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# The Populist Safeguards of Federalism

ROBERT A. MIKOS\*

*Extant legal scholarship often portrays citizens as the catalysts of federalization. Scholars say that citizens pressure Congress to impose their morals on people living in other states, to trump home-state laws with which they disagree, or to shift the costs of regulatory programs onto out-of-state taxpayers, all to the demise of states' rights. Since Congress (usually) gives citizens what they want, scholars insist the courts must step in to protect states from federal encroachments. By contrast, this Article proposes a new theory of the populist safeguards of federalism. It develops two distinct but mutually reinforcing reasons why populist demands on Congress do not portend the demise of states' rights. One reason is that the demand for federalization (assuming it even exists) may be ineffectual. Due to the heterogeneity of citizens' policy preferences and the anti-majoritarian structure of federal lawmaking, proponents of national legislation may be unable to garner the votes needed to pass congressional legislation that trumps state prerogatives. The second more fundamental reason is that citizens may be inclined to limit federal authority rather than to expand it. The theory identifies several reasons, overlooked in the scholarly literature, why citizens may oppose congressional efforts to expand federal authority vis-à-vis the states, even when Congress could enact a policy that most citizens would prefer on the merits. First, citizens may fear that congressional action on one issue (however desirable) may pave the way for unwelcome federal action on related issues in the future. Second, citizens may prefer to have state, rather than federal, officials administer policies, not only because they trust state officials more, but also because they can keep state officials on a shorter leash. Third, citizens may value political processes, and not just the outputs of those processes; they may be willing to sacrifice desired policy outcomes at the federal level out of respect for direct democracy and federalism. The Article closes by discussing some implications of the theory for ongoing debates over the judicial review of federalism.*

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## TABLE OF CONTENTS

I. INTRODUCTION .....	1670
II. CONGRESS'S DEMOCRATIC MASTERS.....	1675
III. THE PEOPLE VS. STATES' RIGHTS.....	1680
IV. CONGRESS'S (RELATIVE) INABILITY TO SATISFY MAJORITY PREFERENCES.....	1684
A. <i>The Shape of National Public Opinion</i> .....	1685
B. <i>The Structure of Congress (and of State Lawmaking)</i> .....	1687
V. POPULAR DISTATES FOR FEDERALIZATION .....	1691
A. <i>Mission Creep</i> .....	1692
B. <i>The Administration of Policies</i> .....	1696
1. <i>The Importance of Policy Administration</i> .....	1697
2. <i>Comparative Trust</i> .....	1699
3. <i>Comparative Control</i> .....	1705
C. <i>Democratic Processes</i> .....	1707
1. <i>The Appeal of Direct Democracy</i> .....	1708
2. <i>The (Surprising) Appeal of Federalism</i> .....	1711
VI. SOME IMPLICATIONS FOR JUDICIAL REVIEW .....	1718
A. <i>Judicial Review and Agency Action</i> .....	1720
B. <i>Judicial Review and Decoupling</i> .....	1723
C. <i>Judicial Review and Individual Rights</i> .....	1727
VII. CONCLUSION .....	1730

## I. INTRODUCTION

For several decades following the New Deal, the Supreme Court declined to set any meaningful legal limits on federal power *vis-à-vis* the states, seemingly content to let the national political process determine the reach of congressional authority.<sup>1</sup> The theory was that the states, by virtue of their influence over Congress (among other things), could protect themselves from unwelcome federal encroachments, thereby making judicial oversight of federal power largely unnecessary.<sup>2</sup> Indeed, by 1985, a slim majority on

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<sup>1</sup> See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 938–39 (2005) (discussing the influence of political safeguards theory on the Court's reluctance to police federal powers).

<sup>2</sup> JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); 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, 551–52 (1954) (suggesting that state governments can fight off federal encroachments due to their control of congressional redistricting, among other things). See also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice*

the Court openly endorsed the so-called political safeguards of federalism, acknowledging that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”<sup>3</sup>

Once William Rehnquist was appointed as Chief Justice, however, the Court dramatically altered course. It restored judicially devised constraints on congressional power as it invalidated (or interpreted narrowly) a wide range of federal statutes in the name of states’ rights.<sup>4</sup> In reprising the role as supreme arbiter of state/federal powers, members of the Court expressed serious misgivings about leaving state power to the mercy of Congress. In *United States v. Lopez*, for example, Justice Kennedy wrote that the “absence of structural mechanisms to require [federal] officials to undertake this principled task [of respecting state prerogatives], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.”<sup>5</sup> Many legal scholars applauded the Court’s renewed efforts to rein in congressional power, critiquing the political safeguards argument on both pragmatic and jurisprudential grounds.<sup>6</sup>

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*Explanation 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).

<sup>3</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985).

<sup>4</sup> *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (holding that the civil remedy provision of the Violence Against Women Act exceeds Congress’s power to regulate interstate commerce); *City of Boerne v. Flores*, 521 U.S. 507, 527–28 (1997) (holding that the Religious Freedom Restoration Act exceeds Congress’s power to enforce substantive guarantees of the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898, 935 (1995) (holding that the Brady Handgun Violence Prevention Act impermissibly commandeers state law enforcement officers to conduct background checks on prospective gun purchasers); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (holding that the Gun-Free School Zones Act exceeds Congress’s commerce power); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the Low-Level Radioactive Waste Policy Amendments Act of 1995 unconstitutionally commandeers state legislatures to provide sites for disposal of waste).

<sup>5</sup> 514 U.S. at 578 (Kennedy, J., concurring).

<sup>6</sup> *See, e.g.*, Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (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 vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 90 (2004); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-*

The doubts about Congress's willingness to respect state authority stem largely from conventional assumptions regarding what ordinary citizens want from government and the demands they make upon Congress in particular. Critics claim that, if given the opportunity, the people would gladly transfer most (if not all) state power to the federal government, thereby undermining the Framers' design.<sup>7</sup> This widely shared view presumes that ordinary citizens do not care about government structure, but instead only care about its outputs, namely, the policies the government (state or federal) adopts.<sup>8</sup> It is this single-minded focus on policy outcomes that supposedly threatens state prerogatives; after all, there are powerful motives for citizens to turn to Congress, rather than their state governments, to provide the policy outcomes they desire, even when the normative case for federal action is weak.<sup>9</sup> In particular, citizens are tempted to wield congressional 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 exploit the economies of scale from passing national laws.<sup>10</sup> Since members of Congress are beholden to their constituents,

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*Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341.

<sup>7</sup> Historically, some scholars argued that the threat to state power came from the federal government itself. 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 1, at 917 (discussing the 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). In order to maximize their chances of being re-elected, politicians push for policies that accord with the demands of their constituents—the people. 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. *Id.* at 972.

<sup>8</sup> See, e.g., *id.* at 943 (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").

<sup>9</sup> The dominant concern today is 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 centralized policies. 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, 816 (1998).

<sup>10</sup> See *infra* Part III.

Congress would readily give citizens what they want—an ever expanding bonanza of federal legislation—eventually causing the federal system to collapse.<sup>11</sup> Indeed, even supporters of the political safeguards approach seem to concede that citizens may demand too much federal legislation; they thus say we must instead rely on political institutions, such as the political party system, to protect state prerogatives.<sup>12</sup>

Contrary to the conventional wisdom, this Article suggests that populist control of Congress does not forebode the demise of states' rights for two distinct but mutually reinforcing reasons. First, on many issues populist demand for federalization (if it exists at all) may be ineffectual because proponents of national legislation will be unable to garner enough votes in Congress to preempt state authority. Due to the fragmentation of national public opinion, Congress will be unable to supply a policy that the national majority would deem preferable to (or at least as good as) the state policies it would displace. Structural features of the national lawmaking process further hinder Congress's ability to give citizens the policy that they want. The states, by contrast, are smaller, more cohesive polities, utilizing lawmaking procedures (such as the ballot initiative) that make it easier for states to provide populist legislation that more closely matches the preferences of their people. The supposed allure of federalization—the broad jurisdictional reach of federal law, for example—is simply lost on those citizens who deem congressional policy inferior to state policy. In other words, even assuming that citizens would, in the abstract, want Congress to usurp state powers (for the reasons discussed above), they will rarely succeed in passing congressional legislation that usurps state power. By virtue of congressional inaction, state power will remain intact.

Second, on many issues, ordinary citizens may be more inclined to *limit* federal authority than to expand it, even when Congress could enact a policy that most citizens would prefer. The Article identifies several reasons, largely overlooked in the scholarly literature, why citizens may oppose efforts to expand federal power *vis-à-vis* states. First, some citizens may fear that congressional action on one issue may lay the groundwork for federalizing related issues—issues on which they would prefer state control. Second, citizens may worry about how laws will be enforced by Executive branch officials in the federal government. 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

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<sup>11</sup> See *infra* Part II (discussing citizen influence over Congress).

<sup>12</sup> See, e.g., Kramer, *supra* note 2, at 278–87 (arguing that because political party machinery is crucial for re-election—and because local officials control the party machinery—members of Congress will respect local authority).

election and recalls), citizens may prefer to have state officials administer the laws (and have state courts interpret them), and hence, may oppose congressional legislation that vests enforcement authority in federal officials. Third, citizens also care about government processes, and not just the outcomes of those processes. Some citizens value the opportunity to participate directly in lawmaking that is only available 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 should be controlled by the states instead.

The main contribution of this Article is in developing the theory of what I call the populist safeguards of federalism and in reviewing the previously neglected political science and legal research that supports that theory. I do not claim that the populist safeguards do a perfect job of protecting states' rights (in fact, even suggesting what might constitute the perfect balance of power would be fraught with controversy). I merely suggest that the political process is not so prone to aggrandize federal power as the Court and many scholars now claim.

The Article also offers some modest insights regarding judicial review and federalism. The Rehnquist Court's federalism jurisprudence has been subjected to widespread criticisms,<sup>13</sup> and even many ardent supporters of the Court's recent effort to cabin congressional power have acknowledged that the Court has not performed its job particularly well.<sup>14</sup> Given the criticisms of judicial review and the diminished need for court protection of states' rights, my theory suggests that judicial review of federalism 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 (such as when administrative agencies expand federal powers *vis-à-vis* the states). Indeed, several sitting Justices have criticized the Court's recent federalism

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<sup>13</sup> Some scholars claim, for example, that the Framers did not intend for the Court to have the 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, on the proper scope of congressional authority. *E.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 47–49 (2005). Although this Article has nothing to add to the historical debate, it does suggest why citizens may be up to this formidable task.

<sup>14</sup> *E.g.*, Baker & Young, *supra* note 6, at 88 (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).

jurisprudence and remain committed (at least on the surface) to relying on the political process to safeguard state 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.”<sup>15</sup> The theory developed herein lends support to calls for relaxing judicial oversight of federal/state power disputes, while at the same time explaining why judicial review of individual rights claims remains necessary—namely, to protect minority rights from majority-friendly state lawmaking processes.

The Article proceeds as follows. Part II discusses the theoretical and empirical justification for focusing on ordinary citizens—the notion that citizens hold Congress’s reins, and Congress will pass legislation only when they demand it. Part III then explains why, according to the conventional wisdom, Congress’s responsiveness to popular demands jeopardizes states’ rights, namely, why citizens (supposedly) are so keen to expand federal power *vis-à-vis* the states. Parts IV and V contain the core contributions of the Article. Part IV explains how fragmented public opinion and the anti-majoritarian structure of federal lawmaking effectively frustrate citizen demands for federalization. Part V then explores the reasons why citizens may actually *oppose* federalization and protect state power from congressional action, even when Congress could enact a policy that the national majority supports on the merits. Part VI then discusses some implications of the theory for judicial review.

## II. CONGRESS’S DEMOCRATIC MASTERS

My theory rests on the assumption that ordinary citizens (the people, colloquially) influence what Congress does.<sup>16</sup> In particular, I assume that

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<sup>15</sup> 529 U.S. 598, 660 (2000) (Breyer, J., dissenting). *See also id.* at 647 (Souter, J., dissenting) (citing the “Founders’ considered judgment that politics, not judicial review, should mediate between state and national interests”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 93 (2000) (Stevens, J., concurring in part and dissenting in part) (“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 Fla. 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.”).

<sup>16</sup> Ordinary citizens are to be distinguished from political elites, including elected



Congress will pass legislation only when the people—or more precisely, when enough people, across enough states and congressional districts—demand it; otherwise, Congress will abstain. While there are competing theories of representation,<sup>17</sup> this Part argues that there is a sound theoretical and empirical basis for suggesting the people hold Congress's reins. In any event, most critiques of the political safeguards seem to be based on the very same premise (after all, popular demands for congressional action threaten states' rights only if Congress responds to such demands), so if my assumption were seriously flawed, the very problem my theory is meant to address (citizens demanding too much federalization) would disappear as well.

Citizens control Congress in several ways, the most important (and most direct) of which is through elections.<sup>18</sup> Members of Congress want to get re-elected; indeed, they often fixate on it and prioritize it above all other goals (particularly since it may be necessary to achieve other goals).<sup>19</sup> But to get

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officials, the rich, the powerful, special interest groups, and so on. In theory at least, all citizens wield influence over Congress; in reality, of course, those who do not vote—or who do not participate in the political process in other ways—wield comparatively less influence. But for ease of exposition, and since there is no *a priori* reason to suspect that citizens who participate have significantly different preferences regarding the balance of state/federal power than those who do not participate, I will simplify the picture somewhat by discussing all citizens, not just those who participate.

<sup>17</sup> See WILLIAM N. ESKRIDGE, JR., ET AL., *LEGISLATION AND STATUTORY INTERPRETATION*, 69–116 (2d ed. 2006), for a discussion of competing theories of representation and legislative behavior.

<sup>18</sup> John Kingdon, in his seminal study of roll call voting in Congress, identifies several mechanisms by which constituents wield influence in the Capitol:

The recruitment process, which brings a congressman with certain attitudes to the House and keeps him there, first of all, determines the major directions which his voting decisions take. Congressmen's apparent preoccupation with graceful ways of explaining potentially unpopular votes, furthermore, often results in votes cast in accordance with constituents' wishes. . . . Potential campaign or electoral consequences and the many uncertainties of primary and general election politics, finally, prompt congressmen to keep their constituents in mind as they vote. It is thus likely that constituency imposes some meaningful constraints on congressmen's voting behavior.

JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* 67–68 (3d ed. 1989). Though elections may not convey precise information about what constituents want on any one issue, elected representatives can discern constituent preferences on issues from a variety of other sources, including constituent mailings, public opinion polls, meetings with citizens, consultations with fellow representatives, and so on. *Id.* at 55.

<sup>19</sup> See RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1978); MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

re-elected, representatives need the support of their constituents (and more specifically, the voters). Hence, they will usually do what constituents ask them to do.<sup>20</sup> If they do not—if they vote against constituent preferences—they must find some satisfactory way to explain themselves (which may be impossible, or take more effort than it is worth), or else risk losing the next election.<sup>21</sup>

Given the electoral pressure on members of Congress, it should come as no surprise that when Congress acts, the votes of members tend to reflect what the people (or more precisely, their own constituents) want. A large body of empirical research has established a close link between public opinion and voting behavior among members of Congress.<sup>22</sup> Some studies have found that constituents are an even more powerful influence on congressional behavior than the political parties, the President, special interest groups, and legislative staffs.<sup>23</sup> This may help to explain why members of Congress go to such great lengths to explain their votes to constituents—and frame their campaign messages in ways they think will

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<sup>20</sup> ROBERT S. ERIKSON & KENT L. TEDIN, *AMERICAN PUBLIC OPINION* 288 (6th ed. 2001) (“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.”); see also KINGDON, *supra* note 18, at 22–23; Levinson, *supra* note 1, 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”).

<sup>21</sup> See KINGDON, *supra* note 18, at 47–48 (noting how members of Congress are “constantly called upon to explain to constituents why they voted as they did”).

<sup>22</sup> JOHN G. GEER, *FROM TEA LEAVES TO OPINION POLLS: A THEORY OF DEMOCRATIC LEADERSHIP* 89 (1996); 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”); Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 *AM. POL. SCI. REV.* 45, 56 (1963) (finding that roll call voting in the House is “strongly influenced” by both constituent preferences and the personal beliefs of the Representative); 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). See also 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”).

<sup>23</sup> *E.g.*, KINGDON, *supra* note 18, at 22–23. In Kingdon’s study, only other members of Congress had as much influence as constituents. *Id.* at 22. But one of the reasons members defer so much to colleagues is because colleagues know so much about what the voters want (*e.g.*, because they hail from a like-minded district). See *id.* at 90.

resonate with ordinary voters,<sup>24</sup> for they would not need to explain themselves if they believed they could ignore public opinion altogether.

In spite of this body of research, some scholars discount the general public's sway in Congress because, they say, the people do not pay sufficiently close attention to national politics.<sup>25</sup> But citizens may wield influence even when they do not pay close attention to what Congress is doing.<sup>26</sup> Members of Congress realize that even if a controversial vote escapes notice today it could still be exploited by an opponent in the next primary or general election.<sup>27</sup> That is why they feel obliged to do what their constituents want (or would want, if they were watching more closely). Hence, citizens do not necessarily need to monitor Congress constantly to keep that institution in check. In fact, when voters show a lack of interest in Congress, it may be a sign that Congress is actually doing what they want; after all, they have little incentive to observe Congress closely if it does its job well. John Kingdon explains:

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<sup>24</sup> See LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* 8 (2000) (demonstrating that political elites attempt to frame arguments in ways that resonate with the public).

<sup>25</sup> It is worth noting that the public is not as ill-informed as skeptics sometimes claim, and may not need as much information to make good decisions as critics often assume. On the most salient issues of the day, citizens are, in fact, well-informed. (As elections draw near, they also become better informed about more issues.) What is more, they do not necessarily need an encyclopedic knowledge of government affairs in order to formulate rational opinions about Congress, its members, and their outputs. When voters do lack information, they can use a variety of shortcuts (such as organizational endorsements, candidate traits, discussions with friends and co-workers, and other heuristics) to make reasoned choices about candidates and issues. See V.O. KEY, JR., *THE RESPONSIBLE ELECTORATE* 7 (1966) (concluding that "voters are not fools"); ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA* 2-6 (1998) (demonstrating that voters are able to make reasoned choices, even without full information); SAMUEL POPKIN, *THE REASONING VOTER* 20 ("It is certainly true that most citizens do not know many of the basic facts about their government, but assessing voters by civics exams misses the many things that voters *do* know, and the many ways in which they can do without the facts that the civics tradition assumes they should know.").

<sup>26</sup> KINGDON, *supra* note 18, at 67 ("While [constituency] has a greater impact on high-salience votes, there is still substantial evidence of distinct influence even on low-salience votes in which constituents' interest is probably virtually nil."); Miller & Stokes, *supra* note 22, at 56 (finding constituent preferences influence roll call voting even when voters are not well informed).

<sup>27</sup> KINGDON, *supra* note 18, at 60 ("If nobody in the district notices a vote at the time it occurs, an opponent in the next election still might pick up an unpopular vote and use it against the congressman."); Miller & Stokes, *supra* note 22, at 54-55 (reasoning that since "their records are quite visible to their constituents," members often play it safe, trying not to give opponents any "material they can use" in the next election).

If constituents were better informed, it would probably be a mark of arousal over something that the congressman did which was out of keeping with their strongly held beliefs. . . . Their apparent lack of interest in him, in short, far from being testimony to their inability to control him, may in fact be testimony to his ability to discern the matters on which they feel intensely and vote according to their preferences.<sup>28</sup>

In other words, even when citizens seem to ignore congressional affairs, their opinions and preferences may yet influence votes on the floor of Congress.

What is more, public opinion can impact congressional votes on individual issues, even though no single issue may decide an election. Members know that each vote against constituent preferences erodes electoral support, and exposes them to attacks both from within and from outside their party.<sup>29</sup> Even if the impact of any one vote on their re-election prospects may be small, the stakes involved are extremely high.<sup>30</sup> The loss of an election may be devastating, particularly for the many members of Congress who expect to serve long careers in the Capitol. In addition, uncertainty looms over elections; factors outside their control (the redrawing of congressional districts by state legislatures, national scandals, and so on) may dim incumbents' otherwise bright re-election prospects. Hence, to minimize the risks, members tend to vote in line with constituent preferences on one issue after another. In fact, even in so-called "safe" districts/states, in which incumbents expect little opposition, members of Congress commonly believe they can vote against constituent preferences on only a small number of issues without seriously jeopardizing their careers.<sup>31</sup>

To be sure, I do not claim that every action Congress takes necessarily reflects what most citizens would want. Sometimes members of Congress may do what they deem is best for the nation, even if their constituents disagree. Sometimes they may put the concerns of special interests ahead of those of most constituents. Sometimes they may pursue their own selfish interests. Nonetheless, by and large, Congress acts as though the public holds the reins. As Professor Daryl Levinson has opined, "government behavior is driven more by the interests and preferences of constituents than by those of government officials," leading him to conclude that we ought to "worry less

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<sup>28</sup> KINGDON, *supra* note 18, at 41.

<sup>29</sup> See *id.*; see also Miller & Stokes, *supra* note 22, at 55.

<sup>30</sup> See KINGDON, *supra* note 18, at 62 (reasoning that politicians play it safe when voting, "even though . . . the loss of a significant number of votes in the next election really is not at issue," because the cost of losing an election is so high).

<sup>31</sup> *Id.* (observing that incumbents may be secure precisely "because they were careful about catering to their constituencies"); Miller & Stokes, *supra* note 22, at 55.

about Leviathan and more about Leviathan's democratic masters."<sup>32</sup> In short, to ascertain what powers Congress will try to exercise, free of judicial constraints, it is essential to know what citizens demand of it. It is to that task that the next three Parts turn.

### III. THE PEOPLE VS. STATES' RIGHTS

Once we recognize that state power is at the mercy of ordinary citizens who hold Congress's reins, we must next ascertain what sort of laws citizens will demand from Congress, particularly on issues affecting states' rights. Parts III–V complete this task. In this Part, I review the conventional notion that citizens, left to their own devices, would eagerly expand congressional power to include many issues the states instead ought to control, thereby endangering the long-term viability of our federal system and the values attributed to it.

The problem identified in the literature is not that citizens demand congressional action per se, for there are many issues on which federal action is (at least arguably) normatively desirable. Citizens may ask Congress to provide certain public goods the states alone cannot provide (e.g., counter-terrorism operations), to address problems that straddle state borders (e.g., air pollution), or to prevent the states from engaging in a race to the bottom (e.g., in the provision of welfare benefits);<sup>33</sup> public demands motivated by such concerns generally do not cause alarm (except among some originalists). While originalists might object to *any* expansion of congressional authority beyond what the Framers envisioned,<sup>34</sup> most scholars—as did even the Rehnquist Court—have acknowledged that Congress must play a much more expansive role today than the Framers may ever have imagined or intended.<sup>35</sup>

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<sup>32</sup> Levinson, *supra* note 1, at 972.

<sup>33</sup> See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 405–09 (1987) (stating economic rationales for federal control: to provide public goods, to address externalities, and to prevent the race to the bottom). For a discussion of the economic basis for federal action, see ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 105–108 (2000).

<sup>34</sup> E.g., *United States v. Lopez*, 514 U.S. 549, 586–89 (1995) (Thomas, J., concurring) (insisting that the Commerce Clause empowers Congress to regulate only the buying and selling of goods and services and not all activities that substantially affect interstate commerce).

<sup>35</sup> In *United States v. Lopez*, for example, the Rehnquist Court declined to overrule any of the Court's earlier decisions that had sustained expansive congressional authority under the Commerce Clause. 514 U.S. 549, 549–68 (1995). See *Perez v. United States*, 402 U.S. 146, 155–57 (1971) (affirming Congress's power to regulate loan-sharking); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62, (1964) (upholding

Instead, the real problem is that citizens may demand congressional action on issues (including some moral issues, for example) beyond the core that most commentators would concede are national in scope.<sup>36</sup> The conventional wisdom suggests several reasons why citizens are tempted to seek congressional legislation on such issues, even though the normative justification for federal control is weak or hotly contested. Given the temptation to federalize, citizens face a collective action problem. Society as a whole may be better off leaving certain issues to the states, but if enough citizens stand to gain by federalizing these issues, nothing will stop them from doing so (given their influence over Congress) and, in the process, jeopardizing the values attributed to our federal system.<sup>37</sup>

One reason citizens may be tempted to aggrandize congressional powers *vis-à-vis* the states is that through Congress they can impose their morals on people living in other states.<sup>38</sup> Consider recent efforts to pass a national ban on same-sex marriages. When a Massachusetts court recognized same-sex marriages,<sup>39</sup> it sparked a national outcry. 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

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1964 Civil Rights Act ban on discrimination in places of public accommodation); *Wickard v. Filburn*, 317 U.S. 111, 133 (1942) (upholding federal regulation of home-grown wheat). *See also* *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (upholding federal ban on medical marijuana).

<sup>36</sup> For a discussion of the issues that should be handled locally, see, for example, Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 *FORDHAM L. REV.* 769, 770 (2006) (suggesting that issues which raise “passionate and irreconcilable religious or ideological differences” among the populace should be addressed at the state or local level).

<sup>37</sup> Preserving the states from federal encroachments is said to serve at least three important purposes. First, 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. *THE FEDERALIST* NO. 51 (James Madison), *reprinted in* *THE FEDERALIST* 347, 351 (Jacob E. Cooke ed., 1961) (“The different governments will control each other.”). Second, decentralization of policymaking also improves the fit between a state’s policies and the preferences of that state’s people, since each state can adopt policies that match its citizens’ preferences better than uniform national legislation ever could. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. CHI. L. REV.* 1484, 1494 (1987). Third, states can serve as laboratories for new policies to be tested and evaluated. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>38</sup> Baker, *supra* note 6, at 962 (citing a national ban on polygamy as an example); Baker & Young, *supra* note 6, at 121–24 (citing Fugitive Slave Act); Macey, *supra* note 2, at 272 (suggesting citizens may prefer federal law because it is more difficult for others to avoid).

<sup>39</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 973 (Mass. 2003).

least none which the states themselves could not address)<sup>40</sup> and even though we may all agree (in the abstract) that we would be better off, collectively, if marriage were defined exclusively by the states. When citizens seek to impose their morals through legislation, it is easy to see why Congress may be their instrument of choice, given the broader jurisdictional reach of its laws.<sup>41</sup>

Similarly, citizens may back federalization to preempt the laws of their own state. When citizens are unhappy with a law of their own state, but cannot change it (say, because they are in the minority on the issue within the state), they may petition Congress to usurp control of the domain—to get a second bite at the apple.<sup>42</sup> Suppose, for illustrative 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, even if they do not necessarily care to impose these policies on people living elsewhere. Once again, although society might be better off entrusting these issues to the states, citizens will be tempted to wield federal power over them when they are dissatisfied with state policies.

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

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<sup>40</sup> 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 (2000). States may also refuse to recognize same-sex marriages on grounds of public policy (though this power too, has been questioned). 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).

<sup>41</sup> This incentive probably exists only with respect to legislation regulating morality. 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 abolish high property taxes there.

<sup>42</sup> Cf. Friedman, *supra* note 33, at 373–74 (suggesting that it has “bec[o]me commonplace for those who ha[ve] not prevailed in the state legislatures to leapfrog over their head[s] to Congress”).

multiple state legislatures.<sup>43</sup> For instance, imagine some new issue arises that requires the attention of either Congress or 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).<sup>44</sup>

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).<sup>45</sup> 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 federalization—but they may not control enough votes to block national legislation on the issue.<sup>46</sup>

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 standard normative case for federal intervention (say, to address externalities) is tenuous. This suggests citizens cannot be trusted to safeguard state prerogatives, for the temptation to wield congressional power is simply too great. Citizens face a collective action problem. Even if they could all agree that Congress should control

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<sup>43</sup> Cf. Macey, *supra* note 2, at 271.

<sup>44</sup> This example probably overstates Congress's lobbying cost advantages. Since it will rarely be necessary to change the laws of all fifty states, and since it probably costs less to lobby a single state than it does to lobby the national government, it may be cheaper to amend the laws of outlier states than it is to enact new federal legislation. Cf. *id.* at 282.

<sup>45</sup> 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, *supra* note 6, 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). The populist safeguards may not adequately protect the states from the conditional spending power. See *infra* Part VI.B.

<sup>46</sup> *But cf.* DEAN LACY, A CURIOUS PARADOX OF THE RED STATES AND BLUE STATES: FEDERAL SPENDING AND ELECTORAL VOTES IN THE 2000 ELECTION 2 (Mar. 2002), <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.”).



only some issues, they have strong incentives to cheat on that bargain—to wield federal power whenever Congress promises to give them the outcome they prefer. Since citizens hold Congress's reins, judicial review is necessary to prevent Congress from imposing uniform national solutions on many issues currently—and more properly—handled by the states. Or so the conventional wisdom says.

#### IV. CONGRESS'S (RELATIVE) INABILITY TO SATISFY MAJORITY PREFERENCES

Parts IV and V contain the core contributions of this Article. In this Part, I show that even assuming that citizens would, in the abstract, want Congress to usurp state powers (for the reasons just discussed), their demands will rarely be met because Congress cannot satisfy majority policy preferences as closely as can the states. To be sure, members of Congress may campaign for, vote for, and even sponsor legislation sought by constituents without regard to state prerogatives. Nevertheless, on many issues, these proposals will fail to attract widespread support, and Congress will be unable to pass legislation.<sup>47</sup>

The explanation stems from the shape of national public opinion and the relatively cumbersome design of the federal lawmaking process. 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 congressional proposal that stands a chance of passing*—inferior to existing state policy. If citizens only want Congress to pass laws that embody their own (idiosyncratic) policy preferences, congressional proposals will often fail to garner majority support, in spite of the benefits that federalization supposedly offers.<sup>48</sup> Second, certain features of the national lawmaking process, such as bicameralism 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 procedural hurdles, push satisfactory

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<sup>47</sup> On this matter, it is telling that, of the 8,621 bills introduced in the 108th Congress, only 498 (or roughly 6%) were actually enacted into law. Paul Jenks, *CongressLine by GalleryWatch.com: A Bill in Congress*, GALLERYWATCH.COM, Feb. 7, 2006, <http://www.llrx.com/congress/billincongress.htm>. See also Clark, *supra* note 2, at 1325 (noting that “thousands of bills are introduced in Congress [every year], but only a small number pass both Houses and are signed into law by the President”).

<sup>48</sup> See Macey, *supra* note 2, at 281–82 (arguing that when interest groups in different states favor different policies, they may prefer to regulate matters at the local level, rather than through Congress).

legislation through Congress.<sup>49</sup> In short, even when citizens otherwise favor federalization, they may not agree upon the precise content of legislation, making it difficult for proponents to run the gauntlet of the federal lawmaking process. By virtue of congressional inaction, state prerogatives will be preserved. (In the next Part, by contrast, I suggest several reasons why citizens might not even want Congress to act, even when it could, in fact, give them the policy outcome most would prefer.)

### A. *The Shape of National Public Opinion*

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.<sup>50</sup>

Opinion within individual states, however, tends to be much more cohesive;<sup>51</sup> in other words, a majority of citizens within a state may favor one policy above all others, even if citizens across the country do not. What is more, the specific policy favored by the majority will likely differ across states.<sup>52</sup> States are, after all, unique civil societies.<sup>53</sup> 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,

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<sup>49</sup> See Clark, *supra* note 2, at 1329 (suggesting that by making it very difficult to enact federal laws, the Constitution “leave[s] the states free to govern”).

<sup>50</sup> National Election Pool Poll, Nov. 2, 2004, Public Opinion Online, The Roper Center at the University of Connecticut, Public Opinion Online, accession no. 1615384, available in LEXISNEXIS ACADEMIC [hereinafter Roper Center Database]. See also CNN/USA Today Poll, Mar. 18–20, 2005, Roper Center Database, *supra*, accession no. 1621899 (20% support same-sex marriages; 27% support civil unions, but not marriages; 45% oppose both marriages and civil unions; 8% expressed no opinion).

<sup>51</sup> Cf. DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 18–22 (3d ed. 1984) (finding most states enjoy strong in-state unity, particularly in the face of external pressures).

<sup>52</sup> ERIKSON & TEDIN, *supra* note 20, at 264–67 (noting significant policy differences across states on many issues). See also Macey, *supra* note 2, at 281 (opining that “the political-support-maximizing solution at the national level may differ from many, perhaps most, of the local solutions”).

<sup>53</sup> ELAZAR, *supra* note 51, at 112 (suggesting that American states harbor distinct political subcultures).

while citizens of a third state might prefer not to regulate smoking at all, and so on.<sup>54</sup>

It follows that legislation crafted by state governments often will satisfy more citizens than will uniform national legislation.<sup>55</sup> 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.<sup>56</sup>

Still, commentators often fail to appreciate how this benefit of federalism also serves to protect states' rights from federal encroachment. If states can come closer to satisfying the policy preferences of their residents, then the proponents of national legislation should be unable to muster enough votes in the Congress to preempt state authority.<sup>57</sup> 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 most 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 (as just discussed, a very difficult condition for Congress to satisfy).<sup>58</sup> Simply put, citizens do not need to accept compromises from Congress. A preference of the content of state legislation thus gives citizens a powerful incentive to oppose the diminution of state authority.

To illustrate, suppose citizens of the nation take three distinct positions regarding how, if at all, government should give parents a say when a child

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<sup>54</sup> See Ctr. for Disease Control, *State Smoking Restrictions for Private-Sector Worksites, Restaurants, and Bars—United States, 1998 and 2004*, 54 (26) MORBIDITY & MORTALITY WKLY. REP. 649, 649–53 (July 8, 2005), available at <http://www.cdc.gov/mmwr/pdf/wk/mm5426.pdf> (showing that none of the four approaches to regulating smoking in restaurants has been adopted by more than twenty-one states).

<sup>55</sup> 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, 416 (1956).

<sup>56</sup> E.g., Friedman, *supra* note 33, at 386–87 (noting the efficiency argument).

<sup>57</sup> Cf. Macey, *supra* note 2, at 282 (suggesting interest groups will pressure Congress to respect local authority when they prefer the content of a local rule to the content of the rule that Congress would otherwise enact).

<sup>58</sup> As Herbert 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 proposes to put forth. This explanation does not make the sentiment the less centrifugal in its effects.” Wechsler, *supra* note 2, at 552.

under age 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 favoring each approach might fare better at the state level. The citizens wanting parental consent may constitute a majority in some states; the citizens favoring free access may constitute the majority in another block of states; and so on. After all, there may be a majority position on the issue at the state level even if there is none at the national level.<sup>59</sup> 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.

### B. *The Structure of Congress (and of State Lawmaking)*

It is true, of course, that national opinion is not always so fragmented. On the surface, at least, there is strong national support for the death penalty,<sup>60</sup> voluntary prayer in public schools,<sup>61</sup> and standardized testing.<sup>62</sup> Nothing

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<sup>59</sup> 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-two states require parental consent; eleven require parental notification; two require both consent and notification; and fifteen 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. See Guttmacher Institute, *State Policies in Brief: An Overview of Abortion Laws* (Aug. 2007), [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf).

<sup>60</sup> Pew Research Center Poll, Dec. 7–11, 2005, Roper Center Database, *supra* note 50, accession no. 1638949 (62% of respondents favor the death penalty for persons convicted of murder; 30% oppose it, and 8% were unsure).

<sup>61</sup> *E.g.*, CNN/USA Today Poll, Aug. 8–11, 2005, Roper Center Database, *supra* note 50, accession no. 1632339 (76% of respondents favor a constitutional amendment to allow voluntary prayer in public schools).

<sup>62</sup> *E.g.*, CBS/New York Times Poll, Jan. 12–15, 2004, Roper Center Database, *supra* note 50, accession no. 0446891 (71% of respondents support annual mandatory testing of students in public schools; only 25% opposed it).

discussed thus far would block the majority from imposing its will on the entire nation on these issues.<sup>63</sup>

Nonetheless, the design of the national lawmaking process may foil attempts to pass congressional legislation even when a national majority backs one policy approach. It protects state prerogatives not by reducing the demand for federal legislation, but by further frustrating congressional efforts to satisfy that demand,<sup>64</sup> namely, by imposing a de facto supermajority requirement on any new federal legislation.<sup>65</sup>

Consider the allocation of seats in the House and Senate. Just because proponents of congressional legislation have the backing of the popular majority 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 outnumbered in the House, may yet control a majority of seats in the Senate, which are not allocated based on population; or, at the very least, they may control enough Senate seats (forty-one) to sustain a filibuster of the measure.<sup>66</sup> Either way, by default of congressional inaction, the issue will remain in the hands of state governments. The system of separation of powers—and perhaps most importantly, the presidential veto—further reinforces the ability of minority interest groups to block popular national legislation, thereby helping to preserve states' rights.<sup>67</sup>

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<sup>63</sup> E.g., Kramer, *supra* note 2, at 222 (“Preferences in Congress are aggregated on a nationwide basis . . . [and] if interests in an area represented by a majority of these legislators concur, interests in the rest of the country will be subordinated.”).

<sup>64</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 34–40 (2006) (discussing various features of the federal government, including bicameralism and the presidential veto, that hinder passage of federal laws); Clark, *supra* note 2, at 1344–45 (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); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEXAS L. REV. 1549, 1609 (2000) (“[T]he ultimate political safeguard may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia.”).

<sup>65</sup> See Clark, *supra* note 2, at 1339 (concluding that “[m]ultiple veto gates establish, in effect, a supermajority requirement” for new federal laws).

<sup>66</sup> Currently, it takes sixty votes in the Senate to end a filibuster. See SENATE COMM. ON RULES & ADMIN., *STANDING RULES OF THE SENATE*, S. DOC. NO. 102–25, at 15–16 (1992), available at <http://rules.senate.gov/senaterules/rule22.php> (last visited Nov. 27, 2007) (Rule XXII requires a three-fifths vote for cloture).

<sup>67</sup> Clark, *supra* note 2, at 1324. Wechsler posits a number of other features of the national political system that reinforce the ability of minority interest groups to block

The argument, of course, is still incomplete. Just because the states are “free to govern”<sup>68</sup> does not necessarily mean the states *will actually govern*. Congressional inaction is a necessary but not sufficient condition for state supremacy in a field. We must also consider whether the states are any less encumbered, and hence, whether they can more easily meet the people’s demands for legislative action.

In many respects, it is easier to pass populist legislation at the state level. 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 save Nebraska employ bicameral legislatures and recognize gubernatorial vetoes), but the structural barriers are less daunting at the state level.<sup>69</sup> For one thing, as a matter of federal constitutional law, states must apportion seats in both houses of the state legislature on a population basis.<sup>70</sup> In other words, states may not give minority interests a comparatively greater voice in a Senate-like institution. What is more, many state constitutions adopt lawmaking procedures that are comparatively easy for simple majorities to satisfy. 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).<sup>71</sup> More importantly, twenty-four states empower voters to enact legislation or constitutional amendments directly, bypassing the state legislature (and many anti-majoritarian procedural safeguards) *altogether*.<sup>72</sup> (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

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unfavorable national legislation, including state control over the drawing of congressional districts and the Electoral College. *See generally* Wechsler, *supra* note 2, at 546–51.

<sup>68</sup> Clark, *supra* note 2, at 1329.

<sup>69</sup> 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 L. & POL’Y REV. 149, 162–71 (1996).

<sup>70</sup> *Reynolds v. Sims*, 377 U.S. 533, 576 (1964) (“[T]he Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis.”). The Court rejected the analogy to the structure of the federal Congress, opining that no “inequitable state legislative apportionment scheme” could be justified by the federal analogy, i.e., the notion that seats in the federal Senate (and to a lesser extent, the House) are not apportioned on a population basis. *Id.* at 575.

<sup>71</sup> COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 104 tbl.3.16 (2006).

<sup>72</sup> INITIATIVE & REFERENDUM INST., I & R FACTSHEET 2 tbl.1.1, <http://www.iandrinstitute.org/Quick%20Fact-Handouts.htm> (follow “Number One: What is the Initiative and Referendum Process?” hyperlink) (collecting data on direct democracy practices used in all fifty states) (last visited Nov. 27, 2007).

referendum process, thereby allowing voters to reject legislation or constitutional amendments passed by the legislature.<sup>73</sup>)

Such majoritarian-friendly lawmaking processes clearly enhance the states' advantage over Congress when it comes to satisfying local policy preferences. Passing state legislation requires less overall support, and hence, fewer compromises. To sum up, at the state level, citizens are not only more likely to find majority support for their position on any issue, they are also more likely to be able to translate majority support into actual legislation.

In addition, direct lawmaking procedures (such as ballot initiatives) protect states by enabling state politicians to pass controversial issues on to state voters, rather than to federal regulators. State and federal politicians alike fear taking stances 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 this gives state politicians a powerful incentive to abet federalization—they would rather let federal politicians suffer the electoral consequences of taking stands on controversial issues like abortion, PAS, and so on—thereby undermining the political safeguards.<sup>74</sup> (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.<sup>75</sup>) However, state politicians can duck controversial issues without necessarily federalizing them—namely, by passing the buck to the voters via the initiative and referenda processes (at least in states that utilize such processes). In other words, they do not need to cede control of such issues 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 also 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 can override a veto with less than a two-thirds majority (or vote cloture with less than sixty percent). Cynical though it seems, securing more legislative votes requires more money and resources. What is more, it

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<sup>73</sup> *Id.*

<sup>74</sup> 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).

<sup>75</sup> See Macey, *supra* note 2, at 275 (suggesting that "Congress often can shift the blame for controversial enactments . . . by deferring to state legislators").

may be cheaper to pass legislation via ballot measure than via legislature (be it state or federal), regardless of governmental structure. Hence, citizens in states utilizing direct democracy may prefer to spend their lobbying dollars at home rather than in Washington, where they get less bang for the buck.

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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 on many issues. The fragmentation of national public opinion and the structural hurdles that must be overcome to enact federal legislation suggest that Congress oftentimes will not be able to give citizens what they want—laws embodying their own idiosyncratic policy preferences. Given a preference for the content of state legislation, citizens may not support federalization regardless of the benefits (e.g., the opportunity to shift costs) 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.<sup>76</sup>

## V. POPULIST DISTASTE FOR FEDERALIZATION

In the last Part, I argued that even if citizens are generally tempted to expand federal power, as the conventional wisdom suggests, this does not necessarily forebode the demise of the states. In order for Congress to

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<sup>76</sup> In this Part, I have assumed that congressional proposals will preempt all state legislation; but if Congress only establishes a floor (or ceiling), and does not preempt state laws the majority deems preferable on the merits, citizens in the majority may yet support the congressional legislation. However, it stands to reason that the temptation to federalize will be less strong if Congress can only establish a floor (or ceiling). It is easy to see why a citizen may 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 many states (including her own, perhaps) have adopted her preferred policy. It simply may not be worthwhile to spend the time and resources necessary to lobby Congress to achieve such a result.

In addition, on some issues, it may not be possible for Congress to establish a floor (or ceiling) that is acceptable to the majority. There may be so many policy options on the table that Congress cannot identify the median position. Or the positions on the issue may not align neatly along the same spectrum. Consider the issue of same-sex marriage. Someone who favors legislation recognizing same-sex marriage, for example, may deem federal legislation that only recognizes civil unions (i.e., sets a floor, but allows states to recognize marriages as well) objectionable, since it could imply second-class status for same-sex couples (even if it conveys some of the same benefits as marriage). This person might prefer that Congress do nothing short of recognizing same-sex marriages.



legislate, it must be able to satisfy the policy preferences of most citizens across most states and congressional districts, and even that may not be enough, given the anti-majoritarian structure of national lawmaking. On many issues, state prerogatives will remain intact because of Congress's inability to satisfy this (onerous) condition.

In this Part, I pose an even more fundamental challenge to the conventional account of citizens as the catalysts of federalization. I identify three reasons, largely overlooked in the literature, why citizens will oppose congressional action, even when Congress *can* give them the policy outcome most prefer. First, citizens may fear that desirable congressional action on one issue may spawn undesirable congressional action on other, related issues. Second, citizens may dislike the way the Executive branch administers federal law, and may thus prefer state-level administration. Third, citizens value democratic processes, such as voter initiatives and even federalism, and not just the outputs of those processes; they may object to congressional actions that obstruct direct democracy, or that regulate issues they believe ought to be handled by the states instead. Each of these arguments chips away at the support for federalization, making it even less likely that proponents of congressional legislation can overcome the daunting procedural obstacles blocking their path.

### A. *Mission Creep*

Up to now, I have assumed (pursuant to the conventional wisdom) that citizens decide whether to support or oppose congressional legislation on one issue without considering how it may impact other issues. Thus, for example, a proposal to ban physician-assisted suicide (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 on other issues as well. 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, explored more fully in the next section, is that the bureaucrats who are tasked with administering the law may extend their jurisdiction without any further action by the legislature.) A seemingly modest regulation may thus 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 towards any government proposal often is conditioned by beliefs about what the government may (or may not) try to do *next* on related issues.<sup>77</sup> Some citizens, for example, may support government efforts to ban PAS, but *only if* they believe that government will not also attempt to restrict 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 (what I call “mission creep”) poses another obstacle for congressional efforts to federalize state policy domains. A large majority may favor federal action on some issue (and for all the wrong reasons), but some members of the majority may worry that nationalizing this 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 (they too may attempt to expand their authority), but congressional mission creep is apt to trigger much more alarm among citizens. The primary reason is that if citizens must choose only one government—either state or federal—to handle *two* (or more) related issues, they are even more likely to choose 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; that difficulty is compounded when Congress must address two issues simultaneously.

Consider national public opinion on two closely related issues: PAS and the termination of life-sustaining medical treatment. The American public is evenly divided on the issue of PAS (one poll shows that 46% favor PAS, while 45% oppose it), but it is strongly in favor of permitting patients to decline life-sustaining medical treatment (84% approve).<sup>78</sup> It is clear from the data that many of those who want to ban PAS nonetheless oppose any ban on the termination of medical treatment. Citizens concerned about federal mission creep may thus oppose congressional legislation on a narrow

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<sup>77</sup> 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”).

<sup>78</sup> Pew Research Center Poll, Nov. 9–25, 2005, Roper Center Database, *supra* note 50, accession no. 1639808.

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.<sup>79</sup>

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.

*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
Aggregate	53	53

As the table shows, large majorities in states *A* and *B* favor a ban. In the aggregate, a majority (roughly 53%) of citizens across the three states support the ban, suggesting one could be passed in the national legislature. Suppose, however, citizens believe 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 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 medical treatment. Once

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<sup>79</sup> Recall the public reaction to Congress's intervention in the Terry Schiavo case. 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 an issue the state should handle. See Jay Bookman, *Schiavo Case Shows Politics' Perilous Side*, ATLANTA JOURNAL-CONSTITUTION., Aug. 17, 2006, at 15A.

again, majorities in two states support a ban on the merits, and in the aggregate, a majority (again, 53%) 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 also 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. Neither issue (PAS or termination of medical treatment) will be addressed at the national level.

Indeed, political elites often seek to rally public opinion against congressional proposals by evoking fear of federal mission creep. 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 twice attempted to pass legislation that would trump Oregon's Death with Dignity Act—the law legalizing PAS in that state. Opponents of the federal 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] would allow the federal government to intrude into the doctor-patient relationship at one of the most difficult and personal times of an individual's life. Despite the language that was included 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 is going to result in less-aggressive pain relief for countless patients.<sup>80</sup>

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<sup>80</sup> *Proposed Amendment to the Pain Relief Promotion Act: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 22 (April 25, 2000) (statement of Sen. Wyden, Member, S. Comm. on the Judiciary). See also Jeff Kosseff, *Wyden Vows Fight on Bid to Ban Assisted Suicide*, THE OREGONIAN, Mar. 14, 2005, at A1 (quoting Sen. Wyden) (“[S]uch 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

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?”<sup>81</sup>

Similarly, opponents of the failed constitutional amendment to ban same-sex marriage have stoked fear 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.”<sup>82</sup> 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 popular support for congressional legislation.<sup>83</sup>

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 when they are exposed to campaigns 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.

### *B. The Administration of Policies*

Citizens may also oppose federalization, even when Congress can legislate satisfactorily, because they may prefer to have their state

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treat pain.”).

<sup>81</sup> Mark O’Keefe & Dave Hogan, *House Votes to Block Suicide Law*, OREGONIAN, Oct. 28, 1999, at A1.

<sup>82</sup> Ron Paul, *Texas Straight Talk—Gay Marriage Quicksand* (Mar. 1, 2004), available at <http://www.house.gov/paul/tst/tst2004/tst030104.htm>.

<sup>83</sup> The suggestion that elites choose arguments because they resonate with ordinary citizens is discussed in more detail in Part V.C.2.

government, rather than the federal government, administer policy. Legislation is often short on details, leaving many important and contentious policy decisions to be made by the executive branch of government.<sup>84</sup> This gives citizens a strong incentive to care about how government officials (state and federal) would interpret and enforce legislation. And when it comes to administering laws, many citizens deem state officials to be superior enforcement agents. For one thing, citizens, on average, believe state officials are more competent, honest, and responsive administrators than their federal counterparts.<sup>85</sup> In addition, citizens have comparatively more control over executive (and judicial) 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.

### 1. *The Importance of Policy Administration*

Although extant scholarship focuses primarily on the outputs of legislatures, citizens may care as much (if not more) about how laws are interpreted and executed. One reason is that executive officials, particularly at the *federal* level, may exert control over issues that, arguably, the drafters of the legislation did not intend to cover.<sup>86</sup> The non-delegation doctrine articulated by the Supreme Court places virtually no limits on Congress's ability to delegate lawmaking power to the Executive.<sup>87</sup> Congress need only lay down an "intelligible principle" for the Executive to follow.<sup>88</sup> By contrast, most states enforce a more rigorous non-delegation doctrine, one that requires the state legislature to provide specific standards to guide agency policymaking.<sup>89</sup> Open-ended directives that would pass muster under

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<sup>84</sup> E.g., Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305 (1988) ("Congress typically leaves the vast majority of policy issues, including many of the most important issues, for resolution by some other institution of government.").

<sup>85</sup> See, e.g., Pettys, *supra* note 2, at 351–52.

<sup>86</sup> 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.

<sup>87</sup> The doctrine has not been used to invalidate a congressional delegation since 1935. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935).

<sup>88</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

<sup>89</sup> Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1189 (1999) ("Many states require the legislature to provide specific standards to guide agency discretion in the statute delegating authority to an agency."). Seven states employ a weak non-

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.

Recall Attorney General John Ashcroft's assertion that the Controlled Substances Act (CSA), a statute (arguably) designed to curtail recreational drug abuse, had given him authority to issue an order banning PAS throughout the nation.<sup>90</sup> Not surprisingly, the Court later ruled that Ashcroft had overreached. It found that when Congress passed the CSA, nearly thirty years before Ashcroft's order, it had not intended to give the Attorney General authority to ban (or legalize) this admittedly controversial practice.<sup>91</sup> And the CSA is hardly the only statute on which federal officials have arguably overstepped the limits of their delegated authority.<sup>92</sup> The possibility that federal officials, sometimes decades after a statute is enacted and following several changes of presidential administrations, may invoke statutory authority in unexpected and unwelcome ways mitigates public support for federalization.

A second misgiving about policy administration may arise even when the executive's statutory authority is more carefully circumscribed. Under almost any statute, executive branch officials (both state and federal) will have some discretion in deciding how to enforce the law. Consider a hypothetical statutory ban on PAS: "Any physician who knowingly causes or aids another person to attempt suicide is guilty of a felony."<sup>93</sup> Unlike the CSA, such a

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delegation doctrine (similar to the federal doctrine), upholding delegations without specific standards so long as various procedural safeguards are in place. *Id.* at 1192–93. 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-three states employ a moderate non-delegation doctrine, but one that still requires more specificity than the federal non-delegation doctrine. *Id.* at 1198–1200.

<sup>90</sup> The Attorney General's ruling was the subject of the Court's decision in *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006).

<sup>91</sup> *Id.* at 259. Despite the fact that the Court blocked the Attorney General's order, citizens may not deem judicial review an adequate check on executive power. The result in *Gonzales v. Oregon* was somewhat atypical, given that federal courts usually defer to executive interpretations of statutory authority. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

<sup>92</sup> See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (invalidating Corps of Engineers' assertion of authority over isolated bodies of water as exceeding its mandate under Clean Water Act); *Rust v. Sullivan*, 500 U.S. 173, 184–87 (1991) (upholding agency's interpretation of "ambiguous" Title X language; agency denied funds to organizations that engaged in abortion counseling and referrals).

<sup>93</sup> This statute is similar to the state law upheld by the Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the case in which the Court found no constitutional

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 officials of one government would enforce the ban too vigorously, prosecuting well-intentioned doctors under the statute.<sup>94</sup> Hence, citizens may compare how state and federal officials would likely handle these issues before endorsing any congressional proposal to ban PAS.

## 2. Comparative Trust

Given that legislative proposals delegate so much authority to executive branch officials (particularly at the federal level), citizens will want to know how these officials will use their power. It is true, of course, that both state and federal officials could abuse their statutory authority, or enforce laws in objectionable ways. Nevertheless, citizens are likely to believe that delegating any quantum of policymaking authority to federal officials carries far more risks, for two main reasons.

One reason is that, on average, citizens trust their state (and local) governments more than they trust the federal government.<sup>95</sup> In relevant part, trust denotes citizens' expectations about how government (state or federal) will utilize the power at its disposal.<sup>96</sup> In deciding how much to trust one level of government, citizens consider several variables, including the government's competence, its responsiveness to ordinary citizens, and its

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right to assisted suicide.

<sup>94</sup> The concern is far from hypothetical: 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).

<sup>95</sup> Cf. Pettys, *supra* note 2, at 333 (suggesting that because of their "trust, confidence, allegiance, or loyalty" in state government, the people may be willing to give states more regulatory responsibility).

<sup>96</sup> E.g., Jack Citrin & Samantha Luks, *Political Trust Revisited: Déjà Vu All Over Again?*, 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*, ANN. REV. POL. SCI. 475 (2000).



integrity.<sup>97</sup> On these and related matters, the public holds state (and local) 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.<sup>98</sup> These findings are consistent across nationally representative surveys.<sup>99</sup> In the 1996 National Election Study, for example, more than two-thirds of respondents said they placed the most trust in state or local government; only 29% said the same of the federal government.<sup>100</sup>

In large part, the fact that citizens, on average, trust state governments more reflects their belief that state governments do a better job administering policy—of executing policy honestly, competently, efficiently, and in accordance with their preferences. In other words, citizens trust state governments more for reasons that may have little to do with the content of

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<sup>97</sup> 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).

<sup>98</sup> KAISER FAMILY FOUNDATION ET AL., ATTITUDES TOWARD GOVERNMENT STUDY (2000), available at <http://www.ropercenter.uconn.edu> (follow “Topics at a Glance” hyperlink; then follow “Role of Government” hyperlink; then follow “Kaiser Family Foundation/Harvard/NPR Poll: Attitudes Toward Government Study—View Details [United States: 2000]” hyperlink). 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.

<sup>99</sup> E.g., JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK 98–100 (2002); PHILLIP W. ROEDER, PUBLIC OPINION AND POLICY LEADERSHIP IN THE AMERICAN STATES 43 (1994); Richard L. Cole & John Kincaid, *Public Opinion on U.S. Federal and Intergovernmental Issues in 2006: Continuity and Change*, 36 PUBLIUS: J. FEDERALISM 443 (2006); 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); Jennings, *supra* note 97; John Kincaid & Richard L. Cole, *Changing Public Attitudes on Power and Taxation in the American Federal System*, 31 PUBLIUS: J. FEDERALISM 205, 207–08 (2001).

<sup>100</sup> AMERICAN NATIONAL ELECTION STUDIES, ANES CUMULATIVE DATA FILE 1948–2004 [hereinafter ANES CUMULATIVE DATA FILE], <http://www.electionstudies.org/studypages/cdf/cdf.htm> (on file with author).

the laws adopted by Congress or their state legislatures.<sup>101</sup> Hence, citizens who trust 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 content, its jurisdictional reach, its cost-shifting advantages, and so on).

A growing body of empirical research supports the notion that trust in state governments dampens support for the federalization of state policy domains. For example, in one recent study with political scientist Cindy Kam, I examined whether trust judgments affected public support for a proposed congressional ban on PAS, using results from a large nationally representative survey experiment.<sup>102</sup> 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 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.<sup>103</sup>

Contrary to popular 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.<sup>104</sup> 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 (opposition increased by twelve percentage points; these results were statistically significant).<sup>105</sup> Indeed, the results indicated that

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<sup>101</sup> When asked to describe why they do mistrust 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 legislative policy outcomes were only secondary concerns. KAISER FAMILY FOUNDATION ET AL., *supra* note 98. To the extent that comparative trust merely reflects one's agreement or disagreement with the content of congressional policy, it would not provide an independent check on the expansion of federal power.

<sup>102</sup> Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589 (2007).

<sup>103</sup> *Id.* at 613–14.

<sup>104</sup> *Id.* at 615–18.

<sup>105</sup> *Id.* at 615.

comparative trust in the states could sway public opinion against congressional proposals that the majority otherwise favors on the merits.<sup>106</sup>

Similarly, other empirical studies, virtually ignored by the legal academy, have shown that evaluations of the comparative trustworthiness of the federal and state governments helps to explain citizen support for the devolution of policy making responsibilities to the states that occurred during the 1980s and 1990s.<sup>107</sup> 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 saw the state governments as more competent, more accountable, and more honest.<sup>108</sup> In other words, support for devolution reflected more than mere agreement with the policies pursued by the states; it was also driven by trust in state governments relative to the federal government.

To be sure, there is no guarantee that citizens will always consider the federal government less trustworthy than the states,<sup>109</sup> and hence, no guarantee that these feelings will always check the expansion of federal power. Indeed, as recently as the late 1960s, citizens on average actually considered the *federal* government slightly more trustworthy.<sup>110</sup> Still, state

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<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., Hetherington & Nugent, *supra* note 99, at 134; Greg M. Shaw & Stephanie L. Reinhart, *The Polls: Devolution and Confidence in Government*, 65 PUB. OPINION Q. 369, 369 (2001) (noting that devolution followed a decline in confidence in the federal government).

<sup>108</sup> Hetherington & Nugent, *supra* note 99, at 134 (attributing public support for devolution 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”). Some scholars 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.

<sup>109</sup> This is particularly evident in times of war or national emergency. THE FEDERALIST NO. 46 (James Madison), *supra* note 37, at 315–23 (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? 45 (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).

<sup>110</sup> The ANES tracked comparative trust on the 1968, 1972, 1974, 1976, and 1996 surveys. On the 1968 survey, 39% of respondents indicated they placed the most faith

and local governments arguably have an inherent advantage over the federal government when it comes to earning and keeping the people's trust, due both to their close proximity to the people<sup>111</sup> and the nature of the affairs they handle (e.g., their capacity as first-responders to crime).<sup>112</sup> Anyway,

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and confidence in the federal government, whereas 38% said the same of their state or local government. (The remaining 23% trusted all governments equally or responded "[d]on't know.") Only four years later, however, state and local governments had the edge (46% to 40%). ANES CUMULATIVE DATA FILE, *supra* note 100. As noted in the text, by 1996, 67% of respondents said they had the most faith in either their state or local government; only 29% said the same of the federal government. *Id.* For a review of the historical swings in comparative trust, see Hetherington & Nugent, *supra* note 99, and Pettys, *supra* note 2.

<sup>111</sup> 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 neighbourhood, to his neighbourhood than to the community at large, the people of each State would be apt to feel a stronger byass 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 NO. 17 (Alexander Hamilton), *supra* note 37, at 107.

Madison elaborates upon this point in *The Federalist No. 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 NO. 46 (James Madison), *supra* note 37, at 316.

<sup>112</sup> 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 that 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.

THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 37, at 107; *id.* at 108 ("The operations of the national government . . . falling less immediately under the observation of the mass of the citizens the benefits derived from it will chiefly be perceived and attended to by 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 a

should the states squander the people's trust, they can always win it back, as they did in the 1970s, and reclaim domains once lost to the federal government.<sup>113</sup>

In any event, 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—but these are the occasions when states, arguably, deserve less protection. The Framers themselves may have believed that trust in state governments (or something like trust) would be sufficient to keep Congress at bay and preserve state power.<sup>114</sup> But as James Madison suggested, should the states squander that trust, “the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.”<sup>115</sup> 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 maladministration when they have another agent (be it state or federal) they believe will do a better job executing their will.<sup>116</sup>

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habitual sense of obligation and an active sentiment of attachment.”).

<sup>113</sup> Indeed, the Framers may have 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 N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1042 (1997). Pettys suggests that the competition between the state and federal governments is alive and well today and 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 cannot control what the other does; and third, the system must remain transparent—the people must know where to assign blame. Pettys, *supra* note 2, at 357–60.

<sup>114</sup> THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 37, at 106 (insisting the national government could not usurp state powers, due to the “greater degree of influence which the State governments, if they administer their affairs with uprightiness and prudence, will generally possess over the people”); THE FEDERALIST NO. 46 (James Madison), *supra* note 37, at 322 (“[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.”).

<sup>115</sup> THE FEDERALIST NO. 46 (James Madison), *supra* note 37, at 317.

<sup>116</sup> One possible critique of the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000), which invalidated a portion of the Violence Against Women Act (VAWA), is that it ignored public evaluations of comparative trustworthiness. The majority emphasized that the states had traditionally handled domestic violence (and related) issues, and said it could find no basis upon which to justify the federal government's intervention. *Id.* at 615–18, 627. But what it failed to

### 3. Comparative Control

At any rate, whether or not they trust state governments more, citizens have a second reason for delegating any quantum of policymaking discretion to state, rather than federal officials: they can keep state executive officials on a shorter leash. If a state official abuses the power he or she has been given—say, by overstepping statutory authority or by exercising poor judgment—the people may be able to remove him or her. The same cannot be said of federal officials.

In almost all states, voters elect 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.<sup>117</sup> Countless local officials, such as district attorneys and county assessors, are also chosen directly by the people. And in thirty-eight states, even the members of the judicial branch are elected.<sup>118</sup> Moreover, in eighteen states and in more than two-thirds of all local governments, voters are allowed to recall public officials who have squandered the public trust.<sup>119</sup> In short, if a state official were to enforce (or interpret) a law in a way that displeased most citizens, the citizens would

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consider was that passage of VAWA may have been spurred by long-standing public dissatisfaction with the way state officials had traditionally handled domestic violence (and related) laws. Namely, the people (and women in particular) may have lost trust in the ability of state police, state prosecutors, and state trial judges to handle domestic violence effectively and fairly. After all, Congress had found that state police made arrests in fewer than 1 out of 100 domestic assault cases; state prosecutors obtained convictions against fewer than 4 out of 100 rapists, on average; and state courts imposed stiff prison terms (i.e., more than twelve months) on less than one-half of convicted rapists. *Id.* at 632–34 (Souter, J., dissenting) (summarizing congressional hearings and legislative history). Arguably, this might be the situation Madison had in mind when he suggested “the people ought not . . . be precluded from giving most of their confidence where they may discover it to be most due”—in this case, the federal government. THE FEDERALIST NO. 46 (James Madison), *supra* note 37, at 317.

<sup>117</sup> THE COUNCIL OF STATE GOVERNMENTS, 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.*

<sup>118</sup> Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725 (1995).

<sup>119</sup> NAT’L CONF. OF STATE LEGISLATURES, RECALL OF STATE OFFICIALS (2006), available at <http://www.ncsl.org/programs/legman/elect/recallprovision.htm>; INT’L CITY/COUNTY MGMT. ASS’N, MUNICIPAL FORM OF GOVERNMENT 1996 2 (on file with author) (69% of municipalities surveyed allow recall elections).

have the power to remove the official directly at the ballot box—either at the next election or via the recall device.

At the federal level, by contrast, only the President is elected by the people, and then, only indirectly via the Electoral College. This means citizens have much less influence over the federal Executive than they do over the state executive. Nor can the people expect Congress to check abuses of executive power for them. It is very difficult for Congress to supervise or rescind delegated authority. The federal courts usually defer to executive interpretations of statutory authority;<sup>120</sup> and they also prohibit Congress from “vetoing” executive action, other than by passing new legislation.<sup>121</sup> But such legislation must be presented to the President, who may, of course, veto it. Congress could, in theory, impeach the President (or other Executive branch officials), but doing so, like overriding the veto itself, requires almost overwhelming (two-thirds) consensus.<sup>122</sup>

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.<sup>123</sup> Citizens trust state governments more, reflecting, in part, a belief that the states do a better job administering policy, and this may temper support for congressional legislation on issues that would otherwise be handled by the states. In addition, citizens can check state/local officials at the ballot box—an option that is simply not available against *any* federal Executive or Judicial branch official except a first-term President—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.

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<sup>120</sup> See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

<sup>121</sup> *INS v. Chadha*, 462 U.S. 919, 951 (1983) (finding legislative veto unconstitutional because it deviates from Bicameralism and Presentment Clauses of Article I).

<sup>122</sup> U.S. CONST. art. I, § 7, cl. 2 (requiring a two-thirds vote of both houses to override a veto); *id.* at § 3, cl. 6 (requiring a two-thirds vote of the Senate for an impeachment conviction). Of 174 presidential vetoes issued from 1968–1998, only thirty were successfully overridden by Congress. Richard S. Conley & Amie Kreppel, *Towards a New Typology of Vetoes and Overrides*, 54 POL. RES. Q. 831, 841–843 (2001).

<sup>123</sup> 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 VI.B.

### C. Democratic Processes

So far, the considerations that shape public attitudes towards congressional legislation have all been policy-oriented, broadly defined: citizens care about the content of legislation, its potential impact on related issues, and how it will be enforced. But citizens also care about how policy is made. Studies have shown that when citizens formulate opinions about government actions, they place weight on matters of procedure, and not just matters of policy substance.<sup>124</sup> Indeed, a burgeoning line of political science research suggests that citizens care as much about the processes that government follows as they do about the outputs of those processes.<sup>125</sup> 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.<sup>126</sup> Other scholars have found that some citizens support a variety of reforms to the political process—campaign finance laws, the use of ballot initiatives, and the devolution of power to the states, among others—that may not be conducive to enacting the substantive policies they favor.<sup>127</sup> 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

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<sup>124</sup> E.g., Dennis Chong, *How People Think, Reason, and Feel About Rights and Liberties*, 37 AM. J. POL. SCI. 867, 874–75 (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 towards the group at issue—before making their decision).

<sup>125</sup> HIBBING & THEISS-MORSE, *supra* note 99, at 6 (“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 34 (“We believe people are more affected by the *processes* of government than by the policies government enacts.”) (emphasis added).

<sup>126</sup> James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC’Y REV. 469, 471 (1989) (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: A Reply to Gibson*, 25 LAW & SOC’Y REV. 621, 622 (1991). In their study of the 1991 California water shortage, for example, Tyler and Degoey find that citizens are 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. PSYCHOL. 482, 483 (1995).

<sup>127</sup> HIBBING & THEISS-MORSE, *supra* note 99, at 77.



party currently controls both branches of government).<sup>128</sup> In short, citizens care about how government is run.

This concern for democratic process hinders Congress's ability to federalize state policy domains for two reasons. 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 in order 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 their preconceived notions of the proper allocation of responsibilities between the state and federal governments. For both reasons, citizens may oppose congressional legislation, even at the expense of sacrificing immediate policy objectives, and thereby preserve state prerogatives.

### 1. *The Appeal of Direct Democracy*

One of the benefits of federalism is that it enhances citizen participation in government.<sup>129</sup> The explanation stems in part from the fact that state (and local) governments follow procedures that give citizens a greater say over local 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.<sup>130</sup> 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.<sup>131</sup> And direct democracy is employed even more commonly by local governments, more than half of which have some form of

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<sup>128</sup> *Id.* at 82.

<sup>129</sup> *E.g.*, Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71, 81 ("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.").

<sup>130</sup> INITIATIVE & REFERENDUM INST., WHAT IS THE INITIATIVE AND REFERENDUM PROCESS? (2007), <http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm>.

<sup>131</sup> 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 voters, on their own initiative, may approve or reject legislation or amendments that were enacted by the state legislature. *Id.*

initiative and ninety percent of which utilize some form of referendum procedure.<sup>132</sup> 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.<sup>133</sup>

As discussed above, direct democracy has instrumental value; the availability of ballot measures (and similar devices) makes 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 adopt more appealing policies.

First, the public may oppose congressional legislation that preempts state authority and thereby eliminates opportunities for participating in government at the state and local level. Direct democracy remains enormously popular among the people.<sup>134</sup> Since 1904, citizens have considered more than 2000 ballot initiatives, and 379 initiatives appeared on ballots in the 1990s alone.<sup>135</sup> 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 deprive citizens of the opportunity to participate by preempting state laws governing the same issue.<sup>136</sup> Simply

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<sup>132</sup> TARI RENNER, INITIATIVE & REFERENDUM INST., LOCAL INITIATIVE AND REFERENDUM IN THE U.S. (2007), <http://iandrinstute.org/Local%20I&R.htm>.

<sup>133</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>134</sup> *E.g.*, HIBBING & THEISS-MORSE, *supra* note 99, at 75 (noting that 86% of their respondents would like to see an increase in ballot initiatives); Gordon S. Black Corporation, May, 1992, Roper Center Database, *supra* note 50, accession no. 0195850 (92% of respondents support ballot initiatives).

<sup>135</sup> INITIATIVE & REFERENDUM INST., INITIATIVE AND REFERENDUM USE 1 (2006), <http://www.iandrinstute.org/IRI%20Initiative%20Use.pdf>.

<sup>136</sup> Rapaczynski, *supra* note 6, at 404 (noting that “the vitality of the participatory state institutions depends in part on the types of substantive decisions that are left for the states”).

For examples of federal legislation preempting state or local initiatives, see *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 844 (9th Cir. 2002) (holding that Proposition 4, which restricts the use of certain traps and poisons, is preempted by Endangered Species Act and National Wildlife Refuge Systems Improvement Act), *Wash. State Bldg. & Constr. Trades Council AFL-CIO v. Spellman*, 684 F.2d 627, 629–32 (9th Cir. 1982) (holding that an initiative banning storage of radioactive waste generated outside state of Washington is preempted by numerous federal statutes), and *League of United Latin Am.*

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.

Second, citizens may also be more 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.<sup>137</sup> The aura of legitimacy conferred upon ballot initiatives could have a powerful impact on public opinion. It may give citizens an incentive to 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.

Oregon's long-standing battle over PAS illustrates how citizens may be willing to defend voter initiatives, even when they disagree with the outcome of those initiatives. In November 1994, Oregon voters approved by the slimmest of margins (52% to 48%) the ballot initiative allowing terminally ill patients to seek prescription drugs to hasten death.<sup>138</sup> Not satisfied with the outcome, the state legislature only three years later sponsored a new ballot measure that would repeal the PAS statute. Oregon voters, however, defeated the repeal effort by a much wider margin (60% to 40%) than first supported PAS.<sup>139</sup> Observers have suggested the repeal measure was defeated so handily not because popular attitudes towards PAS had shifted, but because the repeal had been sponsored by the state legislature and not by the voters themselves.<sup>140</sup>

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*Citizens v. Wilson*, 908 F. Supp. 755, 772 (C.D. Cal. 1995) (holding that Proposition 187, which denies public benefits to illegal immigrants, is preempted by Immigration and Nationality Act).

<sup>137</sup> Jack Citrin, *Who's the Boss? Direct Democracy and Popular Control of Government*, in *BROKEN CONTRACT?: CHANGING RELATIONSHIPS BETWEEN AMERICANS AND THEIR GOVERNMENT* 268, 268-73 (Stephen C. Craig ed., 1996); Rapaczynski, *supra* note 6, 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).

<sup>138</sup> Don Colburn, *Assisted Suicide Bill Passes: Oregon Law Puts State at Center of Ethical Debate*, WASH. POST, Nov. 15, 1994, at Z9.

<sup>139</sup> Jane Meredith Adams, *Assisted Suicide Gains in Propriety*, BOSTON GLOBE, Nov. 9, 1997, at D3.

<sup>140</sup> *The Paper Trail*, THE OREGONIAN, Nov. 8, 1997, at A1. Opponents also tried to overturn the Death with Dignity Act by appealing to the state courts and to the federal Executive, which may have further alienated some who otherwise opposed PAS. *Id.*

To sum up, 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.

## 2. *The (Surprising) Appeal of Federalism*

In addition to direct democracy, federalism itself may be valued by citizens. In other words—and contrary to popular wisdom<sup>141</sup>—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, even if they have no objection to the content of Congress's proposal. 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, many 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.<sup>142</sup> The belief that the states should control some domains, and the

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<sup>141</sup> McConnell, *supra* note 37, at 1488 (suggesting that “for most people . . . issues of federalism take second seat to particular substantive outcomes”); McGinnis, *supra* note 8, at 931–32 (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 6, at 96 (“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.”). See also Neal Devins, *The D’oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1341 (2007) (“Voters—if they think about politics at all—think about policy preferences, not theories of constitutional interpretation.”).

<sup>142</sup> ROEDER, *supra* note 99, at 99 tbl. 6-1. See also CBS/New York Times Poll, Mar. 10–14, 2004, Roper Center Database, *supra* note 50, accession no. 0449531

federal government others, is consistent with the notion that citizens recognize limitations to federal power, in other words, that citizens recognize the principle of federalism.<sup>143</sup>

What is more, for at least some segment of the population, such opinions regarding the proper division of state/federal authority carry weight; in other words, they may trump policy considerations when citizens formulate their opinions of proposed federal legislation. One sign that federalism matters to voters comes from the fact that political elites commonly appeal to the principle of federalism—namely, the abstract notion of a limited central government—to rally public opposition to congressional legislation. Elites who defend federalism as a 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 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 might otherwise support 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: “for 200 years, this has been a state issue. I oppose this election year effort to amend the Constitution in an area that each

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(reporting that a small majority—50% versus 46%—of respondents favor state versus federal control of gun laws).

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.” The poll found that 29% of respondents completely agreed with the statement; 42% mostly agreed; 17% mostly disagreed, and 7% completely disagreed. Pew Research Center Poll, Nov. 2003, Roper Center Database, *supra* note 50, accession no. 0441914.

<sup>143</sup> 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.

state can adequately address.”<sup>144</sup> Likewise, in debates on the floor of Congress, members invoked tradition to oppose the amendment. Senator 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.<sup>145</sup>

Similarly, opponents of the same-sex marriage amendment have also 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.”<sup>146</sup> 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 [same-sex marriage] 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.<sup>147</sup>

Such appeals to federalism have figured prominently in other recent congressional campaigns as well, including debates over national PAS legislation.<sup>148</sup> Similar arguments may have also played a prominent role in defeating congressional legislation much earlier in the nation’s history.<sup>149</sup>

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<sup>144</sup> Marie Horrigan, *Kerry, Edwards Oppose Marriage Amendment*, UPI, Feb. 24, 2004, [http://www.upi.com/International\\_Intelligence/Analysis/2004/02/24/kerry\\_edwards\\_oppose\\_marriage\\_amendment](http://www.upi.com/International_Intelligence/Analysis/2004/02/24/kerry_edwards_oppose_marriage_amendment).

<sup>145</sup> 150 CONG. REC. S8074 (daily ed. July 14, 2004) (statement of Sen. Dodd).

<sup>146</sup> 150 CONG. REC. S7997 (daily ed. July 13, 2004) (statement of Sen. Jeffords).

<sup>147</sup> COMMISSION ON PRESIDENTIAL DEBATES, Transcript, THE LIEBERMAN-CHENEY VICE PRESIDENTIAL DEBATE (Oct. 5, 2000), <http://www.debates.org/pages/trans2000d.html>.

<sup>148</sup> 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

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, law professor William 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.”<sup>150</sup>

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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 am going to fight with all my strength to preserve Oregon’s rights on this matter.

*Proposed Amendment to the Pain Relief Promotion Act: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 21–22 (2000) (statement of Sen. Wyden, Member, S. Comm. on the Judiciary).

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, Nov. 8, 1997, at D6 (“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.”).

<sup>149</sup> See, e.g., Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1568–70 (1977). One example involves the successful campaign against the Second Bank of the United States in 1832. Congress’s authority to create the Bank had been upheld in the famous case of *McCulloch v. Maryland* in 1819. 17 U.S. (4 Wheat.) 316 (1819). Nonetheless, just thirteen years later, opponents of the Bank succeeded in convincing President Andrew Jackson to veto congressional legislation that would have extended the Bank’s charter another twenty years. The Bank was opposed by a diverse coalition of interests, but the successful public campaign against it was framed mainly as a battle for states’ rights. Daniel J. Elazar, *Federal-State Collaboration in the Nineteenth-Century United States*, 79 POL. SCI. Q. 248, 259–60 (1964); BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 214 (1957) (“[P]ersonal and business considerations [against the First Bank of the United States] . . . were subordinated, in public discussion, to general arguments. The favorite contention was that the Bank of the United States was unconstitutional. This was a line of attack . . . that could be taken up by anyone, no matter how little he knew of banking, money, or the government’s fiscal affairs.”).

<sup>150</sup> William B. Rubenstein, *Hiding Behind the Constitution*, N.Y. TIMES, Mar. 20, 2004, at A13. See also Hamilton, *supra* note 6, at 1083 (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”).

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, and not whether elites themselves buy into the principles they espouse in campaigns (which they will, presumably, only if citizens value 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 appeals on a regular basis, elite debate can make federalism a more salient consideration in the minds of citizens.<sup>151</sup> That is, even if citizens normally do not think spontaneously about federalism when evaluating congressional action, elites can bring federalism considerations to mind through public campaigns (e.g., through speeches, mailings, advertisements, debates, and so on).

In addition, and even more importantly, the fact that elites choose to frame debates around federalism—and sometimes stake 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 influence public opinion.<sup>152</sup> Re-framing debates in a particular way will serve their purposes, however, only if the chosen frame resonates with the public.

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<sup>151</sup> Kam & Mikos, *supra* note 102, at 616–18 (finding that elite debate raised the salience of federalism, as subjects decided whether to support congressional ban on PAS); *see also* Chong, *supra* note 124, at 869 (noting that cues raised the salience of constitutional guarantees, such as free speech, as subjects decided whether to allow controversial groups to demonstrate).

<sup>152</sup> 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* JACOBS & SHAPIRO, *supra* note 24, at 8 (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); 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”); POPKIN, *supra* note 25, at 9 (finding that “campaigns and media . . . influence the voter’s frame of reference, and can thereby change his or her vote”); 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)).



To illustrate, recall the debate over the proposed 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 (i.e., whether or not same-sex marriages should be recognized). 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., she says “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 constituents on either side of the same-sex marriage debate. In fact, it may actually harm her re-election prospects, because her 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.

There is also empirical support for the proposition that federalism concerns dampen support for congressional legislation that oversteps preconceived limits the public would impose on federal power. In the study of popular support for a federal ban on PAS discussed above, my co-author and I found that some citizens do indeed care about federalism—that is, an abstract preference for some arrangement of state/federal power may trump their policy preferences on the issue, at least when they are exposed to campaign arguments reminding them of federalism considerations. We asked subjects in the study which level of government should handle controversial medical practices such as PAS (among others issues). The answer defined what we call the subject’s federalism beliefs. When some subjects were later asked their opinion of a congressional proposal to ban PAS, these federalism beliefs helped predict their level of support for (or opposition to) the federal ban, albeit not at a statistically significant level.<sup>153</sup> But among other subjects who had been told to read a short statement from political elites reminding them of federalism considerations, their *a priori* federalism beliefs became more consequential. In this group, subjects who believed state governments

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<sup>153</sup> Kam & Mikos, *supra* note 102, at 615–16 (finding that a “strong belief that the state government should control [the policy] domain (compared to a strong belief the federal government should control [the policy] domain) causes an eleven percentage point increase in probability of opposing federal action,” but that the results are not statistically significant).

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.<sup>154</sup>

In other words, subjects' opinions of the proposed congressional ban on PAS did not necessarily track their policy preferences; some opposed PAS and yet withheld their support for congressional efforts to ban it out of respect for state prerogatives and federalism (at least, once they were reminded of this consideration). The reduction in support for the federal ban among those who believed *a priori* that the states should have primary authority over controversial medical practices was large *and* statistically significant; comparing members of this group to persons who strongly believed the federal government should have primary authority, support for the congressional proposal fell by nearly twenty-nine percentage points (holding all else constant).<sup>155</sup>

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.<sup>156</sup> 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.

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To summarize, each of the factors considered above—the fear of mission creep, trust in state governments, electoral controls on state officials, and respect for both direct democracy and federalism—saps support for federal

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<sup>154</sup> *Id.* at 616–18.

<sup>155</sup> *Id.* at 617. Interestingly, we found that federalism arguments had a polarizing effect; they made subjects who believed in state control even more likely to oppose the ban, but they also made subjects who believed in federal control more likely to support the ban—thus leading to the significant disparity in opposition between the two groups. *Id.* at 618.

<sup>156</sup> *E.g.*, MORRIS FIORINA, *DIVIDED GOVERNMENT* 64 (1996); Lacy, *supra* note 77, at 253–54 (finding that split-ticket voting may be attributable to non-separable preference for divided government); see also James A. Thurber, *Representation, Accountability, and Efficiency in Divided Party Control of Government*, 24 *POL. SCI. & POL.* 653, 654–56 (1991) (reviewing research).

legislation. While citizens may be tempted to impose their values on other states, to second guess their own state government, or to shift the costs of regulatory programs, citizens also realize that federalization comes at a heavy price, one which many of them will be unwilling to pay. In short, citizens may not be so eager to federalize state policy domains. Absent a strong demand for federalization—and given the barriers to passing congressional legislation discussed in Part IV—the collective action problem identified in Part III simply does not materialize.

## VI. SOME IMPLICATIONS FOR JUDICIAL REVIEW

By demonstrating that demands for federalization are often ineffectual and that citizens actually have powerful incentives to protect state authority, the populist safeguards theory undercuts one of the primary rationales for judicial review of federalism—the notion that citizens, left to their own devices, would grant Congress authority over myriad issues the states instead *ought* to control.<sup>157</sup> After all, if the political process can be relied upon to

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<sup>157</sup> In this Article, I do not directly address the jurisprudential claim that the Constitution actually *requires* the judiciary to police Congress's substantive powers, whether or not such supervision is necessary or wise. *E.g.*, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 20 (1988) (“If the Constitution forbids federal interference with state autonomy, then the courts cannot abandon their duty to enforce that limit simply because the political process appears to provide a tolerable substitute for judicial review.”); Prakash & Yoo, *supra* note 6, at 1466–68, 1489–1520; William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1732 (1985).

Not all share this view. Some scholars claim the Constitution does not, in fact, designate the Court as the ultimate arbiter of federal power. Larry Kramer, for one, suggests that the Framers thought the people (through their elected representatives in Congress) would decide for themselves, largely free of judicial meddling, what powers the new national government would exercise. KRAMER, *supra* note 13, at 49; *see also*, CHOPER, *supra* note 2, at 175 (suggesting that federalism is a non-justiciable political question). Others insist the people—through their representatives in government—should assume a much larger role in constitutional interpretation, irrespective of what the Framers may have had in mind. *E.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 175 (1999) (promoting a constitutional amendment that would strip the courts of jurisdiction over constitutional questions).

Even among those who insist the Court has a constitutional duty to delimit federal power, few would seem to accept the corollary—that the Constitution itself fixes (precisely and immutably, barring an amendment following Article V procedures) the metes and bounds of that power. Instead, most commentators would seem to give the Court some leeway in demarcating federal powers. *See Baker & Young, supra* note 6, at 164 (arguing for judicial review of federalism, but conceding that no clear consensus exists about “what sort of judicial review we should have in this area”); Prakash & Yoo, *supra* note 6, at 1523 (acknowledging that “demonstrating that the federal courts must bear this responsibility [of policing congressional powers] sheds little light upon the

rein in Congress, there is no need for the judiciary to strike down congressional legislation in the name of states' rights.

Just as importantly, there is no guarantee that judicial review does more good than harm, since the Court may strike federal laws that ought to stand. The Court's federalism jurisprudence has (to put it mildly) a checkered history. Its decisions have been inconsistent across time, incoherent on occasion,<sup>158</sup> and, some would say, highly political—reflecting the policy preferences of the Justices, rather than the law.<sup>159</sup>

Much more could be said regarding the shortcomings of the judicial safeguards of federalism (a topic beyond the scope of this Article). Suffice to say that given doubts about the need for judicial review and misgivings concerning the Court's capacity to delimit congressional powers, it is at least arguable that the Court should consider deferring more to political judgments about the scope of federal power than it has in its recent federalism "offensive."

I am not suggesting that the Court should abandon federalism considerations altogether, only that it ought to play a more circumspect role in federal/state power disputes. The populist safeguards, while effective, are hardly foolproof. In this Part, I consider two particular circumstances in which we may yet need some form of judicial review to shield state prerogatives from federal encroachments.<sup>160</sup> Section A explains that the populist safeguards may not block federal administrative agencies (or the

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substantive lines that should limit the national government's powers").

Suffice to say that it seems reasonable to suggest the Court might fulfill its constitutional duty (assuming one even exists) if it were to defer more to the political process than it does today, so long as it does not abstain entirely from the business of reviewing the constitutionality of congressional statutes (a strategy I do not endorse, as I make clear below).

<sup>158</sup> See, e.g., Bednar & Eskridge, *supra* note 6, at 1447 (acknowledging that the Court's federalism decisions "flunk [the] requirements of either good law or good policy"); Friedman, *supra* note 33, at 324 (arguing that the Court's doctrines amount to "a set of indeterminate, largely incoherent rules that by and large permit ad hoc decisions by judges"). For commentary from members of the Court, see, for example, *United States v. Lopez*, 514 U.S. 549, 608 (1995) (Souter, J., dissenting) (claiming the Court's decision "portend[s] a return to the untenable jurisprudence" of the *Lochner* era).

<sup>159</sup> For a concise review of the theories of judicial decision making, see Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 480–86 (2001). Whittington concludes that any explanation of the Rehnquist Court's federalism revival must take account of "both politics and law." *Id.* at 518.

<sup>160</sup> This is not meant to be an exhaustive statement of the Court's role in federalism disputes. Legal scholars have identified other ways the Court could bolster the political safeguards of federalism. E.g., Clark, *supra* note 2, *passim* (suggesting that various separation of powers doctrines help protect the states); Pettys, *supra* note 2, at 357–60.

federal courts) from taking powers away from the states, and thus recommends continued judicial oversight of administrative policymaking (via clear statement rules, for example). Section B shows how Congress itself can dilute the populist safeguards by decoupling federal law from federal law enforcement. It suggests that the Court needs to remain vigilant when Congress passes legislation that will be enforced by state, rather than federal, officials. Lastly, Section C warns that while the populist safeguards protect states' rights, they may also endanger individual rights. Hence, we may still need courts to safeguard individual liberty.

### A. *Judicial Review and Agency Action*

My theory explains why *Congress* is not prone to usurp state authority. But Congress is not the only institution capable of expanding federal power at the expense of the states. The federal administrative agencies and courts may do so as well. And since agencies and courts are not directly accountable to the people, the dynamics that block Congress from usurping state policy domains may not check these other lawmaking bodies from doing so, at least when they are free to act without the express imprimatur of Congress.

Attorney General John Ashcroft's efforts to outlaw physician-assisted suicide (PAS) illustrate how the Executive can sidestep populist controls on Congress's ability to federalize controversial issues. In 2001, without consulting Congress, the states, or anyone else outside the Department of Justice,<sup>161</sup> Ashcroft issued a ruling aimed at banning PAS in the state of Oregon,<sup>162</sup> to this day, the only state to legalize the practice.<sup>163</sup> As discussed above in Part V.B, Ashcroft claimed that the Controlled Substances Act of 1970 (CSA) gave him authority to bar doctors from giving their patients lethal doses of prescription medications.

Needless to say, Ashcroft's claim proved controversial. The primary purpose of the CSA was to combat the illicit drug trade.<sup>164</sup> Neither the statute itself, nor the legislative history behind it, suggests the CSA was intended to outlaw (or otherwise regulate) PAS, and indeed, Congress made clear its intention *not* to usurp the states' power to regulate medical practices.<sup>165</sup> What is more, after Oregon enacted its Death with Dignity law in 1994, and before

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<sup>161</sup> *Gonzales v. Oregon*, 546 U.S. 243, 253–54 (2006).

<sup>162</sup> 66 Fed. Reg. 56607 (Nov. 9, 2001) (“[P]rescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act . . . regardless of whether state law authorizes or permits such conduct.”).

<sup>163</sup> Or. Rev. Stat. §§ 127.800–127.897 (2005).

<sup>164</sup> *Gonzales*, 546 U.S. at 269–70.

<sup>165</sup> *Id.* at 270–71 (discussing legislative history).

Ashcroft issued his interpretation of the CSA, Congress had twice considered and rejected legislation that would have explicitly banned PAS.<sup>166</sup> Had Ashcroft's interpretation of the CSA held any water, such legislative efforts would have been superfluous.

Given that federal agencies and courts are not subject to the same populist controls as Congress, it may be desirable for the Court to require that any substantial expansion of federal authority *vis-à-vis* the states come directly from Congress instead.<sup>167</sup> One way the Court has done this is by requiring that federal agencies not assert authority over traditional state domains without a clear statement from Congress that such a result was intended by elected lawmakers.<sup>168</sup> Consider *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.<sup>169</sup> At issue in the case was the Corps' interpretation of its authority under the Clean Water Act (CWA)—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.<sup>170</sup> 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 authority over such waters.<sup>171</sup> In defining the reach of the CWA, Congress simply referred to the "navigable waters" of the United States, but it had not clearly indicated

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<sup>166</sup> Pain Relief Promotion Act of 1999, H.R. 2260, 106th Cong. (1999); Lethal Drug Abuse Prevention Act of 1998, H.R. 4006, 105th Cong. (1998).

<sup>167</sup> *Cf.* Clark, *supra* note 2, at 1379 (suggesting the federal courts can help "preserve state governance prerogatives" in the national lawmaking process by "requiring the participation of actors subject to the political safeguards of federalism").

<sup>168</sup> The clear statement rules considered here are one example of the Court's so-called avoidance canon. For a thoughtful analysis of this canon of statutory construction, see, for example, William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2000) (critiquing the canon on separation of powers grounds).

<sup>169</sup> 531 U.S. 159 (2001).

<sup>170</sup> The Corps' rule, promulgation of which did *not* follow the notice and comment procedures of the Administrative Procedure Act, asserted jurisdiction over intrastate waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41217.

<sup>171</sup> *Solid Waste Agency of N. Cook County*, 531 U.S. at 172, 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.").

(according to the Court) that this definition was as expansive as the Corps claimed.<sup>172</sup>

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 that such a result was intended. 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.<sup>173</sup> 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 the 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 policymaking and elected officials from the Act’s coverage. Since Congress had not made it clear whether judges (or similar officials) fit within this statutory exemption, the Court dismissed the portion of the lawsuit relying on the ADEA. Likewise, in *Atascadero State Hospital v. Scanlon*, a case involving application of the Rehabilitation Act, the Court ruled that Congress must clearly state its intent to abrogate state sovereign immunity.<sup>174</sup> While the Rehabilitation Act authorizes suits 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 the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.”<sup>175</sup>

One proposition underlying both lines of cases is that the expansion of federal authority *vis-à-vis* the states must come from Congress itself, and not from federal administrative agencies or federal courts. Viewed this way, clear statement rules may be desirable, from a populist safeguards perspective.<sup>176</sup> Clear statement rules block agencies and courts from usurping

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<sup>172</sup> 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).

<sup>173</sup> 501 U.S. 452, 470 (1991).

<sup>174</sup> 473 U.S. 234, 243 (1985).

<sup>175</sup> *Id.* at 246. See also *id.* at 242 (“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.”).

<sup>176</sup> See Clark, *supra* note 2, at 1427 (“Unless . . . Congress actually considered—and

state powers without the consent of the people, expressed via their representatives in Congress. Recall that, other than the President, federal Executive branch 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 necessarily represent the will of the people.<sup>177</sup> Whether they seek to impose their own values on the nation, or to curry favor with special interests, they may expand federal powers at the expense of state prerogatives and against the wishes of the people themselves. This helps justify the Court's insistence that federal agencies (and courts) wait for a clear statement from Congress before assuming some authority traditionally exercised by the states.

### B. *Judicial Review and Decoupling*

The populist safeguards may also be diluted when Congress decouples federal law from federal law enforcement. Typically, any expansion of congressional authority *vis-à-vis* the states comes packaged (undesirably, for many citizens) with added executive authority as well, since federal laws are usually enforced by federal officials. In theory, however, Congress could decouple federal law from federal law enforcement. To illustrate, suppose Congress passed a ban on PAS, but gave state officials the power to enforce it. By decoupling popular federal mandates from unpopular federal

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proceeded to enact into law—a proposal that threatens state prerogatives, there is no guarantee that federal lawmaking procedures served to safeguard federalism.”); Young, *supra* note 64, at 1609 (“To the extent that a clear statement rule . . . undermines efforts to compromise on contested issues through vague language, the rule may make [the federal] legislative gauntlet far more difficult to run.”).

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 168, at 846–64 (reviewing claims that clear statement rules neither advance legislative aims, nor allow the courts to avoid making constitutional interpretations).

<sup>177</sup> 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 (2005–2006) (“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, 171–72 (1990) (arguing that compared to the judgments of unelected bureaucrats, legislative history is a better indicator of the meaning of federal statutes).



enforcement, Congress can make its proposals more appealing to citizens who prefer the way their states administer laws. In effect, decoupling allows citizens to reap some of the benefits of federalization (imposing morals out-of-state, for example), without bearing one of the “costs”—submitting to administrators they deem more inept, unresponsive, and/or corrupt.<sup>178</sup>

On the one hand, allowing Congress to use state officials to administer federal programs could help protect state prerogatives, albeit in a limited way. When Congress passes a mandate, but gives states some discretion regarding how to enforce it, state officials can shape the law in meaningful ways.<sup>179</sup> Consider a hypothetical congressional ban on PAS, enforced by the states. In theory, each state could tailor enforcement to suit local preferences. District attorneys in one state might prosecute apparent violations only sparingly, given local concerns over access to palliative care, while in another state they may pursue violators aggressively, given strong local opposition to PAS.

On the other hand, a congressional ban on PAS does not give states the option of legalizing PAS altogether. States retain prerogatives, but only concerning how the ban will be enforced. Indeed, decoupling may, on balance, *harm* state prerogatives, by allowing Congress to pass even more federal mandates. Consider the impact decoupling may have on a citizen who strongly favors a ban on PAS, but who loathes the idea of having Washington officials enforce it. This citizen may oppose a congressional ban, unless, that is, Congress couples it with state enforcement instead.

It may thus be necessary to limit Congress’s ability to use state governments to administer federal laws. Consider the anti-commandeering rule set forth in *Printz v. United States*, which imposes one such limitation. At issue in *Printz* was the Brady Handgun Violence Prevention Act, one provision of which ordered state law enforcement officers to conduct

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<sup>178</sup> To be sure, decoupling can also *reduce* the appeal of congressional legislation, not only because some citizens prefer federal enforcement, but also because some citizens may doubt whether state officials will vigorously enforce federal mandates their constituents oppose. Cf. Robert A. Mikos, *Enforcing State Law in Congress’s Shadow*, 90 CORNELL L. REV. 1411, 1456–65 (2005) (detailing efforts by local district attorneys to subvert federal gun control sanctions that are unpopular with local constituencies).

<sup>179</sup> Cf. *Printz v. United States*, 521 U.S. 898, 959 (1995) (Stevens, J., dissenting) (“In the name of State’s rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies.”); *id.* at 976 (Breyer, J., dissenting) (“The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central ‘federal’ body. They do so in part because they believe that such a system interferes less, not more, with the independent authority of the ‘state,’ member nation, or other subsidiary government.” (citations omitted)).

background checks on all prospective gun purchasers. Invoking precedent and a concern for state autonomy, the Court invalidated the provision, holding that Congress may not command state officials to administer a federal regulatory program.<sup>180</sup>

Viewed from the 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.<sup>181</sup> Suppose, for example, that voters in some states detest submitting to background checks; the concern is that, if Congress could force state officials to conduct such checks, voters might blame them—and not Congress—for the imposition. Through no fault of their own, state officials would be trusted less, easing the way for Congress to appropriate more state power. The anti-commandeering rule, by clarifying responsibility for regulatory programs, may help citizens form better judgments about the comparative competence, honesty, and responsiveness (i.e., trustworthiness) of officials serving different levels of government, thereby boosting the populist safeguards.<sup>182</sup>

The anti-commandeering rule may boost the populist safeguards in a second way, even when commandeering does not blur the lines of accountability. Commandeering decouples federal mandates from federal enforcement. By enabling citizens to wield congressional power without ceding state enforcement authority, commandeering lifts one of the most salient objections to congressional proposals—concerns about how federal

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<sup>180</sup> *Id.* at 935. See also *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that Congress may not direct a state's legislature to address a particular problem).

<sup>181</sup> *E.g.*, *Printz*, 521 U.S. at 930 (“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.”); *New York*, 505 U.S. at 169 (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”). *But see* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2205 (1998) (suggesting that the concern for political accountability “may be relevant but does not of itself justify the broad rule adopted by the Court”); 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.”).

<sup>182</sup> *Cf.* Jenna Bednar, *Credit Assignment and Federal Encroachment*, 15 SUP. CT. ECON. REV. 285, 304–06 (2007) (suggesting that credit assignment problems may undermine the political safeguards of federalism).

officials will execute congressional mandates. As discussed above, 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, and vests enforcement authority in their administrator of choice, say, state or local government.

A second way Congress can decouple its legislation from federal enforcement is by offering the states monetary grants, on condition they adopt (and enforce) federally scripted mandates.<sup>183</sup> This use of the conditional spending power does not violate the anti-commandeering rule, but the Court has placed some outer limits on the conditions Congress may attach to federal grants. Namely, the conditions must be stated unambiguously; they must be reasonably calculated to serve the purpose for which the funds are being expended; and the grant must not be so large so as to compel the states to accept the conditions.<sup>184</sup> Applying these guidelines in *South Dakota v. Dole*, the Court upheld the National Minimum Drinking Age Amendment. Under the Amendment, any state that refused to raise its minimum drinking age to 21 years would forfeit five percent of federal highway funds.<sup>185</sup> The Court noted the condition was explicitly stated, served the purpose of the highway funds (promoting safe travel), and the funds at stake (only five percent of highway grants) were not so great as to deprive the states of any meaningful choice in the matter.<sup>186</sup>

Such restrictions on the conditional spending power seem defensible, as conditional spending poses an especially tough challenge for the populist safeguards.<sup>187</sup> To begin, the temptation to wield Congress's conditional spending power may be quite strong. Citizens can use conditional spending

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<sup>183</sup> 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." U.S. CONST. art. I, § 8, cl. 1. The Court has declined to restrict the purposes for which Congress may spend. 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." 297 U.S. 1, 66 (1936). One implication is that Congress may offer grant monies to persuade the states to pass regulations that Congress itself may not. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

<sup>184</sup> *South Dakota v. Dole*, 483 U.S. at 207–11.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 208–11.

<sup>187</sup> *See* 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).

to: (a) shift the cost of programs onto taxpayers in other states (if conditions are refused), or (b) impose value judgments on other states (if conditions are accepted).<sup>188</sup> What is more, citizens can do this without sacrificing state control over the administration of the law. The grants, after all, simply fund some program; the actual administration of the program remains in the hands of state officials. Given the temptation to impose values or shift costs, and the appeal of decoupling congressional mandates from federal law enforcement, it may be wise to restrain Congress's use of conditional spending. Limiting the amount of the grants, for example, makes it easier for states to decline objectionable conditions, and also limits (somewhat) Congress's ability to shift regulatory costs onto taxpayers living in states that object to federal conditions.

### C. *Judicial Review and Individual Rights*

If there is little need for judicial review of states' rights claims, except in the situations described above, one might ask whether the judiciary should curtail review of individual rights claims as well, on the theory that citizens might pressure government to respect personal rights as well. However, nothing about my theory suggests the political process will protect individual rights nearly as well as it protects states' rights. Without a doubt, some citizens consider individual liberties when formulating their opinions of government action; for example, when deciding whether government should allow a controversial group like the KKK to stage a public demonstration, some people will take into account abstract speech rights, and not just their feelings towards the group seeking the permit.<sup>189</sup> Yet many features of state government (majority-friendly lawmaking procedures, for example) that help to insulate state power from congressional encroachment also expose minority groups to the tyranny of the majority.<sup>190</sup> James Madison recognized the tension between states' rights and individual liberty. In *The Federalist No. 10*, Madison warned that smaller republics, such as the states, were more

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<sup>188</sup> As discussed earlier, these are two of the primary reasons citizens may be tempted to cheat on any federal bargain. See *supra* note 45 and accompanying text.

<sup>189</sup> See Chong, *supra* note 124, at 869 (finding that "the notion of a constitutional right holds a particularly strong influence on people when they are evaluating questions about individual rights and freedoms").

<sup>190</sup> Cf. Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 80 (1998) (noting that the "conflict between federalism and liberty is most pronounced when a rogue state or region is deeply opposed to a liberty to which the nation as a whole is committed").

prone to capture by majority factions, and hence, more likely than larger republics, such as the United States, to curtail personal rights.<sup>191</sup>

For present purposes, I do not mean to espouse any particular theory of the rights to which all citizens are entitled. But suppose, for sake of argument, there was broad public consensus that certain freedoms (e.g., the right to exercise one's religion) should be guaranteed to all citizens—namely, that society as a whole would be better off if these rights were inviolable. Citizens in the majority may nonetheless be tempted to infringe the rights of minorities; for example, they may seek to denigrate other faiths, to deny employment for people of other races, or to silence opposing viewpoints.

Such tactics may carry a price—after all, one day the government could be turned against those currently in the majority—but minority rights remain vulnerable, particularly at the state (and local) level. One reason is that many states employ lawmaking procedures, such as voter referenda, that empower the majority and make it easier to pass legislation. On the one hand, this is good for states' rights; as discussed above, it enables states to better satisfy majority policy preferences, giving citizens (in the majority) an incentive to protect state power. On the other hand, it may jeopardize minority rights, namely, when satisfying majority preferences means passing laws that discriminate against minorities.<sup>192</sup> In many states, minorities simply lack the tools (such as the filibuster) or sheer numbers necessary to stop such proposals from passing.

Similarly, trust in state governments may both shield state authority and endanger minority rights. As discussed above, most citizens trust state government more than they trust the federal government. In part, this means they believe state officials are more likely to do what they ask, which (in some places) may mean curtailing minority rights. To simplify somewhat, members of a majority within a state may defend state power precisely because they believe state law enforcement will do more to suppress minority rights, for example, by levying harsher sanctions against minority defendants, or by stopping more minority drivers on the highways.

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<sup>191</sup> *E.g.*, THE FEDERALIST NO. 10 (James Madison), *supra* note 37, at 63 (comparing national to state government, and finding that “as each Representative will be chosen by a greater number of citizens in the large than in the small Republic, it will be more difficult for unworthy candidates to practice with success the vicious arts, by which elections are too often carried”).

<sup>192</sup> For a discussion of the impact of voter initiatives on minority rights and interests, see Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 409 (1999) (finding that “initiatives may often have a serious detrimental impact on minorities' participation in the polity”).

I am not saying the only reason people support states' rights is to subjugate minorities.<sup>193</sup> In fact, it is noteworthy that on many issues states protect more rights than does the national polity.<sup>194</sup> Nor do I necessarily endorse wholesale the Court's constitutionalization of various individual rights,<sup>195</sup> which, as others have argued, limits state prerogatives.<sup>196</sup> My point is simply that nothing about my theory stops citizens from curbing personal liberties, or dissuades them from wanting to do so. Hence, while we may not need the courts to protect states' rights, we still may need them to safeguard individual liberty.<sup>197</sup>

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Under most circumstances, the populist safeguards shield state power from federal encroachments, thereby tempering the need for judicial review.

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<sup>193</sup> Forty years ago, political scientist William Riker denounced federalism in the debate over civil rights, charging that "federalism is simply a hypocritical plea . . . to permit one minority, segregationist Southern whites, to tyrannize over another minority, the Southern Negroes." WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, AND SIGNIFICANCE* 142 (1964). In later years, however, Riker came to recognize that federalism could protect minority interests. See generally WILLIAM H. RIKER, *THE DEVELOPMENT OF AMERICAN FEDERALISM* (1987).

<sup>194</sup> See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 97–99 (1995) (acknowledging that states sometimes go further than the federal government in protecting individual rights); Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 452 (2002) ("There have always been areas of social policy in which certain states have been more 'progressive,' more 'liberal' than the federal government, and those areas are particularly marked today."); William J. Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 499–502 (1977) (noting how many states have afforded citizens greater protections than required under federal law).

<sup>195</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking state ban on homosexual sex); *Roe v. Wade*, 410 U.S. 113 (1973) (striking Texas ban on most abortions); *Miranda v. Arizona*, 384 U.S. 436 (1966) (ruling that statements obtained by state police, without apprising suspect of rights, were inadmissible at trial); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking state ban on use and distribution of contraceptives); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking various state laws segregating public elementary schools); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (striking Oregon law that effectively barred private schooling).

<sup>196</sup> See J. Harvie Wilkinson, III, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545, 545 (2006) (arguing that by constitutionalizing rights "we are eroding not only our sovereign rights to self-governance, but our ability as a society to debate our deepest differences with even a modest measure of mutual respect").

<sup>197</sup> Jesse Choper, for example, suggests the Court deem federalism a non-justiciable political question, but continue to safeguard individual liberty. CHOPER, *supra* note 2, at 201.

They do not, however, protect the states from federal administrative agencies or the federal courts, both of which are insulated from populist controls; hence, legal doctrines, such as the clear statement rule, may be needed to ensure that significant expansions of federal authority come at the behest of Congress, and not unaccountable agencies or courts. The safeguards may also be diluted by Congress, which may try to delegate enforcement of federal statutes to state officials. The anti-commandeering doctrine and limitations on the conditional spending power thus make sense, from a populist safeguards perspective, because they limit Congress's ability to decouple popular federal laws from unpopular federal law enforcement. Lastly, though we should be wary of judicial efforts to rein in Congress *vis-à-vis* the states, nothing about my theory suggests we should abandon judicial review of individual rights claims as well. Indeed, if anything, the populist safeguards theory demonstrates that judicial review of individual rights is essential, given the majoritarian-friendly nature of state lawmaking processes.

## VII. CONCLUSION

Because scholars have assumed that citizens would opt to aggrandize federal power and that Congress would accede to their demands, they have argued that we must rely upon institutions—namely, the courts or certain political institutions—to cabin congressional power and to preserve our federal system. This Article has developed a new theory of the populist safeguards of federalism suggesting the people, if given the opportunity, would not render states powerless. The theory suggests that populist demands for federalization may be frustrated in Congress by the diversity of citizen policy preferences and by the anti-majoritarian structure of the federal lawmaking process. On many issues, a majority of citizens will prefer state policy on the merits, suggesting that proponents of national legislation will be unable to garner enough votes in Congress to trump state authority. What is more, citizens may defend state prerogatives, even when Congress can satisfy majority policy preferences, because they fear congressional mission creep, because they prefer state versus federal enforcement of laws, and because they value government processes, and not just the outputs of those processes. In other words, citizens are not as eager to federalize state policy domains as the conventional wisdom suggests.

The populist safeguards theory may undermine one of the primary justifications given for judicial efforts to delimit congressional powers—that, barring judicial oversight, Congress would assume control of many issues the states instead ought to handle. Nonetheless, I propose that the courts should continue to check federal power in at least two situations: first, when agencies federalize issues without Congress's imprimatur; and second, when

Congress decouples federal law from federal law enforcement. I also show why courts must remain vigilant guarding minority rights, since in-state minorities are vulnerable to majority-friendly state lawmaking processes. Beyond these situations, however, the populist safeguards may be effective enough, such that (on purely pragmatic grounds) the Court should respect power allocation judgments made by the national political process, regardless of whether they comport with the judiciary's own notions of federalism.



