

SHOULD LIBERALS FEAR FEDERALISM?

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In this Essay, I take up the question of whether liberals should, in general, favor the judicial enforcement of states' rights. My answer, perhaps surprisingly, is "yes." I therefore go on to consider why this answer is so unexpected and counterintuitive; that is, why is the notion of "states' rights" so controversial and, indeed, among liberals so unpopular?

I. SHOULD LIBERALS CELEBRATE THE "FEDERALIST REVIVAL?"¹

Should liberals celebrate recent Supreme Court decisions such as *United States v. Morrison*² and *United States v. Lopez*?³ At one level, of course, the answer is clearly "no." The federal law at issue in *Morrison*, for example, provided a civil damage remedy for victims of gender-motivated violence, thereby arguably reducing the incidence of such

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Some of the arguments made in this Essay are discussed at greater length in Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001) (contribution to symposium on "The Constitution in Exile"). I am grateful to Ernie Young for many valuable and enjoyable conversations in the course of that collaboration that helped me clarify my own views on federalism. Ernie is entitled to a share of the credit for anything the reader of this Essay finds to be useful, interesting, sensible, or correct. I am solely to blame for the rest.

1. By "Federalist Revival," I mean the recent revival in the Supreme Court of a *general* willingness to enforce the rights of the states against the federal government. In using this phrase, I do not mean to suggest that I believe either that each of the "federalism" cases that the Court has heard beginning with *United States v. New York*, 505 U.S. 144 (1992), was correctly decided, or that each necessarily yielded a decision that liberals should cheer. As Professor Sylvia Law observes in her contribution to this Symposium, recent federalism jurisprudence is complicated because it arguably involves many different provisions of the Constitution and may not be internally consistent. See generally Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002). See also Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1380-84 (2001) (discussing apparent inconsistency in the positions taken by both the "states' rights" justices and the "nationalist" justices in recent preemption cases, with the former holding the challenged state law to be preempted by federal law while the latter would have upheld the state law against attempted federal encroachment); Baker & Young, *supra* note *, at 159-62 (same).

2. 529 U.S. 598 (2000).

3. 514 U.S. 549 (1995).

violence.⁴ Most people, whether liberals or conservatives, likely think that less violence of all sorts—including less gender-motivated violence—would be a good thing. Thus, insofar as *Morrison* invalidated a federal law that plausibly reduced the incidence of violence,⁵ the decision gave liberals (and everyone else) little to celebrate.

Similarly, the federal law at issue in *Lopez* made it a criminal offense for any individual knowingly to possess a firearm within 1000 feet of a school.⁶ Few people, whether liberals or conservatives, likely think that children's educational experience or the welfare of the surrounding community would be enhanced by the presence of more guns in school zones. Thus, to the extent that *Lopez* invalidated a federal law whose goals were likely favored by an overwhelming majority of Americans, liberals (and everyone else) had little reason to applaud the decision.⁷

But, of course, the Court in *Lopez*, as in *Morrison*, was not deciding whether the challenged federal law was a *good* law, but whether it was *constitutional*. The Court was deciding whether such a law could properly be enacted by Congress, whatever the Court's (or anyone else's) opinion of the social policy embodied in such a law might be.

If one views *Morrison* and *Lopez* simply as decisions that reaffirmed the appropriateness and importance of the judicial enforcement of states' rights, without regard to the substance of the particular legislation being challenged, the issue posed becomes one of constitutional structure: should liberals generally favor the judicial enforcement of states' rights? In answering this question, it is useful to begin by considering the functions that the judicial enforcement of states' rights serves. I believe it serves two functions of particular importance: First, it provides "outlier" or "minority" states protection from federal homogenization or "horizontal aggrandizement"⁸ in areas in which they deviate from the

4. 529 U.S. at 601-02.

5. *Id.* at 627.

6. 514 U.S. at 551.

7. At the time Congress enacted the Gun-Free School Zones Act, more than forty states already had enacted prohibitions on the possession of guns in or near schools. See *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (citing state statutes regulating possession of guns in school zones). Further, there was no evidence that the few states that had not yet enacted such a prohibition opposed the social policy involved.

It should be noted, however, that although the popularity of the underlying policy gave liberals (and everyone else) little reason to cheer the outcome in *Lopez*, the apparent redundancy of the invalidated federal law also suggests that the case had little immediate practical import. There was no evidence that the existing state laws were ineffective, and one might therefore reasonably conclude that the federal law was "little more than a press release from Congress that it cared." Jerome L. Wilson, *High Court Did Well in School-Guns Case*, N.Y. TIMES, May 5, 1995, at A30; see also Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1 (suggesting that, because many states already had laws banning guns in or near schools, the federal statute invalidated in *Lopez* was largely symbolic).

8. As Ernie Young and I have explained at length elsewhere, there are two different potential threats to state autonomy that are often conflated in the federalism debate. See Baker & Young, *supra* note

national norm, *whether that deviation is to the left or right of the political center*. Second, and quite related, the judicial enforcement of federalism mediates the tensions among different individual rights that increasingly exist in large part because of the Warren Court's expansion of rights and the post-New Deal rise of the administrative state. In serving each of these functions, the judicial enforcement of states' rights increases and preserves diversity among the states, thereby ultimately increasing aggregate social welfare.

I have elsewhere discussed at substantial length why some states would seek to use federal power as an instrument for imposing their preferences on other states.⁹ I have also explained why—in the absence of judicial review—the “political safeguards” of federalism identified by Professors Herbert Wechsler¹⁰ and Larry Kramer,¹¹ and regularly invoked by the “nationalist” Justices,¹² not only will not protect “minority” states against this majoritarian use of the federal lawmaking power, but in fact facilitate it.¹³ I shall summarize both arguments only briefly here.

To the extent that Congress responds to the preferences of a majority of states, it may take action that encroaches on the autonomy of a

*, at 109-110; see also Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 955-56 (2001) (contribution to symposium on “New Voices on the New Federalism”) [hereinafter *Political Safeguards*]. “Vertical aggrandizement” involves efforts by the federal government to increase its own power at the expense of the states and may occur, for example, when the federal government takes over regulatory functions traditionally exercised by the states, preempts sources of state revenue, or imposes regulatory burdens on state governments. The substantive preferences of the states in these situations are irrelevant to the issue of vertical encroachment.

The focus of “horizontal aggrandizement,” by contrast, is precisely on the differences among the states in their substantive policy preferences. Here, the federal political process threatens state autonomy insofar as that process is the means by which a majority of states may impose their own policy preferences on a minority of states with different preferences. Horizontal aggrandizement is typically overlooked in contemporary debates about federalism, but it raises a potentially more serious criticism of the efficacy of political safeguards than traditional critiques focusing solely on vertical issues. For an early discussion of the importance of horizontal threats to state autonomy, see Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1940 (1995) [hereinafter *Conditional Federal Spending*] (demonstrating that conditional federal spending unfettered by the Constitution's constraints is problematic because it allows “some states to harness the federal lawmaking power to oppress other states”).

9. See Baker, *Conditional Federal Spending*, *supra* note 8, at 1942-47; Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 212-17 (2001) (contribution to symposium on “The Spending Clause: Enumerated Power or Blank Check”) [hereinafter *Spending Power*].

10. 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).

11. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

12. See *United States v. Morrison*, 529 U.S. 598, 661 (2000) (Breyer, J., dissenting); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 93-95 (2000) (Stevens, J., dissenting); *Printz v. U.S.*, 521 U.S. 898, 956-57 (1997) (Stevens, J., dissenting); *Seminole Tribe v. Florida*, 517 U.S. 44, 183-84 (1996) (Souter, J., dissenting).

13. See, e.g., Baker, *Political Safeguards*, *supra* note 8.

minority of dissenting states. Such horizontal aggrandizement minimizes the benefits of federalism by creating a federally imposed homogenization of preferences. Why would some states seek to use federal power as an instrument for imposing their preferences on other states? There are at least three different, if not entirely discrete, scenarios in which such encroachment might occur. The first and simplest involves a situation in which people in some states simply do not approve of certain activities that are legal in other states, even though the activity in the other state does not affect them directly. When the States of Arizona, New Mexico, Oklahoma, and Utah entered the Union, for example, Congress required each, as a condition of admission, to include in its state constitution a provision stating that polygamy is "forever prohibited."¹⁴ As Justice Scalia has pointed out, this requirement amounted to an "effort by the majority of citizens to preserve its view of sexual morality . . . against the efforts of a geographically concentrated and politically powerful minority to undermine it."¹⁵ The preferences of polygamists in the new western states, however, did not "undermine" the marriage laws of the majority of states in any direct sense. Rather, the majority states seem to have acted out of a straightforward desire to impose their own moral code on others in the absence of a constitutional amendment reflecting a nationwide consensus on the issue.

A second scenario involves an attempt by some states to capture a disproportionate share of federal monetary or regulatory largesse.¹⁶ Any conditional offer of federal funds, for example, is highly likely to make some states better off at the expense of other states.¹⁷ Such an offer implicitly divides the states into two groups: (1) states that already comply, or without financial inducement would happily comply, with the funding condition, and for which the offer of federal money therefore poses no real choice; and (2) states that find the funding condition unattractive and therefore face the choice of foregoing the

14. See Arizona Enabling Act, ch. 310, 36 Stat. 557, 569 (1910); New Mexico Enabling Act, ch. 310, 36 Stat. 557, 558 (1910); Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, 269 (1906); Utah Enabling Act, ch. 138, 28 Stat. 107, 108 (1894). The complying state constitutional provisions—which are still in force—may be found at ARIZ. CONST. art. XX, para. 2; N.M. CONST. art. XXI, § 1; OKLA. CONST. art. I, § 2; UTAH CONST. art. III, § 1. Indeed, the Arizona, New Mexico, and Utah enabling acts each required that these provisions be "irrevocable without the consent of the United States and the people of said State." Arizona Enabling Act, ch. 310, 36 Stat. at 569; New Mexico Enabling Act, ch. 310, 36 Stat. at 558; Utah Enabling Act, ch. 138, 28 Stat. at 108.

15. *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting).

16. See Baker, *Conditional Federal Spending*, *supra* note 8, at 1939-51; Baker, *Spending Power*, *supra* note 9, at 199-217.

17. For a more extensive discussion of this argument, see Baker, *Conditional Federal Spending*, *supra* note 8, at 1939-51; Baker, *Spending Power*, *supra* note 9, at 212-17.

federal funds in order to avoid complying with the condition, or submitting to undesirable federal regulation in order to receive the offered funds. One would therefore expect such conditional funding legislation to be enacted only if a (substantial) majority of states fall within the first group: that is, they already willingly comply with, or favor, the stated condition, and the conditional offer of funds is therefore no less attractive to them than a similar unconditional offer. For the states in the majority (and their congressional representatives), a vote in favor of the conditional grant is nearly always a vote to impose a burden solely on other states. Whether a state that finds the funding condition unattractive (and is therefore in the minority) chooses to decline the offer of federal funds or to acquiesce in the stated condition, those states in the majority may well improve, and will only rarely worsen, their competitive position relative to that state.¹⁸

If most states have already set their minimum drinking age at twenty-one, for example, then those states' congressional representatives should find it attractive to impose a condition on federal highway funds that permits their disbursement only to states with a minimum drinking age of twenty-one.¹⁹ Such a condition would bring about one of two possible results. An outlier state with a minimum drinking age lower than twenty-one might comply with the condition, accepting the preferences held by the dominant majority and giving up whatever competitive advantage its lower minimum drinking age afforded. Alternatively, the outlier state may choose to forego the federal highway funds tied to the condition it finds unattractive, accepting the obvious financial disadvantage relative to each state that accepts the federal money (obviously including those states that already had a minimum drinking age of twenty-one). The ability to impose conditions on offers of federal funds to the states thus presents states in the majority (and their congressional representatives) with a "no lose" proposition—"no lose," that is, except to the extent that such measures undermine the autonomy of *all* states in the long run.

A final scenario arises when states seek federal regulation in order to avoid externalities or other collective action problems associated with regulating a particular subject at the state level. Consider, for example, a not-so-hypothetical state of affairs under which a majority of the states wishes to discourage homosexual relationships. A solid majority of the citizens in each of these states may share this preference and support

18. By "competitive position" I mean a state's position, relative to other states, in the competition for individual and corporate residents and their tax dollars.

19. See Baker, *Conditional Federal Spending*, *supra* note 8, at 1943-45, 1978-87; *South Dakota v. Dole*, 483 U.S. 203 (1987) (examining one example of such legislation and holding it unconstitutional).

state laws making clear that gay partners are not entitled to family benefits, that gay couples cannot adopt children, and the like. Nonetheless, the elected officials of these states may know that many private companies are more progressive on these issues, and that the minority states that refuse to enact such laws will have an advantage in attracting corporate facilities to their state. The states in the majority may thus seek to enact their anti-homosexual social preferences at the *federal* level. The primary goal here, unlike in the first scenario discussed above, need not be the imposition of the majority states' moral code on the remaining states nor the preservation by the majority states' citizens of their view of sexual morality against the efforts of a politically powerful minority to undermine it. Although the federal legislation that the majority states seek may have these effects, these states' primary motivation is to "level the playing field." Such anti-homosexual federal legislation will restrict the competition for residents and tax dollars that would otherwise exist among the states on this issue, and it will divest the minority states of any competitive gains afforded by their preference not to enact similar anti-homosexual legislation at the state level.²⁰

The net result of the federal legislation in each of the scenarios discussed above is a reduction in the diversity among the fifty states in the package of taxes and services, including constitutional rights and other laws, that each offers its residents and potential residents. Some individuals (and corporations) may no longer find any state that provides a package (including the permissibility of polygamy, a minimum drinking age of eighteen, or the availability of various family benefits for homosexual partners) that suits their preferences, while other individuals and corporations may confront a surfeit of states offering a package (including prohibitions on polygamy, a minimum drinking age of twenty-one, and laws reserving various family benefits to married couples of different genders) that they find attractive. In many instances, this reduced diversity among the states is *likely* to mean a decrease in aggregate social welfare, since the loss in welfare to those with the minority preference is unlikely to yield a comparable gain in welfare for those who favor it.²¹

20. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For commentary on Tiebout's classic model, see, for example, CLAYTON P. GILLETTE & LYNN A. BAKER, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 384-385 (2d ed. 1999) (collecting sources); Vicki Been, "Exit" as a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 514-18 (1991) (offering critique and collecting sources); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 25-33 (1998) (offering critique of the "theory of public goods" including Tiebout's article).

21. That is, the mere existence of the last remaining state in which polygamy is legal, the minimum drinking age is eighteen, or homosexual couples are eligible for family benefits seems *likely* to yield aggregate

Of course, increased diversity among the states is not always a good thing. Federal homogenizing legislation may sometimes increase aggregate social welfare by impeding welfare-reducing interstate races to the bottom²² or by reducing the costs that disuniformities may impose on corporations and individuals seeking to act in more than one state.²³ These observations, however, do not lead inexorably to the conclusion that judicial enforcement of states' rights is either unnecessary or ultimately aggregate-welfare-reducing. Indeed, there are at least three arguments to the contrary that warrant further discussion.

First, although "political safeguards" proponents such as Professors Wechsler²⁴ and Kramer²⁵ have argued that the states are adequately protected by various aspects of the federal political process²⁶ and have each concluded that the states therefore have no meaningful role to play in demarcating and enforcing the boundary between the powers of our

benefits for individuals with those (minority) preferences that are far greater than the aggregate benefits that individuals with the opposing, majority preferences would realize if there were fifty rather than forty-nine states with laws consistent with those majority preferences. Indeed, for a homosexual couple, the only state in which the couple is eligible for family benefits may well have a value beyond measure. Of course, the precise measure and calculation of the actual welfare gains and losses in any of these situations is not currently possible, so the above claim seems unlikely to progress any time soon beyond the status of an open empirical question and a theoretical likelihood. Baker, *Conditional Federal Spending*, *supra* note 8, at 1970-71 & n.279.

22. The most obvious examples are laws concerning environmental regulation and poverty relief. See WILLIAM J. BAUMON & WALLACE E. OATES, *ECONOMICS, ENVIRONMENTAL POLICY, AND THE QUALITY OF LIFE* 75-79 (1979) (giving a classic depiction of environmental pollution as an uninternalized externality); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211 (1992) (observing that "the race to the bottom has been invoked as an overarching reason to vest regulation that imposes costs on mobile capital at the federal rather than the state level, and has been cited as one of the bases for [federal environmental statutes and for] the New Deal") (footnotes omitted); PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 121-24 (1995) (arguing that devolution of welfare responsibility to the states induces a "race to the bottom" because of inter-state competition to avoid becoming a "welfare magnet"); Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 552 (1999) (arguing for "a more aggressive framework of national [welfare] standards or incentives that would insulate the disadvantaged poor from the tyranny of the advantaged majority"). See also Baker, *Conditional Federal Spending*, *supra* note 8, at 1951-52 n.186 (discussing "race to the bottom" in various contexts).

23. The costs imposed by such disuniformities are among the arguments frequently made in favor of the federal reform of tort law. See, e.g., Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917 (1996).

24. See Wechsler, *supra* note 10.

25. See Kramer, *supra* note 11.

26. See Wechsler, *supra* note 10, at 543-58 (identifying various "political safeguards" of federalism, including the existence of the states, the allocation of representation in the Senate, state control of voters' qualifications and congressional districting, and the Electoral College); Kramer, *supra* note 11, at 219, 276-87 (contending that "federalism in the United States has been safeguarded by a complex system of informal political institutions (of which political parties have historically been the most important)," and identifying the interlocking state-federal administrative bureaucracy spawned by the New Deal as a more recent safeguard).

federal and state governments,²⁷ their arguments are especially unpersuasive when the concern is horizontal impositions on state autonomy.²⁸ Indeed, as I have shown elsewhere, Wechsler's Senate and Kramer's political parties are both more likely to exacerbate such horizontal aggrandizement than to protect states from it.²⁹

It is particularly ironic in this regard that it is the Senate, so celebrated by Wechsler as a safeguard of federalism,³⁰ that presents the greatest horizontal threat to state autonomy. Because the Senate affords small-population states disproportionately greater representation relative to their shares of the nation's population, it ensures small-population states a disproportionately large slice, and large-population states a disproportionately small slice, of the federal fiscal and regulatory "pie."³¹ This systematic wealth redistribution obviously infringes on the autonomy of the states that are burdened by, rather than beneficiaries of, this redistribution. In the absence of such redistribution, the burdened states would effectively have greater resources and, therefore, greater freedom of choice.³² Interestingly, Wechsler himself seems to concede that the Senate *cannot* protect the states against horizontal

27. Both Wechsler and Kramer claim to envision *some* role for the courts in protecting state autonomy, but in neither case does this role appear to be a meaningful or particularly clear one. Wechsler acknowledged that the Court had a role to play in "managing our federalism," but he explicitly termed it "subordinate." Wechsler, *supra* note 10, at 560. In addition, he gave no example of when the Court might be needed or expected to play even this limited role in protecting state autonomy. Although Wechsler affirmed that claims of federal infringement on state autonomy are *not* non-justiciable, he was quick to add that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of the Congress in the interests of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress." *Id.* at 559.

Kramer's view of the courts' appropriate role in protecting state autonomy is similarly minimalistic. He contends that the absence of "a clear constitutional mandate demanding judicial intercession" to protect state sovereignty and "more than two centuries of successful federalism without the aid of an aggressive judiciary suggest[] that no such intercession is needed." Kramer, *supra* note 11, at 291. Kramer goes on to suggest that the court "should continue to follow what had been its practice—formally since the New Deal, as a practical matter before that—of applying rational basis scrutiny to questions regarding the limits of Congress's power under Article I." *Id.* Although Kramer is clear that he would substitute this "rational basis scrutiny" for current Commerce Clause doctrine, for example, he offers no example of when this level of scrutiny might cause the courts to invalidate a federal law as exceeding Congress's power under that clause. *Id.* One is left to question whether Kramer envisions any such invalidation under his ideal regime. If he does not, one wonders why he is concerned with preserving a role for the courts in this area as an apparent formality.

28. For discussion of the distinction between horizontal and vertical impositions on state autonomy, see *supra* note 8.

29. Baker, *Political Safeguards*, *supra* note 8, at 961-72.

30. Wechsler, *supra* note 10, at 548 (observing that "the Senate cannot fail to function as the guardian of state interests as such," and that "the composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control").

31. Baker, *Spending Power*, *supra* note 9, at 199-211; Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL'Y 21, 24-42 (1997).

32. Baker, *Spending Power*, *supra* note 9, at 199.

impositions when he observes that “the composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that *dominant state interests* wish preserved for state control.”³³

Second, as I discuss further below, unfettered federal legislation is not needed to rid states of their most pernicious laws: our federal and state constitutions prohibit their enactment and enforcement.³⁴ State laws that violate no federal constitutional provision but which nonetheless express a moral preference that some find reprehensible—for example, laws making the death penalty available for first degree murder convictions,³⁵ providing free abortions to indigent women,³⁶ or providing legal recognition of same-sex marriages or “domestic partnerships”³⁷—denote areas of significant moral disagreement within our society. And these are precisely the areas in which interstate diversity is most valuable and federal homogenization will therefore most greatly reduce aggregate social welfare.

Third, should our society reach a substantial consensus that interstate diversity in some area is no longer acceptable, we can always amend the U.S. Constitution to prohibit the practice(s) agreed to be immoral. History offers many examples of our willingness and ability to amend the Constitution to reflect significant shifts in our moral sensibilities.³⁸

33. Wechsler, *supra* note 10, at 548 (emphasis added).

34. For examples of such provisions in the U.S. Constitution, see Baker, *Conditional Federal Spending*, *supra* note 8, at 1953-54 nn.194-200. For examples of such provisions in state constitutions, see *id.* at 1949 n.177.

35. See ARIZ. REV. STAT. ANN. § 13-703 (West 2001); MD. ANN. CODE art. 27, § 412(b) (1996 & Supp. 2001); see also TRACY L. SNELL, CAPITAL PUNISHMENT 1999, at 3 (tbl. 1) (U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2000) (listing capital offenses, if any, by state).

36. See *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982) (interpreting N.J. STAT. ANN. § 30:4D-6.1 (West 1981)). The court found that under New Jersey law, the state must provide funds for all medically necessary abortions. *Id.* at 935, 938. See also *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986) (same result under Connecticut law) (interpreting CONN. GEN. STAT. ANN. § 17-134b (renumbered as § 17b-261)). The court held invalid a regulation that limited funding to those abortions necessary to save the life of the mother. *Id.* at 143-45. See also Linda M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433, 441-45 (1996) (discussing state constitutional challenges to state statutes restricting public funding for abortions).

37. See VT. STAT. ANN. tit. 15, § 1202 (Supp. 2001) (authorizing establishment of a “civil union” by individuals who are “of the same sex and therefore excluded from the marriage laws of this state” and who meet various other criteria); see also Carol Ness, *Couples Flock to Vermont, the Only Legal Place to Get Hitched*, S.F. EXAMINER, Aug. 7, 2000, at A1 (observing that of the first 263 couples whose civil unions had been registered with the Vermont Vital Records Office, 84 were from Vermont and 179 were from other states).

38. On occasion, however, the Constitution has proven surprisingly difficult to amend. See Baker, *Conditional Federal Spending*, *supra* note 8, at 1950 n.182 (describing failure to adopt the Equal Rights Amendment even though from 1972 to 1982 “a majority of Americans consistently told interviewers that they favored this amendment to the Constitution”) (quoting JANE J. MANSBRIDGE, *WHY WE LOST THE ERA I* (1986)). See also Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 152-53 (1995) (discussing difficulties posed by supermajority requirement for constitutional amendments).

the Thirteenth Amendment's prohibition against slavery;³⁹ the Fourteenth Amendment's guarantee to all persons of due process and equal protection of the laws;⁴⁰ the Fifteenth Amendment's prohibition against race-based discrimination in voting rights;⁴¹ the Eighteenth Amendment's prohibition against the manufacture, sale, or transportation of intoxicating liquors within the United States;⁴² the Twenty-first Amendment's repeal of the Eighteenth Amendment;⁴³ the Nineteenth Amendment's prohibition against gender-based discrimination in voting rights;⁴⁴ and the Twenty-sixth Amendment's guarantee of the right to vote to all citizens eighteen years of age or older.⁴⁵

Thus, I arrive at the perhaps unexpected answer to the question with which I began: Yes, liberals *should* favor the judicial enforcement of states' rights represented by cases such as *Lopez* and *Morrison*. All Americans should.

II. EXPLAINING FEDERALISM'S IMAGE PROBLEM

If one is persuaded by my discussion thus far, the question now becomes why the notion of "states' rights" is nonetheless so controversial and, indeed, among liberals so unpopular.⁴⁶ I believe that the widespread conviction that states' rights are normatively unattractive ultimately springs from some combination of at least three different sources.⁴⁷

39. U.S. CONST. amend. XIII, § 1 (adopted 1865).

40. *Id.* amend. XIV, § 1 (adopted 1868).

41. *Id.* amend. XV, § 1 (adopted 1870).

42. *Id.* amend. XVIII, § 1 (adopted 1919).

43. *Id.* amend. XXI, §§ 1-2 (adopted 1933).

44. *Id.* amend. XIX, § 1 (adopted 1920).

45. *Id.* amend. XXVI, § 1 (adopted 1971).

46. Professor Law contends that "[i]f federalism was explained to American focus groups, most would probably tell us that they like 'federalism.' How not? We all understand that a prime virtue of our government is that power is divided laterally among legislatures, executives, and courts and vertically among federal, state, and local authorities." Law, *supra* note 1, at 371. Later in the same article, however, she observes that, "As a general matter, liberals decry the Court's new federalism, while extreme conservatives support it." *Id.* at 408. See also *id.* at 422 ("Liberals usually view[] the Supreme Court's new federalism as a policy disaster By contrast, conservatives . . . celebrate the Court's radical new constraints on federal power.").

I have been unable to locate any systematic empirical data with regard to Professor Law's claim concerning an informed public's views on "federalism." I suspect, however, that, at best, much of the public would have the same difficulty that is reflected in the writings of many judges and academics: evaluating "federalism" as a structural feature of the U.S. Constitution separately from the substantive, policy outcomes of particular cases or from the ends to which certain groups in our nation's history have sought to invoke state autonomy.

47. A fourth possible source is the apparent failure of most observers to appreciate the distinctive interactions among federalism, individual rights, and economic regulation in contemporary law. See Baker

First, the significance of the term “states’ rights” and its relation to traditional liberal appreciation for diversity frequently are not appreciated or understood. Second, the historical linkage of states’ rights to slavery and segregation tends to obscure the fact that federalism is largely irrelevant to those issues under current constitutional law. Third, the recent configuration of political forces, especially Democratic party dominance of the federal government, is frequently not viewed in its larger historical context. I discuss each of these possible sources in turn below.

A. States’ Rights, Individual Rights, and Diversity

A state’s freedom from federal interference, like an individual’s freedom from governmental restrictions on expression or private choices, is an essentially *negative* freedom. Just as Isaiah Berlin defined “negative freedom” for individuals as “the area within which a man can act unobstructed by others,”⁴⁸ so too federalism seeks to create a space within which a local political community can make choices about how to govern itself without interference from the national government. And just as negative freedoms do not prescribe what the individual shall *do* within this protected sphere of liberty, so too federalism does not dictate

& Young, *supra* note *, at 157-62. Another possible source of the normative unattractiveness of states’ rights to some liberal Americans—at least at present—is suggested by Professor Law’s speculation that the “states’ rights” justices currently on the Court are unlikely to deploy federalism doctrines toward liberal policy ends: “[T]he Justices who created the new federalism are likely to be reluctant to conclude that their new rules prohibit Congress from banning abortion, medical use of marijuana, or physician-assisted death.” Law, *supra* note 1, at 424; *id.* at 372 (“the core principle of the activism of the current majority of the Supreme Court seems to be aggrandizement of the power of the federal judiciary and evisceration of the civil rights of workers, women, people with disabilities, and others”). See also Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era* ____ VA. L. REV. ____ (forthcoming 2002) (empirical study finding that four different versions of “federalism” explain the voting behavior of the “states’ rights” justices on the Rehnquist Court); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000) (examining Supreme Court federalism decisions from 1985 to 1997 and concluding that the “ideology” of both liberal and conservative justices appears to affect their decisionmaking); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, __ CAL. L. REV. __ [MS at 54 & n.250] (forthcoming 2002) (discussing recent empirical work demonstrating that federalism is “selectively invoked by courts only when ideologically convenient”).

Of course, such concerns about judicial ideology potentially apply with equal force to individual rights jurisprudence as well as to federalism doctrine, and to “liberal” as well as “conservative” justices. To take just one example, Cross & Tiller found that during the 1985 to 1997 period (and excluding habeas corpus cases), “conservative Justices used states’ rights federalism to support a conservative plaintiff 74.2% of the time, while using states’ rights federalism to support a liberal plaintiff only 37.5% of the time.” Cross & Tiller, *supra*, at 760. Similarly, “liberal Justices were much more inclined to use states’ rights federalism to defeat a conservative plaintiff (66.1%) than to defeat a liberal plaintiff (29.2%).” *Id.* at 761.

48. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 122 (1969).

that the state government make any particular substantive choice within the range of options permitted it.

I do not contend that one should equate the rights of individuals and the rights of states. Indeed, I believe that "states' rights" have no *independent* value; their worth derives entirely from their utility in enhancing the freedom and welfare of individuals. The question, however, is whether individual freedom can best be protected solely by assigning particular "rights" to individuals—such as the right of free speech or privacy—or through a structure of institutional checks and balances, or through some combination of the two. The Framers of our Constitution, of course, began with a virtually exclusive emphasis on structural mechanisms, although they ultimately adopted a combination of the two approaches with the ratification of the federal Bill of Rights. At no time, however, did the Framers suggest that an exclusive reliance on *individual rights* would provide sufficient protection for individual liberty.

One crucial feature of a system of institutional checks and balances is that the various participants in the system have "rights" against one another—that is, each institution has certain trumps that it can exercise in order to protect its position against encroachments by other entities.⁴⁹ No one is confused when one speaks of Congress's "rights" vis-à-vis the President or vice versa. In order to act as an effective check on executive power for the benefit of the people, it is understood that Congress must have certain prerogatives that are enforceable as a matter of legal "right." So, too, with states' rights: If the states are to be an effective component of Madison's "double security" for individual liberty,⁵⁰ then the states must have certain "rights" that the national government is obligated to respect.

State autonomy ultimately exists to safeguard the liberty of individuals in at least two ways. First, it creates a set of intermediary institutions that exist as a buffer between the individual and the central government. These institutions, because they are large, well-established, and provide a rallying point for opposition to federal policies, will often raise a far more serious obstacle to illiberal measures at the federal level than could individuals acting alone or even through private associations. The second way in which federalism protects liberty focuses more directly on the individual. As I have previously demonstrated, federalism provides a second level of freedom to individuals, beyond that provided by specific guarantees of individual rights, by conferring the freedom to

49. See generally Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1347-48 (1997) (describing the various ways in which such a trump might operate).

50. See FEDERALIST NO. 51, at 323 (Clinton Rossiter ed., 1961).

choose among various diverse regulatory regimes the one that best suits the individual's preferences.⁵¹ Professor Kreimer has recently illustrated the wide variety of situations in which Americans have invoked this freedom at different points in our history:

Mormons moved from Illinois to Utah, while African Americans migrated from the Jim Crow South. Rail travel and, later, automobiles and airplanes enabled residents of conservative states to escape constraints on divorce and remarriage. In the years before *Roe v. Wade*, women from states with restrictive abortion laws sought reproductive autonomy in more sympathetic jurisdictions. Today, the lesbian who finds herself in Utah, like the gun lover who lives in Washington, D.C., and the gambler in Pennsylvania, need only cross a state border to be free of constraining rules. These are liberties that come only with the variations in local norms made possible by federalism.⁵²

As Professor Kreimer's examples demonstrate, this personal right of exit is a negative freedom in the sense that the right itself is indifferent in principle to the uses to which it is put.

The liberal political tradition has not normally equated the appeal of this sort of freedom with the normative appeal of what the individual chooses to use it for. Instead, contemporary liberalism distinguishes "between the 'right' and the 'good'—between a framework of basic rights and liberties, and the conceptions of the good that people may choose to pursue within the framework."⁵³ In the federalism context, one would expect states to agree on a framework of rights ensuring their autonomy to make certain decisions ("the right"), but would expect states to differ on the social choices that they make within that framework ("the good"). In other words, freedom of choice will generally bring about diversity of outcomes.

Federalism, however, generally has been deplored for the ends to which certain groups in our history have sought to use state autonomy. Certainly the modern issues on behalf of which "states' rights" arguments are frequently deployed do not arouse much pro-state sympathy.

51. See Baker, *Conditional Federal Spending*, *supra* note 8, at 1947-51.

52. Seth Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72 (2001) (footnotes omitted); see also Richard A. Epstein, *Evil Rights under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 150 (Winter 1992) (observing that "[f]ederalism works best where it is possible to vote with your feet"); Baker, *Conditional Federal Spending*, *supra* note 8, at 1947-51 (discussing the relationship between individual mobility and benefits of federalism); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-94, 1503 (1987) (same). On the general importance of exit rights in the American political tradition, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 106-12 (1970).

53. Michael J. Sandel, *Introduction to LIBERALISM AND ITS CRITICS* 3 (Michael J. Sandel ed., 1984).

Sometimes the issues hearken all too clearly back to the Civil War era. The recent controversy over whether the Confederate flag should fly over the South Carolina Statehouse, for example, not surprisingly generated much editorial discussion of the historical relationship between states' rights and slavery.⁵⁴ Other times, defenders of states' rights find themselves opposing federal legislation with otherwise uncontroversial and attractive goals and, as a result, may seem to hold the opposing, normatively unattractive views. Thus, in recent years, the defenders of states' rights before the Supreme Court may have appeared, erroneously, to disfavor gun-free school zones,⁵⁵ background checks for purchasers of fire arms,⁵⁶ the imposition of civil sanctions on persons who commit violence against women,⁵⁷ or privacy for personal data provided to obtain a drivers' license.⁵⁸

The frequent identification of federalism's intrinsic value with the ends to which it has sometimes been employed is particularly noteworthy in light of the enthusiasm with which liberals are willing to embrace guarantees of many *individual* rights notwithstanding the fact that those rights will often protect individuals and activities that they consider unattractive, even evil. In areas such as the freedom of expression guaranteed by the First Amendment, or the Fifth and Fourteenth Amendment rights of due process, liberals have long been eager to defend their enemies' rights in the name of a higher principle of broad applicability. Most famously, in 1977, the "liberal" ACLU defended the rights of uniformed neo-Nazis to march in Skokie, Illinois, a city with a large Jewish population, including many Holocaust survivors.⁵⁹

54. See Jack Bass, *The Flag Has Brought Anger - And Progress*, WASH. POST, Apr. 30, 2000, at B1 (observing that the "root issue behind South Carolina's ordinance of secession (which led to the Civil War) was 'the institution of slavery'; the 'states' rights' argument emerged only after the war was lost," and that the defenders of flying the Confederate flag over the South Carolina Statehouse nonetheless "have argued that it symbolizes 'heritage, not hate'"); William Edney, Editorial, *Slavery Was Real Cause of Secession*, AUGUSTA CHRON., July 9, 2000, at 5A ("Much has been written about the Confederate flag and its heritage, the bravery of the Confederate soldier and states' rights. . . . The real issue [behind the secession of the Southern states] was slavery, or rather the opposition to slavery, on the part of some states.").

55. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding unconstitutional a statute making it a federal offense to possess a gun in a school zone).

56. See *Printz v. United States*, 521 U.S. 898, 918-23 (1997) (holding unconstitutional portions of the Brady Act requiring state law enforcement officials to conduct background checks for firearm purchases).

57. See *United States v. Morrison*, 529 U.S. 598, 613-19 (2000) (holding that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment authorized the civil damage remedy provided for in the Violence Against Women Act of 1994).

58. See *Reno v. Condon*, 528 U.S. 141, 148-50 (2000) (upholding the Driver's Privacy Protection Act, which regulates the disclosure of personal information from records of state motor vehicle departments, against a challenge based on *Printz*).

59. See, e.g., Martin Finucane, *ACLU to represent group that advocates sex between men and boys*, AP Newswire, Aug. 31, 2000 (observing that the "ACLU has long accepted unpopular clients and despised

Whether or not the underlying motivation is one of long-term self interest ("there but for the grace of God am I"), the logic of sometimes protecting one's enemies in order to better protect one's self is well understood by liberals in the context of individual rights. In the words of one ACLU official, "If the First Amendment required speech to be good or true or beautiful, who would decide? . . . We protect free speech for racists to protect it for ourselves."⁶⁰ In the area of federalism, however, the analogous big picture is less often kept in sight, and it is not clear why. One possibility, which I take up in the next Section, may be that the associations of federalism with slavery and racial apartheid are simply overwhelming—at a minimum, far more powerful than the association of the Free Speech Clause with repugnant but seemingly ineffectual speech.⁶¹

B. Federalism and Race

The notion of "states' rights" today continues to suffer mightily under the weight of its association with a particularly tragic period in American history. To many, it stands for an anachronistic (and immoral) preference for the race-based denial of essential individual rights that required a Civil War and much federal law to remedy. Thoughtful arguments in favor of the recognition and enforcement of "states' rights" are therefore often viewed as thinly veiled pleas for a return to the race-based inequality of the Antebellum South.

causes, including Ku Klux Klansmen and neo-Nazis. In 1977, the ACLU defended the right of Nazis to march in Skokie, Illinois—home to many Holocaust survivors. Thousands of ACLU members quit and contributions plunged."); see also *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (upholding the Nazis' right to march in Skokie on First Amendment grounds).

60. Barbara Bernstein, Letter to the Editor, *NEWSDAY*, Sept. 21, 1999, at A41. The author was Executive Director of the Nassau County chapter of the New York Civil Liberties Union.

61. The puzzle only deepens, however, when one considers that many beneficiaries of First Amendment protection are proponents of precisely the same forms of racial hatred that federalism stands accused of sheltering. Indeed, efforts by states and localities to protect racial minorities against proponents of racial hatred have been struck down in the name of uniform national norms of free speech. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (invalidating local ordinance prohibiting cross burning that had been upheld by state supreme court).

In addition, one might quarrel with the premise that proponents of hate speech, for example, are ineffectual. See, e.g., Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (detailing the serious harms resulting from racist speech). It would seem far more honest simply to recognize that we sometimes pay a price for negative rights in both the individual and state contexts.

It is, of course, the case that *federal* laws—both constitutional amendments⁶² and Civil Rights legislation⁶³—have played a crucial role in mitigating, if not eliminating, much discrimination against racial minorities since 1865. And much of that discrimination was explicitly sanctioned by various states' laws.⁶⁴ Nonetheless, one cannot fairly lay *all* of the blame for slavery and segregation at the door of states' rights. As Ernie Young and I have discussed elsewhere, the abolitionist opposition to slavery developed first in the Northern *states*, while state anti-slavery impulses were often squelched by pro-slavery norms enacted at the national level.⁶⁵

In any event, federalism's current bad odor seems to be a historically contingent function of the uses to which federalism's advocates have put state autonomy—specifically, as a sanctuary for slavery and segregation. To leap from this history to a condemnation of federalism in general, however, is to fail to understand what it means for states' rights to be a form of negative freedom. The freedom of sub-national political communities to choose their own visions of the good society, like any other form of "diversity," predictably results in a mixed bag of results. One should therefore not be surprised that the vision of the "good" that some communities choose to pursue is sometimes *bad*. Diversity always entails the freedom to make wrong choices.

The way that our society has dealt with this tension is to place certain fundamental values off limits to diversity by enshrining them in the Constitution itself. We do not, for example, allow local communities to organize themselves along aristocratic lines by granting titles of nobility.⁶⁶ So, too, have we dealt with the past failure of some states adequately to protect individual freedom and equality: The Thirteenth, Fourteenth, and Fifteenth Amendments go directly to the issue of racial equality, while the gradual incorporation of the Bill of Rights ensures that other freedoms we have come to regard as basic are respected in all American jurisdictions.⁶⁷ While the actual realization of each of these

62. See U.S. CONST. amends. XIII, XIV, & XV.

63. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a to 2000h-6 (1994)); see also various federal statutes discussed in Law, *supra* note 1, at 369.

64. See, e.g., Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424-27 (1960) (describing the state-sanctioned regime of Jim Crow segregation in the South).

65. See Baker & Young, *supra* note *, at 144-47.

66. U.S. CONST. art. I, § 10, cl. 1.

67. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)) (stating that the Due Process Clause of the Fourteenth Amendment incorporates against the states those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (stating that the incorporation doctrine precludes the states from violating "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental");

constitutional values no doubt remains incomplete, states' rights themselves are no longer a barrier to that realization.

This point is worth underlining: Constitutional principles of state autonomy no longer even arguably protect state authority to engage in racial discrimination or any other activity that violates federal constitutional rights.⁶⁸ Opponents of the states sometimes talk as if *they* have forgotten that in a world with the Supremacy Clause and the Fourteenth Amendment and its associated incorporation doctrine firmly in place, the diversity of choices reserved to the states is limited by a "floor" of basic, federal constitutional guarantees.

Because federal constitutional law now places racial equality and most basic individual rights off limits to state-by-state diversity, the normative case against federalism becomes harder to articulate, but seems typically to encompass two elements: First, the actual normative *benefits* of federalism are said to be minimal, so that any risk that federalism will slight appealing normative values should weigh very heavily.⁶⁹ I discussed above the benefits of federalism in protecting individual liberty.⁷⁰ Other benefits of state-by-state diversity—such as facilitating regulatory competition or promoting civic participation—are the subject of a vast literature.⁷¹

The second element involves the claim that federalism is likely to undermine normatively attractive values that—unlike racial equality and freedom of expression, for example—have not yet been constitutionalized. This claim rests on at least two important assumptions: that there are "right answers" to many questions of social policy, and that politicians at the national level are more likely to discern and to favor those answers than politicians at the state level. I question both assumptions in the next Section.

GEOFFREY R. STONE, et al., CONSTITUTIONAL LAW 811 (3d ed. 1996) (observing that "[t]he only provisions of the first eight amendments that have not been incorporated are the second and third amendments, the fifth amendments requirement of grand jury indictment, and the seventh amendment").

68. That does not mean that the Fourteenth Amendment repealed constitutional federalism in areas not addressed by its text. See Baker & Young, *supra* note *, at 134 n.269.

69. See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 909 (1994). Professor Rubin made the point even more starkly in a subsequent article. See Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. L. REV. 923 (1997); see also Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 37 (2001) [hereinafter *Puppy Federalism*].

70. See *supra* text accompanying notes 8-12, 48-61.

71. See DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 76-106 (1995); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988); McConnell, *supra* note 52, at 1491-1511.

C. States' Rights, "Right Answers," and National Politics

In the area of race, where federalism has had its most tragic costs, a hard-won national consensus has replaced state-by-state diversity with uniform constitutional norms of equality. We have seen that although these norms may have been only imperfectly realized to date, opposition to them no longer rests on a plausible argument based on states' rights.⁷² Federalism continues to matter, however, with respect to a wide range of issues that have *not* been constitutionalized. One claim of federalism's critics is that on these issues—which may range from the death penalty to affirmative action and same-sex marriage—state-by-state diversity is undesirable.⁷³

This claim presupposes that there are "right answers" to many questions of social policy and law, notwithstanding the belief of others that these very same issues are ones on which reasonable people might disagree. If one is sure that one knows the "right answer" on issues such as affirmative action and same-sex marriage, for example, then the federal government is obviously the most efficient provider of legislation to impose those "right answers" on the rest of the country. And if there are no judicial protections for state autonomy, obtaining nationwide uniformity on such issues will never require that one seek a constitutional amendment rather than simple legislation.

In the absence of consensus, imposition of a uniform national solution will almost always satisfy fewer people, and may therefore result in decreased aggregate social welfare, than allowing for state-by-state variation. As Michael McConnell has succinctly demonstrated, state-by-state diversity will generally allow government to accommodate the

72. Indeed, from the standpoint of liberals who favor affirmative action, one of the greatest threats to racial equality today may come from the attempt to create a uniform national norm of colorblindness that would preempt state autonomy to implement race-conscious remedies. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 944-46 (5th Cir. 1996) (holding that the University of Texas School of Law's affirmative action admissions program violates the Equal Protection Clause).

73. Professor Rubin suggests a somewhat different answer in two other articles in which he contends, *inter alia*, that there are no meaningful differences among the American states. Rubin, *Puppy Federalism*, *supra* note 69, at 45 (discussing that the United States "is a socially homogenized" nation in which "[r]egional differences between different parts of the nation are minimal, and those that exist are based on inevitable economic variations, rather than any historical or cultural distinctions"); see also Rubin & Feeley, *supra* note 69, at 909 (contending that "federalism does not secure community because our real community is a national one"). I can only wonder how Professor Rubin would explain the following facts: The Texas Department of Transportation makes available to the public, for \$30 in addition to the regular annual car registration fee, a special license plate that reads: "Texas. It's Like A Whole Other Country." Tx. Dep't of Trans., *Valuable Information for Motorists* (leaflet on file with author). (The author admits to having one on her car.) In addition, the Austin Lounge Lizards, a highly successful Austin-based musical group, includes the following lyrics in its song titled "Stupid Texas Song": "Our pride about our home state is the proudest pride indeed/And we're proud to be Americans, until we can secede." The complete lyrics are available at <http://www.austinlizards.com/Employee/texas.html>.

preferences of a greater proportion of the electorate, as long as those preferences are unequally distributed geographically.⁷⁴ And, as I have previously explained, this is also likely to mean that the imposition of national uniformity in the absence of consensus will reduce aggregate social welfare relative to the existence of state-by-state diversity.⁷⁵ What is important for current purposes, however, is the underlying conviction that, assuming there is a right answer and that it is appropriate to impose it throughout the nation despite the costs such a mandate might involve, federal politicians will generally be willing to do so.

This view of the federal government as the inevitable purveyor and protector of “good” social policies is an especially easy one for today’s liberals to hold because of the Democratic Party’s dominance of Congress from 1955 to 1995. The Democrats had a majority of the House for that entire period and had a majority of the Senate for all but six of those years.⁷⁶ Although the November 1994 election yielded a Republican majority in the House that exists to this day⁷⁷ and a Republican majority in the Senate that existed until Jim Jeffords’s defection in May 2001,⁷⁸ liberals may view the past six years as nothing more than an unfortunate (and surely short-lived) aberration. Because recent events are more salient than those of long ago, it may be easy for liberals to forget that the Republican Party, too, has had periods when it has controlled both houses of Congress for several decades.⁷⁹

74. McConnell, *supra* note 52, at 1494. Whether the accommodation of more people’s preferences actually increases social welfare, of course, depends to some extent on how both preferences and welfare are measured and, in the end, on what the preferences are *for*. A majority preference in a given jurisdiction for slavery, for instance, would raise grave difficulties for any measure of welfare based solely on satisfying the preferences of the greatest number. My claim here is simply that complications like this are often *not* present and that state-by-state diversity often *will* increase welfare. A *categorical* rule against judicial enforcement of federalism would make normative sense only if one had strong evidence that federalism generally decreases welfare. That showing has not been made.

75. Baker, *Conditional Federal Spending*, *supra* note 8, at 1947-51, 1970-72.

76. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, pt. 2, at 1083 (tbl. Y204-10) (1975) [hereinafter HISTORICAL STATISTICS] (1955-1970 statistics); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 2000, at 281 (tbl. 460) (120th ed. 2000) [hereinafter STATISTICAL ABSTRACT] (1971-1999 statistics). The Republican Party had a majority in the Senate from 1981-1987. *Id.*

77. See STATISTICAL ABSTRACT, *supra* note 76, at 281 (tbl. 460). See also *Protest Vote: An Angry Electorate Hands the Republicans a Landslide*, PITTSBURGH POST-GAZETTE, Nov. 10, 1994, at C2.

78. See Katharine Q. Seelye & Adam Clymer, *Senate Republicans Step Out and Democrats Jump In: Jeffords Defects, Forcing Shift in Agenda*, N.Y. TIMES, May 25, 2001, at A1 (observing that Jeffords’s departure from the Republican Party to become an independent “tips the fragile 50-50 power balance in the Senate to a 50-49 Democratic edge”); see also STATISTICAL ABSTRACT, *supra* note 76, at 281 (tbl. 460).

79. See HISTORICAL STATISTICS, *supra* note 76, at 1083 (tbl. Y204-10). See also Michael Wines, *Donkey Drop; Bradley’s Exit Is Not Just the Democrats’ Problem*, N.Y. TIMES, Aug. 20, 1995, § 4, at 1 (“Republicans had ruled politics for 30 years, and Democrats were a husk of a party, too feeble even to repudiate the Ku Klux Klan, only eight years before Franklin D. Roosevelt founded a political dynasty in

Given the unpredictability of national elections over the long term, the rational and risk-averse position, even for those who believe there are "right answers" to important questions of social policy, is to favor states' rights. If some measure of state autonomy exists, liberals and conservatives alike can expect there to be at least one state with laws that will reflect one's own views on certain significant social issues even when both houses of Congress are controlled by the party one opposes. Liberals, however, rarely seem to appreciate that judicial enforcement of states' rights provides them this long-term benefit.⁸⁰

If anti-federalism liberals are too optimistic about the central government, they are often too pessimistic about the states. There have always been areas of social policy in which certain states have been more "progressive," more "liberal" than the federal government, and those areas are particularly marked today. Today, for example, many states provide constitutional and statutory protection against various forms of discrimination on the basis of sexual orientation while federal law does not.⁸¹ Other areas in which some states have in recent years been more "progressive" than the federal government include the right to use marijuana for medical purposes,⁸² physician-assisted suicide,⁸³

1932."); Adam Clymer, *Theorists Look at '94 Voting: Was It Major or Minor Trend?*, N.Y. TIMES, Sept. 4, 1995, § 1, at 8 (noting that the Republican victory of 1894 "ushered in a third of a century of Republican [congressional] dominance").

80. Among academics, Professors Sylvia Law and Susan Klein are two notable exceptions. Professor Law explicitly appreciates that "in many areas, the new constitutional limits on Congressional power might be used to deny federal power to adopt policies that extreme conservatives generally support." Law, *supra* note 1, at 408. See also *id.* at 417 ("under the Supreme Court's current federalism principles, a strong argument can be made that Congress does not have power to override Oregon's Death with Dignity law"); *id.* at 372 ("[l]imiting the power of Congress is not inherently liberal or conservative but rather depends on the nature of the Congress"). Similarly, Professor Klein observes that "[t]he answer to whether liberals or conservatives should champion federalism in the criminal law ultimately depends on what we mean by 'federalism,' whether it can be effectively and neutrally enforced, and what kinds of state regulations we anticipate being protected by such enforcement." Klein, *supra* note 47, at __ [MS 1].

It should also be noted that at least two former, "liberal" Justices—Brennan and Blackmun—appear to have understood and to have taken seriously the relationship between federalism and liberty. See Baker & Young, *supra* note *, at n.395.

81. Compare, e.g., CONN. GEN. STAT. ANN. § 46a-81c (West 1995) (prohibiting housing discrimination on the basis of sexual orientation), and HAW. REV. STAT. § 368-1 (1993) (same), with 42 U.S.C. § 3604 (1994) (prohibiting housing discrimination on the basis of "race, color, religion, sex, familial status, or national origin"—the reference to "familial status" referring not to sexual orientation but to "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody." *Id.* § 3602(k)). Compare CAL. LAB. CODE § 1102.1 (West Supp. 2001) (prohibiting employment discrimination on the basis of sexual orientation), and HAW. GEN. STAT. § 368-1 (1993) (same), with 42 U.S.C. § 2000e-2 (1994) (prohibiting employment discrimination on the basis of "race, color, religion, sex, or national origin"), and 29 U.S.C. § 623 (1994) (prohibiting employment discrimination on the basis of age).

82. Since 1996, Alaska, Arizona, California, Colorado, Maine, Nevada, Oregon, Washington, and Washington, D.C. have adopted laws legalizing the medical use of marijuana. See Law, *supra* note 1, at 417

welfare rights,⁸⁴ and freedom of expression.⁸⁵ By ignoring the benefits of federalism, nationalists increase the risk that each of these areas of state law will fall victim to federal homogenization by a less “progressive” Congress, whether through direct regulation, conditional federal spending, or preemption.

The judicial enforcement of states’ rights, in contrast, would at least sometimes require congressional supporters of homogenization in these areas to secure a federal amendment to that effect. For an outlier state (such as Vermont in the case of same-sex civil unions),⁸⁶ the advantage of that requirement is clear: it will usually be easier to assemble the coalition of thirteen states necessary to block an amendment to the U.S. Constitution⁸⁷ than to garner the simple majority in either the House or Senate necessary to block a congressional enactment.

n.307. Compare, e.g., CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2001) (creating an exception to California laws prohibiting possession and cultivation of marijuana for seriously ill people who use it for medical purposes), and ME. REV. STAT. tit. 22, § 2383-B (West Supp. 2000) (making lawful the possession of marijuana for medical use by individuals with certain serious diseases), with 21 U.S.C. §§ 801-863 (1994) (prohibiting manufacture and distribution of various drugs, including marijuana), and *United States v. Oakland Cannabis Buyers’ Coop.*, 121 S. Ct. 1711, 1715 (2001) (holding there to be no “medical necessity exception” to the Controlled Substances Act, 21 U.S.C. §§ 801-971 (1994)).

83. For discussion of Oregon’s “Death with Dignity Act” as well as federal efforts to “overrule” it, see Law, *supra* note 1, at 412-17. See also *State of Oregon v. Rasmussen*, 192 F. Supp. 2d 1077, 1080 (D. Or. 2002) permanently enjoining various federal agencies and officials from “enforcing, applying, or otherwise giving any legal effect to the Ashcroft directive” that interpreted the federal Controlled Substances Act to authorize the federal Drug Enforcement Agency to suspend or revoke the license to prescribe, dispense, or administer federally controlled substances held by any physician who did so in order to assist suicide. The federal district court in *Rasmussen* concluded that “Congress did not intend the [Controlled Substances Act] to override a state’s decisions concerning what constitutes legitimate medical practice, at least in the absence of an express federal law prohibiting that practice.” *Id.* at 1084.

84. See, e.g., N.Y. CONST. art. XVII, § 1 (providing that “[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine”); see also Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 *FORDHAM L. REV.* 1403 (1998) (discussing history and judicial interpretation of Article XVII).

85. See, e.g., *N.J. Coalition Against War v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994) (stating that Article I of the New Jersey Constitution confers on “citizens an affirmative right of free speech that [is] protected not only from governmental restraint — the extent of First Amendment protection — but from the restraint of private property owners as well”).

86. See Ness, *supra* note 37, at A1 (observing that July 1, 2000 “was the date when Vermont became the first and only state to give legal status to gay and lesbian couples”).

87. Article V of the U.S. Constitution requires the consent of two-thirds of both houses of Congress to propose amendments and the subsequent consent, by the legislature or by a convention, of three-fourths of the states for ratification. U.S. CONST. art. V. An amendment also can be proposed by a national convention called by Congress pursuant to “the Application” of the legislatures of two-thirds of the states. *Id.*

III. CONCLUSION

When one looks around the world, one readily sees the steep and slippery slope of oppression that results when meaningful individual rights do not exist or lose their force. The harms suffered because the rights of a nation's states were increasingly permitted to lapse into desuetude, however, are not as immediately obvious. And when such harms do become clearly visible, they often take the form of a loss of an individual right. Thus, it is easy to focus only on the protections accorded individual rights and to overlook the important role that states' rights play in safeguarding individual liberty.

This misperception may also explain why discussions of states' rights so often focus on the seeming absence of harm resulting from possible overreaching by the federal government in a particular instance. Much attention is paid to the seemingly small degree of harm (if any) which attends an arguably unconstitutional federal law that either tries to accomplish something that is otherwise uncontroversial (*e.g.*, providing a civil damage remedy for victims of gender-motivated violence) or is simply redundant with the existing laws of many states (*e.g.*, prohibiting guns in school zones).

If discussions of federalism instead focused on the importance of states' rights for the long-term protection of individual liberty through the preservation of diversity among the states, liberals might increasingly understand that "states' rights" are not synonymous with any particular right nor any particular state. And we might soon see the formation of a *liberal* states' rights organization with the following motto: "Don't confuse our beliefs with those of our clients. The federalism provisions of the United States Constitution are our only clients."⁸⁸

88. *Cf.* Bernstein, *supra* note 60 (observing that one critic of the ACLU committed "the common error of confusing the ACLU's sympathies with those of its clients. The American Civil Liberties Union has only one client—the Bill of Rights . . ."). Of course, identifying the "federalism provisions" of the U.S. Constitution is likely to be more difficult and more controversial. *See, e.g.*, Baker and Young, *supra* note *, at 78-79 n.15, and sources cited therein.