THE UNIVERSITY OF MICHIGAN
LAW SCHOOL

The Law and Economics Workshop

Presents

THE POPULIST SAFEGUARDS
OF FEDERALISM

by

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THURSDAY, March 8, 2007
3:40-5:30
Room 236 Hutchins Hall

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THE POPULIST SAFEGUARDS OF FEDERALISM

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Abstract

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

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I. INTRODUCTION

One of the most notable legacies of the Rehnquist Court is its restoration of judicially devised constraints on congressional power.1 In the wake of the New Deal, the Supreme Court had long declined to set any meaningful legal limits on federal power vis a vis the states, seemingly content to let the national political process determine the reach of congressional authority.2 Following William Rehnquist’s appointment as Chief Justice, however, the Court took a new interest in federalism, striking down (or narrowly interpreting) a wide range of federal statutes in the name of states’ rights.3

In reprising the role as supreme arbiter of state / federal powers, the Court expressed strong doubts about the so-called political safeguards of federalism—the notion that the states can, because of their influence over congressional districting, for example, protect themselves in

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

the national political process, making judicial oversight unnecessary. 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.” Commentators have blasted the substance of the Court’s federalism rulings, suggesting, for example, that its decisions amount to “a set of indeterminate, largely incoherent rules,” or worse. Still, even some of the most ardent critics of the Court’s reasoning remain supportive of its mission—that of cabining federal powers—given serious doubts about whether the political process will adequately safeguard states’ rights.

The doubts about Congress’s willingness to respect state authority stem from conventional assumptions about what ordinary citizens want from government, and the demands they make upon Congress. Skeptics claim that, given the opportunity, the people would gladly


5 505 U.S. 144, ____ (Kennedy, J., concurring).


7 E.g., Lynn A. Baker & Ernest A. Young, Federalism and the Double Standard of Judicial Review, 51 DUKE L. J. 75, 88 (2001) (acknowledging that the Court’s recent decisions “[d]o 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).
transfer most state power to the federal government, undermining the Framers’ design. Citizens may agree in principle to allocate powers optimally—they may, for instance, give the federal government where some level of central coordination is needed—but nothing stops them from cheating on the bargain. This widely shared view presumes that ordinary citizens do not care about government structure, but instead, only care about its outputs, e.g., the policies it adopts. It is this single-minded focus on policy that makes citizens unreliable guardians of state prerogatives; after all, they have strong reasons to turn to Washington, rather than their state governments, to provide the policy outcomes they desire, even when the normative case for federal action is weak. In particular, they may demand congressional action 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 to passing national laws. Since members of Congress are beholden to their constituents, Congress will give citizens what they want—an ever expanding bonanza of federal legislation. (Indeed, even staunch advocates of the political safeguards approach readily

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9 E.g., Levinson, supra note ___, 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”).
10 Of course, citizens may cheat by shifting powers to the states instead, but 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 coordinated policies. See, e.g., Roderick Hills, The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and Dual Sovereignty Doesn’t, 96 Mich. L. Rev. 813, 816 (1998) (opining that “there must be a limit to federal power and a corresponding reservoir of state power if federalism is to have any meaning at all”). In any event, even if the political process allocates too much power to the states, there is little the Court can do to protect the federal government—it cannot, for example, order Congress to legislate.
11 See Part III infra.
12 See Part II infra.
concede that citizens demand too much federal legislation, and thus say that we must instead rely on political institutions, such as the political party system, to protect state prerogatives.\textsuperscript{13)}

By contrast, this Article suggests that ordinary citizens may opt to limit federal power, not enhance it. The main contribution of the Article is in developing a positive theory of the populist safeguards of federalism, and in reviewing the evidence from both political science and legal scholarship that supports that theory. To this end, the Article identifies several reasons, overlooked in the scholarly literature, why citizens often oppose efforts to expand federal power \textit{vis a vis} states.

First, even assuming that citizens care only about policy outcomes, they may still safeguard state power because they often prefer the policies adopted by their state governments over the policies that (realistically) could be supplied by Congress. The states are smaller, more cohesive polities, utilizing lawmaking procedures (such as the ballot initiative) that make it easier for states to provide populist legislation—to more closely match the preferences of the people.

Second, citizens care about what happens after laws are enacted, thereby giving states another advantage over the federal government. For one thing, some citizens may fear that, when Congress proposes to federalize one issue, it lays the groundwork for federalizing related issues; thus, even if most citizens support what Congress is doing now, some may balk at

Historically, the threat to state power was thought to come from the federal government itself. Scholars suggested Congress would usurp state powers at the behest of its own members who desire to maximize their power “by occupying ever larger swaths of policymaking space”. Levinson, \textit{supra} note \textvisiblespace, at 917 (discussing consensus view among scholars that the “national government will seek to expand the policy space it controls at the expense of the states” due to the empire-building ambitions of federal officials). The views of the people—their constituents—were of little consequence. More recently, however, commentators have dismissed empire-building as the \textit{raison d’etre} 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). See also sources cited \textit{supra}, note \textvisiblespace. 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.

\textsuperscript{13}See, \textit{e.g.}, Kramer, \textit{supra} note \textvisiblespace, at \textvisiblespace.
expanding federal power in order to preserve state autonomy on other issues. Similarly, citizens may worry about how Executive branch officials in the federal government may exercise their statutory authority. Congressional statutes are often vague, leaving it to the Executive to resolve key policy disputes. Since they trust state governments more than they trust the federal government, and since they generally exert more control over state executive officials (via direct election and recalls), citizens may prefer to have state officials administer the laws, and hence, may oppose congressional legislation that vests enforcement authority in federal officials.

Third, citizens 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 ought to be controlled by the states instead.

In addition to proposing a new version of the political safeguards, this Article also adds to growing body of literature analyzing the role of ordinary citizens in interpreting constitutional law. Some scholars claim, for example, that the Framers did not intend for the Court to have final say regarding Congress’s powers; rather, they wanted the people (through their elected representatives in Congress) to decide for themselves, and free of judicial meddling, on the
proper scope of congressional authority.\textsuperscript{14} This Article is the first to elaborate a theory on why citizens may be up to this task.

Finally, the Article provides some useful insights regarding judicial review and federalism. One possible implication of this new theory is that judicial review of federalism may be unnecessary, or at the very least, it could be more circumscribed than it is now, focusing, for example, on the situations in which the populist safeguards of federalism are most likely to fail (such as when administrative agencies expand federal powers \textit{vis a vis} the states). Indeed, several sitting Justices have criticized the Court’s recent federalism jurisprudence and remain committed (at least on the surface) to relying on the political process to safeguard state interests. Justice Stephen Breyer, for example, writing in his dissent in \textit{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.”\textsuperscript{15} The theory developed herein lends support to calls for reduced judicial oversight of federalism disputes.

The Article proceeds as follows. Part II. discusses the empirical basis for focusing on ordinary citizens—the notion that Congress actually pays attention to what the people want. Part III. then explains why, according to the conventional wisdom, citizen influence over Congress jeopardizes states’ rights, namely, why the citizens are so keen to expand federal power. Part IV. contains the core contribution of the Article. It examines why citizens may be more leery of federal power than the conventional wisdom acknowledges. Part V. then addresses some possible objections to, and necessary qualifications of, the theory of the populist safeguards.

\textsuperscript{14} \textsc{Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review}____ (2005) (suggesting the Framers envisioned that the citizenry – and not the courts – would have final say over power disputes between federal and state governments). \textit{See also} Pettys . . . .

\textsuperscript{15} \textit{United States v. Morrison}, 529 U.S. 598, 660 (Breyer, J., dissenting). \textit{See also} discussion \textit{infra}, Part _____.
II. LEVIATHAN’S DEMOCRATIC MASTERS

The core assumption underlying my theory, and one commonly employed by critiques of the political safeguards as well, is that ordinary citizens – the people – exert influence over lawmaking in Congress. Candidates for congressional seats obviously want to get elected.\textsuperscript{16} And to get elected, they need the support of voters. Hence, they will (usually) do what the voters ask them to do.\textsuperscript{17} (Since voting sends messy signals, politicians also pay heed to public opinion polls.)

The influence of the people shows up in the policies that Congress adopts. A body of political science research has established a close link between popular opinion and policymaking, at both the state-level and at the national-level.\textsuperscript{18} It shows up in a variety of other ways as well. For example, candidates for federal (and state) office frame their campaign messages in ways they think will resonate with ordinary voters,\textsuperscript{19} something they would not need to do if they believed they could ignore public opinion altogether.


\textsuperscript{17} E.g., ROBERT S. ERIKSON & KENT L. TEDIN, AMERICAN PUBLIC OPINION 288 (6th ed. 2003) (“Because of the fear of electoral sanctions (or simply because they believe it to be what they ought to do), elected leaders play the role of ‘delegate,’ trying to please their constituents.”); Levinson, supra note _____, at 929 (noting that “elected representatives are keenly interested in winning and keeping their offices . . . [and this] requires [them] to ingratiate themselves to their constituents).”


\textsuperscript{19} See LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, POLITICIANS DON’T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS (2000) (finding that political elites are strategic in the frames they use to persuade the public, and that if a frame does not resonate with the public, political elites take notice, and they adjust their strategies accordingly).
To be sure, I do not claim that every action Congress takes reflects what most citizens would want. Such a claim would be inaccurate and unnecessary. Sometimes members of Congress do what they deem is best for the nation, even if their constituents disagree.\footnote{20} Sometimes they put the concerns of special interests ahead of those of the nation at large.\footnote{21} And sometimes they pursue their own selfish interests.\footnote{22} Nonetheless, by and large, Congress acts as though the public holds the reins of Leviathan. As Daryl Levinson aptly put it, after concluding that “government behavior is influenced more by the interests and preferences of constituents than by those of government officials,” this explains why we ought to “worry less about Leviathan and more about Leviathan’s democratic masters.” 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 two Parts turn.

III. THE PEOPLE VS. STATES’ RIGHTS

According to conventional critique of the political safeguards, judicial review of federalism is necessary (in spite of its flaws) because, left to its own devices, Congress would usurp state authority over issues which the states ought to control, thereby endangering the long-term viability of our federal system and the values attributed to it.\footnote{23} Citizens may agree in principle to allocate powers optimally (however that term may be defined)—they may, for instance, bestow power in the federal government when central coordination is desirable\footnote{24}—but nothing stops them from cheating on the bargain. And, the conventional wisdom suggests, they

\footnote{20}{See sources cited supra, note ___.}
\footnote{21}{E.g., ROBERT COOTER, THE STRATEGIC CONSTITUTION 105-108 (2000) (discussing economic theory of how to assign power to state and central governments).}
will be tempted to do just that – for any of four reasons, they will demand congressional legislation, even when the normative cases for national control is weak or non-existent.

One reason citizens may be tempted to aggrandize congressional powers vis a vis the states is that through Congress they can impose their preferred policies (including their morals) on people living in other states. Consider recent efforts to pass a national ban on same-sex marriages. When a Massachusetts court recognized same-sex marriages, it sparked a national outcry. Interest groups around the country sought to overturn the ruling by amending the federal Constitution, even though (arguably) the ruling would have no legal effect outside Massachusetts (or at least none which the states themselves could not address). Thus, when citizens seek to impose their preferred policies through legislation, Congress may be their instrument of choice, given the broader jurisdictional reach of its laws.

Similarly, citizens may back federalization to preempt the laws of their own state. When citizens are unhappy with the law of their own state, but cannot change it (say, because they are in the minority within the state), they may petition Congress to usurp control of the domain. Suppose, for illustration purposes, that sixty-percent of the entire nation opposes physician-assisted suicide (PAS), but that only forty-percent of Oregon residents feel the same way. Oregon residents who oppose PAS may not be able to convince the state to ban it, so they may

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25 Baker & Young, supra note _____, at 118 (citing Fugitive Slave Act as an example); Baker, supra note _____, at 962 (citing a national ban on polygamy); Macey, supra note _____, at 272 (suggesting citizens may prefer federal law because it is more difficult for others to avoid).
27 Arguably, no other state could be forced to recognize a same-sex marriage performed in Massachusetts. For one thing, the Federal Defense of Marriage Act (DOMA) explicitly grants states authority to refuse to recognize same-sex marriages performed elsewhere. 28 U.S.C. § 1738C (2004). States may also refuse to recognize same-sex marriages on grounds of public policy. For a discussion of this exception to the Full Faith and Credit Clause (as well as DOMA), see Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 YALE L.J. 1965 (1997).
28 The incentive probably exists only with respect to legislation regulating morals. It is easy to imagine an outsider wanting to ban same-sex marriages in Massachusetts; it is more difficult to imagine an outsider wanting to ban high property taxes or other economic policies there.
29 Cf. Friedman, Valuing Federalism, supra note _____, at 373-74 (suggesting that “it has become common for those who have not prevailed in the state legislatures to leapfrog over their heads to Congress”).
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.

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

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

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30 Cf. Macey, supra note ___, at 271.

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

In sum, given the jurisdictional reach, preferred content, and cost advantages of federal law, ordinary citizens may demand congressional action on a wide range of issues on which the normative case for federal intervention (say, to overcome state collective action problems) is tenuous. This suggests citizens cannot be trusted to safeguard state prerogatives, for the temptation to wield congressional power is simply too great. Citizens face a collective action problem. Even if they all agree Congress should control only some issues, they have strong incentives to cheat on that agreement—to wield federal power whenever Congress promises to give them the outcome they prefer. Judicial review is thus necessary to prevent Congress from imposing uniform national solutions on many issues currently—and more properly—handled by the states. Or so the theory goes.

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

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

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

A. Citizens Prefer the Content of State Legislation

In this Section, I show that even assuming that citizens would seek congressional action on many issues that should be handled by the states, Congress often cannot oblige them satisfactorily. The explanation has to do with the shape of public opinion and the structure of Congress. To be sure, members of Congress want to appease their constituents; they may campaign for, vote for, and even sponsor legislation sought by constituents, without regard to state prerogatives. Nevertheless, on many issues, they will be unable to pass legislation. First, due to the sheer size and diversity of the national polity, public opinion on many issues is fragmented at the national level, suggesting that many citizens would deem any congressional proposal—or more precisely, any proposal that stands a chance of passing—inferior to existing state policy. This gives citizens ample reason to oppose federalization and preserve state prerogatives. Second, structural features of the national government, such as the allocation of congressional seats and the Senate filibuster, hinder efforts to enact legislation at the federal level even when the national majority favors the same policy and could, absent these structural constraints, push satisfactory legislation through Congress.

On many important issues today national public opinion is fragmented; that is, no one position on the issue garners majority support. Consider opinion on the legal status of same-sex

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34 Consider that, of the 8,621 bills introduced in the 108th Congress, only 498 (or roughly 6%) were actually enacted into law.
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.\(^{35}\)

Given the range of policy options available on these issues, legislation crafted by state governments often will satisfy more citizens than will uniform national legislation.\(^{36}\) States are unique civil societies.\(^{37}\) Consequently, citizens in different states often prefer different policies from government.\(^{38}\) Citizens of one state might prefer to ban smoking in places of public accommodation, citizens of a second state might opt to require special smoking sections in such places, while citizens of a third state might prefer not to regulate smoking at all.\(^{39}\) 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.\(^{40}\)

When national public opinion is fragmented, states are likely to come closer to satisfying the policy preferences of their residents, and proponents of national legislation will be unable to muster enough votes in the Congress to preempt state authority. Any legislation introduced in

\(^{35}\) National Election Pool, Nov. 2, 2004, The Roper Center, University of Connecticut, Public Opinion Online, accession 1615384, available at Lexis Nexis, Polls and Surveys Database. See also CNN / USA Today, Mar. 18-20, 2005, The Roper Center, University of Connecticut, Public Opinion Online, accession 1621899, available at Lexis Nexis, Polls and Surveys Database (20% support same-sex marriages; 27% support civil unions, but not marriages; 45% oppose both marriages and civil unions; 8% expressed no opinion).

\(^{36}\) Charles Tiebout’s seminal work on the political economy of public goods provides a firm rationale for expecting a higher degree of correspondence between state public opinion and state policy, in comparison with national public opinion and federal policy. See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956).

\(^{37}\) Daniel J. Elazar, American Federalism: A View From the States 112 (3d ed., 1984). Although public opinion varies from one state to the next, within any given state it is generally less fragmented than at the federal level. Cf. id. at _____ (suggesting that one of three political cultures tends to dominate within any given state).

\(^{38}\) E.g., Erikson, et al., supra note ____, (finding that state policies differ widely on many issues).

\(^{39}\) Kam & Mikos, supra note ____, at ____ n. ____ (discussing how states have taken distinct approaches to regulation of smoking in places of public accommodation).

\(^{40}\) E.g., Barry Friedman, Valuing Federalism, 82 MINN. L. REV. 317, _____ (1987).
Congress will face stiff opposition from members whose constituents (on the whole) prefer one of the various alternatives. After all, these constituents can always turn to their state (or local) government to adopt the policy they prefer; thus, they are likely to support federalization only when Congress can give them some policy that is superior to—or at least as good as—the policy offered by their state or local government; they do not need to accept compromises from Congress. A preference of the content of state legislation gives citizens an incentive to oppose usurpation of state authority in the domain.\footnote{As Herb Wechsler explains: [H]ostility to Washington may rest far less on pure devotion to the principle of local government than on opposition to specific measures which Washington proposes to put forth. This explanation does not make the sentiment the less centrifugal in its effects. Wechsler, supra note \___, at 552. \textit{See also} Macey, supra note \____, at 281 (opining that “the political-support-maximizing solution at the national level may differ from many, perhaps most, of the local solutions”). This assumes the congressional statute preempts state legislation; if Congress merely sets a floor or ceiling for the states, some citizens may support the adoption of a second-best policy at the federal level, as long as it does not interfere with any state laws they deem preferable on the merits.}

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

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

Nonetheless, even when a national majority backs one policy approach and can be expected to rally behind congressional efforts to legislate, several structural features of the federal government may foil attempts to pass congressional legislation. That is, even if a majority of citizens demand one particular piece of legislation, Congress may still be unable to supply it. Consider the allocation of seats in the House and Senate. For one thing, proponents of congressional legislation may have the backing of the popular majority, but that does not necessarily mean they control enough seats in Congress to enact the legislation. On the one

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

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

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


46 See, e.g., Kramer, supra note _____, at 222-23 (“Preferences in Congress are aggregated on a nationwide basis . . . . If interests in an area represented by a majority of these legislators concur, interests in the rest of the country will be subordinated.”).
hand, citizens in the majority may be heavily concentrated in a small number of congressional districts and thus may be unable to sway the votes of more than half of the seats in the House of Representatives. On the other hand, opponents of the proposal, though fewer in number, may yet control a majority of seats in the Senate, which are not allocated based on population; or, at the very least, opponents may control enough Senate seats (forty) to sustain a filibuster of the measure.\textsuperscript{47} 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.\textsuperscript{48}

By contrast, the structure of state governments is more conducive to passing populist legislation. To be sure, state governments must overcome some of the same obstacles that make it difficult to marshal populist legislation through Congress (e.g., all states employ bicameral legislatures (except Nebraska) and recognize gubernatorial vetoes), but the structural barriers are less daunting at the state level.\textsuperscript{49} 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).\textsuperscript{50} More importantly, twenty-three states empower voters to enact legislation or constitutional amendments directly through ballot initiatives, bypassing the state

\textsuperscript{47} Currently, it takes sixty votes in the Senate to end a filibuster. Rule 21 of the Standing Rules of the Senate, \textit{available at} \url{http://www.senate.gov/legislative/common/briefing/Standing_Rules_Senate.htm} (last visited Dec. 1, 2006).

\textsuperscript{48} Clark, \textit{supra} note ___, at 1324 (suggesting that separation of powers principles, including bicameralism and presentment, help to safeguard state powers simply by making it more difficult to enact federal legislation). Wechsler posits a number of other features of the national political system that reinforce the ability of minority interest groups to block unfavorable national legislation, including state control over the drawing of congressional districts and the Electoral College. Wechsler, \textit{supra} note _____, \textit{passim}.


\textsuperscript{50} \textsc{Council of State Gov’ts, Book of the States tbl.3.16}, (2006).
legislature (and many anti-majoritarian procedural safeguards) altogether.\textsuperscript{51} (It is worth noting that four more states allow voters to pass laws or amendments previously submitted to the state legislature, and all fifty states employ some version of the referenda process, thereby allowing voters to reject legislation or constitutional amendments passed by the legislature.\textsuperscript{52})

In addition to empowering citizens to sidestep traditional lawmaking processes, direct democracy also enables state politicians to sidestep controversial issues without ceding authority over such issues to the federal government. State and federal politicians alike fear taking stances on controversial issues since doing so may cost them votes needed for re-election. Hence, they may attempt to shift responsibility for such issues onto some other government authority, perhaps another decision-maker within the same level of government (e.g., a court) or another level of government. Some have argued that state politicians willingly abet federalization for this reason—they would rather let federal politicians suffer the electoral consequences of taking stands on controversial issues like abortion, PAS, and so on.\textsuperscript{53} (Of course, the same argument could be applied to federal politicians: they might abstain from legislating in order to leave thorny issues in the hands of their state counterparts.) However, state politicians in states utilizing direct democracy can duck controversial issues without necessarily federalizing them—namely, by passing the buck to the voters via the initiative and referenda processes. In other words, they do not need to cede control of the issue to the federal government to avoid taking a stance (though federal politicians \textit{would} still need to cede control to state governments to duck such issues). Thus, even when state politicians attempt to dodge controversial issues, state

\textsuperscript{51} \textsc{Initiative and Referendum Inst.}, \textsc{1 I&R Factsheet tb1.1}, available at http://www.iandrinstitute.org/New\%20IR\%20Website\%20Info/Drop\%20Down\%20Boxes/Quick\%20Facts/Handouts\%20-%20What\%20Is\%20IR.pdf (collecting data on direct democracy practices used in all fifty states) (last visited Dec. 1, 2006).

\textsuperscript{52} \textit{Id}.

prerogatives remain safe because the state (broadly defined to include the voters) continues to handle them.

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

*   *   *

To summarize, even assuming citizens care only about public policy—and recognize no jurisdictional limits on congressional power—the political process still safeguards state prerogatives on many issues, for two reasons. One is Congress’s (relative) inability to satisfy citizens’ policy preferences when national public opinion is fragmented. Given a preference for the content of state legislation, citizens may oppose federalization regardless of the benefits (the opportunity to shift costs, e.g.) it otherwise offers. Much of the allure of federalization – the broad jurisdicational reach of federal law, for example – is simply lost on citizens who deem congressional policy inferior to state / local policy.54 Another constraint on congressional power is the anti-majoritarian design of the federal lawmaking process. The allocation of congressional seats, the Senate filibuster, and the Presidential veto (and two-thirds override

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54 It is easy to see why a citizen may sometimes want to impose her preferred policy on the entire nation, but it is more difficult to see why the same citizen would want to impose some second-best policy, particularly when some states (including her own, perhaps) have adopted her preferred policy.
requirement) may foil efforts to enact federal legislation even when the national majority would be pleased by its contents. Citizens face less daunting barriers to passing populist legislation at the state level.

B. Citizens Fear Federal Mission Creep

Up to now, I have assumed that the people take a stance on proposed congressional legislation without considering its impact on other issues. Thus, for example, a proposal to ban PAS is just that, and no more; it has no impact on other issues, such as the delivery of palliative care or the termination of unwanted medical treatment. But legislation on one issue often portends action on other issues as well.\textsuperscript{55} A modest rule may serve as a launching pad for a far more ambitious (and perhaps unwelcome) regulatory program down the road. Hence, it seems reasonable to expect that when citizens formulate opinions on proposed legislation they will consider how that legislation could affect government policy on other, related issues in the future.

Indeed, studies suggest that public opinion toward any given policy is often conditioned by public beliefs about what the government may (or may not) try to do next on related issues.\textsuperscript{56} Some citizens, for example, may support government efforts to ban PAS, but only if they believe that government will not also attempt to restrict patient access to palliative care; if they fear that banning PAS will also curtail palliative care, they may prefer not to regulate PAS at all.

\textsuperscript{55} The passage of one law may facilitate the passage of other laws for any number of reasons. For example, the government may need to establish some new bureaucracy to enforce the first law. It may be expensive to set up this bureaucracy—which will undermine support for the initial legislation, but once the bureaucracy has been established, the marginal cost of extending its jurisdiction over other, related subjects will be relatively low. A related concern is that the officials who are tasked with administering the initial regulation may extend their jurisdiction without any further action by the legislature. See Part _____, infra.

\textsuperscript{56} This possibility is captured by what political scientists call “nonseparable preferences.” Dean Lacy, \textit{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. \textit{Id.} at 243 (finding that “on nearly all of the issues, a substantial percentage of respondents have nonseparable preferences”).
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 control of an issue, but some members of the majority may fear that federalizing one issue will jeopardize state autonomy over other, related issues in the future—issues on which they might prefer the policy pursued by their state governments. To be sure, state legislatures may also spark fears of mission-creep (state governments may attempt to expand their authority), but congressional mission-creep is apt to trigger much more alarm among citizens. The reason is that if citizens must choose only one government—either state or federal—to handle two (or more) related issues, they are even more likely to opt for their state government than they would if they were considering either issue alone. After all, Congress has a difficult enough time satisfying policy preferences on any one issue in isolation. Consider public opinion on the issues of PAS and the termination of medical treatment. The American public is evenly divided on the issue of PAS (one poll shows that 46% favor PAS, while 45% oppose allowing “doctors to prescribe lethal doses of drugs that a terminally ill patient could use themselves to commit suicide”), but it is strongly in favor of permitting patients to decline medical treatment (84% approve of “laws that let patients decide about being kept alive through medical treatment”). It is clear from the data that a large portion of those who favor a ban on PAS nonetheless oppose a ban on the termination of medical treatment. Citizens concerned about federal mission-creep may thus oppose congressional legislation on a narrow issue (say, PAS) in order to preserve state

57 Pew Research Center, supra note ____.
control over related issues (say, refusal of treatment), particularly if they expect Congress to adopt an objectionable approach on the second issue (recall the Terry Schiavo case).\(^{58}\)

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>
<thead>
<tr>
<th>State</th>
<th>Support ban on PAS</th>
<th>Support ban on termination of medical treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>State A</td>
<td>60%</td>
<td>40</td>
</tr>
<tr>
<td>State B</td>
<td>60</td>
<td>60</td>
</tr>
<tr>
<td>State C</td>
<td>40</td>
<td>60</td>
</tr>
<tr>
<td>Total</td>
<td>53</td>
<td>53</td>
</tr>
</tbody>
</table>

As the table shows, large majorities in states A and B favor a ban. In the aggregate, a majority (53.3\%) of citizens across the three states support the ban, suggesting one could be passed in the national legislature. Suppose, however, citizens 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.

\(^{58}\) On March 21, 2005, Congress passed a private bill transferring jurisdiction over the Schiavo case to the federal courts (which, like the Florida courts, ultimately refused to block the removal of Schiavo’s feeding tube). The congressional maneuver triggered a backlash from the public, nearly two-thirds of which supported the decision to remove the tube (and even among those who believed Schiavo should be kept alive, many objected to Congress’s intervention in the case, deeming it a state issue instead). See Jay Bookman, *Schiavo Case Shows Politics’ Perilous Side*, ATLANTA JOURNAL-CONSTITUTION, Aug. 17, 2006, at 15A.
do next regarding the termination of life-sustaining medical treatment, and not just what the legislature is currently proposing regarding PAS.

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

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

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

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?”

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

[A] constitutional amendment is not necessary to address the issue of gay marriage, and will only drive yet another nail into the coffin of federalism. If we

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

turn regulation of even domestic family relations over to the federal government, presumably anything can be federalized.61

Such appeals – coming from savvy political elites who know what resonates with their constituents – bolster my claim that fears of federal mission creep may reduce support for congressional legislation.62

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

C. Citizens Prefer State Administration of Policies

Another reason citizens may oppose federalization, is that they prefer to have their state government administer policy. One of the shortcomings of the extant scholarship on the political safeguards of federalism is its narrow focus on the outputs of legislatures (state or federal) and corresponding neglect of the actions taken by officials who execute legislation. Legislation is often short on details, leaving many important and contentious policy decisions to be made by

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

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the executive branch. For example, Congress may authorize the Food and Drug Administration to approve (or not) the so-called morning after pill, the Army Corps of Engineers to regulate (or not) dumping on isolated wetlands, the Environmental Protection Agency to set the precise limits on factory emissions, and so on. Hence, citizens have good reason to care about how officials interpret and enforce legislation. Consequently, citizens also have good reason to care who interprets and enforces legislation. Contrary to an implicit assumption pervading the conventional wisdom, state and federal officials are not perfectly substitutable enforcement agents. Citizens, on average, believe state officials are more trustworthy and competent administrators than their federal counterparts. In addition, citizens have comparatively more control over executive officials in state government, many of whom they can elect (or recall) directly at the ballot box. For both reasons, citizens may oppose congressional legislation that places enforcement authority in the hands of federal officials.

Citizens may oppose congressional legislation due to concerns over how vague laws will be interpreted and enforced by federal officials. One misgiving arises because federal law enables unaccountable federal officials to exert control over issues that, arguably, drafters of the legislation did not intend to cover. Consider Gonzales v. Oregon, a case in which the Supreme Court held that the United States Attorney General had overstepped his statutory authority. John Ashcroft had asserted authority under the Controlled Substances Act (CSA), a statute (arguably) designed to curtail recreational drug abuse, to issue an order banning PAS throughout the

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

64 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.
nation.\textsuperscript{65} The Court held that when Congress passed the CSA, some thirty years before Ashcroft’s order, it had not intended to give the Attorney General authority to ban this admittedly controversial practice.\textsuperscript{66} Simply put, Ashcroft had overreached. And the CSA is hardly the only statute on which federal officials have arguably overstepped the limits of their delegated authority, at the expense of state prerogatives.\textsuperscript{67} The possibility that federal officials, sometimes decades after a statute is enacted and following several changes of administration, may invoke statutory authority in unexpected and unwelcome ways thereby mitigates public support for federalization.

A related problem arises even when the Executive’s statutory authority is more circumscribed. Under almost any statute, Executive branch officials have at least some discretionary authority to decide how to enforce the law. Consider a hypothetical statutory ban on PAS: “Any person who knowingly causes or aids another person to attempt suicide is guilty of a felony.”\textsuperscript{68} Unlike the CSA, such a statute clearly prohibits PAS, but officials must still decide how to administer the law. Should they enforce the ban strictly and prosecute every case in which a doctor has prescribed a lethal dosage of medication? Or should they show leniency in exceptional cases? If leniency is called for, what cases should they deem exceptional? If resources are limited, what cases should be prioritized? Should authorities prosecute doctors who prescribe lethal doses ostensibly to alleviate the patient’s chronic pain (the dilemma of double effect)? Or should they dismiss such cases in order to preserve the patient’s access to palliative

\textsuperscript{65} 126 S.Ct. 904, 925 (2006).
\textsuperscript{66} Id. Despite the fact that the Court blocked the Attorney General’s order, citizens normally will not be appeased by the prospect of judicial review. The result in Gonzales v. Oregon was somewhat atypical, given that federal courts usually defer to Executive interpretations of statutory authority. See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
\textsuperscript{67} E.g., Solid Waste Ag. of Northern Cook Cty. v. Army Corp. of Eng., 121 S. Ct. 675, 683-84 (2001) (invalidating Corps of Engineers assertion of authority over isolated bodies of water as exceeding its mandate under Clean Water Act).
\textsuperscript{68} This statute is identical to the state law upheld by the Supreme Court in Washington v. Glucksberg, 521 U.S. 702 (1997).
care? The PAS ban raises such issues but does not resolve them; citizens may worry, for example, that federal officials would enforce the ban too vigorously, prosecuting well-intentioned doctors under the statute.\(^{69}\) Hence, citizens may consider how federal officials would handle these issues before they endorse any congressional proposal to ban PAS.

In theory, of course, state executive officials may also abuse their statutory authority, or enforce laws in ways the citizenry dislikes. Nevertheless, delegations of authority to federal officials are likely to be seen as more risky, thereby giving the states an advantage. For one thing, compared to many state legislatures, Congress is able to delegate much more policy-making authority. The non-delegation doctrine articulated by the Supreme Court places virtually no limits on Congress’s ability to delegate law-making power to the Executive.\(^{70}\) Congress need only lay down an “intelligible principle” for the Executive to follow.\(^{71}\) By contrast, most states enforce a more rigorous non-delegation doctrine, one that requires the state legislature to provide specific standards to guide agency policy-making.\(^{72}\) Open-ended directives that would pass muster under federal constitutional law may fail as a matter of state constitutional law. As a consequence, citizens have less to fear from the agents of state government because their discretionary authority—and hence their ability to overreach—is more constrained than that of their federal counterparts.

\(^{69}\) Indeed, the federal Drug Enforcement Agency has recently prosecuted doctors who have over-prescribed painkillers for manslaughter or even murder. Tina Rosenberg, *Weighing the Difference Between Treating Pain and Dealing Drugs*, N.Y. TIMES, Mar. 26, 2005 at A12 (discussing cases).

\(^{70}\) The doctrine has not been used to invalidate a congressional delegation since 1935. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).


\(^{72}\) Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1189 (1999) (“Most states require the legislature to provide specific standards to guide agency discretion in the statute delegating authority to an agency.”). Six states employ a weak non-delegation doctrine (similar to the federal doctrine), upholding delegations without specific standards so long as various procedural safeguards are in place. *Id.* at 1192. Twenty states employ a strong non-delegation doctrine, striking down state laws that do not provide specific standards. *Id.* at 1196-97. The remaining twenty-four states employ a moderate non-delegation doctrine, but one that still requires more specificity than the federal non-delegation doctrine. *Id.* at 1198-1200.
In any event, citizens on average trust their state and local governments more than they trust the federal government, suggesting that they would also prefer to delegate any quantum of policy-making authority to state and local officials. In relevant part, trust denotes citizens’ expectations about how government (state or federal) will utilize the power at its disposal.\(^{73}\) 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 integrity.\(^{74}\) On these and related matters, the public holds state governments in greater esteem. On average, citizens have more faith in state government to “do the right thing,” they have significantly higher confidence in the ability of the state government to solve problems effectively, they believe they get more “bang for the buck” from state government, they see the state government as significantly more responsive than the federal government, and they see state government as less corrupt.\(^{75}\) These findings are consistent across nationally representative surveys.\(^{76}\) In short, citizens believe state government does a better job handling policy—of executing policy honestly, competently, more efficiently, and in accordance with their preferences. In other words, citizens trust state governments more for many reasons that may


\(^{74}\) 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).

\(^{75}\) E.g., NPR ET AL., *ATTITUDES TOWARD GOVERNMENT STUDY* (2000) (data archived at the Roper Center for Public Opinion Research, University of Connecticut) (on file with author). This nationally representative survey of 1,557 adults was conducted in May-June 2000 and was commissioned by National Public Radio, the Henry J. Kaiser Family Foundation, and Harvard University’s Kennedy School of Government.

have little to do with the policies adopted by their state legislatures.\(^77\) 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 jurisdictional reach, its content, its cost-shifting advantages, and so on).\(^78\)

\(^77\) When asked to describe why they do not trust the federal government, Americans point to inefficiency in the federal government, over-responsiveness to special interests, cheap talk, and lack of integrity among elected officials. Shared values on policy outcomes were only secondary concerns. NPR ET AL., supra note _____.

<table>
<thead>
<tr>
<th>Reasons Citizens Mistrust Federal Government</th>
<th>Major Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government leaders tell us what they think will get them elected, not what they really believe.</td>
<td>80.4%</td>
</tr>
<tr>
<td>The federal government is inefficient and wastes too much money.</td>
<td>73.8%</td>
</tr>
<tr>
<td>There is too much bickering between the political parties.</td>
<td>68.9%</td>
</tr>
<tr>
<td>Special interests have too much influence on the federal government.</td>
<td>65.5%</td>
</tr>
<tr>
<td>Elected officials lack honesty and integrity.</td>
<td>64.7%</td>
</tr>
<tr>
<td>Federal taxes are too high.</td>
<td>57.4%</td>
</tr>
<tr>
<td>The federal government doesn’t do enough to help people who really need it.</td>
<td>56.1%</td>
</tr>
<tr>
<td>People in government don’t have high moral values.</td>
<td>49.9%</td>
</tr>
<tr>
<td>The federal government interferes too much in people’s lives.</td>
<td>42.1%</td>
</tr>
<tr>
<td>Federal government policies don’t reflect your own beliefs and values.</td>
<td>42.0%</td>
</tr>
<tr>
<td>The problems it focuses on cannot be solved by the federal government.</td>
<td>39.6%</td>
</tr>
</tbody>
</table>

\(^78\) The notion that trust in state governments will hinder efforts to expand the powers of the national government can be traced back to the Framers. In Federalist 17, for example, Hamilton insists that the federal government will not be able to wrest power from the states, owing to the “greater degree of influence which the State governments, if they administer their affairs with uprightness and prudence, will generally possess over the people.” THE FEDERALIST 17, at 119 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Indeed, Hamilton suggests the greater danger is that the states will exploit citizen loyalties to wrest power from the national government. Id. (“[I]t will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the states.”).

Madison elaborates upon this point in Federalist 46:

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

THE FEDERALIST 46, at 316 (James Madison) (Jacob E. Cooke ed., 1961); id. at 296 (“[T]he prepossessions of the people, on whom both [governments] will depend, will be more on the side of the State governments than of the federal government.”). He echoes Hamilton’s sentiment that the states could readily quell any attempt to encroach upon their powers: “[The central government] will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.” Id. at 300.
Indeed, a growing body of political science research suggests that trust in state governments dampens support for federalization of state policy domains. For example, in one recent study, political scientist Cindy Kam and I examined whether trust judgments affected public support for a proposed congressional ban on PAS, using results from a large nationally representative survey experiment. 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. Contrary to conventional wisdom, however, we found that policy preferences do not tell the whole story; statistical analyses of responses showed that some subjects who thought PAS ought to be banned nonetheless opposed Congress’s effort to do so. 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 (support for federal legislation dropped nearly eleven percentage points among our sample). Indeed, the results indicated that the

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


81 Kam & Mikos, supra note _____, at _____.

82 Kam & Mikos, supra note _____, at _____.

83 Kam & Mikos, supra note _____, at ___. The reduction in support for the federal proposal was large and statistically significant.
states’ comparative advantage in earning the trust of the people could sway public opinion against congressional proposals that the majority otherwise favors on the merits.\textsuperscript{84}

Similarly, another line of research, virtually ignored by the legal academy, has shown that evaluations of the comparative trustworthiness of the federal and state governments helps to explain citizen support for devolution of policy making responsibilities to the states that occurred in the 1980s under President Ronald Reagan and in the 1990s under the Republican Congress.\textsuperscript{85} 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, or more honest.\textsuperscript{86} 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.

Citizens’ relative lack of trust in the federal government tempers support for congressional action that enhances federal powers \textit{vis a vis} the states. Of course, there is no guarantee that citizens will always consider the federal government less trustworthy than the states.\textsuperscript{87} Indeed, as recently as the late 1960s, citizens on average actually considered the federal

\textsuperscript{84} Kam & Mikos, supra note ______, at _____.
\textsuperscript{86} Hetherington and Nugent suggest that at least part of the reason so many people supported devolution can be attributed to the “widespread efforts of nearly all state governments over the past thirty years in terms of constitutional revision, legislative reapportionment and professionalization, strengthening executive authority, and increasing fiscal capacity.” Supra, note 76, at 134. They also say that citizens demanded the power shift because of a loss of confidence in the competence of the federal government. \textit{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.
\textsuperscript{87} This is particularly evident in times of war or national emergency. \textit{The Federalist} 46, supra note ___ (noting that support for the national government swelled during the Revolutionary War, but quickly waned thereafter); John R. Alford, \textit{We’re All in This Together, in What is it ABOUT Government that AMERICANS Dislike?} (John R. Hibbing & Elizabeth Theiss-Morse, eds., 2001) (hypothesizing that trust in the federal government may rise in the presence of an external threat to the nation).
government more trustworthy.\textsuperscript{88} Still, state and local governments arguably have an advantage over the federal government when it comes to earning and keeping the people’s trust, due both to their close proximity to the people\textsuperscript{89} and the nature of the affairs they handle (e.g., criminal law enforcement).\textsuperscript{90} Besides, comparative trust protects states precisely when one would most want to protect them—namely, when state governments are operating more competently, openly, and honestly, than the federal government. Trust ceases to provide protection for state prerogatives only when state governments lose the confidence of the people—the occasions when states, arguably, deserve less protection. As Madison suggested, the people “ought not

\textsuperscript{88} The NES tracked comparative trust on the 1968, 1972, 1974, 1976, and 1996 surveys. On the 1968 survey, 50% of respondents indicated they placed the most faith and confidence in the federal government, whereas only 20% said the same of their state government. Only six years later, however, roughly equal portions (about 30%) placed the most trust in state and federal government. NES Cumulative File 1948-2004, available at http://www.umich.edu/~nes. The NES also tracked trust in local governments over the same time period; in 1996, nearly 70% of respondents said they had the most faith in either their state or local government; only 30% said the same of the federal government. \textit{Id.} Arguably, trust in local governments could also reduce support for federal legislation.

\textsuperscript{89} Hamilton explains:

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

\textit{THE FEDERALIST 17, supra note 78, at 119.}

\textsuperscript{90} Hamilton points to the states’ specific responsibilities over crime and punishment as one way in which states can “cement” their hold over citizens’ loyalties:

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

\textit{Id. at 120; id. (“The operations of the national government . . . falling less immediately upon the observation of the mass of the citizens, the benefits derived from it will chiefly be perceived and attended to be speculative men. Relating to more general interests, they will be less apt to come home to the feelings of the people; and, in proportion, less likely to inspire an habitual sense of obligation and an active sentiment of attachment.”}).

In 1984, Daniel Elazar echoed these sentiments:

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

\textit{ELAZAR, supra note _____, at 256.}
surely to be precluded from giving most of their confidence where they may discover it to be most due.” 91 Today, it may be the states, and twenty years from now, it may be the federal government; the point is, the people should not be required to suffer incompetence, corruption, and mal-administration when they have another agent (whether state or federal) they believe will do a better job executing their will. Anyway, should the states squander the people’s trust, they can always win it back, as they did in the 1970s, and reclaim domains once lost to the federal government. 92

In any event, whether or not they trust state governments more, citizens have a second reason for delegating any quantum of policy-making discretion to state, rather than federal officials: they can keep state officials on a shorter leash. If a state official abuses the power he/she has been given—say, by overstepping statutory authority or by exercising poor judgment—the people may be able to remove him/her. At the federal level, only the President is elected by the people (and then, only indirectly via the Electoral College). But in almost all states, voters choose several of the topmost executive officials, including the governor, lieutenant governor, attorney general, and treasurer, among others. Forty-six states allow voters to elect at least one senior executive official besides the governor, and on average, voters elect almost five such officials. 93 Indeed, in most states, even members of the judicial branch are elected. 94

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91 The Federalist 46, supra note ___.
92 The Framers expected the federal and state governments to engage in an ongoing “competition for the political allegiance and affections” of the people, suggesting that loyalties and power would shift back and forth over time. Jack Rackove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031, 1042 (1997); see also Pettys, supra note ___, at 357-60 (suggesting that competition between the state and federal governments will not collapse so long as three conditions are met: first, each sovereign must possess a proving ground—a domain in which it is assured of an opportunity to earn affection; second, each sovereign must remain autonomous—one government can not control what the other does; and third, the system must remain transparent—the people must know where to assign blame).
93 The Council of State Gov’t’s, The Book of the States, 350 (Keon S. Chi ed., 2005). Senior officials include Lieutenant Governor, Secretary of Agriculture, Comptroller, Secretary of State, Treasurer, Attorney General, Auditor, and Superintendent of Public Instruction. Id.
can also elect a variety of local officials, such as the district attorney and county assessor. Furthermore, in eighteen states and more than two-thirds of local governments, voters are allowed to recall public officials who have squandered the public trust. In short, if a state official were to enforce a law in a way that displeased most citizens, the citizens would have the power to remove the official directly at the ballot box—either at the next election or via the recall device—an option that is simply not available against any federal executive or judicial official except a first-term President.

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

D. Citizens Value Processes Too

So far, the considerations that shape public attitudes toward congressional legislation have all been policy-oriented: citizens care about the content of legislation, how it might be enforced, and any impact it may have on related policy domains. Contrary to popular wisdom,

96 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 ____.
however, citizens also care about how policy is made in the first instance. Studies have shown that when citizens formulate opinions about government actions, they place weight on matters of procedure, and not just matters of specific policy substance. 97 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. 98 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. 99 Other scholars have found that some citizens support a variety of reforms to the political process, including campaign finance laws, the use of ballot initiatives, and the devolution of power to the states, that may not be conducive to enacting the policies they favor. 100 That is, some citizens support reforms of the political process, even though the current process is more likely to generate policy outputs they favor, say, because their political party controls both branches of government. 101

Citizens know how they would like government to be run, and these beliefs place important limitations on Congress’s ability to federalize policy domains. First, some citizens

97 E.g., Dennis Chong, How People Think, Reason, and Feel About Rights and Liberties, 37 AM. J. POL. SCI. 867 (1993) (when subjects were asked whether government should allow controversial groups like the KKK to demonstrate, they considered procedural rules, among other things – and not just their feelings toward the group at issue – before making their decision).
98 Hibbing & Theiss-Morse, supra note 76, at 6 (2002) (“Contrary to popular belief, many people have vague policy preferences and crystal-clear process preferences, so their actions can be understood only if we investigate these process preferences.”); id. at 35 (“We believe people are more affected by the processes of government than by the policies government enacts.”) (emphasis added).
99 Gibson, supra note ___, at 471 (reviewing research on the impact of legitimacy and procedural fairness on public attitudes and finding that “[p]roper process contributes to acceptance of unpopular products”); Tom R. Tyler & Kenneth Rasinski, Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions, 25 LAW & SOC’Y REV. 621 (1991). In their study of the 1991 California water shortage, for example, Tyler and Degoey find that citizens were more likely to comply with policies if they believe that the procedures that created the policies are fair. Tom R. Tyler & Peter Degoey, Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities, 69 J. PERSONALITY & SOC. PSY. 482 (1995).
100 Hibbing & Theiss-Morse, supra note __, at 77.
101 Id. at 82.
believe the people themselves ought to have final say on important public policy decisions, via ballot measures and similar devices; these citizens might oppose congressional legislation to spare state laws they deem more “legitimate” (i.e., because they were approved by the voters), or to preserve future opportunities for a direct say in government affairs. Second, citizens may believe that federalism itself is an essential facet of the nation’s legitimate democratic process, and not just a means to another end, and may thus oppose congressional legislation that violates their pre-conceived notions of the proper allocation of responsibilities between state and federal governments. For both reasons, citizens may oppose congressional legislation—sacrificing their immediate policy objectives—and in the process, thereby preserve state prerogatives.

1. The appeal of direct democracy

One of the benefits of federalism is that it enhances citizen participation in government. The explanation stems, in part, from the fact that state and local governments follow procedures that give citizens a greater say over state and local public affairs than they have over national affairs. Twenty-four states have procedures in place that permit some form of direct legislation by the voters, commonly referred to as ballot initiatives. 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. And direct democracy is employed even more commonly by local governments, more than half of which have some form

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102 E.g., Adler & Kreimer, supra note _____, at 81-82 (“It is a shibboleth of the literature endorsing federalism that states facilitate a kind or degree of political participation by citizens that does not occur at the national level.”).
104 Under the legislative referendum, available in all fifty states, an arm of the state submits legislation or constitutional amendments to the voters for their consideration. Under the popular referendum, used in twenty-four states, the people refer legislation or amendments that were enacted by the state government to the voters for approval or rejection. Id.
of initiative and ninety-percent of which utilize some form of referendum procedure.\footnote{105} 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.\footnote{106}

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

First, support for direct democracy may trigger popular opposition to federal legislation that preempts state authority and thereby narrows the range of opportunities for participating in government at the state and local level. Direct democracy remains enormously popular among the people.\footnote{107} Since 1904, citizens have considered more than 2,000 ballot initiatives, and 379 initiatives appeared on ballots in the 1990s alone.\footnote{108} To some citizens, the act of participating in politics has intrinsic value; it is more than a means by which to shape public policy. And congressional legislation may often deprive citizens of the opportunity to participate directly in

\footnotesize{\begin{itemize}
  \item \footnote{105}{TARI RENNER, INITIATIVE & REFERENDUM INST., LOCAL INITIATIVE AND REFERENDUM IN THE U.S., available at http://iandrinstitute.org/Local\%20I&R.htm.}
  \item \footnote{106}{U.S. CONST. art. I, § 7, cl. 2.}
  \item \footnote{107}{E.g., HIBBING & THEISS-MORSE, supra note 76, at 75 (noting that 86% of their respondents would like to see an increase in ballot initiatives); Gordon S. Black Corporation, May 1992, The Roper Center, University of Connecticut, Public Opinion Online, accession 0195850 (92% of respondents support ballot initiatives).}
  \item \footnote{108}{INITIATIVE & REFERENDUM INST., INITIATIVE AND REFERENDUM USE 1 (May 2006).}
\end{itemize}}
policy-making, by preempting state laws governing the same issue.\textsuperscript{109} Simply put, the more policy space Congress occupies, the less room citizens have to govern directly. Hence, some citizens may oppose congressional legislation, even when it serves their policy goals, in order to safeguard their voice in government.

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.\textsuperscript{110} The aura of legitimacy conferred upon ballot initiatives can have a powerful impact on public opinion. Some citizens may oppose attempts to federalize issues on which the voters have already spoken directly, whether or not they agree with what the voters had to say, and whether or not they value the act of participation.\textsuperscript{111}

\textsuperscript{109} Rapaczynski, \textit{supra} note \_, at 404 (noting that “the vitality of participatory state institutions depends in part on the types of substantive decisions that are left to the states”). For examples of federal legislation preempting state or local initiatives, see League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995) (proposition 187, which denies public benefits to illegal immigrants, preempted by Immigration and Nationality Act); Washington State Bldg. & Constr. Trades Council AFL-CIO v. Spellman, 684 F.2d 627 (9th Cir. 1982) (initiative banning storage of radioactive waste generated outside state of Washington preempted by numerous federal statutes); Nat’l Audubon Soc’y v. Davis, 307 F.3d 835 (9th Cir. 2002) (proposition 4, which restricts use of certain traps and poisons, preempted by Endangered Species Act and National Wildlife Refuge Systems Improvement Act).

\textsuperscript{110} Jack Citrin, \textit{Who’s the Boss? Direct Democracy and Popular Control of Government, in Broken Contract? Changing Relationships Between Americans and Their Government} 278 (Stephen C. Craig, ed., 1996); Rapaczynski, \textit{supra} note \_, at 396 (noting that citizen participation generally enhances the legitimacy of government). Whether laws passed through the initiative process are, in fact, more legitimate, according to normative political theory, is beside the point; rightly or wrongly, the public views such laws as more legitimate, making them more resilient in the court of public opinion to challenges from Congress (or elsewhere).

\textsuperscript{111} Oregon’s experience with PAS legislation is illustrative. In November 1994, voters approved by the slimmest of margins (52% to 48%) a ballot initiative that would allow terminally ill patients to seek prescription drugs to hasten death. Don Colburn, \textit{Assisted Suicide Bill Passes: Oregon Law Puts State at Center of Ethical Debate}, WASH. POST, Nov. 14, 1994, at Z9. Three years later, the state legislature authorized a ballot measure to repeal the PAS statute. Oregon voters, however, defeated the repeal effort with an even wider margin of victory (60% to 40%). Jane Meredith Adams, \textit{Assisted Suicide Gains in Propriety}, BOSTON GLOBE, Nov. 9, 1997, at D3. Some commentators suggested that the repeal measure was defeated by such a wide margin to the fact that it had been sponsored by the legislature and not the voters themselves, as well as the fact that other efforts to circumvent the will of Oregon’s voters had been made in the state courts and in the federal government. \textit{The Paper Trail}, The Oregonian, at A1, Nov. 8, 1997.

The ongoing effort to pass the National Uniformity for Food Act provides another useful example. This congressional statute would preempt state and local food labeling laws, including California’s Proposition 65. Critics, including California Governor Arnold Schwarzenegger, have rallied opposition to the congressional
In sum, citizens may value the unique opportunity to participate in governmental decision-making that only state and local governments can provide. Whether it is because federal legislation crowds out the opportunity to participate in lawmaking or because citizens feel they (and not their representatives) should have final say on important matters of public policy, the widespread use of direct democracy in the states gives citizens an additional reason, independent of the merits of legislation, to oppose federal laws that usurp state authority.

2. The (surprising) appeal of federalism

In addition to direct democracy, federalism itself may hold some value to citizens. In other words – and contrary to popular wisdom\textsuperscript{112} -- citizens may believe in a limited central government, and, as a consequence, they may oppose congressional action on an issue they believe \textit{a priori} ought to be handled by the states instead. In this Section, I show that citizens do indeed have beliefs about which level of government ought to handle various policy domains. Just as importantly, I show that these beliefs are consequential—in other words, some citizens appear willing to stand up for this principle even at the expense of satisfying their short-term policy preferences.

To begin, citizens have well-defined notions—quite separate from any immediate policy concerns—about which level of government (local, state, or federal) \textit{ought} to control various policy domains. On some issues, they prefer state (or local) control; and on other issues, they

\begin{footnotesize}
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\item McConnell, supra note \_, at 1488 ("[F]or most people . . . issues of federalism take second seat to particular substantive outcomes."); John O. McGinnis, \textit{Presidential Review as Constitutional Restoration}, 51 \textit{Duke L. J.} 901, 931-32 (2001) (opining that “because [federalism] is a structural principle, citizens are largely indifferent to it when it conflicts with issues that stir their passions”); McGinnis & Somin, supra note \_, at 97 (“Federalism is an abstract and complicated system compared to many underlying public policy issues like drugs and education, which are more concrete and more likely to engage the passions of citizens.”).
\end{itemize}
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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.\footnote{ROEDER, supra note 76, at Tab. 6.1.} The belief that the states should control some domains, and the federal government

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<tr>
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<td>19%</td>
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<td>46%</td>
<td>42%</td>
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<td><strong>Pollution</strong></td>
<td>44%</td>
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<td><strong>Homeless</strong></td>
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<td><strong>Crime</strong></td>
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<td><strong>Economic development</strong></td>
<td>61%</td>
<td>31%</td>
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*See also* CBS/New York Times, Mar. 10-14, 2004, The Roper Center, University of Connecticut, Public Opinion Online, accession 0449531, available at Lexis Nexis, Polls and Surveys Database (reporting that small majority—50% versus 46%—of respondents favor state versus federal control of gun laws); Gallup/CNN/USA Today, Jan. 9-11, 2004, The Roper Center, University of Connecticut, Public Opinion Online, accession 0446939, available at Lexis Nexis, Polls and Surveys Database (reporting that roughly equal numbers of respondents—44% versus 43%—favor state as opposed to federal control of laws regarding marriages and civil unions between same-sex couples). Citizens also have more abstract views about the proper scope of federal power. In a July 2003 Pew Research Center poll, respondents were asked their views on the following statement: “The federal government should run only those things that cannot be run at the local level.” 29% of respondents completely agreed with the statement; 42% mostly agreed; 17% mostly disagreed, and 7% completely disagreed. Pew Research Center, Jul. 14-Aug.5, 2003, The Roper Center, University of Connecticut, Public Opinion Online, accession 0441914, available at Lexis Nexis, Polls and Surveys Database.
others, is consistent with the notion that citizens recognize limitations to federal power, in other words, that citizens recognize the principle of federalism. ¹¹⁴

And for at least some segment of the population, such opinions regarding the proper allocation of state/federal authority carry weight; in other words, they may trump policy considerations when citizens formulate their opinions of proposed federal legislation. To begin, it is worth noting 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 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

¹¹⁴ Here I suggest that citizens’ views about the authority of state and federal governments reflect a principled determination that—as a matter of democratic process—the states ought to control a particular policy domain. To be sure, citizen preferences for state versus federal control of some issue may simply reflect their preference for the overall package of policies offered by their state, rather than a more abstract commitment to state autonomy. Nonetheless, even this “bottom up” approach toward federalism may protect state powers, as long as citizens remain committed to state control over an entire policy domain, and oppose congressional efforts, however appealing on the merits, to federalize certain aspects of it on a more ad hoc basis. Cf. Michael C. Dorf, Whose Ox is Being Gored? When Attitudinalism Meets Federalism 21-23 (on file with author). Professor Dorf suggests that judicial attitudes towards federalism may be formed in similar ways. Namely, he argues that judicial attitudes toward federalism may derive from a “top down” approach, e.g., by asking how the Constitution, its history, and its purposes, demarcate the line between federal and state powers, or a “bottom up” approach, e.g., by asking what sort of policy outcomes solicitude for federalism is likely to generate. In either case, Dorf claims that attitudes toward federalism may trump other considerations—such as the Justice’s views of the wisdom of congressional policy—when the Justice decides a case implicating federalism concerns. Id. at 16. My argument is that federalism beliefs may trump other considerations—such as policy preferences—when citizens decide whether to support congressional legislation, whether those beliefs are derived in a top down fashion, e.g., out of respect for tradition or concern for tyranny, or in a bottom up fashion, e.g., because of a preference for the overall body of laws that would adopted in a pro-state versus a pro-federal system.
citizens not to impose their values on other citizens through Congress—to live and let live (e.g., “what happens in another state is none of your business”).

Recent debates over the twice-defeated federal constitutional amendment to ban same-sex marriage highlight elite efforts to make federalism trump other considerations among the electorate. Opponents of the amendment frequently cited traditional state primacy in the field of family law to defend their position among voters who otherwise supported the amendment. John Kerry, for example, professed personal disagreement with same-sex marriages, but nonetheless objected to a federal constitutional amendment to ban them on federalism grounds: “[F]or 200 years, this has been a state issue. I oppose this election year effort to amend the Constitution in an area that each state can adequately address.”\(^{115}\) Similarly, in debates on the floor of Congress, Senators invoked tradition to oppose the amendment. Christopher Dodd’s comments are illustrative:

> Since the founding of our Nation, marriage has been the province of the States, and in my view it should continue to be a State issue. Yet the Federal Marriage Amendment would deprive States of their traditional power to define marriage and impose a national definition of marriage on the entire country.\(^ {116}\)

The same appeal to tradition has been made against other congressional proposals implicating federalism concerns.\(^ {117}\)

Similarly, opponents of the same-sex marriage amendment have implored voters to take a live and let live attitude. For example, Senator Jim Jeffords of Vermont told his constituents that


\(^{117}\) In the controversy over federal efforts to ban PAS, for example, Oregon Governor Theodore R. Kulongoski applauded the Supreme Court’s *Gonzales* case: “Medical issues traditionally fall within the purview of the states, and today the U.S. Supreme Court strengthened that tradition.” Egan & Liptak, *supra* note ___, at ___.

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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.\textsuperscript{118}

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

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

I don’t think there should necessarily be a federal policy in this area.\textsuperscript{119}

The tyranny argument has been used against other proposals before Congress as well.\textsuperscript{120}

\textsuperscript{118} 150 CONG. REC. S7962 (daily ed. July 13, 2004) (statement of Sen. Jeffords). See also Andrew Sullivan, \textit{Federal Express}, \textit{NEW REPUBLIC} at 6 (Dec. 13, 2004) (“The whole point of federalism is that different states can have different policies on matters of burning controversy . . . Let Ohio prevent gay couples from having legal protections. But let California enact a sweeping civil-unions bill that brings gay couples very close to marriage rights. Let Washington ban federally funded embryonic stem-cell research. But allow Sacramento to set up a huge research program.”).


\textsuperscript{120} Senator Wyden of Oregon invoked the tyranny argument in his effort to defeat the Pain Relief Promotion Act in 2000:

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

\textit{Proposed Amendment to the Pain Relief Promotion Act: Hearing Before the Senate Comm. on the Judiciary, 106th Cong.} (2000).
To be sure, the conventional wisdom suggests that federalism arguments are merely window dressing—that elites are not genuinely interested in protecting federalism. In a 2004 op-ed in *The New York Times*, for example, UCLA law professor William B. Rubenstein suggested that federalism is a red herring: “Politicians generally like a constitutional discussion because it allows them a way to avoid controversial topics by reframing them in terms of the two organizing principles of our system of government: separation of powers and federalism.”\(^{121}\)

But the criticism that elites only invoke federalism to avoid taking a stance on a controversial issue simply misses the point. What matters for present purposes is whether *citizens* care – or can be made to care – about federalism, not whether elites themselves genuinely adhere to the principles they espouse in campaigns (which they will, presumably, only if citizens revere the same principles). And for two distinct reasons, appeals to federalism in elite debate support the notion that *citizens* care about the allocation of state / federal powers. For one thing, by exposing the public to federalism appeals on a regular basis, elite debate can make federalism a more salient consideration in the minds of citizens.\(^{122}\) Even more importantly, however, the fact that elites choose to frame debates around federalism, potentially staking their political careers on it, suggests that some citizens must value federalism. Elites realize, of course, that re-

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\(^{121}\)See also Hamilton, * supra* note _____ (claiming that “[i]t is common knowledge on Capitol Hill that federalism or states’ rights are nonstarters as objections to legislation. Members spout federalism rhetoric to block legislation they oppose for other reasons, but it is never a dispositive consideration.”).

\(^{122}\)Kam & Mikos, * supra* note _____, at ____.
framing debates is an important way to manipulate public opinion. Re-framing debates in a particular way will serve their purposes, however, only if the chosen frame resonates with the public.

To illustrate, consider the proposed federal constitutional amendment to ban same-sex marriage. Suppose that a United States Representative does not want to stake out a position on the merits of the issue—she fears taking a stance would alienate a large number of constituents, who are split on the merits of the proposal. So the Representative may attempt to reframe the debate. But her constituents will only let her “off the hook”, so to speak, if the new frame implicates something the constituents actually value. Suppose, for example, the Representative announces that she opposes the amendment simply because it would make the Constitution “too long” (i.e., “twenty-seven amendments is enough”); she has reframed the debate—it is no longer about same-sex marriage, but about the length of the Constitution—but it will not appease constituents on either side of the same-sex marriage debate. In fact, it may actually harm her re-election prospects, for the constituents may punish her for such an obvious attempt to duck an important issue (few voters are likely to care about lengthening the Constitution). But if she chooses a frame that resonates with her voters—“I oppose this

123 In the political arena, “[e]lites wage a war of frames because they know that if their frame becomes the dominant way of thinking about a particular problem, then the battle for public opinion has been won.” Thomas E. Nelson & Donald R. Kinder, Issue Frames and Group-Centrism in American Public Opinion, 58 J. Pol. 1055, 1058 (1996); see also Donald R. Kinder & Lynn M. Sanders, Divided by Color: Racial Politics and Democratic Ideals 164 (1996) (noting that frames are “rhetorical weapons created and sharpened by political elites to advance their interests and ideologies.”). See also Dennis Chong, Creating Common Frames of Reference on Political Issues, in Political Persuasion and Attitude Change 221 (Diana C. Mutz, et al., eds., 2006) (“Much public opinion formation is a strategic process in which opinion leaders are trying to persuade the public to think about political issues along particular lines, to activate existing values, prejudices, and ideas . . . and to draw obvious conclusions from those chosen frames of reference.”) (citation omitted); Lawrence R. Jacobs & Robert Y. Shapiro, Politicians Don’t Pandering: Political Manipulation and the Loss of Democratic Responsiveness (2000) (finding that political elites are strategic in the frames they use to persuade the public, and that if a frame does not resonate with the public, political elites take notice, and they adjust their strategies accordingly).
amendment because the states should decide whether or not to recognize same sex marriages”—they may be appeased, regardless of what they think of the underlying issue of same-sex marriage.

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

Other studies substantiate the notion that processes, and more specifically, the allocation of governmental powers, influence public opinion of government action. Research suggests, for

124 Kam & Mikos, supra note ___, at ___.
125 Id. at _____.

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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. In other words, citizens appear willing to trade off immediate policy objectives—to tolerate some gridlock—in order to check governmental power. Just as citizens prefer to divide power between parties across branches of the federal government, they may prefer to divide power between state and federal governments, even though it requires them to sacrifice immediate policy objectives.

E. Synthesis

[to be added]

V. SOME OBJECTIONS TO AND QUALIFICATIONS ON THE THEORY

This Part briefly addresses some potential objections to the populist safeguards theory I developed earlier. Section A responds to the critique that citizens are too ignorant, either of federalism, or of congressional goings-on, to block Congress from usurping state powers. Section B qualifies the theory somewhat, by acknowledging that citizens may not block federal administrative agencies, or the federal courts, from taking powers away from the states. Finally, Section C suggests that, although the people protect states’ rights against federal encroachment, they may not safeguard individual rights. Indeed, some of the very reasons citizens have for safeguarding state power—for example, the states employ pro-majority law-making procedures—simultaneously expose individual rights (and particularly minority rights) to greater risks.

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

[In this Section, I will address the claim – often only vaguely formulated – that citizens are too ignorant, of federalism, or of proposals before Congress, or both, to block congressional usurpation of state domains (even assuming they would like to do so).

I intend to argue, first, that citizens are not as ignorant of federalism as the conventional wisdom suggests. As discussed in Part IV.D, ordinary citizens harbor opinions regarding the allocation of government power over various policy domains. In large part, the conventional wisdom has assumed citizens are ignorant of federalism, because federalism is so complex; but the lay conception of federalism may be simpler than the lawyerly—the elite appeals to federalism considerations discussed above were simple and succinct, and yet accurate—hence, citizens may be able to formulate opinions about the propriety of federalization without expending too much cognitive effort (a key point, if citizens are indeed cognitive misers). What is more, my theory does not necessarily depend on everyone being fully informed about federalism – even if only a small number of voters understand federalism, they may be numerous enough to tip the balance against many federal proposals.

Second, and even more importantly, citizens may cabin federal power even without any understanding of federalism. Most of the safeguards identified herein work even if citizens only care about – and only understand – policy outcomes, broadly defined to include the policy-related decisions made by administrators and future legislators. To borrow (loosely) from Milton Friedman’s analogy to the pool player (when he explains rational choice theory), citizens may not think about the balance of state / federal power when formulating opinions of congressional action, but they still act as if they do.
Similarly, the claim that citizens are entirely ignorant of what Congress does is overstated, and somewhat contradictory. First, to be sure, some proposals before Congress undoubtedly escape the attention of citizens. Citizens do, however, pay attention to proposals tackling the most significant issues of the day – the ones with which we should be most concerned anyway. (Think of the public reaction to Terry Schiavo.) What is more, politicians tend to be very risk averse; even if citizens are not terribly well informed about legislation before Congress, members of Congress will act is if they are.

Second, and even more importantly, the argument that public opinion is, in effect, irrelevant (after all, constituents cannot punish Congress if they do not pay attention to what it is doing) undermines the core justification given for judicial review of federalism – that citizens demand too much federal power. After all, if citizen opinion is truly irrelevant – they hold no influence over Congress – then their supposed inclination to wield congressional power should make no difference either. Thus, we must come up with some new theory to explain what drives Congress – and more particularly, what drives Congress to usurp state powers. (And on that score, there is no reason to expect, a priori, that whoever holds Congress’s reins will necessarily demand more or less federal power than citizens do. In other words, the same considerations that make citizens leery of federal power may also make special interests leery of federal power.)

B. Administrative Agencies and Courts

The theory above explains why Congress may not usurp state authority, at least for what are (arguably) the wrong reasons (to impose morality, shift costs, and so on). Still, 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. Since agencies (and courts) are not directly accountable to the people, the dynamics that constrain Congress’s ability to
federalize state policy domains do not necessarily check these other law-making bodies from doing so, at least when they act without the imprimatur of Congress.

Attorney General John Ashcroft’s efforts to outlaw PAS illustrate how federal executive officials can sidestep the populist controls that limit Congress’s ability to federalize the same issues. In 2001, without consulting the Congress, the states, or anyone else outside the Department of Justice,127 Ashcroft issued a ruling aimed at ending physician-assisted suicide in the state of Oregon,128 to this day, the only state in the nation to legalize PAS.129 Ashcroft claimed that the Controlled Substances Act of 1971 (CSA) gave him authority to bar doctors from giving their patients lethal doses of prescription medications.

Needless to say, Ashcroft’s assertion that Congress had given him power to ban PAS under the CSA proved controversial. The primary purpose of the statute was to combat the illicit drug trade.130 Neither the statute itself, nor the legislative history, suggests that the CSA was intended to outlaw (or otherwise regulate) PAS, and indeed, Congress made clear its intention not to usurp the states’ power to regulate medical practices.131 What is more, after Oregon enacted its Death with Dignity law, and before Ashcroft issued his Interpretive Ruling, Congress had twice considered and rejected legislation that would have explicitly banned PAS;132 had

128 66 Fed. Reg. 56,607 (Nov. 9, 2001) (“prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act . . . regardless of whether state law authorizes or permits such conduct”).
129 In November 1994, voters in the state of Oregon narrowly approved a ballot measure to allow terminally ill patients to seek prescription drugs to hasten death. Don Colburn, Assisted Suicide Bill Passes: Oregon Law Puts State at Center of Ethical Debate, WASH. POST, Nov. 14, 1994, at Z9 (52% of voters supported the ballot initiative, while 48% opposed it). The Death with Dignity Act is codified at Or. Rev. Stat. §§ 127.800-127.897. The measure survived three years of legal challenges in the courts, as well as an effort to repeal it at the ballot box, which was rebuffed by a nearly 3-to-2 margin. Thomas B. Edsall, Mod. GOP Gov. Whitman Wins in N.J. Cliffhanger, WASH. POST, Nov. 15, 1997, at A1 (60% of voters opposed ballot measure to rescind Oregon Death with Dignity Act).
130 126 S.Ct. at 922-23.
131 126 S.Ct. at 923 (discussing legislative history).
Ashcroft’s interpretation of the CSA held any water, such legislative efforts would have been superfluous.

Given that federal agencies and federal 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 come directly from Congress. 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 lawmakers.\textsuperscript{133} Consider \textit{Solid Waste Agency of Northern Cook County v. Army Corp of Engineers}.\textsuperscript{134} At issue in the case was the Army Corps of Engineers’ interpretation of its authority under the Clean Water Act—its so-called Migratory Bird Rule, which purported to regulate the dumping of infill on isolated bodies of water which traditionally had been the exclusive concern of state agencies.\textsuperscript{135} 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.\textsuperscript{136} In defining the reach of the CWA, Congress simply referred to the “navigable waters” of the United States, but it had not

\textsuperscript{133} 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, e.g., William K. Kelley, \textit{Avoiding Constitutional Questions as a Three-Branch Problem}, 86 CORN. L. REV. 831 (2000) (critiquing the canon on separation of powers grounds).

\textsuperscript{134} 531 U.S. 159 (2001).

\textsuperscript{135} The Corps’ rule, promulgation of which did \textit{not} follow the notice and comment procedures of the Administrative Procedures Act, asserted jurisdiction over intrastate waters “[w]hich are or could be used as habitat by other migratory birds which cross state lines.” 51 Fed. Reg. 41217.

\textsuperscript{136} 531 U.S. at 173 (”Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result”, particularly where “administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”).
clearly indicated (according to the Court) that this definition was as expansive as the Corps claimed.  

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

*In Gregory,*

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137 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).  
140 *Id.* at 246; *id.* at 246 (“Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute”).
a finding that ADEA applied to state judges would enable federal courts to order relief against the states that engaged in age-discrimination against such judges; and in Atascadero, a finding that Rehabilitation Act abrogated state sovereign immunity would enable federal courts to order monetary relief against the states for discriminating against the disabled.

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

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

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

Finally, it should be recognized that nothing about my theory suggests the political process will protect individual rights as well as it protects states’ rights. Of course, the notion that citizens value structural principles, such as federalism, when formulating opinions of congressional legislation is a comforting thought, for it suggests they may value other principles, such as free-speech, as well.143 Yet, some of the factors that make state power so desirable to the people (majoritarian law-making procedures, for example), also make it more difficult to protect minority groups from the tyranny of the majority.

Suppose, for sake of argument, that we could agree (behind the veil of ignorance, or using some other formulation) that some rights—the right to free speech, the right to exercise one’s religion, the right to equal protection under the law, and so on—should be guaranteed to all citizens. The question is, would citizens, free of judicial constraints, opt to protect such rights, or would they opt instead to cheat on the bargain, as opportunities arose?

As with any imaginary bargain over the allocation of federal / state power, citizens may be tempted to cheat on this deal; they may support laws to silence opposing viewpoints, to demean other faiths, to persecute people of other races, and so on. As long as they gather enough popular support, they may get their way with government. To be sure, some citizens in the majority might fear that government power could be turned against them some day, and this might quell somewhat the desire to abuse rights. So would a principled commitment to individual rights. Still, minority rights remain vulnerable, particularly at the state and local level.

Consider, first, how many states employ law-making procedures, such as voter referenda, that empower the majority. On the one hand, this is good for states’ rights; on many issues, the

143 See, e.g., Lacy, supra note ____, at ____ (finding that survey participants considered principles, such as fairness and free speech rights, in deciding whether to let controversial groups stage rallies).
majority within a state will prefer state policy over federal policy on the merits, and will thereby opt to leave state power intact. Sometimes this could also favor individual rights; after all, the citizens of one state may want government to grant some right that the nation, as a whole, refuses to recognize. On the other hand, pro-majority law-making procedures may instead jeopardize minority rights. Working within the state, the majority will find it easier, if it so desires, to limit minority rights – to pass laws limiting support for minority programs, and so on. Unlike at the federal level, minority interests may lack the tools (the filibuster, for example) or clout necessary to block such proposals at the state level.\footnote{Cf. Douglas Laycock, \textit{Federalism as a Structural Threat to Liberty}, 22 Harv. J. L. & Pub. Pol’y 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”).}

Next, consider how trust in state governments can both insulate state authority and expose individual rights to abuse. As discussed above, citizens, on average, trust state government more than they trust the federal government. This means, in part, they believe state officials are more responsive to their demands, that is, more likely to do what they ask. The problem is that citizens may ask state officials to curb rights. To illustrate, suppose a majority within a state wants government (state or federal) to suppress minority rights. This majority may opt for more state power, in part, because they believe state officials are more likely to stop minority drivers on the highways, more likely to pursue the death penalty in criminal cases involving minority defendants, more likely to enforce onerous voter registration requirements that disadvantage minority voters, and so on. (This may also help to explain why, compared to whites, racial minorities, on average, trust state governments less.\footnote{Cole & Kincaid, survey, APSA 2005 (on file with author).})

\footnote{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.” \textit{William H. Riker, Federalism: Origin, Operation, and Significance} 142 (1964). In later years, however, Riker came to recognize that federalism could protect minority interests. \textit{See generally William H. Riker, The Development of American Federalism} (1987).}
This is not to say the only reason people support states’ rights is to subjugate minorities. States often go beyond rights recognized under federal law – think of same sex marriages in Massachusetts, physician-assisted suicide in Oregon, medical marijuana in California and seven other states, among other examples. My point is simply that nothing discussed herein will block citizens from curbing personal liberties, or dissuade them from wanting to do so. Thus, while we may not need the courts to protect states’ rights, we may still need them to safeguard individual liberty.¹⁴⁶

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[CONCLUSION]

[to be added]

¹⁴⁶ Jesse Choper suggests, for example, that the courts ought to dismiss out of hand challenges to congressional statutes based on federalism arguments, but should remain vigilant when it comes to protecting individual rights. CHOPER, supra note _____, at _____ (suggesting federalism is a political question, and the Court squanders its legitimacy when it tackles federalism cases).