERNANCE* 232 (Valerie Braithwhite & Margarets Levi eds., 1998).

⁷⁹ E.g., NPR ET AL., *ATTITUDES TOWARD GOVERNMENT STUDY* (2000) (data archived at the Roper Center for Public Opinion Research, University of Connecticut) (on file with author). This nationally representative survey of 1,557 adults was conducted in May-June 2000 and was commissioned by National Public Radio, the Henry J. Kaiser Family Foundation, and Harvard University’s Kennedy School of Government.

⁸⁰ E.g., Marc J. Hetherington & John D. Nugent, *Explaining Public Support for Devolution: The Role of Political Trust*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 134 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* (2002); John Kincaid & Richard L. Cole, *Changing Public Attitudes on Power and Taxation in the American Federal System*, 31 *PUBLIUS* 207 (2001); Jennings, *supra* note ____; PHILLIP W. ROEDER, *PUBLIC OPINION AND POLICY LEADERSHIP IN THE AMERICAN STATES* (1994).

⁸¹ When asked to describe why they do not trust the federal government, Americans point to inefficiency in the federal government, over-responsiveness to special interests, cheap talk, and lack of integrity among elected officials. Shared values on policy outcomes were only secondary concerns. NPR ET AL., *supra* note ____.

Reasons Citizens Mistrust Federal Government	
	Major Reason
Government leaders tell us what they think will get them elected, not what they really believe.	80.4%
The federal government is inefficient and wastes too much money.	73.8%
There is too much bickering between the political parties.	68.9%
Special interests have too much influence on the federal government.	65.5%
Elected officials lack honesty and integrity.	64.7%
Federal taxes are too high.	57.4%
The federal government doesn’t do enough to help people who really need it.	56.1%
People in government don’t have high moral values.	49.9%

their state government more than the federal government have an incentive to oppose efforts to take an issue out of the hands of state authorities, even if they would otherwise support congressional legislation (e.g., because of its jurisdictional reach, its content, its cost-shifting advantages, and so on).⁸²

Indeed, a growing body of political science research suggests that trust in state governments dampens support for federalization of state policy domains.⁸³ For example, in one recent study, political scientist Cindy Kam and I examined whether trust judgments affected public support for a proposed congressional ban on PAS, using results from a large nationally representative survey experiment.⁸⁴ In the study, 672 adult subjects were asked, among other things, which level of government – state or federal – they trusted more and whether they would rather government (not specifying state or federal) allow or proscribe PAS. Later, they were told

The federal government interferes too much in people’s lives.	42.1%
Federal government policies don’t reflect your own beliefs and values.	42.0%
The problems it focuses on cannot be solved by the federal government.	39.6%

⁸² The notion that trust in state governments will hinder efforts to expand the powers of the national government can be traced back to the Framers. In Federalist 17, for example, Hamilton insists that the federal government will not be able to wrest power from the states, owing to the “greater degree of influence which the State governments, if they administer their affairs with uprightness and prudence, will generally possess over the people.” THE FEDERALIST 17, at 119 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Indeed, Hamilton suggests the greater danger is that the states will exploit citizen loyalties to wrest power from the national government. *Id.* (“[I]t will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the states.”).

Madison elaborates upon this point in Federalist 46:

Many considerations . . . place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States . . . With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

THE FEDERALIST 46, at 316 (James Madison) (Jacob E. Cooke ed., 1961); *id.* at 296 (“[T]he prepossessions of the people, on whom both [governments] will depend, will be more on the side of the State governments than of the federal government.”). He echoes Hamilton’s sentiment that the states could readily quell any attempt to encroach upon their powers: “[The central government] will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.” *Id.* at 300.

⁸³ Trust judgments also have electoral ramifications within one level of government. *See* Levi & Stoker, *supra* note ____, at 490 (demonstrating that within one level of government, voters who have less trust in the incumbent are more likely to vote for the challenger in elections).

⁸⁴ Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Study*, __ J. EMP. LEG. S. __ (forthcoming 2007).

that Congress was considering legislation that would ban PAS nationwide. Not surprisingly, subjects who thought PAS should be banned were more supportive of the congressional proposal than were subjects who thought PAS should be allowed—that is, people considered policy outcomes when evaluating congressional proposals.⁸⁵ Contrary to conventional wisdom, however, we found that policy preferences do not tell the whole story; statistical analyses of responses showed that some subjects who thought PAS ought to be banned nonetheless opposed Congress's effort to do so.⁸⁶ In particular, subjects who placed more trust in their state government were more opposed to the congressional ban than were subjects who placed more trust in the federal government, holding all else constant.⁸⁷ Indeed, the results indicated that the states' comparative advantage in earning the trust of the people could sway public opinion against congressional proposals that the majority otherwise favors on the merits.⁸⁸

Similarly, another line of research, virtually ignored by the legal academy, has shown that evaluations of the comparative trustworthiness of the federal and state governments helps to explain citizen support for devolution of policy making responsibilities to the states that occurred in the 1980s under President Ronald Reagan and in the 1990s under the Republican Congress.⁸⁹ Citizens supported the transfer of powers to the states at the same time they began to trust the states more than the federal government. They trusted states more at least in part because they

⁸⁵ Kam & Mikos, *supra* note _____, at _____.

⁸⁶ Kam & Mikos, *supra* note _____, at _____.

⁸⁷ Kam & Mikos, *supra* note _____, at _____. The reduction in support for the federal proposal was large and statistically significant.

⁸⁸ Kam & Mikos, *supra* note _____, at _____.

⁸⁹ See, e.g., Hetherington & Nugent, *supra* note 80, at 134; Greg M. Shaw & Stephanie L. Reinhart, *Devolution and Confidence in Government*, 65 PUB. OPINION Q. 369-388 (2001) (noting that devolution followed a decline in confidence in the federal government).

saw the state governments as more competent, more accountable, or more honest.⁹⁰ In other words, support for devolution reflected more than mere agreement with the policies pursued by the states; it was driven largely by trust in state governments relative to the federal government.

Citizens' relative lack of trust in the federal government tempers support for congressional action that enhances federal powers *vis a vis* the states. Of course, there is no guarantee that citizens will always consider the federal government less trustworthy than the states.⁹¹ Indeed, as recently as the late 1960s, citizens on average actually considered the *federal* government more trustworthy.⁹² Still, state and local governments arguably have an advantage over the federal government when it comes to earning and keeping the people's trust, due both to their close proximity to the people⁹³ and the nature of the affairs they handle (e.g., criminal

⁹⁰ Hetherington and Nugent suggest that at least part of the reason so many people supported devolution can be attributed to the "widespread efforts of nearly all state governments over the past thirty years in terms of constitutional revision, legislative reapportionment and professionalization, strengthening executive authority, and increasing fiscal capacity." *Supra*, note 80, at 134. They also say that citizens demanded the power shift because of a loss of confidence in the competence of the federal government. *Id.* at 135. For present purposes, however, it does not matter whether citizens support devolution of powers because their absolute trust in the states increased (because the states have proven their worth) or whether it was because their confidence in the federal government simply decreased (because the federal government broke promises, managed policies ineptly, and so forth); in either case, the relative standing of the states was the trigger for devolution, and the effect is the same.

⁹¹ This is particularly evident in times of war or national emergency. THE FEDERALIST 46, *supra* note ____ (noting that support for the national government swelled during the Revolutionary War, but quickly waned thereafter); John R. Alford, *We're All in This Together*, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? (John R. Hibbing & Elizabeth Theiss-Morse, eds., 2001) (hypothesizing that trust in the federal government may rise in the presence of an external threat to the nation).

⁹² The NES tracked comparative trust on the 1968, 1972, 1974, 1976, and 1996 surveys. On the 1968 survey, 50% of respondents indicated they placed the most faith and confidence in the federal government, whereas only 20% said the same of their state government. Only six years later, however, roughly equal portions (about 30%) placed the most trust in state and federal government. NES Cumulative File 1948-2004, *available at* <http://www.umich.edu/~nes>. The NES also tracked trust in local governments over the same time period; in 1996, nearly 70% of respondents said they had the most faith in either their state or local government; only 30% said the same of the federal government. *Id.* Arguably, trust in local governments could also reduce support for federal legislation.

⁹³ Hamilton explains:

It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter

THE FEDERALIST 17, *supra* note 82, at 119.

law enforcement).⁹⁴ Besides, comparative trust protects states precisely when one would most want to protect them—namely, when state governments are operating more competently, openly, and honestly, than the federal government. Trust ceases to provide protection for state prerogatives only when state governments lose the confidence of the people—the occasions when states, arguably, deserve less protection. As Madison suggested, the people “ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.”⁹⁵ Today, it may be the states, and twenty years from now, it may be the federal government; the point is, the people should not be required to suffer incompetence, corruption, and mal-administration when they have another agent (whether state or federal) they believe will do a better job executing their will. Anyway, should the states squander the people’s trust, they

⁹⁴ Hamilton points to the states’ specific responsibilities over crime and punishment as one way in which states can “cement” their hold over citizens’ loyalties:

[T]he ordinary administration of criminal and civil justice . . . is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence towards the government.

Id. at 120; *id.* (“The operations of the national government . . . falling less immediately upon the observation of the mass of the citizens, the benefits derived from it will chiefly be perceived and attended to be speculative men.

Relating to more general interests, they will be less apt to come home to the feelings of the people; and, in proportion, less likely to inspire an habitual sense of obligation and an active sentiment of attachment.”).

In 1984, Daniel Elazar echoed these sentiments:

Every decade, more states reach the critical mass of population necessary to provide the widest range of services demanded of them, in the most sophisticated manner, leaving fewer too small to do so. At the same time, the federal government becomes further removed from popular pressures simply by virtue of the increased size of the population it must serve. The states may well be on their way to becoming the most manageable civil societies in the nation. Their size and scale remain comprehensible to people even as they are enabled to do more things better.

ELAZAR, *supra* note _____, at 256.

⁹⁵ THE FEDERALIST 46, *supra* note ____.

can always win it back, as they did in the 1970s, and reclaim domains once lost to the federal government.⁹⁶

In any event, whether or not they trust state governments more, citizens have a second reason for delegating policy-making discretion to state, rather than federal officials: they can keep state officials on a shorter leash. If a state official abuses the power he / she has been given—say, by overstepping statutory authority or by exercising poor judgment—the people may be able to remove him / her. At the federal level, only the President is elected by the people (and then, only indirectly via the Electoral College). But in almost all states, voters choose several of the topmost executive officials, including the governor, lieutenant governor, attorney general, and treasurer, among others. Forty-six states allow voters to elect at least one senior executive official besides the governor, and on average, voters elect almost five such officials.⁹⁷ Indeed, in most states, even members of the judicial branch are elected.⁹⁸ Citizens can also elect a variety of local officials, such as the district attorney and county assessor. Furthermore, in eighteen states and more than two-thirds of local governments, voters are allowed to recall public officials who have squandered the public trust.⁹⁹ In short, if a state official were to enforce a law in a way that displeased most citizens, the citizens would have the power to remove the official directly at

⁹⁶ The Framers expected the federal and state governments to engage in an ongoing “competition for the political allegiance and affections” of the people, suggesting that loyalties and power would shift back and forth over time. Jack Rackove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1042 (1997); see also Pettys, *supra* note _____, at 357-60 (suggesting that competition between the state and federal governments will not collapse so long as three conditions are met: first, each sovereign must possess a proving ground—a domain in which it is assured of an opportunity to earn affection; second, each sovereign must remain autonomous—one government can not control what the other does; and third, the system must remain transparent—the people must know where to assign blame).

⁹⁷ THE COUNCIL OF STATE GOVT’S, *THE BOOK OF THE STATES*, 350 (Keon S. Chi ed., 2005). Senior officials include Lieutenant Governor, Secretary of Agriculture, Comptroller, Secretary of State, Treasurer, Attorney General, Auditor, and Superintendent of Public Instruction. *Id.*

⁹⁸ Stephen P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (“in only twelve states are most judges not electorally accountable to the citizenry”).

⁹⁹ NAT’L CONF. OF STATE LEGIS., *RECALL OF STATE OFFICIALS* (2006), available at <http://www.ncsl.org/programs/legman/elect/recallprovision.htm>; INT’L CITY / COUNTY MGMT. ASS’N, 1996 MUNICIPAL FORM OF GOVERNMENT 2 (69% of municipalities surveyed allow recall elections).

the ballot box—either at the next election or via the recall device—an option that is simply not available against *any* federal executive or judicial official except a first-term President.

To summarize, citizens are not so easily convinced to transfer powers from their state governments to the federal government. Citizens may balk at federalization, not because they oppose congressional aims, or quibble with statutory language, but because they dislike the idea of federal enforcement.¹⁰⁰ Citizens trust state governments more, and this may temper support for congressional legislation on issues normally handled by the states. In addition, citizens can check state / local officials at the ballot box, making any delegation of authority to state officials less risky. Thus, while Congress may sometimes promise citizens the policy outcome the majority prefers—say, a ban on PAS—citizens may nonetheless oppose congressional legislation on the belief that federal officials will not execute or interpret the policy as competently or faithfully as would state officials.

D. Citizens Value Processes Too

So far, the considerations that shape public attitudes toward congressional legislation have all been substantive: citizens care about the content of legislation, how it might be enforced, and any impact it may have on related policy domains. Contrary to popular wisdom, however, citizens also care about how policy is made in the first instance. Studies have shown that when citizens formulate opinions about government actions, they place weight on matters of procedure, and not just matters of specific policy substance.¹⁰¹ Indeed, a burgeoning line of political science research suggests that citizens care as much about the processes that

¹⁰⁰ In some instances, Congress may be able to sidestep this safeguard by issuing regulations that will be enforced by state, rather than federal, officials. See discussion *infra* Part _____.

¹⁰¹ *E.g.*, Dennis Chong, *How People Think, Reason, and Feel About Rights and Liberties*, 37 AM. J. POL. SCI. 867 (1993) (when subjects were asked whether government should allow controversial groups like the KKK to demonstrate, they considered procedural rules, among other things – and not just their feelings toward the group at issue – before making their decision).

government follows as they do about the outputs of those processes.¹⁰² To the extent that governmental processes are perceived as being fair, for example, citizens are more likely to comply with the government's decisions, even when they disagree with those decisions on the merits.¹⁰³ Other scholars have found that some citizens support a variety of reforms to the political process, including campaign finance laws, the use of ballot initiatives, and the devolution of power to the states, that may not be conducive to enacting the policies they favor.¹⁰⁴ That is, some citizens support reforms of the political process, even though the current process is more likely to generate policy outputs they favor, say, because their political party controls both branches of government.¹⁰⁵

Citizens know how they would like government to be run, and these beliefs place important limitations on Congress's ability to federalize policy domains. First, some citizens believe the people themselves ought to have final say on important public policy decisions, via ballot measures and similar devices; these citizens might oppose congressional legislation to spare state laws they deem more "legitimate" (i.e., because they were approved by the voters), or to preserve future opportunities for a direct say in government affairs. Second, citizens may believe that federalism itself is an essential facet of the nation's legitimate democratic process, and not just a means to another end, and may thus oppose congressional legislation that violates

¹⁰² HIBBING & THEISS-MORSE, *supra* note 80, at 6 (2002) ("Contrary to popular belief, many people have vague policy preferences and crystal-clear process preferences, so their actions can be understood only if we investigate these process preferences."); *id.* at 35 ("We believe people are more affected by the *processes* of government than by the policies government enacts.") (emphasis added).

¹⁰³ Gibson, *supra* note ___, at 471 (reviewing research on the impact of legitimacy and procedural fairness on public attitudes and finding that "[p]roper process contributes to acceptance of unpopular products"); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions*, 25 LAW & SOC'Y REV. 621 (1991). In their study of the 1991 California water shortage, for example, Tyler and Degoey find that citizens were more likely to comply with policies if they believe that the procedures that created the policies are fair. Tom R. Tyler & Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J. PERSONALITY & SOC. PSY. 482 (1995).

¹⁰⁴ HIBBING & THEISS-MORSE, *supra* note ___, at 77.

¹⁰⁵ *Id.* at 82.

their pre-conceived notions of the proper allocation of responsibilities between state and federal governments. For both reasons, citizens may oppose congressional legislation—sacrificing their immediate policy objectives—and in the process, thereby preserve state prerogatives.

1. The appeal of direct democracy

One of the benefits of federalism is that it enhances citizen participation in government.¹⁰⁶ The explanation stems, in part, from the fact that state and local governments follow procedures that give citizens a greater say over state and local public affairs than they have over national affairs. Twenty-four states have procedures in place that permit some form of direct legislation by the voters, commonly referred to as ballot initiatives.¹⁰⁷ In these states, the citizens may enact legislation without the assistance (or interference) of their state legislatures. What is more, all fifty states utilize some form of referendum, under which voters may accept or reject legislation proposed or enacted by the state government.¹⁰⁸ And direct democracy is employed even more commonly by local governments, more than half of which have some form of initiative and ninety-percent of which utilize some form of referendum procedure.¹⁰⁹ By contrast, the opportunities for citizen participation at the federal level are quite limited; citizens may lobby and petition federal representatives and bureaucrats, but they lack any direct say over the enactment of federal laws, which must be passed by both houses of Congress and presented to the President.¹¹⁰

¹⁰⁶ *E.g.*, Adler & Kreimer, *supra* note _____, at 81-82 (“It is a shibboleth of the literature endorsing federalism that states facilitate a kind or degree of political participation by citizens that does not occur at the national level.”).

¹⁰⁷ INITIATIVE & REFERENDUM INST., WHAT IS THE INITIATIVE AND REFERENDUM PROCESS?, available at <http://www.iandrinstute.org/Quick%20Fact%20-%20What%20is%20I&R.htm>.

¹⁰⁸ Under the legislative referendum, available in all fifty states, an arm of the state submits legislation or constitutional amendments to the voters for their consideration. Under the popular referendum, used in twenty-four states, the people refer legislation or amendments that were enacted by the state government to the voters for approval or rejection. *Id.*

¹⁰⁹ TARI RENNER, INITIATIVE & REFERENDUM INST., LOCAL INITIATIVE AND REFERENDUM IN THE U.S., available at <http://iandrinstute.org/Local%20I&R.htm>.

¹¹⁰ U.S. CONST. art. I, § 7, cl. 2.

As discussed above, direct democracy has instrumental value; the availability of ballot measures (and similar devices) make it easier for state governments, broadly defined, to satisfy majoritarian policy preferences, often by curtailing the power of minority interests to block such legislation. This gives citizens an incentive to oppose federal encroachments, at least when states do, in fact, generate preferable policy outputs. But the widespread use of direct democracy may help to safeguard state prerogatives for two other reasons as well, whether or not states take more appealing policy stances.

First, support for direct democracy may trigger popular opposition to federal legislation that preempts state authority and thereby narrows the range of opportunities for participating in government at the state and local level. Direct democracy remains enormously popular among the people.¹¹¹ Since 1904, citizens have considered more than 2,000 ballot initiatives, and 379 initiatives appeared on ballots in the 1990s alone.¹¹² To some citizens, the act of participating in politics has intrinsic value; it is more than a means by which to shape public policy. And congressional legislation may often deprive citizens of the opportunity to participate directly in policy-making, by preempting state laws governing the same issue.¹¹³ Simply put, the more policy space Congress occupies, the less room citizens have to govern directly. Hence, some citizens may oppose congressional legislation, even when it serves their policy goals, in order to safeguard their voice in government.

¹¹¹ *E.g.*, HIBBING & THEISS-MORSE, *supra* note 80, at 75 (noting that 86% of their respondents would like to see an increase in ballot initiatives); Gordon S. Black Corporation, May 1992, The Roper Center, University of Connecticut, Public Opinion Online, accession 0195850 (92% of respondents support ballot initiatives).

¹¹² INITIATIVE & REFERENDUM INST., INITIATIVE AND REFERENDUM USE 1 (May 2006).

¹¹³ Rapaczynski, *supra* note __, at 404 (noting that “the vitality of participatory state institutions depends in part on the types of substantive decisions that are left to the states”).

For examples of federal legislation preempting state or local initiatives, see *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (proposition 187, which denies public benefits to illegal immigrants, preempted by Immigration and Nationality Act); *Washington State Bldg. & Constr. Trades Council AFL-CIO v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (initiative banning storage of radioactive waste generated outside state of Washington preempted by numerous federal statutes); *Nat’l Audubon Soc’y v. Davis*, 307 F.3d 835 (9th Cir. 2002) (proposition 4, which restricts use of certain traps and poisons, preempted by Endangered Species Act and National Wildlife Refuge Systems Improvement Act).

Second, citizens may also be reluctant to trump state laws that were enacted via the initiative process. Citizens tend to view laws enacted via the initiative process as more legitimate than laws enacted by their representatives, state or federal.¹¹⁴ The aura of legitimacy conferred upon ballot initiatives can have a powerful impact on public opinion. Some citizens may oppose attempts to federalize issues on which the voters have already spoken directly, whether or not they agree with what the voters had to say, and whether or not they value the act of participation.¹¹⁵

In sum, citizens may value the unique opportunity to participate in governmental decision-making that only state and local governments can provide. Whether it is because federal legislation crowds out the opportunity to participate in lawmaking or because citizens feel they (and not their representatives) should have final say on important matters of public policy, the widespread use of direct democracy in the states gives citizens an additional reason, independent of the merits of legislation, to oppose federal laws that usurp state authority.

¹¹⁴ Jack Citrin, *Who's the Boss? Direct Democracy and Popular Control of Government*, in *BROKEN CONTRACT? CHANGING RELATIONSHIPS BETWEEN AMERICANS AND THEIR GOVERNMENT* 278 (Stephen C. Craig, ed., 1996); Rapaczynski, *supra* note ____, at 396 (noting that citizen participation generally enhances the legitimacy of government). Whether laws passed through the initiative process are, in fact, more legitimate, according to normative political theory, is beside the point; rightly or wrongly, the public views such laws as more legitimate, making them more resilient in the court of public opinion to challenges from Congress (or elsewhere).

¹¹⁵ Oregon's experience with PAS legislation is illustrative. In November 1994, voters approved by the slimmest of margins (52% to 48%) a ballot initiative that would allow terminally ill patients to seek prescription drugs to hasten death. Don Colburn, *Assisted Suicide Bill Passes: Oregon Law Puts State at Center of Ethical Debate*, WASH. POST, Nov. 14, 1994, at Z9. Three years later, the state legislature authorized a ballot measure to repeal the PAS statute. Oregon voters, however, defeated the repeal effort with an even wider margin of victory (60% to 40%). Jane Meredith Adams, *Assisted Suicide Gains in Propriety*, BOSTON GLOBE, Nov. 9, 1997, at D3. Some commentators suggested that the repeal measure was defeated by such a wide margin to the fact that it had been sponsored by the legislature and not the voters themselves, as well as the fact that other efforts to circumvent the will of Oregon's voters had been made in the state courts and in the federal government. *The Paper Trail*, *The Oregonian*, at A1, Nov. 8, 1997.

The ongoing effort to pass the National Uniformity for Food Act provides another useful example. This congressional statute would preempt state and local food labeling laws, including California's Proposition 65. Critics, including California Governor Arnold Schwarzenegger, have rallied opposition to the congressional legislation by juxtaposing the "will of the people" themselves against the will of their federal representatives. Schwarzenegger, for example, noted that "I am a strong believer in the rights of individual states to enact laws that protect its citizens and the environment, and the federal government should not interfere in a state's ability to do so. . . . [T]he history of Proposition 65 . . . is rooted in the power of the people to enact legislation." Letter from Governor Arnold Schwarzenegger, to Senator Dianne Feinstein (Apr. 18, 2006) (on file with author).

2. *The (surprising) appeal of federalism*

In addition to direct democracy, federalism itself may hold some value to citizens. In other words – and contrary to popular wisdom¹¹⁶ -- citizens may believe in a limited central government, and, as a consequence, they may oppose congressional action on an issue they believe *a priori* ought to be handled by the states instead. In this Section, I show that citizens do indeed have beliefs about which level of government ought to handle various policy domains. Just as importantly, I show that these beliefs are consequential—in other words, some citizens appear willing to stand up for this principle even at the expense of satisfying their short-term policy preferences.

To begin, citizens have well-defined notions—quite separate from any immediate policy concerns—about which level of government (local, state, or federal) *ought* to control various policy domains. On some issues, they prefer state (or local) control; and on other issues, they prefer federal control. In public opinion polls, for example, sizeable majorities favor state / local control of education (80%), homelessness (75%), and crime (81%) policies, whereas most say that the federal government should handle economic development (61%); citizens are more evenly divided when it comes to responsibility for other matters, such as public health and pollution.¹¹⁷ The belief that the states should control some domains, and the federal government

¹¹⁶ McConnell, *supra* note _____, at 1488 (“[F]or most people . . . issues of federalism take second seat to particular substantive outcomes.”); John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L. J. 901, 931-32 (2001) (opining that “because [federalism] is a structural principle, citizens are largely indifferent to it when it conflicts with issues that stir their passions”); McGinnis & Somin, *supra* note _____, at 97 (“Federalism is an abstract and complicated system compared to many underlying public policy issues like drugs and education, which are more concrete and more likely to engage the passions of citizens.”).

¹¹⁷ ROEDER, *supra* note 80, at Tab. 6.1.

Level of Government Preferred to Handle Policy Areas, 1988			
	Federal Government	State Government	Local Government
Education	19%	58%	22%
Public Health	46%	42%	13%
Pollution	44%	42%	14%
Homeless	26%	38%	37%
Crime	19%	37%	44%

others, is consistent with the notion that citizens recognize limitations to federal power, in other words, that citizens recognize the principle of federalism.¹¹⁸

And for at least some segment of the population, such opinions regarding the proper allocation of state / federal authority carry weight; in other words, they may trump policy considerations when citizens formulate their opinions of proposed federal legislation. To begin, it worth noting that political elites commonly appeal to the *principle* of federalism—namely, the notion of a limited central government—to rally public opposition to congressional legislation. Elites who defend federalism as legitimate democratic process make two versions of the argument. The first version appeals to the tradition of state control of a particular domain (e.g., “the states have always defined marriage,” or “the states have always regulated medical

Economic development	61%	31%	9%
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See also CBS/New York Times, Mar. 10-14, 2004, The Roper Center, University of Connecticut, Public Opinion Online, accession 0449531, *available at* Lexis Nexis, Polls and Surveys Database (reporting that small majority—50% versus 46%—of respondents favor state versus federal control of gun laws); Gallup/CNN/USA Today, Jan. 9-11, 2004, The Roper Center, University of Connecticut, Public Opinion Online, accession 0446939, *available at* Lexis Nexis, Polls and Surveys Database (reporting that roughly equal numbers of respondents—44% versus 43%—favor state as opposed to federal control of laws regarding marriages and civil unions between same-sex couples). Citizens also have more abstract views about the proper scope of federal power. In a July 2003 Pew Research Center poll, respondents were asked their views on the following statement: “The federal government should run only those things that cannot be run at the local level.” 29% of respondents completely agreed with the statement; 42% mostly agreed; 17% mostly disagreed, and 7% completely disagreed. Pew Research Center, Jul. 14-Aug.5, 2003, The Roper Center, University of Connecticut, Public Opinion Online, accession 0441914, *available at* Lexis Nexis, Polls and Surveys Database.

¹¹⁸ Here I suggest that citizens’ views about the authority of state and federal governments reflect a principled determination that – as a matter of democratic process – the states ought to control a particular policy domain. To be sure, citizen preferences for state versus federal control of some issue may simply reflect their preference for the overall package of policies offered by their state, rather than a more abstract commitment to state autonomy. Nonetheless, even this “bottom up” approach toward federalism may protect state powers, as long as citizens remain committed to state control over an entire policy domain, and oppose congressional efforts, however appealing on the merits, to federalize certain aspects of it on a more ad hoc basis. *Cf.* Michael C. Dorf, *Whose Ox is Being Gored? When Attitudinalism Meets Federalism* 21-23 (on file with author). Professor Dorf suggests that judicial attitudes towards federalism may be formed in similar ways. Namely, he argues that judicial attitudes toward federalism may derive from a “top down” approach, e.g., by asking how the Constitution, its history, and its purposes, demarcate the line between federal and state powers, or a “bottom up” approach, e.g., by asking what sort of policy outcomes solicitude for federalism is likely to generate. In either case, Dorf claims that attitudes toward federalism may trump other considerations—such as the Justice’s views of the wisdom of congressional policy—when the Justice decides a case implicating federalism concerns. *Id.* at 16. My argument is that federalism beliefs may trump other considerations—such as policy preferences—when citizens decide whether to support congressional legislation, whether those beliefs are derived in a top down fashion, e.g., out of respect for tradition or concern for tyranny, or in a bottom up fashion, e.g., because of a preference for the overall body of laws that would adopted in a pro-state versus a pro-federal system.

practices.”). By this argument, the process by which laws are enacted in these issue domains has already been established, and those who seek to aggrandize federal control are violating that process. The second version of the process-oriented argument reflects a concern for tyranny, defined as the concentration of power into a single entity or level of government. It implores citizens not to impose their values on other citizens through Congress—to live and let live (e.g., “what happens in another state is none of your business”).

Recent debates over the twice-defeated federal constitutional amendment to ban same-sex marriage highlight elite efforts to make federalism trump other considerations among the electorate. Opponents of the amendment frequently cited traditional state primacy in the field of family law to defend their position among voters who otherwise supported the amendment. John Kerry, for example, professed personal disagreement with same-sex marriages, but nonetheless objected to a federal constitutional amendment to ban them on federalism grounds: “[F]or 200 years, this has been a state issue. I oppose this election year effort to amend the Constitution in an area that each state can adequately address.”¹¹⁹ Similarly, in debates on the floor of Congress, Senators invoked tradition to oppose the amendment. Christopher Dodd’s comments are illustrative:

Since the founding of our Nation, marriage has been the province of the States, and in my view it should continue to be a State issue. Yet the Federal Marriage Amendment would deprive States of their traditional power to define marriage and impose a national definition of marriage on the entire country.¹²⁰

¹¹⁹ Marie Horrigan, *Kerry, Edwards Oppose Marriage Amendment*, UPI, Feb. 24, 2004.

¹²⁰ 150 CONG. REC. S8074 (daily ed. July 14, 2004) (statement of Sen. Dodd).

The same appeal to tradition has been made against other congressional proposals implicating federalism concerns.¹²¹

Similarly, opponents of the same-sex marriage amendment have implored voters to take a live and let live attitude. For example, Senator Jim Jeffords of Vermont told his constituents that Congress should leave the power to define marriage in the hands of the states, regardless of how they might wield it:

I believe our States are not only capable but deserving to define marriage in the way they see fit. Every State will bring its own approach, and I am proud the way my State led the Nation in addressing this issue.¹²²

During the 2000 Vice-Presidential debate, Dick Cheney's view on same-sex marriage reflected this same line of argument:

The fact of the matter is we live in a free society, and freedom means freedom for everybody. We shouldn't be able to choose and say you get to live free and you don't . . . The fact of the matter is that matter is regulated by the states. I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area.¹²³

¹²¹ In the controversy over federal efforts to ban PAS, for example, Oregon Governor Theodore R. Kulongoski applauded the Supreme Court's *Gonzales* case: "Medical issues traditionally fall within the purview of the states, and today the U.S. Supreme Court strengthened that tradition." Egan & Liptak, *supra* note ___, at ___.

¹²² 150 CONG. REC. S7962 (daily ed. July 13, 2004) (statement of Sen. Jeffords). See also Andrew Sullivan, *Federal Express*, NEW REPUBLIC at 6 (Dec. 13, 2004) ("The whole point of federalism is that different states can have different policies on matters of burning controversy . . . Let Ohio prevent gay couples from having legal protections. But let California enact a sweeping civil-unions bill that brings gay couples very close to marriage rights. Let Washington ban federally funded embryonic stem-cell research. But allow Sacramento to set up a huge research program.").

¹²³ Commission on Presidential Debates, Transcript, The Lieberman-Cheney Vice Presidential Debate, (Oct. 5, 2000), available at <http://www.debates.org/pages/trans2000d.html>.

The tyranny argument has been used against other proposals before Congress as well.¹²⁴

To be sure, the conventional wisdom suggests that federalism arguments are merely window dressing—that elites are not genuinely interested in protecting federalism. In a 2004 op-ed in *The New York Times*, for example, UCLA law professor William B. Rubenstein suggested that federalism is a red herring: “Politicians generally like a constitutional discussion because it allows them a way to avoid controversial topics by reframing them in terms of the two organizing principles of our system of government: separation of powers and federalism.”¹²⁵

But the criticism that elites only invoke federalism to avoid taking a stance on a controversial issue simply misses the point. What matters for present purposes is whether *citizens* care – or can be made to care – about federalism, not whether elites themselves genuinely adhere to the principles they espouse in campaigns (which they will, presumably, only if citizens revere the same principles). And for two distinct reasons, appeals to federalism in elite debate support the notion that *citizens* care about the allocation of state / federal powers. For one thing, by exposing the public to federalism

¹²⁴ Senator Wyden of Oregon invoked the tyranny argument in his effort to defeat the Pain Relief Promotion Act in 2000:

I firmly believe that my election certificate does not give me the authority to substitute my personal and religious beliefs for the judgment made twice by the people of Oregon. The states have always possessed the clear authority to determine acceptable medical practice and acceptable medical uses of controlled substances, and I will fight to preserve Oregon’s rights in this matter.

Proposed Amendment to the Pain Relief Promotion Act: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. (2000).

Similarly, the editorial board of one of the leading newspapers in Oregon was vehemently opposed to efforts to legalize PAS, but when Oregon voters (for the second time) backed the practice, the editorial board called upon the federal government to respect their decision. Editorial, *Oregon’s Choice Good or Bad, State’s Assisted Suicide Law Deserves Respect from Federal Government*, THE OREGONIAN, at D6, Nov. 8, 1997 (“We continue to oppose the physician-assisted-suicide law as a dangerous step beyond historically accepted medical practice. But we also accept Oregon’s right to take that step . . . A federal decision to punish Oregon doctors for doing something permitted by Oregon law would usurp that right.”).

¹²⁵ William B. Rubenstein, *Hiding behind the Constitution*, N.Y. TIMES, Mar. 20, 2004, at A21. See also Hamilton, *supra* note _____ (claiming that “[i]t is common knowledge on Capitol Hill that federalism or states’ rights are nonstarters as objections to legislation. Members spout federalism rhetoric to block legislation they oppose for other reasons, but it is never a dispositive consideration.”).

appeals on a regular basis, elite debate can make federalism a more salient consideration in the minds of citizens.¹²⁶ Even more importantly, however, the fact that elites choose to frame debates around federalism, potentially staking their political careers on it, suggests that some citizens must value federalism. Elites realize, of course, that re-framing debates is an important way to manipulate public opinion.¹²⁷ Re-framing debates in a particular way will serve their purposes, however, only if the chosen frame resonates with the public.

To illustrate, consider the proposed federal constitutional amendment to ban same-sex marriage. Suppose that a United States Representative does not want to stake out a position on the merits of the issue—she fears taking a stance would alienate a large number of constituents, who are split on the merits of the proposal. So the Representative may attempt to reframe the debate. But her constituents will only let her “off the hook”, so to speak, if the new frame implicates something the constituents actually value. Suppose, for example, the Representative announces that she opposes the amendment simply because it would make the Constitution “too long” (i.e., “twenty-seven amendments is enough”); she has reframed the debate—it is no longer about same-sex marriage, but about the length of the Constitution—but it will not appease

¹²⁶ Kam & Mikos, *supra* note _____, at _____.

¹²⁷ In the political arena, “[e]lites wage a war of frames because they know that if *their* frame becomes the dominant way of thinking about a particular problem, then the battle for public opinion has been won.” Thomas E. Nelson & Donald R. Kinder, *Issue Frames and Group-Centrism in American Public Opinion*, 58 J. POL. 1055, 1058 (1996); see also DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 164 (1996) (noting that frames are “rhetorical weapons created and sharpened by political elites to advance their interests and ideologies.”). See also Dennis Chong, *Creating Common Frames of Reference on Political Issues*, in *POLITICAL PERSUASION AND ATTITUDE CHANGE* 221 (Diana C. Mutz, et al., eds., 2006) (“Much public opinion formation is a strategic process in which opinion leaders are trying to persuade the public to think about political issues along particular lines, to activate existing values, prejudices, and ideas . . . and to draw obvious conclusions from those chosen frames of reference.”) (citation omitted); LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON’T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* (2000) (finding that political elites are strategic in the frames they use to persuade the public, and that if a frame does not resonate with the public, political elites take notice, and they adjust their strategies accordingly).

constituents on either side of the same-sex marriage debate. In fact, it may actually harm her re-election prospects, for the constituents may punish her for such an obvious attempt to duck an important issue (few voters are likely to care about lengthening the Constitution). But if she chooses a frame that resonates with her voters—“I oppose this amendment because the states should decide whether or not to recognize same sex marriages”—they may be appeased, regardless of what they think of the underlying issue of same-sex marriage.

In the study of popular support for a federal ban on PAS, Cindy Kam and I found that citizens do indeed care about federalism – for some, it may trump policy preferences, at least when they are exposed to elite cues. We asked subjects in the study which level of government should handle controversial medical practices such as PAS (among other issues). The answer defined what we call the subject’s federalism beliefs. When subjects were later asked their opinion of a congressional proposal to ban PAS, these federalism beliefs helped predict (albeit not at a statistically significant level) their level of support for (or opposition to) the federal ban. When some subjects were told to read a short statement from political elites reminding them of federalism considerations, their *a priori* federalism beliefs became more consequential. Subjects who believed state governments should control the policy domain were more likely to oppose the congressional ban than were subjects who believed the federal government ought to control the domain, holding all else constant.¹²⁸ In other words, subjects’ opinions of the proposed congressional ban on PAS did not necessarily track their policy preferences; some opposed PAS, and yet withhold their support congressional efforts to ban it out of respect for state prerogatives and federalism. The reduction in support for the federal ban among those who believed a priori

¹²⁸ Kam & Mikos, *supra* note ____, at ____.

that the states should have primary authority over controversial medical practices was large and statistically significant.¹²⁹

Other studies substantiate the notion that processes, and more specifically, the allocation of governmental powers, influence public opinion of government action. Research suggests, for example, that many citizens prefer divided government at the federal level (different parties controlling the White House and Congress), even though it often results in gridlock and may keep the federal government from adopting policies they favor.¹³⁰ In other words, citizens appear willing to trade off immediate policy objectives—to tolerate some gridlock—in order to check governmental power. Just as citizens prefer to divide power between parties across branches of the federal government, they may prefer to divide power between state and federal governments, even though it requires them to sacrifice immediate policy objectives.

E. Summary

V. WITHER JUDICIAL REVIEW? SAFEGUARDING THE POPULIST SAFEGUARDS

The theory developed above in Part IV challenges what is arguably the dominant rationale given for judicial supremacy on federalism questions – the notion that the political process, left to its own devices, fails to adequately protect state power from federal encroachments. The populist safeguards temper the need for the judiciary to strike down congressional legislation in the name of states rights. After all, if citizens can be relied upon to rein in federal power, judicial review is at best redundant. Worse yet, some claim the Court's efforts to delimit congressional authority lack legitimacy. Larry Kramer, for one, suggests that

¹²⁹ *Id.* at ____.

¹³⁰ *E.g.*, MORRIS FIORINA, *DIVIDED GOVERNMENT* (1992); James A. Thurber, *Representation, Accountability, and Efficiency in Divided Party Control of Government*, 24 *POL. SCI. & POL.* 653 (1991); *see also* Lacy, *supra* note ____, at 253 (finding that preferences for divided government are indeed consequential).

the Framers originally did not intend for the Court to have final say regarding Congress's powers; rather, they wanted the people (through their elected representatives in Congress) to decide for themselves, and free of judicial meddling, what role the new national government would play.¹³¹ While such claims remain controversial (I do not take a position on the issue),¹³² the Court itself has openly flirted with the idea of entrusting federalism to the political process. In 1985, a closely divided Court concluded that, "State sovereign interests . . . are more properly protected by procedural safeguards in the structure of the federal system than by judicially created limitations on federal power."¹³³ While the Court never followed through on *Garcia's* pronouncement (it continues to hear federalism cases), several current members of the Court continue to endorse the *Garcia* opinion. Justice Stephen Breyer, for example, writing in his dissent in *United States v. Morrison*, a case in which the Court struck down a provision of the Violence Against Women Act on federalism grounds, suggested that "Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance."¹³⁴

In any event, even assuming the legitimacy of the endeavor, the Court may not be up to the task of delimiting congressional powers. Since the founding of the Republic, the Court has struggled to articulate coherent federalism jurisprudence. The Court's latest efforts to rein in

¹³¹ LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* ____ (2005) (suggesting the Framers envisioned that the citizenry – and not the courts – would have final say over power disputes between federal and state governments). See also Choper, *supra* note ____, at ____ (suggesting that federalism is a political question).

¹³² E.g., Yoo & Prakash, *supra* note ____, at ____ (arguing that constitutional text and Framers' intent require the judiciary to demarcate federal / state powers).

¹³³ *Garcia v. San Antonio MTA*, 469 U.S. 528, 552-56 (1985).

¹³⁴ *United States v. Morrison*, 529 U.S. 598, 660 (Breyer, J., dissenting); see also *id.* at 647 (Souter, J., dissenting) (citing the "Founder's considered judgment that politics, not judicial review, should mediate between state and national interests"); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 93 (2000) (Stevens, J., dissenting) ("The Framers did not . . . select the Judicial Branch as the constitutional guardian of . . . state interests. Rather, the Framers designed important structural safeguards to ensure that when the National Government enacted substantive law . . . the normal operation of the legislative process itself would adequately defend state interests from undue infringement."); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 184 (1996) (Souter, J., dissenting) ([T]he political safeguards of federalism are working . . . [A] plain statement rule [requiring Congress's clear intent to abrogate state sovereign immunity] is an adequate check on congressional overreaching, and . . . today's abandonment of that approach is wholly unwarranted.").

federal power have provoked widespread criticism. Though not necessarily rejecting the Court's mission, Erwin Chemerinsky has blasted the Court's federalism doctrine as overly formalistic and inconsistent.¹³⁵ One of the most faithful defenders of judicial review, Lynn Baker, and her co-author, Ernest Young, admit that the Court's recent decisions "[do] not speak well for the judicial ability to develop doctrinal limits on national power that are at once meaningful and workable."¹³⁶ Professors Jenna Bednar and William Eskridge suggest the Court's federalism decisions "flunk the requirements of either good law or good policy."¹³⁷ Barry Friedman is even less diplomatic, viewing the doctrine as "a set of indeterminate, largely incoherent rules that by and large permit ad hoc decisions by judges."¹³⁸ Such assessments are hardly surprising, given the opacity of the constitutional text, and the enormous cultural, political, technological, and economic changes the nation has endured since it was written.

Given that judicial review may be unnecessary, illegitimate, and even capricious, it is tempting to ask whether the Court should play any role at all in federalism disputes. Indeed, some notable scholars have called upon the Court to dismiss federalism-based challenges out-of-hand.¹³⁹ However, I suggest that judicial review should not be abandoned altogether. The populist safeguards, while effective, are not foolproof; in certain limited, and identifiable, situations they may not adequately protect state prerogatives. First, the safeguards may fail when federal agencies and federal courts, which are not directly accountable to the people, expand

¹³⁵ Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995).

¹³⁶ Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 88 (2001).

¹³⁷ Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1447 (1995).

¹³⁸ Friedman, *Valuing Federalism*, *supra* note _____, at 324. For commentary from members of the Court, see, e.g., *United States v. Lopez*, 514 U.S. 507, 608 (1995) (Souter, J., dissenting) (claiming the Court's decision "portend[s] a return to the untenable jurisprudence" of the *Lochner* era).

¹³⁹ E.g., CHOPER, *supra* note _____, at _____ (suggesting complete abandonment of judicial review of federalism, deeming it a political question); WECHSLER, *supra* note _____, at _____ (arguing that the Court should abandon judicial review of federalism).

federal powers at the expense of the states and without the imprimatur of Congress. The dynamics that constrain Congress does not check these other law-making bodies. Second, some federal laws may blur the lines of accountability between state and federal officials, thereby straining the ability of citizens to assign credit (or blame) for government policies (and hence, their capacity to check Congress). Third, certain types of laws may make federalization more appealing to citizens, because they offer the advantages of federalization (such as shifting costs of regulatory programs), without incurring some of the costs normally associated with it (such as the relying upon federal officials to enforce the laws). For example, federal conditional grants remain suspect because they enables citizens to impose their morals on citizens in other states (or shift costs onto them), without simultaneously having to surrender execution of the law to federal authorities. Hence, *some* judicial oversight remains desirable, namely, to ensure that Congress itself authorizes federalization, that the people are able to assign credit and blame where it is due, and to limit Congress's ability to offer federalization without some of the features citizens find objectionable. Beyond these situations, however, the Court should respect judgments made by the political process, regardless of whether they comport with the judiciary's own notions of federalism. In other words, the judiciary should focus on ensuring that the populist safeguards work well, but it should not second-guess power allocation judgments made by well-functioning political system.

This Part does an admittedly tentative job of sketching out what judicial review should look like, from the perspective of the populist safeguards. To begin the task of defining the Court's role, this Part examines three lines of recent Supreme Court federalism decisions from the perspective of the populist safeguards—cases imposing statutory drafting requirements on Congress, cases limiting the means by which Congress may effectuate the nation's will against

individual states, and cases limiting the issues that are subject to congressional control—to ascertain whether such decisions help to supplement the populist safeguards, or merely supplant them. It suggests that the Court has already crafted several useful doctrines that may serve to bolster the populist safeguards, but that some of the Court’s cases are indefensible from the populist safeguards perspective.

A. Statutory Drafting Requirements

One way the Court has checked the aggrandizement of federal power is by requiring Congress to satisfy certain statutory drafting rules when it enacts legislation that encroaches upon traditional state authority.

1. Clear statement rules

One requirement stipulates that federal agencies may not assert authority over traditional state domains without a clear statement from Congress that such a result was intended by lawmakers.¹⁴⁰ Consider *Solid Waste Agency of Northern Cook County v. Army Corp of Engineers*.¹⁴¹ At issue in the case was the Army Corps of Engineers’ interpretation of its authority under the Clean Water Act—its so-called Migratory Bird Rule, which purported to regulate the dumping of infill on isolated bodies of water which traditionally had been the exclusive concern of state agencies.¹⁴² The Court invalidated the rule, not because the federal government necessarily lacked the power to regulate isolated waters (an assertion the Court did not need to address), but because Congress had not plainly stated its intent to displace state

¹⁴⁰ The clear statement rules considered here are one example of the Court’s so-called avoidance canon. For thoughtful analyses of this canon of statutory construction, see, e.g., William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORN. L. REV. 831 (2000) (critiquing the canon on separation of powers grounds).

¹⁴¹ 531 U.S. 159 (2001).

¹⁴² The Corps’ rule, promulgation of which did *not* follow the notice and comment procedures of the Administrative Procedures Act, asserted jurisdiction over intrastate waters “[w]hich are or could be used as habitat by other migratory birds which cross state lines.” 51 Fed. Reg. 41217.

authority over such waters.¹⁴³ In defining the reach of the CWA, Congress simply referred to the “navigable waters” of the United States, but it had not clearly indicated (according to the Court) that this definition was as expansive as the Corps claimed.¹⁴⁴

A related line of cases instructs the courts not to apply federal regulations to state governments, nor to abrogate state sovereign immunity, without a plain statement from Congress. In *Gregory v. Ashcroft*, for example, the Court held that Congress must clearly state its intent to apply federal labor laws to certain state employees.¹⁴⁵ In the case, state judges had invoked the federal Age Discrimination in Employment Act (ADEA) to challenge a Missouri law requiring them to retire at age seventy. The Court noted that ADEA discourages such mandatory retirement programs and that states were clearly “employers” for purposes of ADEA; however, the majority also noted that Congress had exempted certain policy-making and elected officials from the Act’s coverage. Since it was not clear whether judges fit within this exemption, the Court dismissed the portion of the lawsuit relying on ADEA. Likewise, in *Atascadero State Hospital v. Scanlon*, the Court ruled that Congress must clearly state its intent to abrogate state sovereign immunity.¹⁴⁶ While the federal Rehabilitation Act authorizes suit against “any recipient” of federal funding that engages in discrimination against disabled individuals, the Court held that this language was not specific enough to allow respondent’s suit against the state of California to proceed: “A general authorization for suit in federal court is not

¹⁴³ 531 U.S. at 173 (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result”, particularly where “administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”).

¹⁴⁴ Similarly, in *Jones v. United States*, the Court rebuffed the Bureau of Alcohol, Tobacco, and Firearms, and ruled that the arson of owner-occupied residential property was not covered by the federal arson statute; although the statute referred to the destruction of “any building”, the Court held that Congress had not clearly conveyed an intention to significantly alter the federal / state balance in the prosecution of what it considered a traditional state crime—the arson of a house still occupied by its owner. 529 U.S. 846, 858 (2000).

¹⁴⁵ 501 U.S. 452 (1991).

¹⁴⁶ 473 U.S. 234 (1985).

the kind of unequivocal statutory language sufficient to abrogate state sovereign immunity.”¹⁴⁷

In *Gregory*, a finding that ADEA applied to state judges would enable federal courts to order relief against the states that engaged in age-discrimination against such judges; and in *Atascadero*, a finding that Rehabilitation Act abrogated state sovereign immunity would enable federal courts to order monetary relief against the states for discriminating against the disabled.

One proposition underlying both sets of cases is that the expansion of federal authority *vis a vis* the states must come from Congress itself, and not from the administrative agencies or courts. Viewed this way, clear statement rules may be desirable, from a populist safeguards perspective.¹⁴⁸ First, clear statement rules block federal agencies from usurping state powers without the consent of the people, expressed via their representatives in Congress. Second, clear statement rules also cabin the power of federal courts *vis a vis* the states. Given that federal agencies and federal courts are not subject to the same populist controls as Congress (if at all), it may be desirable for the Court to require that any substantial expansion of federal authority come directly from Congress. Recall that, other than the President, federal Executive officials are not elected by the people; nor are they subject to recall by the voters. And one of the oft-extolled virtues of the Article III courts is their (real or imagined) immunity to the political pressures of the day. Hence, federal officials and judges are not accountable to the people to the same extent members of Congress are, and their actions—say, in interpreting federal statutes—do not

¹⁴⁷ *Id.* at 246; *id.* at 246 (“Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute”).

¹⁴⁸ Clear statement rules have been criticized on other grounds, beyond the scope of this Article. For a useful discussion of the arguments against clear statement rules, see Kelley, *supra* note _____, at 846-64 (noting arguments that clear statement rules do not advance legislative aims, nor do they allow the courts to avoid making constitutional interpretations).

necessarily represent the will of the people.¹⁴⁹ They may seek to impose their own values on the nation, for example, or to curry favor with special interests, at the expense of state prerogatives and against the wishes of the people themselves.

Attorney General John Ashcroft's efforts to outlaw physician-assisted suicide illustrate how federal executive officials can sidestep the populist controls that limit Congress's ability to federalize important issues. In 2001, without consulting the Congress, the states, or anyone else outside the Department of Justice,¹⁵⁰ Ashcroft issued a ruling aimed at ending physician-assisted suicide in the state of Oregon,¹⁵¹ to this day, the only state in the nation to legalize PAS.¹⁵² Ashcroft claimed that the Controlled Substances Act of 1971 (CSA) gave him authority to bar doctors from giving their patients lethal doses of prescription medications.

Needless to say, Ashcroft's assertion that Congress had given him power to ban PAS under the CSA proved controversial. The primary purpose of the statute was to combat the illicit drug trade.¹⁵³ Neither the statute itself, nor the legislative history, suggests that the CSA was intended to outlaw (or otherwise regulate) PAS, and indeed, Congress made clear its intention

¹⁴⁹ See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1283 n.209 (1999) (noting that neither administrative agencies nor federal judges are directly accountable to the electorate); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1255 (2006) ("As unelected officials, bureaucrats will not usually have the same incentive to be as responsive as Congress to the information provided by competing interest groups."); Arthur Stock, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 172 (1990) (arguing that compared to the judgments of unelected bureaucrats, legislative history is a better indicator of the meaning of federal statutes).

¹⁵⁰ *Gonzales v. Oregon*, 126 S.Ct. 913 (2006).

¹⁵¹ 66 Fed. Reg. 56,607 (Nov. 9, 2001) ("prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act . . . regardless of whether state law authorizes or permits such conduct").

¹⁵² In November 1994, voters in the state of Oregon approved a ballot measure to allow terminally ill patients to seek prescription drugs to hasten death. Don Colburn, *Assisted Suicide Bill Passes: Oregon Law Puts State at Center of Ethical Debate*, WASH. POST, Nov. 14, 1994, at Z9 (52% of voters supported the ballot initiative, while 48% opposed it). The Death with Dignity Act is codified at Or. Rev. Stat. §§ 127.800-127.897. The measure survived three years of legal challenges in the courts, as well as an effort to repeal it at the ballot box, which was rebuffed by a nearly 3-to-2 margin. Thomas B. Edsall, *Mod. GOP Gov. Whitman Wins in N.J. Cliffhanger*, WASH. POST, Nov. 15, 1997, at A1 (60% of voters opposed ballot measure to rescind Oregon Death with Dignity Act).

¹⁵³ 126 S.Ct. at 922-23.

not to usurp the states' power to regulate medical *practices*.¹⁵⁴ What is more, after Oregon enacted its Death with Dignity law, and before Ashcroft issued his Interpretive Ruling, Congress had twice considered and rejected legislation that would have explicitly banned PAS;¹⁵⁵ had Ashcroft's interpretation of the CSA held any water, such legislative efforts would have been superfluous.

Ashcroft's effort was rebuffed in January, 2006, when the Supreme Court, in *Gonzales v. Oregon*, ruled that the CSA did not grant the Attorney General authority to regulate PAS.¹⁵⁶ In his majority opinion for the Court, Justice Kennedy characterized the actions undertaken by the Attorney General as demonstrating "a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it."¹⁵⁷

Despite the apparent victory, supporters of states' rights, and of the right to PAS, lamented the Court's reasoning, deeming it no more than a temporary reprieve from reprieve from federal control. Justice Scalia's dissenting opinion stoked their pessimism. Justice Scalia made clear his view that Congress had constitutional authority to ban PAS, should it choose to do so: "Unless we are to repudiate a long and well-established principle of our jurisprudence, using the federal commerce power to prevent assisted suicide is unquestionably permissible."¹⁵⁸

¹⁵⁴ 126 S.Ct. at 923 (discussing legislative history).

¹⁵⁵ Lethal Drug Abuse Prevention Act of 1998, H.R. 4006, 105th Cong. (1998); Pain Relief Promotion Act of 1999, H.R. 2260, 106th Cong. (1999).

¹⁵⁶ 126 S.Ct. at 925. Since the AG lacked authority to issue the ruling in the first instance, his interpretation of the CSA was not entitled to *Chevron* deference. *Id.* at 916.

¹⁵⁷ 126 S.Ct. at 925.

¹⁵⁸ 126 S.Ct. at 939 (Scalia, J., dissenting).

Soon after the decision was announced, commentators began to speculate that it was only a matter of time before the Congress would pass legislation banning PAS nationwide.¹⁵⁹

Despite such projections, however, it seems unlikely Congress will succeed at banning PAS anytime soon. After all, it has already (twice) failed to push through legislation. And should Congress decide to take up the issue again, there is no reason to suspect that the populist safeguards will not adequately shield state prerogatives. So long as Congress plainly states its intent to tackle the issue (as it did in the prior two attempts), the people will be put on notice. And even assuming they sympathize with congressional aims, they may not be eager to expand federal authority.

2. Congressional record-building

[The Court has demanded even more of Congress when it enacts legislation pursuant to Section five of the Fourteenth Amendment.]

B. Restrictions on Congressional Means

The previous two doctrines require Congress to take certain steps when drafting legislation: to state clearly its intent (if any) to apply statutes to state governments, and to build the factual record necessary to support passage of legislation under Section five of the Fourteenth Amendment. In another line of cases, the Court has limited the means by which Congress may exercise its powers.

1. The anti-commandeering rule

Consider first the anti-commandeering rule set forth in *New York v. United States* and *Printz v. United States*. In *New York*, Congress had, through the Low-Level Radioactive Waste

¹⁵⁹ *The Assisted Suicide Decision*, N.Y. TIMES, Jan. 19, 2006, at A22 (editorial) (“Congressional conservatives are already vowing to push through a law barring assisted suicide. After the sorry display of pandering during the Terri Schiavo tragedy, no one can bet that they won’t succeed this time.”).

Policy Act, ordered state legislatures to provide for the disposal of low level nuclear waste. And in *Printz*, pursuant to the Brady Handgun Violence Prevention Act, Congress had ordered state law enforcement officers to conduct background checks on prospective gun purchasers as required by federal law. The Court held that Congress may not direct a state's legislature to address a particular problem, nor command its officers to administer a federal program, respectively.¹⁶⁰ That is, even when Congress enjoys constitutional authority to regulate a particular subject, such as the disposal of radioactive waste or the purchase of firearms, it still must regulate in a way that does not infringe state autonomy.

From a populist safeguards perspective, the anti-commandeering rule may serve two useful functions. One is that it may help citizens (albeit in a very modest way) to sort out responsibility for potentially controversial regulatory programs.¹⁶¹ Suppose, for example, that requiring background checks for every firearms purchase proves unpopular among some voters; the concern is that, if Congress were able to force state officials to conduct the background checks, voters might blame them – rather than the federal government – for the burden. The anti-commandeering rule thus assures that citizens will not blame the wrong level of government for programs they dislike. Clarifying responsibilities for regulatory programs may boost the populist safeguards, by enabling citizens to form more accurate judgments about the comparative trustworthiness (competence, honesty, responsiveness, etc.) of the different levels of

¹⁶⁰ *New York v. United States*, 505 U.S. 144, 188 (1992) (Low-Level Radioactive Waste Policy Act ordered state legislatures to provide for the disposal of waste); *Printz v. United States*, 521 U.S. 898, 935 (1995) (Brady Handgun Violence Prevention Act commandeered state law enforcement officers to conduct background checks on prospective gun purchasers).

¹⁶¹ *New York v. United States*, 505 U.S. 144, 169 (1991) (noting concern that voters might blame state representatives for regulations that are actually dictated by Congress, thereby permitting “the federal officials who devised the regulatory program [to] remain insulated from the electoral ramifications of their decision”) (O’Connor, J.); *Printz v. United States*, 521 U.S. 898, 930 (1997) (by “forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes”) (Scalia, J.).

government.¹⁶² Recall that comparative trust judgments serve as an important constraint on federal power (assuming citizens trust states more than they trust the federal government). To make distinct assessments of the trustworthiness of state and federal officials, citizens must be able to distinguish the roles of each – to know which level of government to blame for actions they deem incompetent, dishonest, or unwise. In other words, for trust to serve as an effective safeguard, citizens must be able to make informed trust judgments, something they cannot do (reasonably) without knowing, for example, who is ultimately responsible for popular and unpopular government programs. (Though it is questionable, first, whether citizens are really so easily confused, and second, whether the Court’s rulings can do anything about it.)¹⁶³

The anti-commandeering rule may boost the populist safeguards for a second reason as well, even when commandeering does not blur the lines of accountability. Giving Congress the power to commandeer state officials may make the federalization of an issue more appealing to some citizens, by allowing them to wield congressional power—say, in order to impose their values on people living in other states—without having to sacrifice state control of the actual enforcement of the laws. To put it another way, commandeering removes one of the most important constraints on congressional power—concerns over how federal officials will execute federal laws. Citizens may be more willing to support congressional legislation that both gives them the substantive outcome they prefer – say, background checks for all firearms purchases –

¹⁶² Cf. Jenna Bednar (suggesting that credit assignment problems may undermine political safeguards of federalism).

¹⁶³ See, e.g., Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 100-01 (2001) (claiming the Court failed to explain “why the voters could not understand when the state was acting pursuant to a federal mandate”); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2201-04 (1998) (suggesting that the concern for political accountability “may be relevant but does not of itself justify the broad rule adopted by the Court”); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 824-29 (1998) (suggesting that concerns over political accountability provide inadequate justification for the anti-commandeering rule); Neil S. Siegel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1633 (2006) (“[I]t seems likely that citizens who pay attention to public affairs and who care to inquire will be able to discern which level of government is responsible for a government regulation, and citizens who do not care to inquire may be largely beyond judicial or political help on the accountability front.”) (notes omitted).

and vests enforcement authority in their administrator of choice – say, the state or local government. They no longer need to accept a package of federal regulation and enforcement that would otherwise be required.

2. *Conditional spending*

Second, the Court has also placed constraints on Congress's ability to extract concessions from the states in return for the receipt of federal grants. On the one hand, the Court has declined to restrict the purposes for which Congress may spend.¹⁶⁴ In *United States v. Butler*, the Court took the position that “the power of Congress to authorize expenditures of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”¹⁶⁵ One implication is that Congress may offer grant monies to persuade the states to pass regulations that Congress itself may not.¹⁶⁶

On the other hand, the Court has placed some outer limits on the conditions Congress may attach to federal grants. Conditional grants to the states must satisfy several judicially-crafted requirements: the conditions must be stated unambiguously, they must be reasonably calculated to serve the purpose for which the funds are being expended,¹⁶⁷ and the financial incentive offered must not be so great as to compel state acceptance.¹⁶⁸ Applying these guidelines in *South Dakota v. Dole*, the Court upheld the National Minimum Drinking Age Amendment, which denied five-percent of federal highway funds from any state permitting the purchase or possession of alcoholic beverages by anyone less than 21 years of age.¹⁶⁹ The Court noted that the terms of the conditions were explicitly stated, they served the purpose of the grants

¹⁶⁴ Congress may “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Art. I, § 8, cl. 1.

¹⁶⁵ 297 U.S. 1, 66 (1936).

¹⁶⁶ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

¹⁶⁷ 483 U.S. at 207.

¹⁶⁸ *Id.* at 211. In addition, the Court has stated that the conditions must not be used “to induce the States to engage in activities that would themselves be unconstitutional.” *Id.* at 210.

¹⁶⁹ *Id.*

(promoting safe travel on interstate highways), and the funds that were at stake were not so great as to deprive the states of any meaningful choice in the matter.¹⁷⁰

[Such restrictions on the scope of the conditional spending power may be defensible from the populist safeguards approach. (Indeed, other scholars have suggested that the political process may not adequately protect state prerogatives from the use of the conditional spending power.¹⁷¹) For one thing, citizens have a strong incentive to utilize the conditional spending power. It may enable them to shift the cost of certain programs onto taxpayers in other states (who, they might suspect, would find the conditions unappealing), or alternatively, to impose value judgments on other states (if the conditions are accepted). Just as importantly, they can do this without sacrificing state control over the administration of the laws. The grants, after all, simply fund some program; the actual administration of the program remains in the hands of state officials. In short, citizens who agree with the substance of some congressional policy but place more trust in state governments may get the best of both worlds – adoption of their preferred policy nationwide, to be executed by state officials. For both reasons, conditional spending programs pose a particularly severe challenge to the capabilities of the populist safeguards. Hence, some judicial impose restrictions on these programs seem defensible. Limiting the size of the inducement, for example, helps reduce the incentive to use these grants – and the ability of Congress to impose certain values throughout the country.]

¹⁷⁰ Id. at 208-11.

¹⁷¹ Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 123-25 (suggesting that reliance on the political process is less justified in *Dole* than in *Garcia*); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1140-42 (1987) (suggesting that political safeguards might not protect states from conditional federal spending power since states will not be willing to refuse such grants).

C. Restrictions on Congressional Ends

[In several recent decisions, the Court has also placed limits on Congress’s substantive powers. *Lopez v. United States* and *United States v. Morrison* placed some boundaries on Congress’s power to regulate commerce among the states (by suggesting, for example, Congress may only regulate “economic” activities),¹⁷² while *City of Boerne v. Flores* narrowed congressional authority under Section Five of the Fourteenth Amendment (Congress may only “enforce” rights against the state, not redefine them).¹⁷³]

D. The Dormant Commerce Clause

* * *

[CONCLUSION]

¹⁷² *United States v. Morrison*, 529 U.S. 598, 610 (2000) (civil remedy provision of Violence Against Women Act is not regulation of “economic” activity having a substantial effect on interstate commerce); *United States v. Lopez*, 514 U.S. 549, 565 (1995) (Gun Free School Zones Act regulates mere “possession” of firearms; possession is not an economic activity). However, the Court’s most recent Commerce Clause decision, *Gonzales v. Raich*, has cast some doubt on the viability and significance of the limitations set forth in *Lopez* and *Morrison*. *E.g.*, 125 S.Ct. 2195, 2211 (2005) (defining economic activity as the “production, distribution, and consumption of commodities”).

¹⁷³ *City of Boerne v. Flores*, 521 U.S. 507, 527-28 (1997) (concluding that Religious Freedom Restoration Act “alters the meaning of the Free Exercise Clause” and thus “cannot be said to be enforcing the Clause” as Congress is permitted to do under Section five of the Fourteenth Amendment).