

4-2003

Competing for the People's Affection: Federalism's Forgotten Marketplace

Todd E. Pettys

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Law and Economics Commons](#)

Recommended Citation

Todd E. Pettys, Competing for the People's Affection: Federalism's Forgotten Marketplace, 56 *Vanderbilt Law Review* 329 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol56/iss2/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

VANDERBILT LAW REVIEW

VOLUME 56

MARCH 2003

NUMBER 2

Competing for the People's Affection: Federalism's Forgotten Marketplace

*Todd E. Pettys**

I.	INTRODUCTION	329
II.	THE BATTLE FOR THE PEOPLE'S AFFECTION	338
	A. <i>The Framers' Vision</i>	338
	B. <i>The Continuing Vitality of the Framers'</i> <i>Vision</i>	345
III.	MARKET FAILURE AND JUDICIAL INTERVENTION	353
	A. <i>An Overview of the Terrain</i>	353
	B. <i>The Market's Requirements</i>	357
	1. A Proving Ground.....	357
	2. Autonomy.....	358
	3. Transparency.....	359
	C. <i>The Recent Record of Judicial Intervention</i>	360
	1. To Ensure a Proving Ground	360
	2. To Ensure Autonomy.....	368
	3. To Ensure Transparency	379
IV.	CONCLUSION.....	389

I. INTRODUCTION

In recent years, the United States Supreme Court frequently has invoked federalism principles when reviewing federal legislation¹

* Associate Professor of Law, University of Iowa College of Law. Many thanks to Randy Bezanson, Stephanos Bibas, Bill Buss, Erwin Chemerinsky, Herb Hovenkamp, Shelly Kurtz, and the participants in a faculty colloquium at Boston College Law School for generously providing their remarks.

but has failed to articulate an overarching vision of federal-state relations.² The Court has relied instead on seemingly disparate premises, including a local-national distinction that some believe is disingenuous,³ notions of “commandeering” and political accountability that some believe are poorly rationalized,⁴ and a conception of state dignity that critics charge is ill suited for a nation in which the people are sovereign.⁵ The Court does occasionally recite

1. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1871-79 (2002) (holding that states are immune from private actions brought before federal administrative tribunals and that Congress cannot abrogate that immunity pursuant to its Article I powers); *United States v. Morrison*, 529 U.S. 598, 607-27 (2000) (holding that Congress unconstitutionally intruded upon local, noneconomic matters when it created a civil remedy for victims of gender-motivated violence); *Alden v. Maine*, 527 U.S. 706, 741-54 (1999) (holding that Congress cannot abrogate the states' immunity from suit in state courts pursuant to its Article I powers); *Printz v. United States*, 521 U.S. 898, 918-25 (1997) (holding that Congress unconstitutionally commandeered state executive officials when it required them to perform background checks on prospective gun purchasers); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57-73 (1996) (holding that Congress cannot abrogate the states' immunity from suit in federal courts pursuant to its Article I powers); *United States v. Lopez*, 514 U.S. 549, 551-68 (1995) (holding that Congress unconstitutionally intruded upon local, noneconomic matters when it banned the possession of firearms near schools); *New York v. United States*, 505 U.S. 144, 155-69, 174-77 (1992) (holding that Congress unconstitutionally compelled the states to regulate when it threatened to force the states to take title to radioactive waste); *Gregory v. Ashcroft*, 501 U.S. 452, 456-67 (1991) (holding that federalism required Congress plainly to express its intent to protect state judges with antidiscrimination legislation).

2. See Ronald J. Krotoszynski, Jr., *Listening to the “Sounds of Sovereignty” but Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 14 (1998) (stating that the Court has not “articulate[d] a coherent theory of federalism that explains the discrete results reached in particular cases and that would facilitate reasonably accurate predictions regarding the probable results in future cases”); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 518 (2002) (“The Rehnquist Court lacks a coherent federalism philosophy.”).

3. See, e.g., *Morrison*, 529 U.S. at 617-18 (emphasizing the need to distinguish “between what is truly national and what is truly local”); see also Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 619-22, 629-56 (2001) (arguing against a simple local-national distinction and pointing out the numerous ways in which the federal government regulates family life).

4. See, e.g., *Printz*, 521 U.S. at 918-25 (holding that Congress cannot commandeer state executive officials); *New York*, 505 U.S. at 155-69, 174-77 (holding that Congress cannot commandeer state legislators); see also Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71, 143 (“There is simply no difference, even in general, between permissible preemption and impermissible commandeering with respect to the [commonly understood values of federalism].”); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 822-30 (1998) (arguing that *Printz* and *New York* fail to explain why federal coercion is more objectionable than both federal preemption and instances in which the states agree to implement federal policy).

5. See, e.g., *Alden*, 527 U.S. at 715 (stating that the doctrine of sovereign immunity protects the states’ “sovereign dignity”); see also Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1040 (2000) (stating that the Court’s conception of state dignity appears “drawn from royal dignity—hardly a promising doctrinal source in a democratic republic”); cf. Suzanna Sherry, *States Are People Too*, 75 NOTRE

the perceived benefits of federalism, but those benefits are framed at such a high level of abstraction that they provide little guidance as to the manner (if any) in which the Constitution requires that regulatory power be distributed between the state and federal governments.⁶ Even those benefits themselves have been challenged, with numerous scholars arguing that much of what judges and politicians say about federalism is merely politics-driven rhetoric.⁷

Courts and politicians alike, however, need a strong normative sense of how our federal system of government ought to function. For courts in particular, a robust theory of federalism is not a mere luxury. When a litigant asks a court to strike down or uphold legislation on federalism grounds, the court almost invariably is confronted with vague constitutional texts, histories that are subject to conflicting interpretations, and precedents that point in more than one direction. To a significant extent, therefore, the court's ruling will be shaped by its own understanding of both federalism and the judiciary's role in preserving it. What should that understanding be?

In their quest to comprehend federalism, jurists have devoted considerable attention to the benefits that may be achieved when state and local governments compete with one another for a mobile citizenry. Prompted in part by Charles Tiebout's famous 1956 article,⁸

DAME L. REV. 1121, 1126-31 (2000) (arguing that, by speaking of state "dignity," the Court unjustifiably treats the states as persons).

6. In *Gregory*, for example, the Court stated:

[Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. [It also places] a check on abuses of government power.

501 U.S. at 458.

7. See, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 319 (1997) ("The values of federalism are invoked regularly in much the same way as 'Mom' and 'apple pie': warm images with little content."); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 265 (1990) (stating that federalism is "one of the most revered sacred cows on the American political scene" and that people invoke principles of state autonomy or federal supremacy, depending on their political objectives); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907-08 (1994) (arguing that federalism "achieves none of the beneficial goals that the Court claims for it").

8. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). In his article, Tiebout attempted to identify "the mechanism by which consumer-voters register their preferences for public goods." *Id.* at 417. He argued that, under the proper conditions, a marketlike restraint is placed on local governments' expenditures—thereby rendering such expenditures more efficient—by virtue of the fact that local governments compete with one another for citizens by offering varying combinations of taxes and public goods, and that citizens cast their vote for the combinations they prefer by moving to the most appealing jurisdictions. *Id.* at 417-19; cf. FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 258 (1948) ("The

many have wedded themselves to the view that horizontal competition among states and localities helps to ensure that citizens will have an array of governmental options from which to choose and that governments will have a marketlike incentive to satisfy citizens' demands in increasingly efficient ways.⁹ This argument finds a close cousin in the frequent observation that states and localities serve as laboratories for testing social and economic programs.¹⁰

Courts and scholars have been remarkably silent, however, on the subject of a very different competition—a competition that the Framers not only contemplated but also expressly urged as one of the benefits of federalism. The *Federalist Papers* clearly suggest that the Framers believed federalism would foster a vertical competition between the states and the federal government for the people's "affection."¹¹ Although I describe this forgotten dimension of the

absence of tariff walls and the free movements of men and capital between the states . . . limit to a great extent the scope of the economic policy of the individual states.").

9. See, e.g., *Gregory*, 501 U.S. at 458 (stating that federalism "makes government more responsive by putting the States in competition for a mobile citizenry"); MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 2 (1999) ("Federalism is about competition among the states."); Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 478 (1991) (arguing that judicial scrutiny of land-use exactions is often unnecessary because local governments' competition for real-estate development will constrain them from overreaching); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriages*, 68 S. CAL. L. REV. 745, 747-48 (1995) (arguing that competition for tourists gives each state an incentive to be among the first to solemnize same-sex marriages); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 33-40 (1983) (discussing interstate competition and the regulation of monopolies); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2361 (1998) (proposing to extend "the competition among the states for corporate charters to two of the three principal components of federal securities regulation"); Symposium, *Constructing a New Federalism: Jurisdictional Competence and Competition*, 14 YALE J. ON REG. 1 (1996) (presenting articles on theoretical models of competition and on matters relating to environmental regulation, welfare policy, torts, and individual rights). For an introduction to the voluminous literature on Tiebout's model, see COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM (Daphne A. Kenyon & John Kincaid eds., 1991) [hereinafter COMPETITION AMONG STATES].

10. See, e.g., *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (concluding that, by banning guns near schools, Congress "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise"); *FERC v. Mississippi*, 456 U.S. 742, 788-89 (1982) (O'Connor, J., concurring in part and dissenting in part) (stating that federalism enables the states to serve as laboratories for social, economic, and political experimentation and providing examples); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (endorsing localities' varying approaches to public education); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.").

11. See, e.g., THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Framers' vision in greater detail below,¹² its essence is easily summarized. Each time a government acts or refuses to act, it further develops its reputation among its constituents. If a government satisfactorily regulates a given matter, it can expect to earn an added measure of its citizens' affection (or trust, confidence, allegiance, or loyalty—terms that I shall employ as synonyms, notwithstanding their different shades of meaning). The more areas that a government regulates satisfactorily, the greater the affection it can expect to earn and thus the greater the responsibilities it can expect citizens to confer upon it. Because there are many areas in which the state and federal governments' legislative powers overlap, however, if one government regulates an activity in an *unsatisfactory* manner, the people may be able to shift responsibility to the other sovereign.¹³ With two separate governments vying to win their trust, the Framers reasoned, the people would be free continually to assess the sovereigns' conduct and capabilities, and to confer or withdraw regulatory power as they deemed appropriate. Regardless of whether state and federal politicians ever think of themselves as rivals, therefore, they are indeed competitors. They compete in what I shall call the marketplace for the people's affection—a marketplace in which citizens allocate regulatory power based upon which sovereign has made the strongest claim to their confidence.

While acknowledging that Congress assumed an extraordinary measure of power during the past century,¹⁴ the Court has not characterized the federal government's ascendancy as a function of vertical competition for the people's affection. Nor has the Court even identified federal-state competition as a federalism value to be sought and preserved. The Court has acknowledged that the federal and state governments are designed to hold one another in check, but the Court's explanation of that principle rests primarily on the proposition that federalism prevents tyranny in the same way that dividing federal power among three branches prevents tyranny—it avoids concentrating power in a single set of hands.¹⁵ In a concurring opinion in *Lopez*, Justice Kennedy briefly noted that the two sovereigns “hold

12. See *infra* notes 30-63 and accompanying text.

13. I frequently will refer to state and federal governments as “sovereigns,” even though sovereignty ultimately lies with the people. See *McCulloch v. Maryland*, 17 U.S. 316, 402-05 (1819).

14. See, e.g., *New York v. United States*, 505 U.S. 144, 157 (1992) (stating that “[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers”).

15. See, e.g., *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991).

each other in check by competing for the affections of the people.”¹⁶ Like the scholarly community,¹⁷ however, when the Court discusses competition in the context of federalism, it is almost invariably competition of the horizontal, interstate variety. Consequently, as Akhil Reed Amar has observed, our understanding of federal-state competition is significantly underdeveloped.¹⁸

There are good reasons, however, why we should consider expanding our conception of federalism’s competition-derived benefits beyond the confines of competition among state and local governments. First, there is obvious tension between the notions of horizontal and vertical competition, and before we tether ourselves tightly to the former, we should be certain we are uninterested in the latter. If our objective is to promote competition among the states, we likely will urge Congress to abstain from substantive regulation so that the states have plenty of room in which to distinguish themselves from one another.¹⁹ If, instead, our objective is to promote competition between the states and the federal government, we likely will urge Congress to exercise its enumerated powers in whatever ways it thinks the voters desire. One cannot reconcile those conflicting objectives by focusing solely on the benefits of interstate competition.

Second, while many legal scholars have placed their faith in the assumptions underlying economic models of interstate competition, many economists remain troubled by those assumptions and have abandoned the simplistic notion that devolving power upon

16. *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (citing THE FEDERALIST NO. 46 (James Madison) (Clinton Rossiter ed., 1961)); cf. *Morrison*, 529 U.S. at 617 n.7 (acknowledging that “public opinion” often operates as a restraint “on the congressional exercise of the commerce power”).

17. See John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, in COMPETITION AMONG STATES, *supra* note 9, at 87, 89-90 (observing that scholars have focused on horizontal competition and have largely ignored vertical competition). A number of scholars have briefly noted the existence of both vertical and horizontal competition, but then have chosen to focus almost exclusively on the latter. See, e.g., THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS XV-XVI (1990); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 76 (1995).

18. See Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229, 1236-40 (1994) (stating that we need to understand better how federal-state competition preserves liberty beyond merely diffusing power between two sovereigns).

19. See, e.g., DYE, *supra* note 17, at 5 (“Federalism must grant some political and financial independence, some responsibility for deciding about policy and paying for these policy decisions, to state and local governments if they are to be truly competitive [with one another.]”); Krotoszynski, *supra* note 2, at 21-22 (arguing that, when the federal government acts, it nullifies competition among the states, thereby depriving citizens of a choice among regulatory alternatives); David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1081 (1996) (stating that an “overambitious Congress” might regulate too heavily, thereby undercutting the benefits that accrue when state and local governments compete with one another to meet citizens’ needs).

the states will always lead to welfare-enhancing competition.²⁰ William Bratton and Joseph McCahery persuasively argue, for example, that states do not always compete with one another, that interstate competition does not always yield regulations that match citizens' preferences, that centralization often may be desirable, and that proponents of devolution in any given area bear the burden of demonstrating that economic theories of interstate competition are appropriately applied to that subject matter.²¹

Third, by focusing primarily on economic incentives, scholarly and judicial writings on horizontal competition fail to take full account of the social and psychological forces that help to shape how citizens regard their governments. Citizens certainly do care about the efficiency with which their governments use tax revenues, for example, but such economic concerns tell only part of the story. The Framers' notion of "affection" encourages one to consider the broader range of factors—both economic and noneconomic—that often cause citizens to feel a stronger sense of identification with or loyalty to one sovereign rather than the other.

Fourth, while the Framers were largely silent on the subject of competition among the states, they said a great deal regarding competition between the states and the federal government.²² While we need not limit our own understanding of federalism's benefits to that of Hamilton, Madison, and the others, it does seem that arguments made in support of the Constitution's ratification should continue to play at least some role in federalism debates until they have been proven unmeritorious.²³

20. For a discussion of legal scholars' tendency to overstate the connections between devolution, competition, and efficiency, see William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997). Bratton and McCahery argue that, unlike economists, the legal community has not appreciated the weakness of the Tiebout model, and that legal scholars have been too eager to support their contentions with outdated economic assumptions. *Id.* at 205, 219-21, 278. Tiebout himself acknowledged that his assumptions do not always reflect reality. See Tiebout, *supra* note 8, at 423 (acknowledging that citizens are not always able to move to a more desirable jurisdiction, that citizens lack perfect information about the alternatives offered by other jurisdictions, and that positive and negative externalities are often imposed by one jurisdiction upon another).

21. See Bratton & McCahery, *supra* note 20, at 222, 262-63.

22. See GREVE, *supra* note 9, at 10 ("Admittedly, the Founders themselves said little about interstate competition. The *Federalist Papers* emphasize competition between states and the federal government . . ."); see also *infra* notes 30-63 and accompanying text (describing the Framers' vision).

23. Cf. *Alden v. Maine*, 527 U.S. 706, 734-35 (1999) (focusing on the Framers' understanding of states' sovereign immunity); *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (indicating a desire to "maintain[] the design contemplated by the Framers").

Finally, the concept of federal-state competition offers an opportunity to reach a deeper understanding of the Court's recent federalism cases.²⁴ As I explain below,²⁵ the Court's controversial federalism rulings are all consistent with the view that the states need the judiciary's assistance if they are to remain able to compete with the federal government for the people's affection. The notion of vertical competition not only thereby points the way toward a theory of federalism that helps to explain the Court's recent intervention in a variety of settings, but it also enables one to build a bridge between those rulings and the process-focused conception of federalism to which they often are seen as starkly opposed—namely, the conception of federalism articulated in *Garcia v. San Antonio Metropolitan Transit Authority*.²⁶ Although *Garcia* declared that the national political process provides states with their primary protection from federal overreaching, the Rehnquist Court frequently has sought to protect the states by declaring federal legislation unconstitutional. One can begin to span the chasm between those two categories of cases by stepping back from the discrete political mechanisms identified in *Garcia* and taking account of the full range of political processes that constitute federal-state competition for the people's affection. Ordinarily, those processes must be allowed to operate undisturbed, so that the two sovereigns can make their best effort to earn the people's allegiance and so that the people can assign and withdraw responsibility as they see fit.²⁷ The Court's recent decisions suggest, however, that there are several ways in which the Court believes it must protect that marketplace and thereby ensure genuine political competition between the two sovereigns.

I proceed in two remaining parts. In Part II,²⁸ relying principally on the *Federalist Papers*, I reintroduce the Framers' understanding of federalism as a form of government that encourages the two sovereigns to compete for the people's affection. I argue that, for all areas in which the Constitution stops short of assigning

24. See *supra* note 1 (listing the Rehnquist Court's leading federalism rulings).

25. See *infra* notes 124-250 and accompanying text.

26. 469 U.S. 528 (1985). In *Garcia*, the Court declared that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. As examples of those safeguards, the Court pointed to states' control over electoral qualifications and over the Electoral College's composition, and to states' equal representation in the Senate. *Id.* at 551. The Court also noted, however, that states find additional protection in "the limitation on federal authority inherent in the delegated nature of Congress' Article I powers." *Id.* at 550; see also *infra* notes 139, 184, 188 (discussing *Garcia*).

27. See *infra* notes 30-63 and accompanying text (describing federal-state competition).

28. See *infra* notes 30-102 and accompanying text.

exclusive responsibility to one sovereign or the other, the Framers believed citizens would continually reassess the actual distribution of power between the sovereigns to ensure that no alternative distribution would better serve their interests. In making that determination, the Framers predicted, the people would be greatly influenced by the extent to which each sovereign had earned the people's confidence. I then argue that, although certain features of the Framers' expectations have failed to withstand the test of time, the Framers' fundamental vision of federal-state competition remains a powerful tool for making descriptive observations about American politics.

In Part III,²⁹ I argue that at least three requirements must be met if the two sovereigns are to compete with one another in the way that the Framers expected: each must possess a "proving ground," a domain in which it is assured of an opportunity to display its regulatory competence; each must be sufficiently autonomous from the other to enable it to make its own strategic decisions about how to earn the people's confidence; and the sovereigns' activities and relationships with one another must be sufficiently transparent to enable citizens to allocate praise and blame appropriately. I then argue that, although the Rehnquist Court has not explained its federalism rulings in marketplace terms, those rulings appear animated by a desire to ensure that these three market requirements are met. I do not claim that the marketplace's three requirements compelled the Court to decide those cases precisely in the ways that the Court decided them. Nor do I claim that the Court has developed all of the well-honed analytic tools it needs if it is to police the two sovereigns' battle for the people's affection in a praiseworthy manner. Indeed, we might ultimately conclude that the courts are competent to play only a marginal role in maintaining the health of the federal-state marketplace. After all, judicial intervention itself poses a significant threat to federal-state competition—each time the courts declare a regulatory arrangement unconstitutional on federalism grounds, they risk undercutting the effort of one sovereign (or both) to provide citizens with the kind of government they desire. I believe the Rehnquist Court has become convinced, however, that there are occasions when the states require the judiciary's protection from their powerful federal competitor. By casting the Court's recent federalism rulings in that light, I hope to set the stage for a long-term examination both of the ways in which particular lawmaking processes, governmental structures, and regulatory arrangements

29. See *infra* notes 103-250 and accompanying text.

promote or hinder federal-state competition, and of the judiciary's proper role—if any—in preserving that competition's vitality.

II. THE BATTLE FOR THE PEOPLE'S AFFECTION

A. *The Framers' Vision*

All students of the federal Constitution know that “[t]he Framers split the atom of sovereignty,” creating a system of government in which citizens possess “two political capacities, one state and one federal.”³⁰ Far less familiar is the Framers' belief that the state and federal governments each must have an opportunity to earn the people's “affection, esteem and reverence” by favorably regulating matters of public concern, thereby instilling in their constituents an “habitual sense of obligation and an active sentiment of attachment.”³¹ The link the Framers perceived between government regulation and the people's affection—between governance and the people's trust, confidence, loyalty, and respect—was a powerful one. Hamilton argued, for example, that “the authority of the Union and the affections of the citizens towards it will be strengthened, rather than weakened, by its extension to what are called matters of internal concern,” and that the more the federal government “enters into those objects which touch the most sensible chords and put in motion the most active springs of the human heart, the greater will be the probability that it will conciliate the respect and attachment of the community.”³²

The Framers believed that the nation would founder if citizens failed to feel strong affection for their two governments. Each sovereign needs the people's support, for example, if it is to resist abuses of power by the other: military resistance requires financing and soldiers, and political resistance requires a constituency.³³

30. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). For a discussion of the Framers' reasons for creating a system of dual sovereignty, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1492-511 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)).

31. THE FEDERALIST NO. 17, *supra* note 11, at 120.

32. THE FEDERALIST NO. 27, at 176 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

33. See THE FEDERALIST NO. 17, *supra* note 11, at 122; THE FEDERALIST NO. 28, at 178-82 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (asserting that the two sovereigns “will act as mutual restraints only if both are credible”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1494-507 (1987) (explaining that the Framers intended each sovereign to be able to restrain the other militarily, politically, and legally). For an example of Virginia's early success in militarily deterring abuses by the federal government, see PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 8 (1995) (stating that the Federalists chose not to challenge Jefferson's victory in the presidential election of 1800,

Moreover, it was vital that the newly created federal government be able to regulate individuals' activities directly, rather than through state intermediaries, so that it could "attract to its support those passions which have the strongest influence upon the human heart"³⁴ and thereby reduce the likelihood that it would have to resort to military power to secure the people's compliance with its laws.³⁵

The Constitution's opponents feared that the federal government would overwhelm the states in the battle for political support.³⁶ Specifically, they worried that the federal government and the states frequently would enact overlapping legislation, that the Supremacy Clause would render the states' legislation void, and that state governments—deprived of opportunities to prove their worth to the people—would eventually wither and die.³⁷ The Constitution's proponents responded with several arguments.³⁸ They emphasized that the federal government's powers are "few and defined," while the states' powers are "numerous and indefinite."³⁹ They contended that federal officials would have no interest in local affairs, since local

in part because they "realized that the Virginia state militia was at least as strong as the remnants of the Continental Army"). For an example of Virginia's and Kentucky's comparable successes in the political arena, see Amar, *supra*, at 1502-03 (describing those states' political opposition to the Alien and Sedition Acts).

34. THE FEDERALIST NO. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961). At the Philadelphia Convention in June 1787, Hamilton similarly argued that one of the "great & essential principles necessary for the support of Government [is a]n habitual attachment of the people." III DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 128 (James McClellan & M.E. Bradford eds., 1989) [hereinafter DEBATES IN THE FEDERAL CONVENTION].

35. See THE FEDERALIST NO. 16, *supra* note 34, at 115-16; THE FEDERALIST NO. 27, *supra* note 32, at 174-77.

36. See generally GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 526-29 (1969) (describing the Antifederalists' fears of federal dominance).

37. See JACKSON T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 124 (1961); cf. NEAL H. COGAN, CONTEXTS OF THE CONSTITUTION: A DOCUMENTARY COLLECTION ON PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW 485-92 (1999) (reprinting comparable arguments made by an opponent of the Constitution during the Pennsylvania Convention in November 1787).

38. See generally Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View From The Federalist Papers*, 61 S. CAL. L. REV. 1669, 1677 (1988) (summarizing the arguments). The Framers also eventually agreed to support ratification of the Tenth Amendment. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). For a sample of the debates regarding the Tenth Amendment's necessity, see COGAN, *supra* note 37, at 506-27.

39. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961); accord THE FEDERALIST NO. 14, at 102 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects . . .").

matters “hold out slender allurements to ambition.”⁴⁰ Indeed, the Framers argued, the greatest risk was not that the federal government would intrude upon matters best left to the states, but rather that the states would encroach upon matters best left to the federal government.⁴¹ The states would enjoy tremendous popular support, after all, both because people tend to favor that which is local and because the states would have primary responsibility for matters of greatest concern to citizens.⁴² Moreover, state officials would play important roles in the election of federal officials—Senators would be selected by state legislatures, for example—while federal officials would play no formal role in the election of state officials and would seek to protect their respective states’ local interests.⁴³

The Constitution’s advocates attached an important caveat to these assurances of state vitality and dominance—a caveat that constitutes yet another reason why power is divided between state and federal sovereigns and why those sovereigns must be allowed to battle for the people’s affection. Namely, if the federal government earned the people’s confidence through “manifest and irresistible proofs of a better administration,” the people might “become more partial to the federal than to State governments” and support a more expansive federal government.⁴⁴ True sovereignty lies only with the people,⁴⁵

40. THE FEDERALIST NO. 17, *supra* note 11, at 118.

41. Other nations’ experiences suggested as much, and there was little reason to think that the United States would be an exception. *See id.* at 120-22; THE FEDERALIST NO. 45, *supra* note 39, at 289-90; *cf.* COGAN, *supra* note 37, at 501 (reprinting comparable arguments made by a proponent of the Constitution during the Pennsylvania Convention in December 1787). Justice Story later echoed the Framers’ concern:

If . . . the State governments could engross all the affections of the people, to the exclusion of the national government, by their familiar and domestic regulations, there would be a danger that the Union, constantly weakened by the distance and discouragements of its functionaries, might at last become, as it was under the confederation, a mere show, if not a mockery, of sovereignty.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 291, at 211 (Melville M. Bigelow ed., 5th ed. 1891).

42. *See* THE FEDERALIST NO. 17, *supra* note 11, at 119 (arguing that people’s “affections are commonly weak in proportion to the distance or diffusiveness of the object”); *see also* THE FEDERALIST NO. 45, *supra* note 39, at 292-93 (stating that the powers of state governments “extend to all objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people”); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 157 (George Lawrence trans. & J.P. Mayer ed., 1969) (1850) (stating that the “lawgivers of America” gave “the Union money and soldiers, but the states retained the love and the prejudices of the peoples”).

43. *See* THE FEDERALIST NO. 45, *supra* note 39, at 290-91 (discussing the formation of the federal government); THE FEDERALIST NO. 46, *supra* note 16, at 296 (“A local spirit will infallibly prevail much more in the members of the Congress than a national spirit will prevail in the legislatures of the particular States.”).

44. THE FEDERALIST NO. 46, *supra* note 16, at 295; *see also* THE FEDERALIST NO. 17, *supra* note 11, at 119 (stating that the people’s natural attachment will be to local government, rather

and, when it comes to their government, “the people of any country (if, like the Americans, intelligent and well-informed) seldom adopt and steadily persevere for many years in an erroneous opinion respecting their interests.”⁴⁶ Should the people desire a greater consolidation of power in the federal government, Madison argued, “the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.”⁴⁷ If that means allotting the states a lesser measure of power, then so be it:

Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty and safety, but that the government of the individual States . . . might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? . . . It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object . . . [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.⁴⁸

Because the people would be free to “giv[e] most of their confidence where they may discover it to be most due,” the state and federal governments would be engaged in a competition for the people’s affection and for the regulatory power which that affection often brings. State and federal politicians might not always regard themselves as rivals, and citizens might not always feel greater affection for one sovereign than they do for the other. Yet conscious rivalries and differing levels of affection are not required for the Framers’ vision to be realized. Even if, at a given moment in time, all politicians believe they are engaged in a cooperative effort to secure

than to the federal government, “unless the force of that principle should be destroyed by a much better administration of the latter”); THE FEDERALIST NO. 27, *supra* note 32, at 174 (“I believe it may be laid down as a general rule that [the people’s] confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration.”).

45. See WOOD, *supra* note 36, at 530-32, 545-46 (stressing that this principle comprised the core of the Federalists’ thinking).

46. THE FEDERALIST NO. 3, at 41-42 (John Jay) (Clinton Rossiter ed., 1961).

47. THE FEDERALIST NO. 46, *supra* note 16, at 295; see also THE FEDERALIST NO. 17, *supra* note 11, at 119 (suggesting that states will lose power if they fail to “administer their affairs with uprightness and prudence”).

48. THE FEDERALIST NO. 45, *supra* note 39, at 289. Madison addressed the matter in more startling fashion during the Framers’ debates in Philadelphia:

Were it practicable for the Genl. Govt. to extend its care to every requisite object without the cooperation of the State Govts. the people would not be less free as members of one great Republic than as members of thirteen smaller ones Supposing therefore a tendency in the Genl. Govt. to absorb the State Govts. no fatal consequence could result.

DEBATES IN THE FEDERAL CONVENTION, *supra* note 34, at 161-62.

the common good and all citizens feel equal measures of affection for the two governments, the *potential* for a future realignment of power remains: if the people ever conclude that one sovereign is more competent, more reliable, more efficient, or more worthy of the people's trust than the other sovereign, they can work to redistribute power in a manner that better mirrors the differing levels of confidence they are willing to place in the two governments.

Of course, the Framers acknowledged, the Constitution would prevent the people from placing *all* of their confidence in a single sovereign. The Constitution limits Congress to its enumerated powers,⁴⁹ it grants the federal government the exclusive power to perform certain functions,⁵⁰ and it reserves for the states "certain exclusive and very important portions of sovereign power."⁵¹ In each of these respects, the Constitution is anticompetitive because it prevents the people from allocating responsibility as they see fit.⁵² Yet with respect to all matters that the Constitution does not commit to the exclusive care of one sovereign or the other,⁵³ the Framers wished to empower citizens by reserving to them the power of choice—the power to choose to distribute power in any way they believe serves their interests.

Even with respect to those areas in which the Constitution does limit the ability of a sovereign to regulate, the Framers believed the people would play an important role. Madison conceded that "the task of marking the proper line of partition, between the authority of

49. THE FEDERALIST NO. 45, *supra* note 39, at 292.

50. See THE FEDERALIST NO. 44, at 280-83 (James Madison) (Clinton Rossiter ed., 1961) (providing as examples the power to enter into treaties and to coin money); see also THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the states "retain all the rights of sovereignty which they before had," except where the Constitution delegates power "exclusively" to the federal government).

51. THE FEDERALIST NO. 9, at 76 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (providing no examples); cf. THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that Congress would exceed its powers if it tried "to vary the law of descent in any State" or "to abrogate a land tax imposed by the authority of a State").

52. See generally ALBERT BRETON, *COMPETITIVE GOVERNMENTS: AN ECONOMIC THEORY OF POLITICS AND PUBLIC FINANCE* 190 (1996) (stating that "constitutionally entrenched assignments . . . must . . . be conceived as constraints on the competition that orders the relationship of governments engaged in the production and provision of goods and services").

53. See, e.g., THE FEDERALIST NO. 32, *supra* note 50, at 199 (stating that the power to impose taxes "on all articles other than exports and imports . . . is manifestly a concurrent and coequal authority in the United States and in the individual States"). Hamilton elaborated:

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution.

Id. at 201.

the general, and that of the State Governments” had been an “arduous” one for the Constitution’s drafters, given the complexity of the subject matter, the limitations of human faculties, and the imprecision of words.⁵⁴ The task of defining that “proper line of partition” would fall partially on the shoulders of legislators, who must make an initial assessment of what they are empowered to do;⁵⁵ partially on the shoulders of executive and judicial officials, who are called upon “to expound and give effect to the legislative acts”;⁵⁶ and ultimately on the shoulders of the people, who must rectify unconstitutional usurpations of power in any way that “the exigency may suggest and prudence justify.”⁵⁷ In determining whether one sovereign had encroached on the other’s territory, the people would “appeal to the standard they have formed”⁵⁸—a standard that is embodied in the text of the Constitution, but that also is undoubtedly colored (especially when the Constitution’s text is not clear) by the extent to which each sovereign has earned the people’s trust and has proved itself competent to perform desired functions.

Determining when that line-drawing task should be committed to the judicial branch and when it should be left to overtly political judgments is one of the chief problems of modern American federalism.⁵⁹ Regardless of who draws that line in close cases, however, the Framers conferred upon us a system of government in which citizens often have “a choice among political authorities” and are able to bring their requests to whichever government they deem best able to serve them.⁶⁰ Each government is permitted to exercise greater or lesser regulatory power over time in accordance with the people’s judgment about which government most deserves the public’s

54. THE FEDERALIST NO. 37, at 227-29 (James Madison) (Clinton Rossiter ed., 1961).

55. See THE FEDERALIST NO. 33, *supra* note 51, at 203 (stating that “the national government, like every other, must judge in the first instance of the proper exercise of its powers”).

56. THE FEDERALIST NO. 44, *supra* note 50, at 286.

57. THE FEDERALIST NO. 33, *supra* note 51, at 203; *cf.* THE FEDERALIST NO. 16, *supra* note 34, at 117 (stating that the people are “the natural guardians of the constitution”); THE FEDERALIST NO. 31, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that concerns about usurpation ultimately must “be left to the people, whom . . . it is to be hoped will always take care to preserve the constitutional equilibrium between the general and the State governments”). Ordinarily, Madison explained, the people’s remedy for such usurpations would be found at the ballot box, where citizens “can by the election of more faithful representatives, annul the acts of the usurpers.” THE FEDERALIST NO. 44, *supra* note 50, at 286.

58. THE FEDERALIST NO. 33, *supra* note 51, at 203.

59. See *infra* notes 113-15 and accompanying text.

60. VINCENT OSTROM, *THE POLITICAL THEORY OF A COMPOUND REPUBLIC: DESIGNING THE AMERICAN EXPERIMENT* 121 (2d ed. 1987).

confidence.⁶¹ Not only might federalism protect individuals' freedom by diffusing power between two sovereigns,⁶² therefore, but it also enhances their freedom by giving them at least two governmental options from which to choose when trying to solve public problems. Jack Rakove summarizes the Framers' vision well:

Federalism . . . involves a struggle or competition for the political allegiance and affections of a population that has consented to be ruled simultaneously by two levels of government. [Federalism encourages people] to express preferences as to which level will, over time, prove more competent to provide the services and perform the duties they desire. From its inception in the Revolutionary era, the formal structure of American federalism has created not so much a set of mandates as a set of possibilities If one treats federalism solely as a legal arrangement for dividing the sovereign powers of government, without measuring the alternating political currents that flow along its complicated circuitry, its essential character will remain elusive.⁶³

61. See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 52-53 (1984) (stating that, under the system described in the *Federalist Papers*, the scope of powers exercised by each sovereign "will be determined by the degree to which the people are or become attached to one or the other," that people "can elect more assertive officers to one and more restrained officers to the other, depending on which government seems to deserve a larger role," and that the people should not be precluded from placing their trust in whichever government seems most worthy of that trust); Kincaid, *supra* note 17, at 100 (stating that the Constitution enables the federal government to "compete directly with state governments for public esteem, tax resources, policy supremacy, and other goods" and that this "is one of the great innovations of the U.S. Constitution"); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 268-69 (2000) (stating that the Framers "presupposed a durable and enduring political competition between state and federal officials"); Sandra Day O'Connor, *Testing Government Action: The Promise of Federalism*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 35, 39 (Stephen E. Gottlieb ed., 1993) ("As to the vertical division of government power, the Federalists intended a sort of competition between the states and the national government, whereby the people would benefit."); cf. Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 441 (2002) ("The role of state and local governments may divide citizens' allegiance and soften impulses to vest totalizing power in the national government.").

62. See THE FEDERALIST NO. 51, at 323-25 (James Madison) (Clinton Rossiter ed., 1961). I use the word "might" because scholars debate the senses in which federalism does or does not protect individuals' freedom. Compare WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 139-45 (1964) (arguing that there is no meaningful sense in which federalism ensures freedom, and using slavery and the persistence of racial discrimination as examples), and Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE J. ON REG. 227, 233-34 (1996) (similarly pointing to slavery and racial discrimination as examples of federalism's failures), with Massey, *supra* note 2, at 440-44 (arguing that federalism promotes freedom by allowing citizens to move to more favorable states and by preventing the concentration of power in tyrannical hands), and Wille, *supra* note 19, at 1081 (making arguments comparable to those advanced by Massey).

63. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1042 (1997).

B. The Continuing Vitality of the Framers' Vision

There certainly are ways in which the Framers' expectations seem plainly outdated. It is difficult to believe, for example, that state militias could still restrain a tyrannical federal government,⁶⁴ and the Seventeenth Amendment undercuts the Framers' expectation that state legislatures' election of Senators would give the states a powerful means of restraining Congress.⁶⁵ Indeed, the federal government has grown so large and powerful that it may be difficult to imagine that it is engaged in any sort of meaningful competition with the states.⁶⁶

Yet the Framers' expectation of federal-state competition is far from anachronistic. After all, elected officials today are surely as eager to keep their jobs and to wield meaningful power as their counterparts were at the time of the nation's founding. While it undoubtedly is true that legislators often succumb to pressure from special-interest groups to enact laws that are not in the public's best interest,⁶⁷ their desire for reelection also gives them an incentive to be perceived as meeting their constituents' needs.⁶⁸ If a sovereign's lawmakers too frequently subordinate the needs of their constituents to the wishes of special-interest groups, prove ineffectual in the face of public problems, waste the people's resources, or otherwise lose the people's confidence, citizens are presented with a choice. They can maintain the existing allocation of power and simply vote to replace the unsatisfactory lawmakers with more conscientious leaders, or they can conclude that

64. Compare THE FEDERALIST NO. 46, *supra* note 16, at 298 ("The only refuge left for those who prophecy the downfall of the State Governments, is the visionary supposition that the Federal Government may previously accumulate a military force for the projects of ambition. [It is surely unnecessary] to disprove the reality of this danger."), and THE FEDERALIST NO. 16, *supra* note 34, at 115 (stating that the belief that the federal government would militarily dominate the states was "little less romantic than that monster-taming spirit, which is attributed to the fabulous heroes and demi-gods of antiquity"), with Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1516-17 (1994) (describing such predictions as "quaint").

65. Compare U.S. CONST. art. I, § 3, cl. 1 (stating that Senators representing each state shall be "chosen by the Legislature thereof"), and THE FEDERALIST NO. 45, *supra* note 39, at 291 (assuring readers that "[t]he Senate will be elected absolutely and exclusively by the State Legislatures"), with U.S. CONST. amend. XVII, § 1 (mandating popular election of Senators).

66. See Kincaid, *supra* note 17, at 90.

67. See Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 340-41 (1990) (stating that public choice theorists have taught us that the explosion of federal regulation in the twentieth century was the result, in part, of pressure from lobbyists, rather than of a desire to serve the public interest).

68. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 24-33 (1991) (concluding that public choice models of legislative behavior are too simplistic if they ignore the fact that legislators are motivated by both ideology and constituent interests); cf. Macey, *supra* note 7, at 265-67 (explaining that, in the eyes of public choice theorists, legislators take those actions that will maximize their political support).

more decisive action is needed and that power should be shifted from one sovereign to the other. If citizens prefer the latter course—perhaps to achieve greater economic efficiency,⁶⁹ to bypass a class of politicians who are too easily captured by special-interest groups,⁷⁰ or to accomplish other objectives—they can elect leaders who share their views regarding the optimal distribution of power, bolster the capacities of the sovereign to which they wish to shift power, and shape public opinion through such means as advertising and public demonstrations.⁷¹

Although it rarely is employed in scholarly and judicial writings on federalism, the Framers' vision of federal-state competition thus remains a powerful tool for making descriptive observations about American politics.⁷² Democrats and Republicans,

69. See, e.g., WILLIAM ANDERSON, *THE NATION AND THE STATES, RIVALS OR PARTNERS?* 149 (1955) (stating that, "[o]n grounds of greater efficiency," one level of government may be better suited than another to perform a given function); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 *SAN DIEGO L. REV.* 555, 556 (1994) (arguing that federal regulation of commerce is appropriate only when "state regulation of commerce would be inefficient due to the presence of externalities"); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 *MINN. L. REV.* 73, 141 (1997) (stating that decentralization is undesirable if it frustrates efforts to achieve economies of scale).

70. See, e.g., Stewart, *supra* note 67, at 340 (arguing that federal lawmaking processes "invite the very domination by faction that Madison so desired to prevent"); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 *HASTINGS CONST. L.Q.* 483, 508-10 (1998) (stating that some prefer decentralization because they believe federal politicians are too responsive to special-interest groups).

71. See BRETON, *supra* note 52, at 48-49; see also ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 16-17, 34 (1970) (explaining that dissatisfied consumers often have "exit options" and "voice options"; that economists tend to believe exit is the most powerful means of expressing unhappiness; and that, when exit is not a viable alternative, "voice must carry the entire burden of alerting management to its failings").

72. In addition to those features of American politics noted above, competition between state and federal officials also may be seen in citizens' use of what Albert Breton calls the "Salmon mechanism." BRETON, *supra* note 52, at 189. Pierre Salmon argues that citizens make comparative assessments of government leaders even if those leaders serve different jurisdictions. Pierre Salmon, *Decentralisation as an Incentive Scheme*, 3 *OXFORD REV. OF ECON. POL'Y* 24, 31-35 (1987). Breton summarizes Salmon's insight as follows:

Citizens use the information they acquire about the supply performance of one or more benchmark governments to appraise and evaluate the supply performance of their own governments. Opposition parties, therefore, have ready-made platforms, based on the same information as that of their citizens, from which to challenge incumbent governments.

BRETON, *supra* note 52, at 189. When former New York City Mayor Rudolph Giuliani was widely praised for his handling of the terrorist attacks of September 11, 2001, for example, he established a performance benchmark for government leaders across the country faced with crises. Citizens easily make such performance comparisons across the federal-state divide. When he imposed a moratorium in 2000 on executions pending a study of his state's system of capital punishment, for example, Illinois Governor George Ryan prompted federal legislators to consider

for example, continue to distinguish themselves from one another, at least in part, by the different ways in which they would allocate power between the state and federal governments.⁷³ Similarly, there are countless ongoing debates concerning whether regulatory control over specific matters should reside in state or federal hands.⁷⁴ There also are areas in which one sovereign's legislative activity may best be explained by that sovereign's eagerness to mimic the popular activity of its competitor.⁷⁵

ways of decreasing the likelihood that innocent persons will be executed. See Wayne Washington, *217 Back a House DNA Bill in Capital Case, U.S. to Help Pay for Test*, BOSTON GLOBE, Apr. 19, 2002, at A3 (reporting that federal politicians believe that "Ryan's stand in Illinois has provided the biggest boost for changes in the death penalty"); see also Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at 1 (reporting that Governor Ryan "commuted all Illinois death sentences [on January 11, 2003] to prison terms of life or less"). Governor Ryan established a performance benchmark, in other words, and other politicians are striving to ensure that the public does not judge them harshly in light of it.

73. In the 2000 presidential campaign, for example, the Democrats stressed the need for an active federal presence in a wide range of domestic areas. See THE 2000 DEMOCRATIC NATIONAL PLATFORM: PROSPERITY, PROGRESS, AND PEACE, at <http://www.democrats.org/about/platform.html> (last visited May 15, 2002) (on file with author). The Republicans also outlined areas in which federal action was needed, but devoted a portion of their platform to the Tenth Amendment and to the need "to shift power from Washington back to the states." See REPUBLICAN PLATFORM 2000: RENEWING AMERICA'S PURPOSE. TOGETHER, at <http://www.rnc.org/gopinfo/platform> (last visited May 15, 2002) (on file with author).

74. Consider, for example, the debate about physician-assisted suicide. Under the Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800-897 (2001), physicians may prescribe medications to help certain patients take their own lives. The Bush Administration has concluded that the federal Controlled Substances Act, 21 U.S.C. §§ 801-950 (2000), prohibits prescribing medications for that purpose. *Oregon v. Rasmussen*, 192 F. Supp. 2d 1077, 1078-84 (D. Or. 2002) (describing Oregon's dispute with the Bush Administration). Although the *Rasmussen* court rejected the Administration's interpretation of the federal statute, Congress undoubtedly will consider legislation that would unambiguously ban physicians from prescribing drugs for the purpose of helping their patients to commit suicide. Cf. *id.* at 1092-93 (noting that earlier attempts to amend the federal statute failed). By electing politicians who share their views, voters both in Oregon and nationwide can decide whether this is a matter for state or federal determination.

75. Consider, for example, the increasing federalization of criminal law. In recent years, Congress has criminalized an ever widening array of conduct—conduct that, in many instances, was already proscribed by state law. See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997-98 (1995); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1162 (1995); see also George D. Brown, *Constitutionalizing the Federal Criminal Law Debate: Morrison, Jones, and the ABA*, 2001 ILL. L. REV. 983 (discussing constitutional and jurisdictional issues relating to federalization of the criminal law). Federal criminal statutes may now be found for such things as murder, carjacking, domestic violence, assault, theft, robbery, embezzlement, extortion, fraud, arson, bribery, drug trafficking and possession, and firearms offenses. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 654-55 (1997) (citing the relevant statutes). Moreover, the sentences for federal convictions tend to be significantly longer than those for state convictions. See Beale, *supra*, at 998.

Why has Congress created an overlay of federal criminal law under which penalties are generally stiffer than those under state law? It is not because the states were widely perceived as

While the battle for affection sometimes pits one government against the other in a struggle for power—unless revenues are somehow shared, for example, a dollar paid to one sovereign in taxes is a dollar that cannot be paid to the other sovereign⁷⁶—it is not always so. Sometimes the two sovereigns believe they can best accrue political support by joining forces in a cooperative effort to secure the common good.⁷⁷ On other occasions, a government might seek the people's affection by *withdrawing* from a regulatory arena and ceding

being soft on crime. *See, e.g.,* Brickey, *supra*, at 1159-61 (arguing that the states were effectively enforcing their drug laws prior to Congress's decision to enact largely duplicative laws). Rather, federal politicians have been eavesdropping on Alexander Hamilton, who told the states they would have a significant competitive advantage over the federal government because they would be the primary "guardian[s] of life and property." *See* THE FEDERALIST NO. 17, *supra* note 11, at 120. By seeking to join the states as the people's local guardian, Congress hopes to win a greater measure of affection for itself. When Congress banned the possession of guns near schools in the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(2)(A) (1994), *amended by* 18 U.S.C. § 922(q)(2)(A) (2000), for example, it was not meeting a pressing public need—more than forty states had already banned the possession of guns in or near schools. *See* United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Presumably, Congress enacted that legislation because it hoped to score the same kinds of political points that local officials hope to score when they "get tough on crime." *See generally* Brickey, *supra*, at 1165 (stating that, in federalizing the criminal law, Congress has proven unable to resist "the all too irresistible urge to do something politically popular").

76. *Cf.* John Shannon & James E. Kee, *The Rise of Competitive Federalism*, 9 PUB. BUDGETING & FIN. 5, 7 (1989). Shannon and Kee state:

Washington policymakers as well as state and local officials must go back, hat-in-hand, to a common source—the nation's taxpayers—when additional tax revenue is needed . . . [T]here is growing evidence that absent a national crisis, Washington does not have the inside track in the emerging intergovernmental race for taxpayer support.

Id.

77. In the decade immediately following the Constitution's ratification, for example, federal and state authorities launched cooperative efforts in a number of areas, such as enforcing the states' quarantine laws, licensing auctioneers, housing prisoners, and using the states' courts to enforce federal laws. *See* FEDERAL-STATE RELATIONS: REPORT OF THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 4 (1978) [hereinafter FEDERAL-STATE RELATIONS]. As time passed, that spirit of cooperation also manifested itself in other areas. The federal government frequently granted cash and land to the states in the late 1700s and the 1800s, for example, but attached increasingly specific conditions to those grants, such as the requirement that the property be used for public education. *See id.* at 12-16. The federal and state governments often exchanged expertise during times of crisis, and state and local officials worked with the Army Corps of Engineers on a wide range of projects. *See* Daniel J. Elazar, *The Scope of Cooperation*, in AMERICAN INTERGOVERNMENTAL RELATIONS: FOUNDATIONS, PERSPECTIVES, AND ISSUES 36, 37-40 (Laurence J. O'Toole, Jr. ed., 1985) [hereinafter AMERICAN INTERGOVERNMENTAL RELATIONS]. Although many of these early cooperative arrangements were primarily administrative in nature, by the time of the New Deal the two sovereigns' cooperative undertakings had taken on a decidedly regulatory cast, with the federal government thereby extending its reach into a wide range of areas that previously had been controlled exclusively by the states. For a discussion of the transition to the New Deal era, see *infra* notes 83-90 and accompanying text.

power to its competitor.⁷⁸ Regardless of whether lawmakers ever pursue such strategies for the very purpose of improving their standing in the federal-state competition for affection, their actions necessarily have competitive implications: the more affection a sovereign earns, the more difficult it becomes for its competitor to persuade citizens that a power-shift is desirable.

The continued relevance of the Framers' vision is perhaps best illustrated by the macrolevel shifts in popular sentiment and in regulatory power that have occurred over the course of the nation's history. Until the late 1800s, the federal-state competition played out much as the Framers predicted. Hamilton and Madison had argued that state politicians would command a greater measure of the people's loyalty than federal politicians and that, as a result, responsibility for securing the public good would fall primarily on the states' shoulders.⁷⁹ In the nation's first century, the states were indeed the source of nearly all legislation that was of any consequence to the American public.⁸⁰ Professor Rakove exaggerates only slightly when he writes that, during this period, "the business of the national government was reduced to collecting some duties, delivering the mail (albeit on Sunday, at least for a while), and governing western territories."⁸¹ The American people wanted a small federal government, and that is what they got.⁸²

After the Civil War, however, political pressure for a more active federal government grew as the nation's economy shifted from agrarian to industrial, as businesses sought to exploit nationwide markets, as citizens crowded into the nation's cities and tried to secure

78. Jonathan Macey has pointed out, for example, that Congress often can maximize its political support by deferring to state and local regulators when federal regulation would undermine a state's widely valued regulatory assets (such as Delaware's body of corporate law), when different regions strongly prefer different regulatory outcomes, and when Congress can avoid damaging attacks from special-interest groups by shifting responsibility to state and local officials. See Macey, *supra* note 7, at 267-69, 276-90.

79. See *supra* notes 41-43 and accompanying text.

80. See Scheiber, *supra* note 62, at 234-35 (stating that, prior to 1861, "family law, criminal law, business organization law, labor law (including slavery), inheritance, local government organization, education at all levels, even much of the relationship of religious organizations to the state, and other areas of social and economic ordering . . . all were largely or entirely in the hands of state governments").

81. Rakove, *supra* note 63, at 1042.

82. See Shannon & Kee, *supra* note 76, at 7 (stating that, from 1789 to 1929, "the public voiced and voted its preference for small government in general and a very small federal domestic presence in particular"). Barry Weingast explains that, prior to the 1930s, "[a] national consensus supported the limited role of the federal government. Because this view was so widely held, all the major parties before the 1930s championed it . . ." Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 19 (1995).

favorable treatment from their increasingly powerful employers, and as numerous state officials refused to honor the civil rights conferred by the Thirteenth, Fourteenth, and Fifteenth Amendments.⁸³ Congress responded by attempting to enforce the Civil War Amendments,⁸⁴ conferring federal-question jurisdiction on federal district courts,⁸⁵ and enacting the Interstate Commerce Act of 1887⁸⁶ and the Sherman Anti-Trust Act of 1890.⁸⁷ Congress further extended the federal government's reach during the Great Depression, as a popular president pushed through New Deal programs on matters ranging from entitlements, to agriculture, to the terms and conditions of employment, to transportation, and more.⁸⁸ By the time the Supreme Court finally gave this expanded federal role its blessing,⁸⁹ it was clear that the public supported a broad shift of power to the nation's capital.⁹⁰

The years following the New Deal were not happy ones for the states. As William Riker noted at the time, there had been a "gradual transfer of patriotism from state to nation."⁹¹ This shift was prompted in part by the widespread public perception that state governments were corrupt, inept, and inefficient.⁹² Shortly after serving as North

83. See ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 117-19 (1987) (concisely describing these events); Keith Werhan, *Checking Congress and Balancing Federalism: A Lesson from Separation-of-Powers Jurisprudence*, 57 WASH. & LEE L. REV. 1213, 1242-44 (2000) (tying these developments to Madison's acknowledgment in *Federalist No. 46* that the people might one day prefer federal regulation).

84. See generally Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws"*, 67 GEO. WASH. L. REV. 51, 54-60 (1998) (describing the evolution of early civil rights legislation).

85. See Act of March 3, 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2000)).

86. See Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C. (2000)).

87. See Sherman Anti-Trust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (2000)).

88. See Scheiber, *supra* note 62, at 257-59; see also *id.* at 261 (stating that President Roosevelt pointed to his "enormous electoral majorities" as evidence of "an overwhelming mandate for change" in the nation's governance structure) (internal quotation omitted).

89. See, e.g., *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

90. See GREVE, *supra* note 9, at 21 ("The lesson of 1937 is that the Court cannot enforce constitutional norms against the will of the country and against Congress."); cf. ANDERSON, *supra* note 69, at 142 (arguing that there was "nothing to be gained except injured toes by kicking against the necessity of our times for large-scale government").

91. RIKER, *supra* note 62, at 105; accord Whittington, *supra* note 70, at 500 (asserting that the states lost "much of their moral authority as representatives of the people, and popular allegiance shifted to the national government").

92. See IRA SHARKANSKY, *THE MALIGNED STATES: POLICY ACCOMPLISHMENTS, PROBLEMS, AND OPPORTUNITIES* 1-2 (1972) (defending the states against the common charge that they were

Carolina's governor in the early 1960s, for example, Terry Sanford wrote that the states had "lost their confidence, and the people their faith in the states."⁹³ The shift was also encouraged by broad public approval of Congress's regulatory activity. Congress created popular "large-scale education, welfare, and environmental programs," for example, and secured the states' assistance in implementing them.⁹⁴ In taking those actions, the federal government claimed a sizable percentage of the nation's limited tax revenues, thereby "squeeze[ing] out the revenue raising capacities of states and localities" and causing the states to be increasingly dependent on federal financial support.⁹⁵ Yet this appeared to be what the American people wanted. Public opinion surveys indicated, for example, that when asked which government made the best use of its money, more people placed the federal government strongly in first, with local government second, and state government a distant third.⁹⁶

By the time Ronald Reagan was elected president in 1980, the tide had begun to shift once again in ways that continue to be felt today. People had grown increasingly concerned about the federal government's penchant for deficit spending and had come to believe that federal programs often create more problems than they solve and that lobbyists too frequently have federal officials within their grasp.⁹⁷

"habitats of corrupt, evil, or simply ineffective politicians and bureaucrats"); RICHARD S. WILLIAMSON: *REAGAN'S FEDERALISM: HIS EFFORTS TO DECENTRALIZE GOVERNMENT* 221 (1990) (stating that, after World War II, "[s]tates were . . . characterized as corrupt, and ignorant of social needs").

93. TERRY SANFORD, *STORM OVER THE STATES* 21 (1967). Sanford attributed this drop in the public's confidence to a variety of factors, including neglected cities, environmental concerns that transcended state boundaries, benighted tax policies, stifling state constitutions, weak governorships, and state legislators who were too quick to succumb to lobbyists and too slow to reapportion representation to match population shifts. *Id.* at 22-38.

94. Michael S. Greve, *Against Cooperative Federalism*, 70 *MISS. L.J.* 557, 577 (2000); see also Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 *N.Y.U. L. REV.* 1692, 1695 (2001) ("Starting most notably with the environmental protection statutes passed in the 1970s, federal regulatory programs increasingly have relied on state agencies to implement federal law.").

95. WILLIAMSON, *supra* note 92, at 221. Even today, federal disbursements comprise nearly thirty percent of all state revenue. Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 *GEO. L.J.* 461, 461-62 (2002).

96. In 1972, for example, 39% of surveyed individuals chose the federal government, 26% chose local government, and 18% chose state government, with the balance expressing no opinion. Those numbers had not significantly changed by 1976, when 36% chose the federal government, 25% chose local government, and 20% chose state government. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *CHANGING PUBLIC ATTITUDES ON GOVERNMENT AND TAXES* 2 (1976) (providing survey results for the years 1972 through 1976 and stating that the federal government was "the clear public opinion winner").

97. See Robert B. Hawkins, Jr., *American Federalism: Again at the Crossroads*, in *AMERICAN FEDERALISM: A NEW PARTNERSHIP FOR THE REPUBLIC* 3, 8-10 (Robert B. Hawkins, Jr.

The states, meanwhile, had revitalized themselves by improving their tax systems, professionalizing their staffs, and strengthening their governors' powers.⁹⁸ Not surprisingly, when asked today which government makes the best use of its funds, citizens place both local and state government ahead of the federal government.⁹⁹ The result has been two decades of political and scholarly conversation about devolving power to state and local governments.¹⁰⁰ (Consider, for example, the 1996 welfare reform legislation, which provided states with increased flexibility in the distribution of federally funded welfare benefits.¹⁰¹) While scholars debate the impact of some of these devolution initiatives,¹⁰² there is no question that the public's changing sentiments are continuing to shape the nation's legislative agenda.

History clearly suggests, therefore, that the state and federal governments continue to compete for supremacy in the public's eyes and that citizens have favored changes in the distribution of regulatory power when they have judged it to be in their best interest. Such shifts may reflect broad-based disenchantment with or affection for one sovereign or the other, or they may reflect a narrower judgment that one sovereign is more likely than the other to regulate specific areas of concern in a satisfactory manner. These shifts in

ed., 1982); Whittington, *supra* note 70, at 506-10; *see also* Shannon & Kee, *supra* note 76, at 13 (stating that Reagan articulated the public's growing dissatisfaction with always looking to Washington for solutions to the nation's problems).

98. *See* ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES & THE FEDERAL GOVERNMENT 102-07 (1992); Shannon & Kee, *supra* note 76, at 13-16; Whittington, *supra* note 70, at 516-22. Michael Greve notes that, in recent years, state and local governments "have become more confident, more assertive, more resistant to federal micro-management, and more vocal in demanding authority and flexibility in administering federal programs." GREVE, *supra* note 9, at 104.

99. *See* Richard L. Cole & John Kincaid, *Public Opinion and American Federalism: Perspectives on Taxes, Spending and Trust*, 74 SPECTRUM: THE JOURNAL OF STATE GOVERNMENT No. 3, at 14 (2001); *cf.* Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 YALE J. ON REG. 1, 3 n.7 (1996) (stating that surveys indicate a higher level of trust in state government than in the federal government).

100. For a lengthy discussion of the various devolution proposals, *see* TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM *passim* (1998). For a brief discussion of the same topic, *see* Greve, *supra* note 94, at 578-84. Most recently, President George W. Bush has concluded that he can win public support by reducing the extent of federal involvement in a wide range of areas, prompting states to scramble to fill perceived gaps in such areas as antitrust, health care, product safety, and environmental protection. Stephen Labaton, *States Seek to Counter U.S. Deregulation*, N.Y. TIMES, Jan. 13, 2002, at A23.

101. *See* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C. (2000)).

102. *See* Richard L. Cole et al., *Devolution: Where's the Revolution?*, 29 PUBLIS: J. FEDERALISM 99, 99-100 (1999).

sentiment and power do not always occur quickly—they may be more akin to the turns of an ocean freighter than to those of a speedboat—but they *do* occur.

There is no guarantee, however, that the state and federal governments will remain viable competitors against one another or that citizens will remain able to allocate power between the two sovereigns in ways they deem advantageous. Indeed, there are several ways in which the federal-state marketplace might falter. It is to these important matters that I devote the balance of this Article.

III. MARKET FAILURE AND JUDICIAL INTERVENTION

A. An Overview of the Terrain

Beginning in the late 1960s, a small group of economists developed a new way of thinking about competition and monopoly power. Under the traditional model of perfect competition, the market's invisible hand can be relied upon to push prices to competitive, welfare-maximizing levels only if there is a large number of sellers, so that no single seller can cause prices to rise by cutting its own production.¹⁰³ Proponents of the theory of contestable markets suggested, however, that prices could come to rest at competitive levels even in a market populated by a single seller.¹⁰⁴ This would be true, these economists argued, if the seller continually operated under the *threat* that other sellers might quickly enter the market and sell the same product or service at a lower price.¹⁰⁵

Although it has failed to revolutionize the way in which economists and regulators approach problems of dominance in the private marketplace,¹⁰⁶ the theory of contestable markets provides a

103. See HERB HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 3, 8 (2d ed. 1999).

104. See generally WILLIAM J. BAUMOL ET AL., *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* *passim* (1982) (providing one of the leading discussions of the theory of contestable markets); Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 *YALE J. ON REG.* 111 *passim* (1984) (providing a more concise discussion of the same theory); Harold Demsetz, *Why Regulate Utilities?*, 11 *J.L. & ECON.* 55 *passim* (1968) (arguing that competitive forces may prevail even in industries having only one or a small number of sellers).

105. See BAUMOL, *supra* note 104, at 5-6; Bailey & Baumol, *supra* note 104, at 113. On this view, the goal of government regulation should not be to limit the size or maximize the number of sellers, or to regulate prices, but rather to eliminate or mitigate those factors that make quickly entering and exiting markets costly. See BAUMOL, *supra* note 104, at 477-83.

106. See HOVENKAMP, *supra* note 103, at 36 (stating that the theory may prove to be a "flash in the pan" because "[t]he minimum conditions for contestability . . . must obtain very strictly, and contestable market performance deteriorates very quickly in response to minor imperfections").

useful analogy for beginning to think about the ways in which the marketplace of federal-state competition might fail. If one sovereign assumes a position of regulatory dominance and the other sovereign falls so far out of favor with the American people that it ceases to be regarded as a viable regulatory alternative, at least two related misfortunes likely will ensue. First, the people will be deprived of one of the benefits that federalism was intended to confer—namely, governmental alternatives on all issues that the Constitution does not commit to the exclusive care of one sovereign or the other.¹⁰⁷ Second, at least until it too loses the public's trust, the dominant sovereign will be free to abuse its power and to disregard the public interest without fear that it will lose power to the disfavored sovereign.

Suppose that the mechanisms of the federal-state marketplace do break down, perhaps in one of the ways that I shall describe in a moment—where might one turn for a remedy? The judiciary is one candidate, and it is on recent instances of judicial intervention that I shall largely focus. Yet one must take a long, careful look through the peephole before inviting the courts through the federalism door.¹⁰⁸ Just as they should be reluctant to intervene in markets in other settings,¹⁰⁹ courts should be especially reluctant to find that legislation—although enacted pursuant to the requisite formalities—is unconstitutional because it either creates or is the product of a flawed political marketplace.¹¹⁰ As a matter of institutional competence,

107. See *supra* notes 30-63 and accompanying text (describing the Framers' vision).

108. See generally Kramer, *supra* note 61, at 293 ("Supporters of judicial intervention [in federalism disputes] have a greater burden than they seem to realize if they want to make their position legally and intellectually respectable."); David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 685 ("A broad legal consensus has long held that judicial intervention in the political process . . . requires a substantial burden of justification in the form of strong reasons to mistrust the political branches' ability to resolve the issue.").

109. See, e.g., Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 273 ("[T]he basic rule [in antitrust cases] should be nonintervention unless the tribunal has a high degree of confidence that it has identified anticompetitive behavior and can apply an effective remedy."); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998) ("Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention [in election-law cases]."); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 682 (1979) (arguing that courts and legislatures "should attempt to ascertain whether noncompetitive behavior is occurring in the relevant [consumer] market before intervening").

110. Under the Equal Protection Clause, for example, the Court usually is extremely reluctant to declare legislation unconstitutional absent an indication that the legislation interferes with the exercise of a fundamental right or discriminates against a person who is a member of a group that historically has been excluded from the political process. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 643-49 (2d ed. 2002); LAURENCE

courts are not inevitably better suited than the political branches to identify and repair failings in the political process.¹¹¹ Moreover, if courts too readily accept invitations to declare legislation the ill-begotten progeny of a malfunctioning political market, they risk usurping the value-identifying and policymaking functions that the political branches of government are intended to serve.¹¹² Indeed, there has long been a debate about whether the courts are *ever* an appropriate forum for resolving federalism disputes. Some have taken the position that the states' interests are sufficiently protected by structural features of American politics,¹¹³ while others have argued that the courts play a vital role in maintaining our federal system of

H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1012 (1978). With respect to discrimination against members of politically disadvantaged groups, John Hart Ely describes a leading rationale for judicial intervention:

The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust" as opposed to a "regulatory" orientation to economic affairs—rather than dictate substantive results it intervenes only when the "market," in our case the political market, is systematically malfunctioning. . . . Our government cannot fairly be said to be "malfunctioning" simply because it sometimes generates outcomes with which we disagree. . . . Malfunction occurs when the *process* is undeserving of trust. . . .

JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102-03 (1980); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (famously suggesting that legislation that discriminates against "discrete and insular minorities" might warrant "more searching judicial inquiry," because those minorities cannot rely on the political process for their protection).

111. See Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 398-425 (1984) (arguing against the presupposition that the judiciary is always best suited to fix malfunctions of the political process); cf. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 106 (1988) (stating that "the political process is enormously complex" and that judges asked to diagnose failings in that process are confronted with a wide array of conflicting views from which to choose); Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 730 (1998) (stating that courts lack "a yardstick for measuring appropriate political competition either between party and nonparty political actors or among nonparty actors").

112. See TUSHNET, *supra* note 111, at 70-83 (1988) (arguing that representation-reinforcement theories of judicial review are flawed because, by inviting courts to rectify a broad range of formal and informal failings in the political process, they leave judges insufficiently constrained).

113. See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 175-81 (1980) (arguing that structural features of the federal government render federalism issues nonjusticiable); Kramer, *supra* note 61, at 278-91 (arguing that political parties protect the states from federal overreaching and that courts should apply a highly deferential standard of review to claims that Congress has intruded upon matters reserved to the states). All such arguments inevitably trace their lineage to Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

government.¹¹⁴ The Court itself has vacillated between those two camps.¹¹⁵

Thus far, however, the participants in that debate have focused primarily on the federal and state governments' structural interconnections and have ignored the dynamics of the larger marketplace for citizens' allegiance.¹¹⁶ Yet until we understand the requirements of that marketplace, it is premature to make declarations about the judiciary's role in preserving federalism. We cannot know whether courts, the political branches, or other forces are best suited to correct the federal-state marketplace's failings, in other words, until we understand the forms in which those failings might appear.

I will therefore begin to identify the conditions that must be met if the federal and state governments are to compete with one another in the way that the Framers envisioned. After briefly describing three such conditions, I argue that the Court has placed itself on a path aimed at ensuring that the requirements of the federal-state marketplace are met. As I explained at the outset, my objective here is not to prove that judicial intervention in each of the Court's recent federalism cases was unassailably proper or that the Court selected the best analytic tools for the task. We might even ultimately reach the ironic conclusion that, although the Rehnquist Court should be credited with helping to refocus our attention on federal-state competition, the judiciary itself is not competent to manage that marketplace in all of the ways that the Court currently envisions. By identifying an overarching market-based rationale for the Court's actions, however, I hope to provide an analytic framework that will revitalize the debate about the dynamics and requirements of federalism and the judiciary's role in preserving the constitutional scheme.

114. See, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 849 (1979) (arguing that the judiciary plays an important role in resolving federalism disputes because the states today are less able to protect their own interests); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001) (rejecting "the theory that because the states are represented in the national political process, judicial review of federalism questions is either unnecessary or unwarranted").

115. See *supra* notes 1, 26 (citing cases in which the Court has manifested varying degrees of interest in adjudicating federalism disputes).

116. For a rare exception to this pattern, see Rakove, *supra* note 63, at 1050 (stating that opponents and proponents of the Constitution acknowledged that "[j]udicial review of legislation—whether national or state—would be important principally as it affected federalism, and as it regulated the competition for political influence and loyalty that the Constitution would inspire").

B. The Market's Requirements

At least three requirements must be met if the federal and state governments are to compete with one another for affection and power.¹¹⁷ I briefly identify those requirements here and then elaborate on them more fully in the section that follows.

1. A Proving Ground

The first requirement for robust competition between the state and federal governments is a proving ground on which each sovereign is assured an opportunity to demonstrate its competence to the American people. Consider the following argument: A sovereign cannot effectively compete for citizens' trust if it has no means of persuading them that it deserves that trust; a sovereign cannot persuade citizens that it deserves their trust unless it has some means of demonstrating the competent manner in which it would handle that trust; and a sovereign cannot demonstrate its competence unless it possesses some meaningful measure of regulatory power. This is precisely the kind of reasoning that animated Hamilton's insistence that the federal government have an opportunity to "attract to its support those passions which have the strongest influence upon the human heart" by regulating directly rather than through state intermediaries: If a sovereign is deprived of the chance to regulate matters of concern to its constituents, it cannot make a powerful claim to those constituents' affection.¹¹⁸

Suppose, for example, that the Commerce Clause were read so broadly that the federal government possessed the power to deprive the states of all regulatory opportunities and that Congress fully

117. There is a fourth apparent requirement. For the Framers' vision of federal-state competition to work, citizens must be able to elect officials to positions of leadership in at least one of the two sovereigns who will be responsive to the public's demands. If narrowly focused special-interest groups succeed in capturing only one sovereign's officials by persuading those officials to adopt laws that violate the wishes of a majority of citizens, the situation is bad but not irremediable—the people can attempt to respond by shifting power to the sovereign that remains responsive to their desires, thereby placing pressure on the captured sovereign to mend its ways. But if special-interest groups so fully capture officials representing *both* sovereigns that the wishes of the majority are ignored no matter where power is placed and no matter whom citizens vote into office, then the people are deprived of the electoral opportunity to attach consequences to their judgment that the existing distribution of power is not serving their interests. To give these problems an appropriate measure of attention, one must delve into such matters as public choice theory and direct democracy regulatory options (such as initiatives and referendums). Given the length of any satisfactory discussion of these issues, they must be reserved for treatment elsewhere.

118. See THE FEDERALIST NO. 16, *supra* note 34, at 116; see also *supra* notes 30-63 and accompanying text (recounting the Framers' arguments).

exercised that power. How could the states persuade the people to strip significant power from Washington and invest it in the states? State leaders certainly could describe how they would handle certain matters, could point out the ways in which the federal government is failing to serve the public interest, and could push for the election of federal officials who would cede power back to the states. Those state leaders, however, would have roughly the same credibility as the newcomer to politics who, although lacking any sort of track record in elective office, seeks election to a position of high responsibility—such campaigns occasionally culminate in success, but the odds are stacked against them. The problem would be compounded if the reason power had swung so decisively to the federal government in the first place is that people had lost their confidence in the states: the states' problem then would not be that they lacked a track record, but rather that they were saddled with a terrible one. To compete effectively for allegiance and power, therefore, a government must have the opportunity to create regulatory success stories in areas that genuinely matter to the people and then to urge the people to give it the opportunity to replicate those successes in a broader range of settings. Thus arises a paradox: To ensure that the people are well served in the long run by competition between two viable sovereigns, each government must be guaranteed a certain measure of power no matter how poorly it fares as a competitor in the short run.¹¹⁹

2. Autonomy

The second requirement for competition between the states and the federal government is that each sovereign must enjoy a significant measure of autonomy from the other. Of course, the two sovereigns cannot be *entirely* autonomous; there are a variety of ways in which they are interconnected, such that one sovereign is able to influence the other's decisionmaking.¹²⁰ (Indeed, one way to protect the integrity of the federal-state marketplace is to ensure that the sovereigns are

119. Cf. Shannon & Kee, *supra* note 76, at 18 (stating that, if they are to compete with the federal government for limited tax revenues, the states must retain "control of those governmental programs that most directly impact voters/taxpayers where they live and work, e.g., education and police protection"); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 32 (1998) (arguing that judicial review of federalism disputes is necessary in order to ensure that the states, by regulating meaningful aspects of people's lives, will have the popular support necessary to resist a tyrannical federal government).

120. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-54 (1985) (describing the formal ways in which the states play a role in the composition and workings of the federal government); Kramer, *supra* note 61, at 278-85 (describing the emergence of political parties and other informal mechanisms that render the state and federal governments interconnected).

able to make full use of those interconnections to safeguard their respective interests.¹²¹) Yet there must be meaningful limits on the extent to which the sovereigns are able to control one another's behavior. As Lewis Kaden has observed, the very notion of "sovereignty" denotes "a power to make choices—about how to use public monies and direct public attention, and about how to vary the choices as the needs of the community change."¹²² If the sovereigns are genuinely to compete for the people's affection, each must enjoy a broad measure of freedom to select those avenues by which it will try to earn that affection, as well as to decide how to spend its limited resources in that quest. To put it somewhat differently, each sovereign must have significant control over the conduct that earns it a reputation among the citizenry. If one sovereign is permitted to control the other's tactical decisions about how to earn the people's trust, then there is no true competition between them.

3. Transparency

The third requirement for federal-state competition is a level of systemic transparency sufficient to enable the people to determine which sovereign has earned their trust for regulating any given

121. As Herbert Wechsler pointed out nearly half a century ago, as the Court later acknowledged in *Garcia*, and as Larry Kramer has more recently stressed, participation in federal politics provides the states with their primary opportunity to protect themselves from burdensome federal action. See *Garcia*, 469 U.S. at 550-57 & n.11 (citing Wechsler, *supra* note 113); Kramer, *supra* note 61, at 252-68. This participation undoubtedly plays an important role in shaping federal-state competition, particularly as a force for tempering the advantages that the Supremacy Clause confers on the federal government. See *infra* note 138 (noting the power of the Supremacy Clause). By demanding that federal law be made pursuant to the "single, finely wrought and exhaustively considered, procedure" set forth in the Constitution, *INS v. Chadha*, 462 U.S. 919, 951 (1983), for example, the Court ensures that federal statutes have to survive what William Eskridge and Jenna Bednar describe as the federal lawmaking "gauntlet": At each step along the way, the states are afforded an opportunity to exert powerful lobbying forces. See Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1485 (1995); see also U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . ."); *Clinton v. New York*, 524 U.S. 417, 436-41 (1998) (holding that the line-item veto violates the Presentment Clause); *Chadha*, 462 U.S. at 958-59 (holding that the one-house veto violates the Constitution's bicameralism and presentment requirements). Yet there are aspects of current lawmaking doctrine that seem at odds with the notion that the states always can adequately protect their interests through the political process. Under the Spending Clause, for example, Congress remains free to extract wide-ranging concessions from the states in exchange for the federal funds on which states have become increasingly dependent. See *South Dakota v. Dole*, 483 U.S. 203, 206-11 (1987); see also *infra* notes 235-40 and accompanying text (discussing the Spending Clause). When space permits, it will be important to explore the implications of the Framers' vision of federal-state competition for these and related matters.

122. Kaden, *supra* note 114, at 851.

subject matter at any given time. The primary purpose of vertical competition, as the Framers envisioned it, is to enable citizens to distribute regulatory power in the manner that best serves their interests. If one sovereign is permitted to obscure its role in bringing about undesirable regulatory outcomes, or if political responsibility is otherwise veiled to such an extent that the people cannot accurately allocate blame and praise between the two governments, then the competition's chief purpose has been thwarted. Although this requirement is perhaps the most obvious, it is also—for reasons I explain below¹²³—perhaps the most problematic.

C. *The Recent Record of Judicial Intervention*

The Rehnquist Court has never expressly developed a theory of federal-state competition. When the requirements of the federal-state marketplace are placed side-by-side with the Court's recent rulings in cases concerning the Commerce Clause, intergovernmental immunities, and the states' sovereign immunity,¹²⁴ however, there is a remarkable correspondence between them. Each of those decisions may be construed as an effort to protect the federal-state marketplace and thereby to ensure that the states will be able to compete effectively with the federal government for the people's affection.

1. To Ensure a Proving Ground

In *United States v. Lopez*¹²⁵ and *United States v. Morrison*,¹²⁶ the Court struck down the Gun-Free School Zones Act of 1990 and the civil-remedy provision of the Violence Against Women Act of 1994, respectively, primarily on the strength of its insistence that the Constitution requires a distinction "between what is truly national and what is truly local."¹²⁷ Yet the Court did little to explain the importance of that distinction. In *Lopez*, the Court merely emphasized

123. See *infra* notes 207-50 and accompanying text.

124. See *supra* note 1 (citing the Court's recent federalism rulings). Because these cases are familiar to most readers, my descriptions of their facts and holdings will be exceedingly brief.

125. 514 U.S. 549 (1995).

126. 529 U.S. 598 (2000).

127. See *id.* at 617-18 (citing *Lopez*, 514 U.S. at 568). In *Lopez*, the Court held that Congress exceeded its power to regulate interstate commerce when it enacted the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(2)(A) (1994), amended by 18 U.S.C. § 922(q)(2)(A) (2000), which made it a crime to possess a firearm near a school. 514 U.S. at 568. In *Morrison*, the Court held that Congress exceeded its commerce power when it enacted the civil-remedy provision of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994), which allowed a person injured by gender-motivated violence to bring an action for damages against the perpetrator. 529 U.S. at 627.

that Congress is limited to its enumerated powers and that the very notion of enumeration requires that some areas of regulatory concern—such as certain matters relating to family law and education—be beyond Congress’s reach.¹²⁸ In *Morrison*, the Court relied heavily on *Lopez*’s analytic framework¹²⁹ and concluded that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”¹³⁰ In both cases, the Court stopped short of denying that, when taken in the aggregate, violence (whether committed near schools or motivated by gender) substantially affects national productivity and interstate travel.¹³¹ Yet the Court refused to sustain the statutes, fearing that to rule otherwise would be tantamount to allowing Congress to regulate all forms of human activity.¹³² Instead, the Court announced that, while the Commerce Clause does authorize Congress to regulate activities that substantially affect interstate commerce, it does so only if those activities are economic or commercial in nature.¹³³

If a reasonable legislator could indeed find that such violence substantially affects interstate commerce, why would the Court insist on concluding that Congress cannot proscribe it?¹³⁴ Justice Souter attributed the majority’s insistence to “a new animating theory that makes categorical federalism seem useful again.”¹³⁵ A more satisfying answer might be found in a theory that is not new at all—only

128. See *Lopez*, 514 U.S. at 552 (“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”); *id.* at 564-68 (emphasizing that the Constitution places certain areas of human activity beyond Congress’s reach).

129. See 529 U.S. at 607-13 (recounting the Court’s reasoning in *Lopez*).

130. *Id.* at 618.

131. See *id.* at 615; *Lopez*, 514 U.S. at 563-64. Indeed, in both cases, four Justices believed Congress should have been permitted to regulate on the strength of those causal chains. See *Morrison*, 529 U.S. at 628-36 (Souter, J., dissenting) (citing extensive evidence that violence against women affects interstate commerce); *Lopez*, 514 U.S. at 618-25 (Breyer, J., dissenting) (arguing that a rational legislator easily could conclude that violence in schools affects interstate commerce).

132. See *Morrison*, 529 U.S. at 615; *Lopez*, 514 U.S. at 564.

133. See *Morrison*, 529 U.S. at 613 (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”); *Lopez*, 514 U.S. at 561 (“[The statute under review] is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”).

134. Although Justice Thomas believes “that the very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’s powers and with this Court’s early Commerce Clause cases,” *Morrison*, 529 U.S. at 627 (Thomas, J., concurring), he has failed to persuade any of his colleagues on the Court to join him in that position.

135. *Id.* at 644 (Souter, J., dissenting). *But see infra* notes 142-57 and accompanying text (distinguishing the Court’s current conception of federalism from the discredited dual—or “categorical”—federalism of the Court’s past).

forgotten. Namely, if the state and federal governments are to compete with one another in the manner that the Framers envisioned, both sovereigns must be assured of opportunities to prove their competence to the American people, and any interpretation of Congress's enumerated powers that threatens to rob the states of all such opportunities must be rejected.

Reduced to its essentials, the argument runs as follows: The Constitution assures both the federal government and the states of their own respective proving grounds.¹³⁶ For the federal government, that assurance appears principally in the form of Congress's enumerated powers and the Supremacy Clause;¹³⁷ for the states, it appears principally in the form of the Tenth Amendment.¹³⁸ Congress is assured that, no matter how popular the states become, it always will be able to regulate matters that fall within its enumerated powers, while the states are assured that Congress will not be able to use the Supremacy Clause to deprive them of all opportunities to earn the people's affection.¹³⁹ Any interpretation of Congress's enumerated powers that would permit Congress to regulate all significant areas of human activity and thereby force the states entirely to the sidelines must, therefore, be rejected. In the Court's eyes, the interpretations advanced in *Lopez* and *Morrison* were just such interpretations.

Of course, even if the Court had upheld the legislation at issue in *Lopez* and *Morrison*, the states still would have been left with plenty of opportunities to prove their competence. After all, the Gun-Free School Zones Act and the Violence Against Women Act did not

136. Pierre Salmon similarly argues that, for there to be vertical competition in a federal system of government, there must be constitutional rules that prevent one level of government from unilaterally stripping power from the other. See Salmon, *supra* note 72, at 36.

137. See U.S. CONST. art. I, § 8 (providing the primary enumeration of Congress's powers); U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").

138. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). That is not to say that the Constitution assures the two sovereigns of *equal measures* of power. Indeed, Congress's enumerated powers, when combined with the power of preemption, undoubtedly deal the federal government a stronger hand. Cf. *New York v. United States*, 505 U.S. 144, 159 (1992) ("[T]he Supremacy Clause gives the Federal Government a decided advantage in the delicate balance the Constitution strikes between state and federal power.") (internal alteration and quotation omitted).

139. In *Garcia v. San Antonio Metropolitan Transit Authority*, for example, the Court acknowledged that Article I, Section 8 "works a[] sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation." 469 U.S. 528, 548 (1985). Yet the Court hastened to add that "the limitation on federal authority inherent in the delegated nature of Congress's Article I powers" is one of the means by which "the role of the States in the federal system" is preserved. *Id.* at 550.

broadly preempt the states' civil and criminal codes. If the courts are ever to adjudicate federalism disputes, and if concerns about maintaining a proving ground for the states are properly to animate those federalism rulings, should the courts simply wait until the states really are at risk of losing all opportunities to earn the people's affection before declaring federal legislation unconstitutional on these grounds?

Probably not. The problem with telling the courts that their role is to intervene only when there is a federalism crisis is that the judiciary lacks a principled means of assessing the states' competitive strength at any given moment in time and of assessing the affection-earning value of specified areas of regulatory concern. Those are political judgments that the courts simply are not equipped to make.¹⁴⁰ Yet the Constitution does not call upon the courts to make such finely calibrated political assessments. Instead, it seeks to assure the states of a proving ground by enumerating Congress's powers and by reserving the balance of power for the states. Courts are left, therefore, with two options: either they can refrain from adjudicating claims that Congress has exceeded its enumerated powers—an option that some have urged the Court to select¹⁴¹—or they can try to interpret Congress's enumerated powers in a manner that places a realm of public concerns beyond Congress's reach. By distinguishing between those activities that are economic or commercial in nature

140. Such an approach also would produce the anomalous result that the same piece of federal legislation might be upheld one month but declared unconstitutional the next, entirely because the states' other regulatory opportunities had decreased in the interim.

141. See, e.g., CHOPER, *supra* note 113, at 193-94 (listing federalism issues that the author believes should be deemed nonjusticiable). If the Court is instead going to identify limits on Congress's enumerated powers, there will be occasions when the Court's rulings seem ironic in light of state support for the federal legislation at issue. In *Morrison*, for example, there was widespread support among state officials for the civil-remedy provision of the Violence Against Women Act. See Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 119-20 (2000). It might, therefore, have seemed odd for the Court to invalidate that provision in the name of preserving a proving ground for the states—a proving ground that the states seemed perfectly happy to surrender. Cf. Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1, 59 (2000) (arguing that the *Morrison* Court's reasoning is "opaque, particularly in light of the massive record of state acknowledged failure to remedy violence against women and the overwhelming state support for a federal remedy"). Yet unless state approval is to be accorded dispositive significance in enumerated-powers cases, the Court must consider whether a constitutional construction applied in a case featuring state approval would pave the way for federal intrusions in cases where states wish to preserve their regulatory control. In *Morrison*, the Court found that the only way to sustain the civil-remedy provision under the Commerce Clause would be to adopt an interpretation that would permit Congress to regulate *all* criminal activity. See *United States v. Morrison*, 529 U.S. 598, 615 (2000). The Court refused to take that step. *Id.*

and those that are not, the Court has accepted the challenge of negotiating the latter course.

It would be easy—but a serious mistake—to confuse the modern Court's economic/noneconomic and local/national distinctions with the "dual federalism" of the nineteenth-century Court.¹⁴² The hallmarks of that dual federalism were an emphasis on the fact that Congress must act within the confines of its enumerated powers; a belief that the states and the federal government have few, if any, overlapping areas of responsibility and are wholly sovereign within their respective spheres of activity; and a belief that the federal-state relationship "is one of tension rather than collaboration."¹⁴³ The primary focus of federal-state competition under a dual federalism regime is not which of the two sovereigns has best made its case to the American people for regulating a given matter, but rather where courts should draw the line that separates state and federal powers.¹⁴⁴

Prior to its New Deal capitulation, for example, the Court often attempted to draw a sharp distinction between interstate and intrastate commerce.¹⁴⁵ In *Gibbons v. Ogden*,¹⁴⁶ Chief Justice Marshall

142. See generally Daniel J. Elazar, *Cooperative Federalism*, in COMPETITION AMONG STATES, *supra* note 9, at 67 ("Until the 1930s, the regnant theory of federalism in the United States, as elsewhere, was . . . 'dual federalism.'").

143. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950). The classic judicial statement of dual federalism is found in *Tarble's Case*, 80 U.S. 397 (1872):

There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other . . . that they would if their authority embraced different territories.

Id. at 406. The Court's job, on this view, is to ensure that neither sovereign intrudes upon the other's territory. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) ("This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and state . . ."); 2 JOHN A. SCHROTH, *DUAL FEDERALISM IN CONSTITUTIONAL LAW* 379 (1941) ("In [a dual federalism] system the Supreme Court stands as arbiter between the two sovereign governments, state and national.").

144. Under dual federalism, in other words, the primary locus of federal-state competition is shifted from the political branches to the courts. Yet the political branches are not entirely cut out of the picture: they can continue to enact popular legislation that the courts find objectionable and can thereby force the courts to decide whether to reduce their own political capital by declaring that legislation unconstitutional. President Roosevelt's battle with the Court during the New Deal era illustrates this phenomenon.

145. Indeed, to read some of the Court's opinions prior to 1937, one might suppose that the federal and state governments had little to do with one another prior to the New Deal, with each merely operating in its separate sphere of influence. In reality, however, the Court's philosophy of dual federalism was in tension with a pattern of federal-state cooperation that marked numerous governmental undertakings in the nation's first century and that blossomed into an

declared that Congress enjoyed plenary power to regulate commerce “among” the states, but that the “completely internal commerce of a State . . . may be considered as reserved for the State itself.”¹⁴⁷ In *Hammer v. Dagenhart*,¹⁴⁸ the Court similarly determined that states’ control over “purely local” matters was “as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.”¹⁴⁹ Having determined that manufacturing was an intrastate process, the *Hammer* Court held that Congress could not prohibit the interstate shipment of goods manufactured by children.¹⁵⁰

The Rehnquist Court’s insistence that “[t]he Constitution requires a distinction between what is truly national and what is truly local”¹⁵¹ certainly has the initial feel of dual federalism.¹⁵² Yet there

era of judicially sanctioned cooperative federalism after the New Deal. *See supra* note 77 (describing early instances of cooperation). Daniel Elazar and Morton Grodzins remain the leading proponents of the view that dual federalism never really existed as a practical matter, and that cooperative integration has always been the norm. *See* DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 51 (3d ed. 1984); Morton Grodzins, *Centralization and Decentralization in the American Federal System*, in *A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM* 1, 6-7 (Robert A. Goldwin ed., 1963). Others have argued that the Grodzins-Elazar view is too simplistic. *See, e.g.*, Harry N. Scheiber, *The Conditions of American Federalism: An Historian’s View*, in *AMERICAN INTERGOVERNMENTAL RELATIONS*, *supra* note 77, at 51-56.

146. 22 U.S. 1 (1824).

147. *Id.* at 195; *see also id.* at 203 (stating that the states retained the power to enact “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State,” and that “[n]o direct general power over these objects is granted to Congress”).

148. 247 U.S. 251 (1918).

149. *Id.* at 275.

150. *Id.* at 276. The same conception of federal-state relations may be seen in the Court’s rulings regarding fugitive slaves. In *Ableman v. Booth*, Sherman Booth had been convicted of aiding a slave’s escape and had been sentenced to a month’s imprisonment by a federal district court. 62 U.S. 506, 507-14 (1859). The Wisconsin Supreme Court ordered him released pursuant to a writ of habeas corpus, then refused to send the appropriate paperwork to the United States Supreme Court when federal officials appealed the state court’s decision. *Id.* at 508, 514. In a ruling that remains good law today, the Court reversed, holding that state courts lacked the power to order the release of federal prisoners:

[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye.

Id. at 516; *see also* *Kentucky v. Dennison*, 65 U.S. 66, 107-08 (1861) (holding, for comparable reasons, that Congress could not compel Ohio officials to arrest and hand over to Kentucky officials a man indicted in Kentucky for helping a slave to escape).

151. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000); *accord* *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

are critical differences.¹⁵³ Most notably, the Court today has not sought to disentangle the two sovereigns' regulatory activities and confine the sovereigns to entirely separate spheres. The Commerce Clause as interpreted by the modern Court, for example, permits both the federal government and the states to regulate economic activities, so long as Congress acts only when there is the requisite connection to interstate commerce and so long as the states stay within the confines of the Dormant Commerce Clause.¹⁵⁴ Because a vast array of human endeavors presumably may be characterized as economic in nature,¹⁵⁵ there remain innumerable ways in which state and federal powers overlap, thereby enabling the two sovereigns broadly to compete with one another for affection and regulatory opportunities. The Court merely has indicated that there also is a realm of activities reserved for the states—a realm in which the states are assured that, no matter how powerful the federal government becomes, they will remain able to perform regulatory functions of value to their constituents.¹⁵⁶ In other words, the Court has implicitly seized upon the Framers' insistence that the federal government have the opportunity to regulate matters of concern to its citizens and thereby instill in those citizens a sense of affection for the national sovereign,¹⁵⁷ and has applied that same reasoning to the states.

Even if the Court today is not reverting to the dual federalism of its past, significant problems remain unresolved, not the least of which is determining, in Commerce Clause cases, how to draw the line that separates those noneconomic matters that are reserved for the states from those economic matters that Congress may regulate so

152. See David M. O'Brien, *The Supreme Court and Intergovernmental Relations: What Happened to "Our Federalism"?*, 9 J.L. & POL. 609, 611 (1993) ("Justices on the Rehnquist Court often invoke the language of dual federalism."); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) ("The rhetoric of a 'dual federalism' characterizes many of the Supreme Court's recent statements on the constitutional law of federalism.").

153. See generally Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513 *passim* (2002) (characterizing the Court's conception of dual federalism in the 1920s and arguing that it is distinct from any credible conception of federalism today).

154. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 159-60 (2001) (noting that "state regulation of interstate commerce is unconstitutional only if it is discriminatory or very burdensome" and that "the federal sphere, of course, is not exclusive").

155. See, e.g., Resnik, *supra* note 3, at 630-42 (arguing that numerous household activities have economic components).

156. Stated in terms of Venn diagrams, the dual federalism of the nineteenth-century Court is best depicted as two circles in which the area of overlap is minimal or nonexistent, while the federalism of the modern Court is best depicted as two circles in which the area of overlap is substantial, but not total.

157. See *supra* notes 31-35 and accompanying text (recounting the Framers' argument).

long as there is a nexus with interstate commerce. As Justice Souter observed in his dissenting opinion in *Morrison*,¹⁵⁸ the Court's previous efforts to define subject-matter categories of state and federal regulation were less than resoundingly successful,¹⁵⁹ and one can be forgiven for believing that the economic/non-economic distinction will not fare much better.¹⁶⁰ That distinction might even have to be jettisoned in favor of an alternative form of analysis—and if no satisfactory form of analysis can be found, the courts might have to withdraw from the realm of Commerce Clause disputes altogether, leaving the fate of the states' proving ground entirely to political forces. The *Lopez* Court itself conceded that it was unable to frame "precise formulations" and that a certain measure of "legal uncertainty" often would attend judicial efforts to determine whether Congress had exceeded its limited powers.¹⁶¹ Moreover, the stakes are high when a litigant asks a court to declare a particular subject matter within the exclusive control of one sovereign or the other, because it is only in those areas where the two governments' powers overlap that the people are empowered (absent a constitutional amendment) to allocate power as they see fit. Defining the states' proving ground is therefore a task with profound implications for the freedom of the sovereign people.

Whether the Court's most recent effort to define an area of state control ultimately meets with failure or success, however, the Court's tacit faithfulness to the Framers' vision of federal-state competition gives the effort an aura of legitimacy that it might otherwise lack. The Court's determination to place limits on Congress's power need not be seen as a manifestation of a desire to undermine legislative outcomes that the Justices find ideologically objectionable,¹⁶² although the Court certainly will be open to that and other criticisms if it defines the sovereigns' proving grounds in an unprincipled or ideological manner. Instead, the Court's recent

158. See *United States v. Morrison*, 529 U.S. 598, 645-46 (2000) (Souter, J., dissenting).

159. See, e.g., *supra* notes 184, 188 (describing the Court's failed attempt to identify "traditional governmental functions" that would be immune from federal commerce regulation).

160. As Robert Post and Reva Siegel observe, "the domains *Lopez* and *Morrison* repeatedly characterize as areas of traditional state regulation—the family, education, and the regulation of intrastate violence—are permeated with federal law enacted pursuant to Congress's commerce and spending powers." Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *YALE L.J.* 441, 484-85 (2000).

161. *United States v. Lopez*, 514 U.S. 549, 566-67 (1995).

162. *But cf.* Herman Schwartz, *The Supreme Court's Federalism: Fig Leaf for Conservatives*, 574 *ANNALS AM. ACAD. POL. & SOC. SCI.* 119, 121-29 (2001) (arguing that conservative Justices invoke federalism as a pretext for achieving political outcomes that they find ideologically desirable).

Commerce Clause jurisprudence may be seen as the beginning of an effort to try to safeguard citizens' long-term freedom and regulatory options by ensuring that the federal government cannot monopolize the marketplace for the people's affection and that citizens always will have two separate, field-tested sovereigns making persuasive claims to their trust.

2. To Ensure Autonomy

In its two leading cases on intergovernmental immunities, *New York v. United States*¹⁶³ and *Printz v. United States*,¹⁶⁴ the Rehnquist Court struck down provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 and of the Brady Handgun Violence Prevention Act, respectively, finding that the federal government had impermissibly attempted to force the states' legislative and executive officials to implement federal policy.¹⁶⁵ In both cases, the Court emphasized that the Constitution does not permit the federal government "to require the States to govern according to Congress' instructions"¹⁶⁶ or to " 'commandeer' state governments into the service of federal regulatory purposes"¹⁶⁷ "It is an essential attribute of the States' retained sovereignty," Justice Scalia wrote for the Court in *Printz*, "that they remain independent and autonomous within their proper sphere of authority."¹⁶⁸

In a separate line of cases, the Court has broadly construed the states' sovereign immunity from private lawsuits. In *Seminole Tribe of Florida v. Florida*,¹⁶⁹ the Court held that Article I does not authorize Congress to abrogate the states' immunity from private actions

163. 505 U.S. 144 (1992).

164. 521 U.S. 898 (1997).

165. *See id.* at 933-35; *New York*, 505 U.S. at 174-77. In *Printz*, the Court held that a provision of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(2) (1994), impermissibly commandeered states' law enforcement officials by requiring them to perform background checks on prospective gun purchasers. 521 U.S. at 933-35. In *New York*, the Court held that the take-title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021e(d)(2)(C) (1988), impermissibly commandeered states' legislators by forcing the states to choose between providing for the disposal of low-level radioactive waste generated within their respective borders and becoming that waste's owner. 505 U.S. at 188.

166. *New York*, 505 U.S. at 162; *accord Printz*, 521 U.S. at 925-28.

167. *New York*, 505 U.S. at 175; *accord Printz*, 521 U.S. at 925-28.

168. *Printz*, 521 U.S. at 928; *see also* *Reno v. Condon*, 528 U.S. 141, 150-51 (2000) (explaining that a federal statute runs afoul of *New York* and *Printz* if it forces states to regulate private parties in a particular manner, but not if it forces states to engage in activities of a nonregulatory variety) (citing *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)).

169. 517 U.S. 44 (1996).

brought in federal courts.¹⁷⁰ The Court strengthened the states' immunity still further in *Alden v. Maine*,¹⁷¹ holding that Article I similarly fails to give Congress the power to abrogate the states' sovereign immunity in state courts.¹⁷² Most recently, in *Federal Maritime Commission v. South Carolina State Ports Authority*,¹⁷³ the Court held that Article I does not empower Congress to abrogate the states' immunity from private actions brought before federal administrative tribunals.¹⁷⁴

Both lines of cases are plainly aimed at reinforcing the states' dignity and sovereign status.¹⁷⁵ With its anticommandeering rulings, the Court is trying to prevent Congress from legislating in a manner "incompatible with the dignity and independence of the several states."¹⁷⁶ With respect to the doctrine of sovereign immunity, the Court has emphasized that, while one important function of the doctrine is to protect the states' treasuries from attack, its "preeminent purpose . . . is to accord States the dignity that is consistent with their status as sovereign entities."¹⁷⁷

170. *Id.* at 72-73. *Seminole Tribe* involved a lawsuit brought by a tribe against the State of Florida in federal court pursuant to a provision of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7) (1994). *Id.* at 47. The Court held that the statute "cannot grant jurisdiction over a State that does not consent to be sued." *Id.*; see also U.S. CONST. amend. XI ("The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

171. 527 U.S. 706 (1999).

172. *Id.* at 712. In *Alden*, probation officers had sued the State of Maine in state court for overtime pay pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1998). The Court held that Article I does not permit Congress "to subject nonconsenting States to private suits for damages in state courts." *Id.*

173. 122 S. Ct. 1864 (2002).

174. *Id.* at 1871-79. In this case, a private shipping company had filed a claim with the Federal Maritime Commission, seeking damages for a state's failure to provide a berthing space for one of the company's cruise ships. *Id.* at 1868-69. The Court dismissed the lawsuit, holding that the state was immune. *Id.* at 1879. The Court determined that "it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, but permit the use of those same Article I powers to create courtlike administrative tribunals where sovereign immunity does not apply." *Id.* at 1875 (internal citations omitted).

175. See *Alden*, 527 U.S. at 714 ("The federal system established by our Constitution . . . reserves to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status.").

176. Louis H. Pollak, *Judging Under the Aegis of the Third Article*, 51 CASE W. RES. L. REV. 399, 403 (2001) (discussing *Printz*).

177. *Fed. Mar. Comm'n*, 122 S. Ct. at 1874, 1877; accord *Alden*, 527 U.S. at 715 ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (stating that sovereign immunity protects the states' "dignity and respect"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994) (stating that "the States' solvency and dignity" are the "concerns . . . that underpin the Eleventh Amendment").

Scholars have leveled a number of criticisms at these decisions. Daniel Meltzer argues, for example, that dignity is an inappropriate foundation for the doctrine of sovereign immunity in a democracy.¹⁷⁸ Evan Caminker similarly argues that, when the Court declares that states' dignity renders them immune from a broad range of private lawsuits, the Court wrongly suggests "that individuals are subordinate to states rather than the other way around."¹⁷⁹ So far as *New York* and *Printz* are concerned, Matthew Adler and Seth Kreimer argue that "[t]here simply is no difference, even in general, between permissible preemption and impermissible commandeering with respect to the [commonly recited federalism] values of innovation, diversity, tyranny prevention, and political community . . ."¹⁸⁰

Those are formidable critiques. The general thrust of the Court's rulings begins to make more sense, however, if those rulings are understood as efforts to maintain the state autonomy that is vital to federal-state competition. To say that a sovereign is autonomous means, again, that it is free to identify and pursue courses of action that it believes will earn it the affection of its constituents.¹⁸¹ It is the possession of autonomy—the control over its own reputation among its citizens—that confers on each sovereign a measure of dignity and that enables each sovereign to compete with the other for the people's trust.¹⁸² When one sovereign compels the other to act in a particular way—whether to subject itself to private lawsuits or to regulate in a particular manner—the coerced sovereign is stripped of the ability to act in accordance with its own assessment of whether the conduct at issue will earn it or cost it the people's allegiance. As the Court noted in a different context in *Garcia*,¹⁸³ "the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else . . . deems state involvement to be."¹⁸⁴ If citizens are to benefit from robust competition

178. See Meltzer, *supra* note 5, at 1040.

179. Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 86 (2001).

180. Adler & Kreimer, *supra* note 4, at 143; *accord* Hills, *supra* note 4, at 822-30 (making a similar argument).

181. See *supra* notes 120-22 and accompanying text.

182. Cf. Robert F. Nagel, *Judicial Power and the Restoration of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 58 (2001) (stating, without elaboration, that the Court's federalism rulings "insist that states retain a certain degree of dignity and status, and this is an important precondition to the sort of competition between levels of government that the Framers envisioned").

183. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

184. *Id.* at 546. The *Garcia* Court rejected the "traditional governmental functions" test for determining whether, pursuant to the Commerce Clause, Congress may restrict the States' ability to perform given functions. *Id.* at 531, 557 (overruling *Nat'l League of Cities v. Usery*, 426

between the two sovereigns, neither sovereign can have *carte blanche* to write the other's script.

Yet the Constitution makes it clear that Congress sometimes may constrain the states' freedom to act as they wish.¹⁸⁵ When exercising its power to enforce the Fourteenth Amendment, for example, Congress may abrogate the states' immunity and thereby compel the states either to abide by federal standards or pay damages to those injured by the states' recalcitrance.¹⁸⁶ Moreover, for those areas in which Congress has preempted state law, the Supremacy Clause bars the states from adopting regulations of their own choosing.¹⁸⁷ The challenge for defenders of the Rehnquist Court's federalism jurisprudence, therefore, is to explain why it is permissible for Congress to use its Fourteenth Amendment power of abrogation and its Supremacy Clause power of preemption to prevent the states from freely charting their own regulatory paths, but impermissible for Congress to achieve that same objective either by abrogating the states' immunity pursuant to the powers enumerated in Article I or by forcing the states to regulate their constituents in a federally prescribed manner.

Although that is a worthy challenge, the notion of federal-state competition provides a promising framework for at least beginning to meet it. In its rulings regarding abrogation and intergovernmental immunities, the Court placed its finger on principles that, if too frequently disregarded, would eviscerate the states' competitive powers. In each of these cases, Congress had chosen regulatory

U.S. 833 (1976)). The Court determined that a "fundamental problem" with that test was that, by inviting the federal judiciary to determine whether a given governmental function was "traditional," it restricted states' freedom to engage in activities of their own choosing. *Id.* at 545-46; see also *infra* note 188 (discussing *National League of Cities and Garcia*).

185. The Constitution itself places restraints on the two sovereigns' ability to act as they please. For example, with few exceptions, the Bill of Rights equally limits the behavior of both state and federal governments. In fact, one may understand the doctrine of incorporation as driven in part by the need to place the state and federal governments on a level playing field in their battle for political support. See generally CHEMERINSKY, *supra* note 110, at 470-86 (describing the process by which the Court determined that, by virtue of the Fourteenth Amendment's ratification, most of the provisions of the first ten amendments to the Constitution apply to the states, rather than just to the federal government).

186. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); see also U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

187. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our preemption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.") (internal quotation omitted); see also U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").

methods that, if too often employed, would threaten to inflict debilitating financial and reputational harms on the states—harms that could undercut the states' ability to regulate in any area of human concern.

Consider, first, the Court's decisions concerning Congress's power to abrogate the states' sovereign immunity. Abrogation is an extraordinary measure when viewed in the context of federal-state competition, particularly when such abrogation permits private actions for damages. Each dollar paid as damages by a state to a private citizen is a dollar that the state cannot spend in ways of its own choosing in an effort to please the larger public. Although concerns about states' finances have previously led the Court in unfortunate doctrinal directions,¹⁸⁸ the validity of those concerns cannot reasonably be questioned: because no sovereign has unlimited revenues, a government must possess a significant measure of control over its expenditures if it is to address those needs it believes are most pressing. When it authorizes citizens to obtain sizable judgments against the states, therefore, Congress is setting in motion a process that could inhibit the states' ability to pay for programs that state leaders believe are essential to earning the people's affection. That same danger is present (though greatly lessened) when private parties are allowed to sue states for nonfinancial relief, as litigation of any sort can consume large quantities of the states' financial and human resources.

188. In *National League of Cities v. Usery*, for example, the Court stated:

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.

426 U.S. 833, 845 (1976). On the strength of those propositions (among others), the Court declared that, when legislating pursuant to the Commerce Clause, Congress cannot "displace the States' freedom to structure integral operations in areas of traditional governmental functions . . ." *Id.* at 852.

Nine years later, however, the Court abandoned the "traditional governmental functions" test, conceding that courts had proven unable to find a principled way to distinguish between those functions that are immune from federal regulation and those that are not. *See Garcia*, 469 U.S. at 538-47. This does not mean, however, that concerns regarding states' finances are illegitimate underpinnings for constitutional doctrine. Rather, it means the Court must exercise great caution when framing the doctrine to which those financial concerns give rise. By categorically declaring that Congress cannot abrogate the states' immunity pursuant to any of its Article I powers, *see supra* notes 169-74 and accompanying text, the Court has avoided the dubious task of making fact-intensive, case-by-case determinations akin to those required under *National League of Cities*. The Court faces a more difficult task when defining Congress's power to abrogate the states' immunity pursuant to Section Five of the Fourteenth Amendment, *see infra* note 192 and accompanying text, but it is too soon to declare that the Court's jurisprudence in this area will suffer the same ignominious fate as the jurisprudence it inaugurated in *National League of Cities*.

Abrogation also threatens the states with reputational harm. Each time a citizen learns that her state has been haled into court or that a sizable verdict has been entered against her state, she has cause to resent the use of a portion of her tax payments for such purposes, as well as cause to doubt the good judgment of her state leaders and to view those leaders as no more worthy of respect, trust, and affection than common tortfeasors. Consequently, a state that frequently finds itself embroiled in defensive litigation can expect to face an uphill climb when it asks its constituents for the power and funds necessary to launch new initiatives.

Of course, a state suffers those same financial and reputational harms when it waives its own immunity and subjects itself to private lawsuits.¹⁸⁹ When a sovereign consents to such actions, however, it presumably is doing so because it believes it will earn greater political support if it agrees to be sued than it will if it does not. There is no reason why a sovereign should not be able to pursue that course of action if, in the exercise of its own autonomous judgment, it concludes that is what the people desire. But when the federal government tries to force those consequences upon the states, it is directly undermining the states' ability to engage only in conduct that they believe will earn them the people's affection; indeed, it is forcing the states to engage in conduct that they would *not* pursue if left to their own devices. So far as the battle for the people's affection is concerned, therefore, the ability of one sovereign to abrogate the immunity of the other is a powerful weapon indeed.

None of this means that Congress should be entirely barred from abrogating the states' sovereign immunity. The Fourteenth Amendment was plainly intended to enable the federal government to bring great pressure to bear on those states that trample upon

189. States also suffer those harms when they are sued by the federal government—actions from which the states are not immune. See *United States v. Mississippi*, 380 U.S. 128, 140 (1965) (“[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State’s being sued by the United States.”). Yet if citizens are unhappy about the federal government frequently dragging their states into court, they can exert countervailing pressure on federal officials, thereby making this yet another venue for federal-state competition. Indeed, the Court has explained that one of the reasons it distinguishes between private actions against the states and actions brought by the federal government is that federal officials must take “political responsibility” for federal actions, “a control which is absent from a broad delegation to private persons to sue nonconsenting States.” *Alden v. Maine*, 527 U.S. 706, 756 (1999). But federal-state competition’s explanatory power should not be overstated. For example, it does not explain the fact that private citizens may obtain injunctions against state officers pursuant to federal standards even when complying with those injunctions will cost the states money. See *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

citizens' liberties.¹⁹⁰ It is no surprise, therefore, that the Court has concluded that Congress may abrogate the states' immunity when acting pursuant to its power to enforce the Fourteenth Amendment.¹⁹¹ But abrogation may be too powerful a weapon for Congress to wield whenever it concludes that abrogating the states' immunity would help achieve the objectives of legislation enacted pursuant to Congress's numerous and wide-ranging Article I powers. Even when Congress purports to be acting pursuant to its authority to enforce the Fourteenth Amendment, we should be reluctant to declare Congress entirely unconstrained—and this, of course, is another area in which the Court has begun to act.¹⁹² For the states, the financial and reputational consequences of rampant abrogation could be crippling. By declaring Article I off limits to federal politicians bent on subjecting the states to private lawsuits, and by identifying respects in which Congress's power to interpret the Fourteenth Amendment is not unbounded, the Court has applied the Constitution in ways that help to ensure that states will retain significant control over their own finances and over their own reputations among their constituents. Did the health of the federal-state marketplace dictate that the *entirety* of Article I be declared off limits? Perhaps not. When one considers the importance of maintaining the states' autonomy, however, it should come as no surprise that the Court wished to place *some sort of meaningful limit* on Congress's power of abrogation.

The link between the Rehnquist Court's anticommandeering principle and the need to maintain the states' autonomy is, at first blush, even more apparent. When Congress forces state legislative or executive officials to govern in a particular way, it undercuts federal-state competition by depriving states of the ability to regulate in

190. See generally *Ex parte Virginia*, 100 U.S. 339, 345-48 (1880) (emphasizing that, by ratifying the Fourteenth Amendment, the people shifted significant power from the states to the federal government).

191. See *supra* note 186 and accompanying text. For a discussion of whether Congress also may condition a state's receipt of federal benefits on a state's agreement to waive its immunity, see Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 303-44 (2002).

192. In *City of Boerne v. Flores*, the Court declared that "Congress [lacks] the power to decree the substance of the Fourteenth Amendment's restrictions on the States" and that, when Congress acts to enforce that amendment, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. 507, 519-20 (1997). The Court already has applied that standard in a variety of settings. See, e.g., *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-74 (2001) (concerning Congress's attempt to abrogate the states' immunity from suit for discrimination against disabled individuals); *United States v. Morrison*, 529 U.S. 598, 619-27 (2000) (concerning Congress's attempt to provide a civil remedy for victims of gender-motivated violence); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-91 (2000) (concerning Congress's attempt to abrogate the states' immunity from suit for age discrimination).

accordance with their own assessment of what will earn them the people's affection.¹⁹³ Again, however, the Court's anticommandeering cases are defensible only if one can justify the Court's distinction between commandeering and preemption, since both deprive state officials of the opportunity to regulate in whatever manner they think will earn them the people's support.¹⁹⁴ Of course, commandeering and preemption strip the states of regulatory freedom in different ways—the former prescribes the manner in which states will regulate, while the latter prevents them from regulating at all.¹⁹⁵ But why should that distinction matter?

The explanations again fall into two categories—financial and reputational. First, commandeering often poses a greater threat to states' treasuries than preemption. When Congress preempts state law, the costs of implementing the federal scheme fall primarily on the federal government.¹⁹⁶ When Congress attempts to commandeer state officials, however, it often seeks to shift at least a portion of the federal program's costs onto the states' shoulders by acquiring their regulatory assistance at no charge to the federal government.¹⁹⁷ To the extent this is true in any given instance, commandeering is more damaging than preemption to federal-state competition for one of the same reasons that abrogating the states' sovereign immunity is objectionable: It prevents the states from spending their limited resources in ways they think their constituents would prefer.¹⁹⁸

193. Significantly, state judges are not protected by the anticommandeering principle and so must enforce federal law. See *Printz v. United States*, 521 U.S. 898, 928-29 (1997) (citing *Testa v. Katt*, 330 U.S. 386 (1947)). This lack of protection makes good sense so far as federal-state competition is concerned, because state and federal judges do not enjoy nearly the same latitude to compete for the public's approval through differing interpretations of the law as state and federal politicians enjoy to compete for the public's approval through differing approaches to public policy.

194. Cf. *Adler & Kreimer*, *supra* note 4, at 143.

195. See generally *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002) (stating that preemption "imposes no affirmative duties of any kind" on states' politicians, while commandeering does impose affirmative duties on states' executive or legislative officials).

196. See *New York v. United States*, 505 U.S. 144, 168 (1992) (stating that preemption offers a state's citizens the opportunity "to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program").

197. See *Printz*, 521 U.S. at 930 (stating that, when Congress attempts to "forc[e] state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes"); cf. *Hills*, *supra* note 4, at 855-91 (proposing that the federal government always be required to pay states for services that state officials perform at the federal government's behest).

198. As a basis for distinguishing the Court's current doctrines of preemption and commandeering, however, this argument only goes so far. The Court has indicated that commandeering is objectionable "even when the States are not forced to absorb the costs of

The second justification for the commandeering-preemption distinction concerns reputational harm, a category of harm that, while more speculative in this context than its financial counterpart, is sufficiently plausible to warrant further exploration. On some occasions, most citizens are undoubtedly ill informed regarding the federal and state governments' relations with one another, and in these instances reputational harm is not a concern. (Political accountability, however, is a concern, as I explain in the next subsection.¹⁹⁹) On other occasions, however, citizens' understanding is surely more complete. In these instances, regardless of who pays the costs of implementing federal programs, commandeering threatens to demean the states (or, in the language of the Court, it threatens to strip the states of their "dignity") to a greater extent than preemption and thus threatens to place the states at a greater competitive disadvantage.

By suggesting that commandeering demeans the states, my contention is not that commandeering is more objectionable than preemption because it causes greater harm to the states' psychological well-being. Evan Caminker has argued that such concerns are "surely silly" when applied to the states,²⁰⁰ and I agree. Rather, my suggestion is that commandeering threatens to force a reputation upon the states that makes it more difficult for them to persuade citizens that the states, not the federal government, are the most desirable repositories of regulatory responsibility.

It is my strong intuition that many people believe a greater infringement of autonomy occurs when a person is compelled to engage in conduct that he or she finds objectionable than when a person is compelled to refrain from conduct that he or she finds desirable.²⁰¹ As a general matter, for example, many likely would judge forced labor to be a greater infringement of their autonomy than imprisonment. When compelled to engage in objectionable conduct (as with commandeering), a person is forced to devote his resources to an

implementing a federal program . . ." *Printz*, 521 U.S. at 930 (citing concerns regarding political accountability, which I discuss *infra* notes 207-50). Moreover, the Court does permit Congress to impose financial burdens on the states in noncommandeering settings. In *Reno v. Condon*, for example, the Court unanimously permitted Congress to compel states to perform nonregulatory administrative functions at state expense. See 528 U.S. 141, 150-51 (2000) (allowing Congress to prevent states from disclosing personal information about individuals unless state officials first obtain those individuals' consent).

199. See *infra* notes 207-50 and accompanying text.

200. Caminker, *supra* note 179, at 85.

201. See generally GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 17 (1988) (arguing that, to be fully autonomous, one must possess "some ability both to alter one's preferences and to make them effective in one's actions").

undertaking he would prefer to avoid. When a person instead is deprived of the ability to pursue those courses of action that she finds desirable (as with preemption), her autonomy is violated but she has avoided the additional infringement that occurs when she is co-opted by others and forced to associate herself with, and devote her energies to, objectionable purposes.

If the federal government frequently were permitted to commandeer the states' legislative and executive officials by compelling those officials to engage in conduct that they would prefer to avoid,²⁰² therefore, many citizens might draw the following inferences. First, although state officials have numerous opportunities to influence federal legislation—through the very political mechanisms that some believe should render federalism issues nonjusticiable²⁰³—those officials lack the power, the political skills, or the wits to persuade the federal government not to force the states to implement federal policy in ways that state officials find objectionable. Second, if state actors cannot shield themselves from autonomy-infringements of the highest order, then those seeking powerful government assistance would be best served by entrusting their own well-being to the federal government, rather than to its weaker counterparts.²⁰⁴ Why deal with the puppet when one has direct access to the puppetmaster? By allowing citizens to view the states in this

202. The facts in *New York* present a twist on the usual notion of commandeering, because the federal legislation at issue in that case was endorsed by state officials at the time of its enactment. See *New York v. United States*, 505 U.S. 144, 180-81 (1992). *Printz*—a case in which law enforcement officials in Montana and Arizona objected to helping the federal government conduct background checks on prospective gun purchasers, see *Printz*, 521 U.S. at 904—illustrates the more straightforward species of commandeering that I have in mind here. Although autonomy concerns are lessened when a state endorses the federal legislation at issue, transparency remains problematic. See *infra* notes 207-50 and accompanying text.

203. See *supra* note 113 and accompanying text.

204. One might argue that the possibility of such an inference is a reason to *permit* commandeering—if states lack the ability to prevent the federal government from compelling them to implement federal policy in ways they find objectionable, perhaps that is something citizens should know when deciding which sovereign to trust. While plausible, that argument does not lead to a conclusion with which all reasonable jurists must agree. A judge might conclude, for example, that while citizens might draw the inference in question, that inference does not provide a fair basis for discounting a sovereign's ability to regulate a broad range of matters in a satisfactory manner. A judge might therefore wish to exclude commandeering from the marketplace, just as she might exclude relevant evidence from a trial when there is a risk that jurors will accord the evidence undue weight. See FED. R. EVID. 403. Of course, trials and political markets are entirely different animals, and allowing the courts to get into the business of determining the fairness of inferences a citizen might draw while shopping in the federal-state marketplace itself poses a threat to the integrity of that marketplace. Again, however, my purpose here is not to defend judicial intervention against all attacks. Rather, my intent is simply to use the Framers' conception of federal-state competition to suggest a principled reason why the Court might find itself comfortable with preemption yet suspicious of commandeering.

way, commandeering threatens the states with greater reputational harm than preemption.²⁰⁵

This notion of reputational harm might help to explain why a distinction between laws of general applicability and laws focused solely on the states continues to lurk in the Court's discussions of commandeering and federalism. Although the Court has not yet clearly assigned dispositive significance to that distinction, neither has the Court declared it irrelevant. Instead, the Court simply continues to hint that federal statutes might pose a greater risk to federalism values if they are directed solely at the states, rather than at all persons and entities (both public and private) that engage in particular activities.²⁰⁶ The Framers' notion of federal-state competition suggests that, at least in many cases, the Court's suspicion is well founded. When Congress enacts legislation regulating public and private actors alike, it has a disincentive to impose onerous regulations on the states because those same regulations would have to be imposed simultaneously on private constituents whose affection Congress covets. When Congress enacts legislation regulating solely the states, however, not only are the states stripped of the protection that comes from being grouped with voters whose affection Congress wishes to earn (itself a significant concern), but Congress also is afforded an opportunity to co-opt its competitors' regulatory powers and thereby dilute the states' ability to portray themselves as independent and potent sovereigns in their own right.

205. Cf. Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1316 (2000) (arguing that the anticommandeering principle helps the states appear to be autonomous, credible alternatives to the federal government); *id.* at 1337 (arguing that commandeering "demeans" the states by treating them "as nothing more than puppets of the federal government"). The same point can be made in a slightly different way. When the federal government creates a regulatory program and forces the states' legislative or executive officials to help bring the program directly to bear on the citizenry, state officials are serving as Congress's messenger. Congress has authored regulatory legislation, in other words, and the states are merely delivering it to the people. If frequently employed, such commandeering may cause citizens to become accustomed to regarding state officials as mere functionaries working for a higher power. If that occurred, it would become more difficult for citizens to regard the states as potent sovereigns in their own right, and thus more difficult for states to persuade citizens that they, the states, are more capable than the federal government of getting the job done.

206. See, e.g., *Reno v. Condon*, 528 U.S. 141, 151 (2000) (stating that the Court need not address the possibility that Congress can regulate the states only through generally applicable laws, since the statute at issue is a law of general applicability); *Printz*, 521 U.S. at 932 (stating that weighing burdens imposed on states might be relevant when evaluating the constitutionality of "a federal law of general applicability," but is irrelevant when "the whole object of the law [is] to direct the functioning of the state executive"); *New York*, 505 U.S. at 160 (distinguishing *Garcia* and other cases on the ground that "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties").

Again, the occurrence of commandeering-induced reputational harm is speculative. Many citizens are surely often oblivious to federal-state relations, and many of those who do keep themselves apprised of such matters may not draw the kinds of conclusions I have posited. When confronted with a particular instance of commandeering, for example, many citizens might resent the federal government's meddling in state affairs and thus work to shift power from the nation's capital to the states. Yet the fact that reasonable minds might differ when it comes to predicting the reputational consequences of commandeering is itself a reason to find commandeering problematic. So long as the risk of reputational harm is more than ephemeral, there is reason to be wary about giving the federal government broad latitude to prescribe when, and how severely, its competitors are exposed to it.

The courts, of course, lack the institutional capacity to predict the precise financial and reputational consequences that would flow from particular instances of immunity abrogation or commandeering. Courts wishing to stay within their realm of competence are presented, therefore, with a choice: They can either withdraw from the scene entirely and allow Congress to employ such regulatory methods whenever it can muster the votes necessary to do so—and thereby trust that political forces will protect the integrity of the marketplace for the people's affection—or conclude that the risk of market failure is unacceptably high in the absence of judicial oversight and that boundaries of some sort should be drawn around Congress's power to employ those regulatory methods in the first place. By ruling that Congress cannot abrogate the states' sovereign immunity pursuant to any of its Article I powers and by prohibiting commandeering—a regulatory arrangement that, while sometimes difficult to distinguish from mere strong encouragement, is surely easier for the courts to identify than precise financial and reputational consequences—the Court has chosen the latter course.

3. To Ensure Transparency

In both *New York* and *Printz*, the Court also identified a political accountability rationale for its adoption of the anticommandeering principle. In *New York*, the Court reasoned that, “where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain

insulated from the electoral ramifications of their decision.”²⁰⁷ The Court reiterated the point in *Printz*, explaining that, when Congress compels the states to regulate in a particular manner, it both enables itself to take credit for popular programs whose implementation costs have been shouldered at least in part by the states and creates the risk that citizens will blame the states for unpopular federal initiatives.²⁰⁸

When it speaks of political accountability, the Court is explicitly speaking the language of federal-state competition. If citizens are to identify the changes necessary to rectify government's failures, they must know which sovereign to blame for those shortcomings, just as they must know which sovereign to reward for government's successes. If one sovereign is permitted to prescribe the other's conduct, and if citizens fail to perceive such commandeering when it occurs, citizens may become confused regarding which sovereign to hold responsible and so may lose their ability to assign blame and praise in an accurate fashion. One may thus regard the Rehnquist Court's federalism jurisprudence as aimed, in part, at providing something akin to the protections of intellectual property law for federal-state relations: just as the law relating to trademarks, for example, serves in part to prevent confusion among consumers of goods and services,²⁰⁹ so too does the Court appear eager to enable

207. *New York*, 505 U.S. at 169.

208. *Printz*, 521 U.S. at 930. In the years between *New York* and *Printz*, Justice Kennedy used the political accountability rationale to explain why Congress must be limited to its enumerated powers. There must be “distinct and discernable lines of political accountability” between the people and each sovereign, he argued, so that the people know “which of the two governments to hold accountable for the failure to perform a given function.” *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring). “Were the Federal Government to take over the regulation of entire areas of traditional state concern,” he wrote, “the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.” *Id.* at 577 (Kennedy, J., concurring). By using the political accountability rationale in this context, Justice Kennedy comes dangerously close to endorsing a return to the discredited dual federalism of the nineteenth century, when the Court sought to minimize, if not entirely eliminate, the areas in which state and federal power overlapped. *See supra* notes 142-57 and accompanying text (discussing dual federalism). If the Court were to try to disentangle state and federal governments' involvement in regulatory programs by assigning each sovereign to an entirely separate sphere, then the overarching objective of federal-state competition—to enable citizens to assign regulatory power as they see fit—would be thwarted.

209. *See, e.g.*, 15 U.S.C. § 1114(1)(a) (2000) (prohibiting the use of trademarks in a manner “likely to cause confusion”); *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 742 (2d Cir. 1998) (explaining that trademark law prohibits “a later user [of a trademark] from employing a confusingly similar mark, likely to deceive purchasers as to the origin of the later user's product, and one that would exploit the reputation of the first user”); *see also* § 1125(a)(1)(A) (prohibiting the use of words, symbols, and devices in a manner “likely to cause confusion” regarding the source or affiliation of goods or services); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989) (“The law of unfair competition has its roots in the common-law tort of deceit: its general concern is with protecting consumers from confusion as to source.”).

citizens accurately to associate regulatory products with their governmental vendors.

Although it is here that the links between the Court's recent federalism cases and a theory of federal-state competition may be the most obvious, it is also here that the challenges facing an intervention-minded Court may be the greatest. Those challenges take at least two related forms. First, it is in the very nature of a federal system of government for lines of accountability often to be obscured.²¹⁰ Vincent Ostrom explains:

Fragmentation of authority [between the states and the federal government] is assumed to confuse political responsibility in a democratic society Yet these characteristics of fragmentation of authority and overlapping jurisdictions are essential attributes of constitutional rule and of a federal system of government.²¹¹

A certain measure of confusion among the citizenry, in other words, is simply the price one pays for choosing federalism over alternative forms of government. Indeed, if there are to be numerous matters that the state and federal governments are jointly authorized to regulate, and if regulatory power is to be differently distributed at various points in time, it seems unavoidable that many citizens often will be confused about which sovereign to blame or praise for particular regulatory outcomes. Writing on American federalism more than 150 years ago, Alexis de Tocqueville exclaimed that it was "frightening to see how much diverse knowledge and discernment it assumes on the part of the governed."²¹² If that was true in the early nineteenth century, when the federal government was active in only a limited number of areas,²¹³ it surely is true today. Consequently, if it wishes to use political accountability as a tool for resolving federalism disputes, the Court must find a principled way to distinguish between those acceptable ambiguities that are inherent in our federal system of

210. See Salmon, *supra* note 72, at 37 ("Whatever its merits, vertical competition [in a federal system] makes responsibilities more difficult to ascertain. Voters are not well informed of the precise relations between various levels of government.").

211. OSTROM, *supra* note 60, at 201.

212. DE TOCQUEVILLE, *supra* note 42, at 164. He went on to express great confidence in the American people's ability to live up to the task:

Nothing has made me admire the good sense and practical intelligence of the Americans more than the way they avoid the innumerable difficulties deriving from their federal Constitution. I have hardly ever met one of the common people in America who did not surprisingly and easily perceive which obligations derived from a law of Congress and which were based on the laws of his state

Id. at 165. De Tocqueville may have confused those who possessed a clear understanding of governmental affairs with those who were merely sure of their opinions. Regardless, American government has grown immeasurably more complicated over the past century, thereby making it that much harder for citizens to assign political responsibility.

213. See *supra* notes 80-82 and accompanying text.

government and those unacceptable ambiguities that arise from unconstitutional regulatory methods—a daunting task.

Second, a Court determined to create political transparency could easily find itself on a path that leads to a dramatic reduction in the regulatory freedom of the states—an outcome that is at odds both with federal-state competition and with some of the other objectives that our federal system of government seeks to achieve.²¹⁴ Congress's enumerated powers are indisputably broad enough to enable the federal government to continue to regulate a vast range of matters—even the Rehnquist Court has shown no desire to construe those powers in a dramatically narrower fashion.²¹⁵ If the Court tried to disentangle the two sovereigns' activities to yield a more transparent system of government, therefore, it likely is the states that would suffer the greater loss of power. If the Court wants to eliminate the risk that state officials will be blamed for federal failures or that federal officials will claim credit for state successes, for example, it presumably must prevent the states from consensually participating in federal programs.²¹⁶ Such an outcome would not only foreclose the states from seeking the people's affection by participating in popular federal initiatives, but it also would place greater distance between citizens and their regulators and would reduce the likelihood that federal programs could be tailored to meet local preferences.

Proponents of federal-state competition, therefore, face a quandary: While a certain measure of transparency is required for that competition to work, how is it to be achieved in a system where accountability is often necessarily obscured and where any thoroughgoing quest for transparency likely would result in a sharp reduction in states' regulatory activity? That problem is exceptionally delicate, and its solution might rest largely (if not entirely) in the hands of the political branches. Because state and federal politicians have strong incentives to ensure that they are properly credited for successes and that they are not unfairly blamed for failures, perhaps the burden should rest on them to ensure that citizens have the information they need to allocate praise and blame in an appropriate

214. See *supra* note 6 (quoting a prominent recitation of federalism's objectives).

215. *But cf.* *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("In an appropriate case, I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.").

216. See *Hills*, *supra* note 4, at 828-30 (making this point and stating that "erosion of political accountability is endemic to *all* forms of cooperative federalism"); Schwartz, *supra* note 162, at 124 ("The lines between state and federal authority are continually blurred, especially since so many federal programs that are indisputably constitutional under, for example, the spending clause, involve a mixture of state discretionary rules and federal requirements.").

fashion. Indeed, citizens' lack of awareness of federal-state relations is presumably often a function of the fact that politicians have not deemed further educating the citizenry to be politically essential.

The Court, however, clearly is not currently inclined to cede responsibility for this matter entirely to political actors. Writing for the Court in *New York*, Justice O'Connor stressed that federalism exists for the benefit of individual citizens, rather than for the benefit of the two sovereigns and their politicians, and that politicians therefore cannot cure unconstitutional federal-state arrangements by blessing those arrangements with their consent.²¹⁷ The Court stated that politicians sometimes might actually prefer commandeering's obfuscation of political responsibility when the actions being taken (such as the siting of disposal sites for radioactive waste) are likely to be politically hazardous.²¹⁸ When the two sovereigns collude to conceal responsibility from their constituents, the Court concluded, "federalism is hardly being advanced."²¹⁹ With an eye toward possible avenues for future exploration, therefore, I close by briefly identifying several ways in which the Court might approach the difficult task of promoting accountability in our complex system of government.

Reconceptualize the function of clear-statement rules. The Court frequently has indicated that, if Congress wishes to alter the balance of power between the state and federal governments, it must clearly express its desire to do so.²²⁰ Clear-statement rules are designed to serve a variety of purposes when employed in federalism-sensitive contexts. The Court has explained, for example, that such rules help the judiciary to be certain that Congress did wish to take actions having federalism implications;²²¹ they help to ensure that the states are afforded an opportunity to respond to legislation having

217. *New York v. United States*, 505 U.S. 144, 180-83 (1992); cf. THE FEDERALIST NO. 45, *supra* note 39, at 289 (quoted *supra* note 48) (stressing that the interests of citizens are superior to those of politicians).

218. *New York*, 505 U.S. at 182.

219. *Id.* at 183.

220. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460-64 (1991) (finding that Congress must plainly state its intent to protect state judges with antidiscrimination legislation); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (declaring that Congress must plainly state any conditions it wishes to attach to federal grants to the states); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (holding that Congress must "unequivocally express" its intent to abrogate the states' sovereign immunity); *United States v. Bass*, 404 U.S. 336, 349-50 (1971) (refusing to interpret a criminal statute in a manner that would intrude upon territory ordinarily occupied by the states, absent a clear statement that Congress intended such a result); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that if Congress wishes to preempt "the historic police powers of the States," it must make its intentions "clear and manifest").

221. See *Atascadero State Hosp.*, 473 U.S. at 243; *Bass*, 404 U.S. at 349.

significant federalism consequences;²²² and they help to ensure that Congress achieves its objectives through the political processes on which the states generally rely to protect themselves from federal overreaching, rather than through judicial interpretations of ambiguous statutes.²²³ Although the Court has not yet explained them in this way, clear-statement rules also may be seen as tools designed to ensure that, when Congress alters the federal-state balance of power, it places its intentions clearly on record, reducing the likelihood that Congress later will be able to evade responsibility for its actions or that states will be blamed for unpopular federal initiatives. Although most citizens do not study the language of federal legislation, clear statements of Congress's intentions at least provide the raw material that politicians and activists need when they wish to reveal those intentions to the public, just as such statements provide the answers that citizens desire when trying to ascertain those intentions for themselves. Once clear-statement rules are conceptualized in this manner, the Court might find that one of the best ways it can help to promote accountability is simply to enforce the rules it already has promulgated and perhaps extend those rules to other federalism-sensitive settings.²²⁴

Strengthen the prerequisites for preemption. One area in which the Court might strengthen its application of clear-statement requirements is preemption.²²⁵ As Judith Resnik has pointed out,²²⁶ the Rehnquist Court—sometimes dividing along familiar lines—occasionally has been quick to find that Congress preempted state law, in the absence of an unambiguous statement by Congress that it wished to do so.²²⁷ In such rulings, the Court not only deprives states

222. See *Dole*, 483 U.S. at 207.

223. See *Gregory*, 501 U.S. at 464.

224. Congressional findings of fact might similarly be reconceived as helping citizens to determine the nature of Congress's actions. Cf., e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640-41 (1999) (noting that Congress failed to find a widespread pattern of unlawful conduct by the states before attempting to abrogate the states' sovereign immunity); *United States v. Lopez*, 514 U.S. 549, 562-63 (1995) (stating that congressional findings of fact can help a court determine whether federal legislation is a proper exercise of Congress's enumerated powers).

225. Under the Supremacy Clause, federal law preempts state law when Congress expressly or implicitly makes clear its intent to preempt. Implied preemption is found when Congress occupies an entire regulatory field or when state and federal laws conflict. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); CHEMERINSKY, *supra* note 110, at 376-77.

226. See Resnik, *supra* note 3, at 623 n.7; see also Massey, *supra* note 2, at 502-12 (arguing that the Rehnquist Court has often disregarded the traditional presumption against preemption, thereby exhibiting a surprising disregard for federalism values); cf. Weiser, *supra* note 94, at 1733 (urging federal officials to exhibit "a greater sensitivity to displacing state authority").

227. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-52 (2001) (5-4 decision) (holding that Congress preempted Massachusetts's regulation of cigarette advertising); *Geier v.*

of the opportunity to pursue the people's affection in ways of their own choosing, but it also allows Congress to deprive the states of that opportunity without ever having to place itself clearly on record as having wished to do so.²²⁸ I am not suggesting that the Court abandon its willingness to declare state law implicitly preempted when state law and federal law conflict or when Congress occupies an entire regulatory field. Rather, I am suggesting that, in close cases, concerns about political accountability might cause the Justices to be less willing to declare state law preempted in the absence of a clear declaration of Congress's preemptive intent.²²⁹

Reconsider the analytic utility of the Guarantee Clause. The Court has not yet assigned the political accountability principle a home in the text of the Constitution.²³⁰ By grounding that principle in the Constitution's text, the Court might find itself able to define more precisely the circumstances in which it believes accountability concerns warrant declaring legislation unlawful. One candidate for helping the Court refine its analysis is the Guarantee Clause.²³¹ Deborah Jones Merritt has argued that, when Congress commandeers the states, it violates the Guarantee Clause by impairing citizens'

Am. Honda Motor Co., 529 U.S. 861, 867-86 (2000) (5-4 decision) (holding that Congress preempted District of Columbia tort law governing a claim against an automobile manufacturer that failed to equip a plaintiff's car with airbags).

228. Cf. Ann M. Lininger, *Narrowing the Preemptive Scope of the Clean Water Act as a Means of Enhancing Environmental Protection*, 20 HARV. ENVTL. L. REV. 165, 185 (1996) ("[T]he Court's willingness to interpret preemptive language broadly undermines elected [federal] representatives' political accountability.").

229. For a brief description of legislative efforts to strengthen the role of clear-statement requirements in preemption analysis, see Michael S. Greve, *Business, the States, and Federalism's Political Economy*, 25 HARV. J.L. & PUB. POLY 895, 895-96 (2002).

230. In *Printz*, the Court grounded its anticommandeering holding, at least in part, in the Necessary and Proper Clause. See *Printz v. United States*, 521 U.S. 898, 924 (1997) (stating that commandeering is not a "proper" exercise of Congress's powers); see also U.S. CONST. art. 1, § 8 (stating that Congress possesses the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"). Rather than tie the clause to its concerns relating to political accountability, however, the Court tied the clause to the Court's concerns relating to violations of "the principle of state sovereignty." See *Printz*, 521 U.S. at 924. There certainly are occasions other than *New York* and *Printz* on which the Court has employed political accountability rationales. In *McCulloch v. Maryland*, for example, the Court ruled that Maryland could not tax a federally incorporated bank, in part because non-Maryland citizens had no means of holding Maryland's leaders accountable for their actions. See 17 U.S. 316, 435-36 (1819). Because that case concerned state interference with a federal initiative, however, the Court was able to ground its concerns in the Supremacy Clause. See *id.* When the Court wishes to find federal legislation unconstitutional on the strength of political accountability concerns, that avenue is not open.

231. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

ability to hold their state leaders accountable.²³² While it has cited Merritt's discussion of political accountability, the Court has stopped short of grounding those concerns in the Guarantee Clause.²³³ The Court's reluctance to rest its federalism jurisprudence on that constitutional provision is likely a function of the fact that, since the mid-nineteenth century, the Court has insisted that claims arising under the Guarantee Clause raise nonjusticiable political questions.²³⁴ Yet if a detailed exploration of that text would provide principles for refining the Court's conceptions of acceptable and unacceptable confusion, the Court should reconsider its refusal to adjudicate Guarantee Clause claims.

Clarify the Court's Spending Clause jurisprudence. The Court would lend greater strength and coherence to its political accountability concerns if it clarified the distinction between coercive and noncoercive uses of the Spending Clause.²³⁵ Although state governments depend on federal funds for support,²³⁶ the Court has said that the Spending Clause allows Congress to make federal grants conditional upon states' acceptance of wide-ranging terms: If states find Congress's terms unacceptable, the Court reasons, they may simply decline the funds.²³⁷ Yet when a state agrees to abide by Congress's terms, many of its citizens surely are unaware of the details of the arrangement, thus causing the very kind of confusion that the Court identifies when condemning commandeering.²³⁸ The

232. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 60-70 (1988).

233. See *New York v. United States*, 505 U.S. 144, 169 (1992) (citing Merritt, *supra* note 232); see also *Printz*, 521 U.S. at 930 (discussing political accountability, citing Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 n.65 (1994), and making no reference to the Guarantee Clause or to any other specific provision of the Constitution).

234. See, e.g., *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Luther v. Borden*, 48 U.S. 1, 42 (1849). For an example of arguments in favor of finding Guarantee Clause claims justiciable, see Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 516 (1962) (stating that "only the guarantee clause can compensate for the deficiencies of the fourteenth amendment").

235. See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

236. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1938 (1995) ("Th[e] monopoly power that the federal government directly and indirectly wields over the states' ability to raise revenue makes the states' financial relationship with the federal government more closely analogous to that of welfare recipients than to that of public employees."); *supra* note 95 and accompanying text (discussing the states' financial dependence upon the federal government).

237. See *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987).

238. See Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 124 ("[T]he national electorate simply is not as likely to recognize an abuse of federal power in schemes involving grants of federal money to the states as it is in

Court presumably is not troubled by that confusion, however, so long as the states' acceptance of Congress's conditions was voluntary—responsibility is then properly laid at the feet of either sovereign since both of them willingly entered the arrangement. Yet the Court has acknowledged that “in some circumstances”—the nature of which the Court has not yet defined—“the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.”²³⁹ If the states were indeed coerced into accepting Congress's conditions, it would be unfair to hold them politically responsible for their behavior, just as it would be unfair to hold them responsible if they were commandeered by federal officials in other ways.²⁴⁰ By clarifying the Spending Clause's distinction between permissible encouragement and impermissible coercion, therefore, the Court might begin to paint a more complete picture of when citizen confusion is constitutionally harmless because responsibility is properly attributed to both state and federal officials and when citizen confusion is constitutionally unacceptable because one sovereign compelled the other's behavior.

Take full account of the roles played by federal administrative agencies. No credible theory of political accountability can avoid addressing the ways in which federal administrative agencies shape public policy and thereby influence the two sovereigns' battle for the people's affection. Although the Constitution vests the federal lawmaking power in Congress,²⁴¹ Congress may delegate broad rulemaking authority to an administrative agency so long as it statutorily provides an “intelligible principle” to guide the agency's exercise of discretion.²⁴² Only twice, however, has the Court

cases of direct regulation.”); Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1420 (1994) (arguing that conditional federal grants obscure political responsibility because “federal legislators can point to the state's voluntary decision to accept the funds as the decisive act,” while state officials can argue that “Congress never intended to offer the states a choice because the state could not, in practical terms, decline the much-needed federal funding”). Indeed, even when citizens are apprised of the legal realities, it is not always clear whom they should blame if they find states' compliance with Congress's conditions unacceptable: should they blame the state officials who agreed to abide by those conditions or the federal officials who attached those conditions to badly needed funds in the first place? Cf. McCoy & Friedman, *supra*, at 125 (arguing that conditional federal grants obscure the lines of political accountability even for those voters who are “astute”).

239. *Dole*, 483 U.S. at 211 (internal quotation omitted).

240. Coercive uses of the Spending Power also are problematic because they infringe on a state's autonomy. See generally *supra* notes 120-22, 163-206 and accompanying text (discussing autonomy).

241. See U.S. CONST. art. I, § 1.

242. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); see also *Loving v. United States*, 517 U.S. 748, 771 (1996) (“The intelligible-principle rule seeks to enforce the

determined that Congress failed to provide an agency with sufficient policymaking guidance.²⁴³ As a result, Congress is able to delegate vast power pursuant to the haziest of enabling clauses. Although there are significant benefits that accrue from this state of affairs,²⁴⁴ those benefits come at a cost: Congress often is able to claim legislative achievements without ever having to take direct responsibility for the details of federal initiatives, unelected federal officials are granted a significant measure of policymaking power, and citizens are confronted with a maze of bureaucratic relationships in which political responsibility can be remarkably difficult to trace.²⁴⁵ Moreover, in two areas that I have already identified as problematic—implied preemption and the Spending Clause—agencies sometimes play surprisingly dominant roles, thereby compounding the difficulties citizens face when seeking to hold government officials accountable. In *Geier v. American Honda Motor Co.*,²⁴⁶ for example, the Court determined that a Department of Transportation regulation implicitly preempted state tort law,²⁴⁷ notwithstanding the Court's prior explanation of the reasons why it ordinarily is reluctant to accord implied preemptive effect to administrative regulations.²⁴⁸ In *Davis v. Monroe County Board of Education*,²⁴⁹ the Court held that Department of Education regulations—not a statute—satisfactorily notified recipients of federal funds that, by accepting those funds, they would be subject to certain kinds of actions for damages.²⁵⁰ The

understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.”).

243. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

244. See, e.g., *Whitman*, 531 U.S. at 474-75 (“[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”) (internal quotation omitted); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate under broad general directives.”).

245. Depending on the applicable state law, the same problems may occur at the state level.

246. 529 U.S. 861 (2000).

247. See *id.* at 874-86.

248. See, e.g., *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717-18 (1985) (stating that frequent implied preemption by agencies “would be inconsistent with the federal-state balance” and that agencies have abundant opportunities to “make their intentions clear,” and thus the Court “will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety”); see also *Massey*, *supra* note 2, at 504 (criticizing *Geier* on these grounds).

249. 526 U.S. 629 (1999).

250. See *id.* at 643-44 (finding that adequate notice was provided by several administrative regulations and by the state's own common-law principles). *But see id.* at 669 (Kennedy, J.,

current state of affairs in each of these doctrinal areas might be entirely unobjectionable, or it might require rethinking in one way or another—but either way, the Court cannot credibly distinguish between acceptable and unacceptable clouding of political responsibility without employing principles that take full account of the ways in which the Court permits administrative agencies to affect the federal-state marketplace.

IV. CONCLUSION

For far too long, conversations about competition and federalism have been dominated by talk of competition among the states.²⁵¹ Interstate competition is indeed an important facet of modern American federalism. Yet to focus solely on competition among the states is to ignore a vital dimension of the federal system of government that the Framers conferred upon us. Because the Constitution offers citizens a choice between state and federal regulation in a vast array of areas, state and federal officials wishing to retain or increase their power have strong incentives to compete with one another for an ever-increasing measure of the people's trust and allegiance. A sovereign that persistently abuses the people's confidence, squanders the people's resources, or fails to fulfill the duties with which it has been entrusted risks losing power to its competitor. State and federal politicians are rivals, therefore, in the marketplace for the people's affection. As Alice Rivlin explains,

[t]he argument about which functions should be exercised by the federal government and which by the states has been going on for more than two hundred years. There are no "right" answers. The prevailing view shifts with changing perceptions of the needs of the country and the relative competence and responsiveness of the states and the federal government.²⁵²

Although the Court has not expressly adopted a theory of federal-state competition, its recent federalism rulings bear powerful hallmarks of the Framers' vision of competition between the two sovereigns. By insisting that there are local matters beyond Congress's reach, the Court appears determined to maintain a "proving ground" for the states—a domain in which the states are assured an opportunity to prove their regulatory competence and

dissenting) (stating that neither the administrative regulations nor state common law "could or did provide States the notice required by our Spending Clause principles").

251. See *supra* notes 8-9 and accompanying text.

252. RIVLIN, *supra* note 98, at 8; see also *supra* notes 30-102 and accompanying text (describing the Framers' vision of federal-state competition and the ways in which that vision remains relevant).

thereby earn the people's affection, no matter how powerful the federal government becomes.²⁵³ By limiting Congress's ability to abrogate the states' sovereign immunity from private lawsuits, the Court appears determined to ensure that states retain the financial and reputational autonomy they need in order to pursue their own strategies for winning the people's allegiance.²⁵⁴ And by declaring that Congress cannot commandeer the states' legislative and executive officials, the Court both preserves the states' autonomy and tries to ensure the systemic transparency that is necessary if citizens are to allocate power between the two governments in ways that best serve their interests.²⁵⁵

To become reacquainted with the Framers' vision of federal-state competition, to identify several of the requirements of the marketplace for the people's affection, and to discover that the Court's controversial federalism rulings are consistent with an effort to preserve the vitality of that marketplace is, however, only a beginning. For both scholars and the Court, a number of challenges lie ahead. First, in each of the doctrinal areas in which it has begun to act, the Court faces significant unresolved difficulties. The distinction between economic and noneconomic activities, which now lies at the core of the Court's Commerce Clause jurisprudence, promises to be remarkably difficult to make. The distinction between permissible encouragement and impermissible commandeering is not always easily drawn. Perhaps most daunting of all is the task of distinguishing those instances in which obfuscation of political responsibility renders a regulatory method unconstitutional from those instances in which a measure of unaccountability must be accepted as an inherent feature of our federal system of government. These all are problems that will demand our attention for years to come.

Second, the Framers' conception of federalism as a system in which two sovereigns battle for the people's affection has wide-ranging implications that require careful consideration. In my discussion of transparency, for example, I identified a few of the ways in which the Court might help enable citizens properly to distribute praise and blame between the state and federal governments—reconceptualize the function of clear-statement rules, strengthen the requirements for preemption, revisit the question of the Guarantee Clause's justiciability, clarify the distinction between coercive and noncoercive uses of the Spending Clause, and consider the variety of ways in which

253. See *supra* notes 125-62 and accompanying text.

254. See *supra* notes 188-92 and accompanying text.

255. See *supra* notes 193-209 and accompanying text.

federal administrative agencies impact citizens' ability to hold government officials accountable.²⁵⁶ There are numerous other ramifications of the Framers' vision that need to be explored as well, such as the ways in which political parties and special-interest groups promote or distort the federal-state marketplace, the ways in which state and federal campaign finance laws differently affect state and federal candidates' ability to convey their visions to the public, and the role of citizen initiatives and other nontraditional lawmaking procedures, among others.

Third, as long as the federal government remains as powerful as it is today, it would be tantalizingly easy for those who favor shifting power to the states to try to justify *any* state-favoring doctrine as necessary to preserve the states' competitive power. Any invocation of federal-state competition as a dispositive rationale should instead be accompanied by a rigorous attempt to tie the requirements of that competition to the issue at hand. In the absence of such connections, the normative power of the Framers' vision of federal-state competition will be squandered, and critics will be able to charge that jurists haphazardly invoke whatever principles they find expedient to reach outcomes they find politically preferable.

Finally, the burden of demonstrating that judicial intervention is superior to other means of protecting the federal-state marketplace continues to rest squarely on the shoulders of those who advocate such intervention. In this Article, I have focused primarily on developing the links between the Framers' vision and the Rehnquist Court's recent federalism decisions. To say that there are such links, however, does not irrefutably demonstrate that the federal-state marketplace cannot thrive in the absence of close court supervision or that judicial intervention itself poses no risks to the marketplace. If the Court wishes to serve as referee in the two sovereigns' battle for political allegiance, it must be mindful of the need persuasively to demonstrate not only that the Constitution entrusts it with that duty, but also that it can fulfill that duty in a principled, praiseworthy manner. Otherwise, the Court risks losing the people's confidence by appearing partisan—and even the Court cannot thrive without at least a modicum of the people's affection.

256. See *supra* notes 220-50 and accompanying text.

Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy

Glen Staszewski

56 Vand. L. Rev. 395 (2003)

Successful ballot measures are commonly perceived as a pure reflection of "the will of the people." Yet initiatives do not appear magically on election ballots or in statute books as a result of the electorate's wishes. Rather, such measures are conceived, drafted, and vigorously promoted by identifiable initiative proponents, who often represent particular special interests and may not even live in the communities in which their measures are proposed. The "myth of popular sovereignty" in direct democracy should be rejected. Instead, initiative measures should be characterized as lawmaking by initiative proponents, whose general objective is either ratified or rejected by the voters.

Rejecting the myth of popular sovereignty in direct democracy would alleviate many of the problems of judicial review that commentators have identified. By treating the initiative proponents as the relevant lawmakers, courts would be able to identify impermissible motives underlying a measure's enactment and continue using an intentionalist methodology of statutory interpretation without resorting to a counterproductive fiction of "voter intent." On the other hand, express recognition that direct democracy involves lawmaking by initiative proponents intensifies the tension between direct democracy and representative government, the problems associated with the delegation of lawmaking authority to unelected actors, and the absence of safeguards to encourage careful deliberation and reasoned decisionmaking in the initiative process.

Initiative proponents are not the only unelected lawmakers in our democracy. Administrative agencies have freely enacted binding rules based on broad delegations of authority since the New Deal. This development has always been consid-

ered constitutionally suspect, but courts have allowed it to continue unabated largely because administrative law has developed alternative safeguards to replace those provided in the legislative process by representation and the requirements of Article I, Section 7. Specifically, administrative agencies must comply with the notice-and-comment procedures of the Administrative Procedure Act, and their final rules must withstand hard-look judicial review. Those safeguards ensure that agency officials engage in careful deliberation and reasoned decision-making and have thereby legitimized agency lawmaking.

A similar model is needed to constrain the proponents of ballot measures and thereby legitimize the use of direct democracy. This Article therefore draws on the agency model to propose amending state laws that regulate direct democracy to subject the proponents of initiatives to the requirements of public deliberation and reasoned decisionmaking that presently constrain administrative agencies. The Article argues that unlike previous proposals, such reforms would promote careful deliberation, improve the legislative product, and provide a heightened standard of judicial review that is well established and directly responsive to the serious structural shortcomings of the current method of lawmaking by "the people."