

2001

## Toward Political Safeguards of Self-Determination

Gregory P. Magarian

*Washington University in St. Louis School of Law*, [gpmagarian@wustl.edu](mailto:gpmagarian@wustl.edu)

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_scholarship](https://openscholarship.wustl.edu/law_scholarship)

 Part of the [Constitutional Law Commons](#), and the [Law and Politics Commons](#)

---

### Repository Citation

Magarian, Gregory P., "Toward Political Safeguards of Self-Determination" (2001).  
*Scholarship@WashULaw*. 227.  
[https://openscholarship.wustl.edu/law\\_scholarship/227](https://openscholarship.wustl.edu/law_scholarship/227)

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Scholarship@WashULaw by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

## TOWARD POLITICAL SAFEGUARDS OF SELF-DETERMINATION

GREGORY P. MAGARIAN\*

*"Federalism would have few adherents were it not, like other elements of government, a means and not an end."<sup>1</sup>*

## I. INTRODUCTION

WHY do we need federalism?<sup>2</sup> This question, elementary as it might seem, has not gotten the searching attention it deserves in scholarly debates over constitutional protections for the prerogatives of states.<sup>3</sup> Constitutional constraints on policy choices are appropriate in a democratic society only to the extent they advance constitutionally ingrained values. The Constitution establishes a federal system and makes clear that

---

\* Assistant Professor of Law, Villanova Law School. I am grateful to Michelle Anderson, Barry Friedman, Gail Levine, and Peter Shane for helpful comments on an earlier draft and to participants and attendees at the *Villanova Law Review's* Symposium on the New Federalism, which was held on October 28, 2000.

1. 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, 552 (1954) (emphasis added); see also Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223 (2000) [hereinafter Kramer, *Politics*] ("Federalism must be understood as a means rather than an end . . .").

2. "Federalism" is a word, like "presently," "sanction," and "toll," that people commonly understand to connote each of two directly opposite concepts. Following David Shapiro's choice in his excellent analysis of the subject, I will use "federalism" in its prevalent current sense, as connoting strong state prerogatives within our federal system. See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 10-11 (1995) (discussing terminology and linguistics of federalism).

3. Advocates of varying levels of state prerogatives have emphasized the need to develop a rationale for protecting states' power. 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, 1447 (1995) (lamenting absence of "a persuasive normative theory" behind Court's federalism decisions); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 501 (1995) (observing that "of all the areas of constitutional law, discussions about federalism are the ones where the underlying values are least discussed and are the most disconnected from the legal doctrines"); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 324 (1997) (analyzing whether constitutional law of federalism in America is valued); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 345-46 (calling for more refined understanding of "the basic purposes of federalism and the reasons behind their constitutional protection"); see also SHAPIRO, *supra* note 2, at 58-106 (cataloguing values of federalism); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853-57 (1979) (discussing importance of state sovereignty to federal system); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988) (noting values that support preservation of federalism).

states exist distinct from the federal government. That existential commitment, however, hardly justifies the aggressive defenses of federalism mounted by some scholars and by a slender majority of the present Supreme Court.

Assessing the validity of constitutional protections for state prerogatives in the federal system requires an assessment of federalism's value as a means to some essential constitutional end(s). My contention in this Article is that the major scholarly attack on federalist judicial review, the "political safeguards of federalism" critique, has paid insufficient attention to this underlying task. Advocates of the political safeguards theory maintain that various features of the American political system are sufficient to protect state prerogatives against the federal government, obviating the need for federalist judicial review.<sup>4</sup> Although the theory accurately explains the continuing power of the states in the federal system<sup>5</sup> and charts a normatively appealing course for courts, its architects have not explained why and to what extent state prerogatives need or deserve protection.

The most familiar reasons offered for protecting state prerogatives in the federal system are: (1) that states improve the efficiency with which government serves the people; and (2) that states guard against federal governmental infringement of people's rights. The Constitution, however, does not support the first justification, and the dire history of federalist judicial review belies the second. In my view, state prerogatives are useful primarily for enhancing two values that stand at the intersection of these failed justifications: the people's opportunities to create governmental institutions and their ability to use those institutions to fulfill the popular will. These values embody the constitutional principle of *political self-determination*, a broad end toward which protection of state prerogatives in the federal system is merely one means.

The self-determination principle buttresses the conclusion that the political process, rather than courts, should serve to protect state prerogative—indeed, the principle compels that conclusion—but it requires a recalibration of the political safeguards theory. Some features of the

---

4. For a discussion of the political safeguards theory, see *infra* notes 113-56 and accompanying text. The scope of this Article precludes a thorough discussion of all the significant elaborations of and variations on the political safeguards critique. See Bednar & Eskridge, *supra* note 3, at 1476-77 (suggesting that political structures play important role in preventing congressional "cheating" on federalist arrangements); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2221 (1996) (reviewing "political debate over federal power and state sovereignty"); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 896-99 (1999) (describing judicial safeguards of federalism); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

5. See, e.g., Kramer, *Politics*, *supra* note 1, at 227-28, 233 (discussing theories opposed to political safeguards theory); Moulton, *supra* note 4, at 922-23 (discussing future of federalism).

political system the theorists have extolled as political safeguards are actually counterproductive, which means legislatures and courts need to reconsider how they manage the political system. The Supreme Court's recent line of cases that advance the rights of the two major political parties demonstrates the problem. Those decisions, while desirable on a sophisticated account of the political safeguards of federalism, contravene the underlying principle of political self-determination.

## II. FEDERALISM: A MEANS TOWARD WHAT END?

Herbert Wechsler<sup>6</sup> and Jesse Choper<sup>7</sup> articulated the classic statements on the political safeguards of federalism. Their insights have recently been refined and extended by Larry Kramer.<sup>8</sup> These scholars' variations on the political safeguards critique all posit that features of the political system make judicial protection of federalism values substantially or completely unnecessary.<sup>9</sup> Such a critique, like any account of constitutional federalism, requires identification of the values whose protection the Constitution compels.<sup>10</sup> Any justification of federalism must satisfy two criteria.

First, any reason offered for extending constitutional protection to state prerogatives must be of constitutional magnitude. It must turn on some value with independent constitutional force. The Constitution explicitly provides only skeletal protection for the states against federal

6. See Wechsler, *supra* note 1.

7. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) [hereinafter Choper, *National Power*]; see also Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577 (1994) [hereinafter Choper, *Update*].

8. See Kramer, *Politics*, *supra* note 1; Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) [hereinafter Kramer, *Understanding*].

9. See *infra* notes 113-56 and accompanying text (summarizing theories). Although contemporary ideological divisions over the substance of federalism questions may suggest that the political safeguards critique reflects a left-wing or liberal perspective, the critique appeals to some conservative judicial minimalists who believe federalist judicial review accords judges too much discretion. See Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 768 (1996) ("[J]udicial review of exercises of the commerce power under the affects doctrine is not appropriate, in any event, because principled limits cannot be defined."); cf. William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 (1985) (criticizing political safeguards reasoning as entailing "the piecemeal repeal of judicial review").

10. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 909 (1994) (concurring with rejection of federalist judicial review on ground "not that the states are capable of protecting themselves . . . but that there is no normative principle involved that is worthy of protection").

power,<sup>11</sup> ensuring little more than the states' "necessary existence."<sup>12</sup> The Constitution's enumeration of federal powers in Article I and attendant reservation of powers in the Tenth Amendment does not give federalism independent constitutional force.<sup>13</sup> Nothing about the Tenth Amendment's reservation of unenumerated powers "to the States respectively, or to the people"<sup>14</sup> requires any particular measure of power for the states. Numerous developments have expanded the zone of federal power at the expense of state prerogatives, among them the Supreme Court's generous conception of implied powers under the Necessary and Proper Clause,<sup>15</sup> the expansion of congressional power in the post-Civil War amendments,<sup>16</sup> the increased integration of the national economy and of American society after the Industrial Revolution,<sup>17</sup> and the Court's broad permission for Congress to use its spending power to facilitate federal reg-

---

11. See U.S. CONST. art. I, § 2, cl. 1 (providing states with indirect authority to determine electorate that chooses members of House of Representatives); U.S. CONST. art. I, § 4, cl. 1 (reserving for states power to prescribe time, place and manner of holding elections for Senators and Representatives); U.S. CONST. art. I, § 9, cl. 6 (guaranteeing equal preferences for ports of different states); U.S. CONST. art. I, § 10, cl. 2 (providing state with power to lay "[i]mposts or [d]uties on [i]mports or [e]xports" with consent of Congress); U.S. CONST. art. II, § 1, cl. 3 (outlining role of states in selecting President, and role of state delegations in House of Representatives in breaking deadlocks in presidential elections); U.S. CONST. art. IV, § 3, cl. 1 (forbidding creation of new state from existing state's territory without existing state's consent); U.S. CONST. art. V (guaranteeing states' equal representation in Senate); U.S. CONST. amend. X (reserving "to the states . . . or to the people" all powers "not delegated to the United States by the Constitution, nor prohibited by it to the states"); U.S. CONST. amend. XI (providing states immunity from suit by citizens of another state, or by citizens or subjects of any foreign state); U.S. CONST. amend. XVII (providing for direct election of Senators but indirectly providing states authority to determine electorate that chooses Senators).

12. *County of Lane v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869) ("[I]n many articles of the Constitution the necessary existence of the States . . . is distinctly recognized."); see also Wechsler, *supra* note 1, at 543.

13. Some who advocate protection of state prerogatives concede this point. See Chemerinsky, *supra* note 3, at 534-35 (contending that "[t]he Constitution provides little guidance as to federalism" and that any systemic protection of federalism must therefore be justified on a "functional analysis"); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2181, 2215 (1998) (contending that "standards limiting national legislation in substantive matters claimed to be 'reserved' to the states do not emerge clearly from the naked text of Congress' enumerated powers"); Kaden, *supra* note 3, at 850 ("The historical materials supply little guidance . . . about the nature of the state sovereignty that was to be preserved.").

14. U.S. CONST. amend. X.

15. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 412-25 (1819) (discussing Necessary and Proper Clause as it applies to Congress' ability to make laws affecting states' prerogatives).

16. See U.S. CONST. amend. XIII, § 2 (granting Congress enforcement power); U.S. CONST. amend. XIV, § 5 (same).

17. See Kramer, *Understanding*, *supra* note 8, at 1502 ("Even the Court's harsh critics acknowledge that changes in society, culture, and the economy require broadening national authority, both practically and as an interpretive matter

ulation of the states.<sup>18</sup> The constitutional mechanism of reserved and enumerated powers has no bearing on any of these developments, or on any inquiry into the proper scope of federal power.<sup>19</sup>

If no textual provision defines, and thereby limits, a purported constitutional mandate, then some value of constitutional magnitude must do so. Why, asks Ernest Young, does federalism require a rationale with independent constitutional force when other “constitutional provisions and features”—the First Amendment and the Due Process Clause, for example—do not?<sup>20</sup> The answer is that the constitutional “feature” of federalism lacks the textual security of constitutional “provisions” like the First Amendment and, to a lesser extent, the Due Process Clause.<sup>21</sup> We may invoke extraconstitutional values as rationales for the Free Speech Clause, and therefore as guides to its scope, because the stark textual prohibition against any “law . . . abridging the freedom of speech”<sup>22</sup> firmly grounds our inquiry. Enforcement of the First Amendment merely requires explanation; enforcement of federalism requires justification. The Due Process

---

(since changing the circumstances transforms the meaning of the original grants of federal power).”).

18. See *South Dakota v. Dole*, 483 U.S. 203, 207-09 (1987) (Rehnquist, C.J.) (analyzing Congress’ power to use Spending Clause to regulate state activity). For an expansive account of the spending power as a federal regulatory device, see generally Ann Carey Juliano, *The More You Spend, the More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111 (2001) (contending that Spending Clause empowers Congress to require states to waive immunity to disparate impact claims as condition on federal funding).

19. Moreover, the Court has recognized that “the People” who generated the Constitution were the people of the nation, not of the several states. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995); *McCulloch*, 17 U.S. (4 Wheat.) at 402 (noting that Constitution and government “proceed[ ] directly from the people”); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1455-62 (1987) (developing historical argument that “the unitary people” of United States enacted Constitution). Thus, the Tenth Amendment’s concurrent reservation of powers “to the people” indicates that any powers the states claim under the Tenth Amendment are subject to the will of the national electorate. Akhil Amar has explained that, under the principle the Tenth Amendment embodies, “the People retained all powers not expressly or impliedly delegated by enumeration—powers they could either give to other government agents in individual states, or withhold from all governments.” Amar, *supra*, at 1440. Nothing inherent in the Tenth Amendment appears to preclude a third option: for the People of the United States to choose, through the national political process, to assign any given reserved power to the federal government. That possibility, of course, raises complex issues about representation and the people’s delegation of governing authority. See, e.g., Rapaczynski, *supra* note 3, at 358 (discussing “[t]he complexity of the concept of the people, as spelled out in the Constitution”).

20. See Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1370-71 (2001).

21. See Laurence H. Tribe, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 65 (1997) (maintaining that extratextual factors in constitutional interpretation “can never substitute for what was in fact enacted as law”).

22. U.S. CONST. amend. I.

Clause stands in a middle ground: “due process of law”<sup>23</sup> provides some textual grounding, but the uncertain meaning of that phrase has inspired fundamental disputes about the scope of “substantive” due process protection. Instructively, those disputes have focused prominently on the presence or absence of independent constitutional values that support such protection. If enforcement of a firm textual provision like the Due Process Clause requires inquiries into constitutional “penumbras and emanations,”<sup>24</sup> then enforcement of a textually tenuous concept like federalism must require, at a minimum, a connection to some value(s) with independent constitutional force.

Second, a nexus must exist between the constitutional value and the proposed protection of state prerogatives. Our constitutional system cannot privilege federalism as an instrument for achieving some constitutional value if the instrument is demonstrably ineffective, let alone counterproductive.

A. *The Inadequacy of Conventional Justifications for Protecting State Prerogatives*

Advocates of federalism tend to favor two justifications for protecting state prerogatives. The first, which I will call the “good government” justification, fails to satisfy the constitutional magnitude criterion. The second, which I will call the “personal freedom” justification, fails to satisfy the nexus criterion. After describing the failings of both justifications, I will contend that the most coherent explanation for protecting state prerogatives in the federal system lies at a narrow intersection of the personal freedom and good government justifications: the principle of political self-determination.

1. *The Good Government Justification*

To the extent they attend to the matter of what values of federalism need or deserve protection, the political safeguards theorists endorse the “good government”<sup>25</sup> principle that federalism contributes to the efficient delivery of government services. Professor Wechsler’s description of federalism emphasizes the need for a “government responsive to the will of the full national constituency, without loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern.”<sup>26</sup> In Dean Choper’s words, “[t]he functional, borderline question posed by federalism disputes is one of comparative skill and

---

23. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

24. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (contending that “penumbras” and “emanations” of other constitutional provisions support due process right to privacy).

25. See Kramer, *Understanding*, *supra* note 8, at 1513 (defining “good government” as not only dividing power but also providing many services).

26. Wechsler, *supra* note 1, at 543.

effectiveness of governmental levels: in a word, an issue of practicability.”<sup>27</sup> Professor Kramer echoes the theme: “The whole point of federalism (or at least the best reason to care about it) is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking.”<sup>28</sup> Numerous arguments in defense of state prerogatives have invoked variations on this rationale, maintaining that federalism produces public policies more responsive to citizens’ preferences,<sup>29</sup> increases governmental accountability to voters,<sup>30</sup> maximizes choice and utility through

---

27. Choper, *National Power*, *supra* note 7, at 1556; *see also id.* at 1614 (asserting that Framers’ primary intent in federal system was “to promote the efficiency of government administration”).

28. Kramer, *Politics*, *supra* note 1, at 222; *see also* Kramer, *Understanding*, *supra* note 8, at 1511 (calling satisfaction of more people through decentralized decisionmaking “the best argument for federalism”); *id.* at 1514 (identifying as key question of federalism “whether the political process distributes power in an effective or desirable manner”).

29. *See* Bednar & Eskridge, *supra* note 3, at 1467 (“In a heterogeneous society, a federal system can better satisfy political preferences and economic needs, especially over time, than can a simple unitary government.”); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 775 (1995) (arguing “that social tastes and preferences differ, that those differences correlate significantly with geography, and that social utility can be maximized if government units are small enough and powerful enough that local laws can be adapted to local conditions”); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1494 (1987) (book review) (illustrating greater responsiveness of smaller governmental units); *see also* SHAPIRO, *supra* note 2, at 77-78 (discussing arguments in favor of significant state participation in administration of government programs). *But see* Chemerinsky, *supra* note 3, at 527-28 (noting that smaller units of government are more prone to interest group capture); Rapaczynski, *supra* note 3, at 385-86 (same).

30. This argument is most familiar from the cases in which the Court has struck down congressional actions alleged to have “commandeered” state officials to implement federal policies. *See* *Printz v. United States*, 521 U.S. 898, 929-30 (1997) (“By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.”); *New York v. United States*, 505 U.S. 144, 182-83 (1992) (arguing for enforcement of federalism because “powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests”); *see also* SHAPIRO, *supra* note 2, at 111-12 (defending Court’s *New York* decision on grounds of governmental accountability); Calabresi, *supra* note 29, at 777-79 (discussing decentralized government’s ability to make accountable decisions); Friedman, *supra* note 3, at 394-97 (characterizing accountability as critical benefit of federalism that deserves greater emphasis). *But see* *Printz*, 521 U.S. at 957-58 n.18 (Stevens, J., dissenting) (contending that “suggestion that voters will be confused over who is to ‘blame’ for [a federal policy carried out by state officials] reflects a gross lack of confidence in the electorate that is at war with the basic assumptions underlying any democratic government”); Chemerinsky, *supra* note 3, at 517 (rejecting accountability rationale in “commandeering” cases because “[v]oters . . . surely can understand that the state is acting under federal compulsion”).



competition among state governments,<sup>31</sup> yields greater cultural diversity,<sup>32</sup> and promotes innovation through policy experimentation in states as “laborator[ies].”<sup>33</sup>

The insight behind the good government justification, that a multiplicity of governmental decisionmakers will provide more efficient government in a variety of ways, has undeniable value for policymakers in

---

31. See THOMAS R. DYE, *AMERICAN FEDERALISM* 177 (1990) (suggesting that federalism provides opportunity to develop values of intergovernmental competition); SHAPIRO, *supra* note 2, at 78-80, 139 (discussing competition among states as primary value of federalism); Bednar & Eskridge, *supra* note 3, at 1466-67 (tying state competition theory to rational choice theory of federalism); Moulton, *supra* note 4, at 901 (“The diversity of policies produced by state-level decisionmaking, coupled with citizen mobility, permits a far greater level of citizen satisfaction than could a single, central government.”). *But see* Rapaczynski, *supra* note 3, at 410-11 (contending that interstate competition for resources may hinder policy development by forcing states to forego desirable programs with high short-run costs); Rubin & Feeley, *supra* note 10, at 917-23 (contending that state competition arguments, whatever their descriptive merits, do not require support for federalism).

32. Vicki Jackson has developed this idea most thoroughly, arguing that “[e]nforcing federalism may help maintain the significance of state and local governments as organizing features of identity and participation in public life, and thereby promote structures of tolerance.” Jackson, *supra* note 13, at 2221; *see also* Friedman, *supra* note 3, at 401-02 (noting that “cultural and local diversity are threatened by uniformity, whether legislatively enacted or judicially imposed”); Kaden, *supra* note 3, at 854 (arguing that “federalism promotes variety in political choice and counters the impulse toward social and ideological homogeneity by allowing ideological and cultural differences to find expression in different places”); Rapaczynski, *supra* note 3, at 387 (“[T]he existence of a strong system of local government may . . . modify those divisions between the potential ins and outs that are essentially social in nature . . .”). *But see* Choper, *National Power*, *supra* note 7, at 1618-19 (contending that smaller political units tend toward “narrower community tolerance for deviant beliefs and behavior”).

33. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *accord* *San Antonio Metro. Transit Auth. v. Garcia*, 469 U.S. 528, 568 n.13 (1985) (Powell, J., dissenting); *FERC v. Mississippi*, 456 U.S. 742, 787-88 (1982) (O’Connor, J., concurring in part and dissenting in part); *see also* SHAPIRO, *supra* note 2, at 85-88 (discussing arguments about states’ value as laboratories and suggesting that states serve experimental function in some circumstances); Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 822 (1996) (urging courts to enforce federalism through Commerce Clause so that states may “experiment[ ] with different solutions to problems and tailor[ ] legislation to local preferences”); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 419 (1998); Friedman, *supra* note 3, at 397-400 (reviewing theory that states are laboratories for experimentation); Kaden, *supra* note 3, at 854-55 (discussing “aphorism that a federal system permits the states to serve as laboratories for experimentation”); Merritt, *supra* note 3, at 9 (examining theory that states serve as laboratories). *But see* Rapaczynski, *supra* note 3, at 408-14 (questioning empirical validity and constitutional salience of “laboratories of democracy” theory); Donald H. Regan, *How To Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 557-58 (1995) (questioning experimentation rationale as primary justification for federalism); Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 596-99 (1980) (arguing that lower-level governments resist innovation); Rubin & Feeley, *supra* note 10, at 923-26 (questioning salience of innovation argument for debates about federalism).

deciding how to divide governmental responsibilities. The trouble is that the efficiency values underlying the good government justification<sup>34</sup> lack constitutional magnitude, thereby failing the first criterion for a justification of federalism.<sup>35</sup> Professor Kramer's hedging commendation of governmental efficiency as "[t]he whole point of federalism (or at least the best reason to care about it)" illustrates the problem, as do halfhearted assertions that the Framers expressly intended to inscribe twentieth century theories of efficiency and management in the Constitution.<sup>36</sup> Nowhere amid the Constitution's guarantees of personal freedom and structural governmental integrity does the document provide for any particular quantum of efficiency or responsiveness in governmental performance.<sup>37</sup> Even if the Constitution did inscribe efficiency values, those values would not require the protection of state prerogatives; rather, as Edward Rubin and Malcolm Feeley have demonstrated, they could be accomplished through various schemes of decentralized government.<sup>38</sup> As one

---

34. In addition to the statements of the political safeguards theorists, cited *supra* notes 26-28, see Calabresi, *supra* note 29, at 785 (summing up argument for federalism by asserting that "most of the time, federalism gives us at least enough of the best of both worlds [centralized and decentralized decisionmaking] so that it is worth the costs of keeping it around"); 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, 265-68 (1990) (noting that federalism principles are related to political economic choice rules); Moulton, *supra* note 4, at 852 ("The great insight of federalism is that different levels of government have different competencies, and that wisely allocating responsibilities to those different levels of government can work significant benefits in terms of both citizen satisfaction and governmental efficiency.").

35. [E]ven if it turns out that decentralization does contribute to governmental efficiency, the analysis necessary to determine which aspects of local governance should be protected from central interference is of a very complex and largely pragmatic nature and thus unsuitable either for elevation to the constitutional level or for judicial assessment. Rapaczynski, *supra* note 3, at 409; see also Chemerinsky, *supra* note 3, at 537 ("[I]t is unclear how much weight the judiciary should give to utility when it evaluates the constitutionality of federal laws on federalism grounds[.]"); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1402-04 (1997) (acknowledging good government benefits of federalism but arguing that original intent behind federal structure was primarily to safeguard individual rights).

36. See Amar, *supra* note 19, at 1427 ("Guided by emerging principles of agency law and organization theory, the Federalists consciously designed a dual-agency governance structure in which each set of government agents would have incentives to monitor and enforce the other's compliance with the corporate charter established by the People of America."); Bednar & Eskridge, *supra* note 3, at 1449 (attempting to support positive political theory ("PPT") justification for federalism by asserting that "the Framers . . . not only established federalism as a central value in the Constitution but . . . shared the rational choice assumptions of PPT").

37. Indeed, as Barry Friedman notes, "American democracy rests explicitly on the idea that there is a benefit to inefficiency." Friedman, *supra* note 3, at 388; see also Yoo, *supra* note 35, at 1404 (discussing Framers' intent to divide political power between federal and state governments).

38. See Rubin & Feeley, *supra* note 10, at 951 ("States serve a valuable function in our nation; they are the natural and convenient means to achieve the manage-

advocate for state prerogatives has acknowledged, “[i]f the sole purpose of forming a nation had been to promote economic progress or efficient government, there would have been no need for federalism, then or now.”<sup>39</sup>

The prominence in the political safeguards theory of such a constitutionally suspect basis for federalism as the good government rationale is understandable. The key political safeguards theorists, with the arguable exception of Professor Kramer, concede that there is such a thing, even short of direct federal abrogation of state sovereignty, as an impermissible federal encroachment on state prerogatives.<sup>40</sup> But given the conventional understanding that the Court is the ultimate, perhaps sole, arbiter of what is “constitutional,”<sup>41</sup> urging an end to judicial review of federalism issues is hard to square with acknowledging the existence of a constitutional baseline for federalism. The political safeguards theorists elide this problem by grounding their theory of federalism in what is really a subconstitutional value. That move, however, omits any explanation of what authority compels political safeguards any more than judicial ones.

---

rial benefits that flow from decentralizing certain governmental functions.”); *see also* Rapaczynski, *supra* note 3, at 408-09 (pointing out, in context of “laboratories of experiment” argument for federalism, that “a unitary government could avail itself of the same advantages by a partial delegation of authority to its local branches, so that there may be nothing in the laboratory rationale that is peculiarly related to the federal structure of American government”).

39. Kaden, *supra* note 3, at 855. Ernest Young’s complaint that the “constitutional magnitude” criterion lacks “any practical limiting value,” Young, *supra* note 20, at 1371, is understandable, given the way he applies that criterion to the “good government” rationale. He purports to identify two groups of “good government” mandates in the text of the Constitution. *See id.* at 1371 & n.100. The first group—the Speech and Debate Clause, the Appropriations Clause, the State of the Union Clause—provide for specific procedures that hardly elevate anyone’s broad philosophy of efficient management to the level of constitutional mandate. The second group—the Preamble and the Guaranty Clause—can, as Professor Young acknowledges, mean virtually anything to anyone, and thus they cannot justify protection of state prerogatives. The ease and danger of special pleading on behalf of favored priorities demonstrates why claims for the constitutional enforceability of a textually uncertain principle like federalism must be rooted in some value(s) of independent constitutional magnitude.

40. *See* Choper, *National Power*, *supra* note 7, at 1599-1600 (acknowledging that congressional actions “may transgress the constitutional principle of federalism, just as they may offend against constitutionally secured personal rights”) (footnote omitted); Wechsler, *supra* note 1, at 559 (declining to argue that Court should withdraw completely from “measur[ing] national enactments by the Constitution” in federalism cases). Professor Kramer, in contrast, criticizes “the mistake of assuming an underlying ideal, permanent division of authority between the national government and the states: a substantive allocation that stands apart from and independent of the process by which this division is to be implemented.” Kramer, *Politics*, *supra* note 1, at 292.

41. *See* *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (denying congressional authority to define scope of constitutional rights against states); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (declaring Supreme Court to be authoritative interpreter of Constitution).

## 2. *The Personal Freedom Justification*

The second principal justification offered for protecting state prerogatives is that federalism protects personal freedom by interposing the states as a defense against the danger of federal governmental tyranny. Advocates for state power, both judicial<sup>42</sup> and academic,<sup>43</sup> frequently make this claim. Justice O'Connor has stated the essence of the argument: "In the tension between federal and state power lies the promise of liberty."<sup>44</sup>

The constitutional magnitude of personal freedom is undeniable, and this libertarian rationale therefore satisfies the first criterion for a justification of federalism. If a nexus existed between strong protection of states' prerogatives and personal freedom, the case for that protection would be strong. The Supreme Court's experience with federalist judicial review,

42. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (arguing that Framers established federalism "to ensure the protection of our fundamental liberties") (internal quotation marks and citation omitted); see also *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (stating that Framers created federal system of government to protect people's rights); *Printz v. United States*, 521 U.S. 898, 921 (1997) ("Th[e] separation of the [federal and state] spheres is one of the Constitution's structural protections of liberty."); *New York v. United States*, 505 U.S. 144, 155-59 (1992) (discussing importance of federalism for individual liberty); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting) (describing "the constitutionally mandated balance of power between the States and the Federal Government" as "designed to protect our fundamental liberties").

43. See Rex E. Lee, *The Dilemma of American Federalism: Power to the People, the States, or the Federal Government? Federalism, Separation of Powers, and the Legacy of Garcia*, 1996 BYU L. REV. 329, 330 ("[B]y checking the exercise of governmental powers, the constitutional division of authority serves—perhaps even more effectively than the specific liberty guarantees—to protect the rights of the individual."); Merritt, *supra* note 3, at 4 (emphasizing "the ability of independent state governments to check the oppressive power of a strong central government"); Rapaczynski, *supra* note 3, at 380-95 (arguing for states' role in prevention of tyranny); Yoo, *supra* note 35, at 1313 (arguing that, under Framers' design, "[s]tates would protect the rights of their citizens not only by creating and enforcing new rights, but also by simply checking the power of the federal government" and that Framers intended federalist judicial review "as a protector of a state's ability to promote and preserve the rights and liberty of the people"); see also SHAPIRO, *supra* note 2, at 95-105 (discussing relationship between individual rights and federalism); Amar, *supra* note 19, at 1493 (arguing that James Madison believed "the Constitution's structure of government [would] help assure compliance with the specific legal rights established by that instrument"); McConnell, *supra* note 29, at 1500-07 (analyzing arguments for libertarian value of federalism). *But see* Choper, *National Power*, *supra* note 7, at 1614-16 (contending that Framers intended federalism as structural rather than libertarian doctrine); Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 83-86 (criticizing tendency to value federalism and separation of powers only in terms of those doctrines' purported benefits for individual rights).

44. *Gregory*, 501 U.S. at 459.

which began with *Dred Scott*<sup>45</sup> in 1857 and has seen three periods of ascendancy since then,<sup>46</sup> provides a test for the existence of a nexus. That test reveals a persistent disharmony between limitations on federal power to ensure state power and exactly the sorts of personal freedoms to which federalists appeal in defense of state power.<sup>47</sup>

Federalist judicial review saw its first ascendancy in the late nineteenth century, when the Supreme Court relied on states' rights in order to construe the post-Civil War Amendments narrowly. In the *Civil Rights Cases*,<sup>48</sup> the Court held unconstitutional the Civil Rights Act of 1875, which provided that all persons were "entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement."<sup>49</sup> The Act specifically prohibited discrimination by private actors.<sup>50</sup> The Court held that section 5 of the Fourteenth Amendment did not authorize such legislation. "Individual invasion of individual rights

---

45. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450-52 (1857) (holding that powers over person and property are not granted to Congress and that if act of Congress interferes with property ownership, act "is therefore void").

46. See Kramer, *Politics*, *supra* note 1, at 231-32 (noting that, at least until 1995, even most aggressive periods of federalist judicial review were primarily a conservative argument used to resist progressive federal efforts, especially in the areas of civil rights and social welfare.); Choper, *National Power*, *supra* note 7, at 1618 (arguing that "in every area of constitutionally designated individual liberties . . . the record of state and local governments has been far inferior to that of the nation"); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306 (1999) ("Federalism's role in American history as a stalking horse for racism is infamous."); Jackson, *supra* note 13, at 2215 n.161 ("Certainly the history of southern slavery and segregation, and of the federal government's role in civil rights enforcement, are vivid reminders that state power can disserve and federal power can serve as a powerful protector of individual liberty."). Beyond encouraging violations of so-called "negative" rights, federalism creates political and economic disincentives to social welfare programs that redistribute wealth. See McConnell, *supra* note 29, at 1500 ("[I]t can be shown that the level of redistribution in a decentralized system is likely to be lower even if there is virtually unanimous agreement among the citizens that higher levels would be desirable."); Rapaczynski, *supra* note 3, at 410-11 (explaining that competition among states discourages "many redistributive and social programs that make the cost of doing business higher"); Mark Tushnet, *The Politics of Constitutional Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1990) 222-23 (explaining that federalism impedes ability of local majorities to adopt social welfare programs).

47. Others have discussed the constraints states have imposed directly on personal freedoms. See Amar, *supra* note 19, at 1425 ("Victims of government-sponsored lawlessness have come to dread the word 'federalism.'"); Chemerinsky, *supra* note 3, at 501 ("Hindsight reveals that federalism has been primarily a conservative argument used to resist progressive federal efforts, especially in the areas of civil rights and social welfare."); Choper, *National Power*, *supra* note 7, at 1618 (arguing that "in every area of constitutionally designated individual liberties . . . the record of state and local governments has been far inferior to that of the nation"); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306 (1999) ("Federalism's role in American history as a stalking horse for racism is infamous."); Jackson, *supra* note 13, at 2215 n.161 ("Certainly the history of southern slavery and segregation, and of the federal government's role in civil rights enforcement, are vivid reminders that state power can disserve and federal power can serve as a powerful protector of individual liberty."). Beyond encouraging violations of so-called "negative" rights, federalism creates political and economic disincentives to social welfare programs that redistribute wealth. See McConnell, *supra* note 29, at 1500 ("[I]t can be shown that the level of redistribution in a decentralized system is likely to be lower even if there is virtually unanimous agreement among the citizens that higher levels would be desirable."); Rapaczynski, *supra* note 3, at 410-11 (explaining that competition among states discourages "many redistributive and social programs that make the cost of doing business higher"); Mark Tushnet, *The Politics of Constitutional Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1990) 222-23 (explaining that federalism impedes ability of local majorities to adopt social welfare programs).

48. 109 U.S. 3 (1882).

49. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

50. See *Civil Rights Cases*, 109 U.S. at 10 (explaining that second section of Act "makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section").

[was] not the subject-matter of the amendment.”<sup>51</sup> Rather, section 5 only authorized Congress to remedy state action.<sup>52</sup> A contrary holding, the Court declared, would allow the law to step into the domain of local jurisprudence, ignoring the providence of the states, and thus would be “repugnant to the Tenth Amendment of the Constitution.”<sup>53</sup>

Similar reasoning animated the *Slaughter-House Cases*.<sup>54</sup> The Court read the Fourteenth Amendment’s directive that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”<sup>55</sup> to protect only against abridgments of “privileges” and “immunities” enjoyed by citizens of the United States, as distinct from those enjoyed by citizens of the several states.<sup>56</sup> “[W]ith the exception of these and a few other restrictions, the entire domain of privileges and immunities . . . lay within the constitutional and legislative power of the States, and without that of the Federal government.”<sup>57</sup> The majority feared that a contrary holding would “fetter and degrade State governments by subjecting them to the control of Congress” and would “radically change[ ] the whole theory of the relations of the State and Federal governments to each other.”<sup>58</sup> Thus, in an effort to safeguard federalism, the Court eliminated any basis in the Privileges and Immunities Clause for applying the Bill of Rights to the states or for protecting any rights from state interference.

In the late nineteenth and early twentieth centuries, federalism and personal freedom clashed again, this time in conflicts over the extent of federal power to shield workers from the most hazardous excesses of the Industrial Revolution. In the era’s most notorious elevation of state prerogatives over human rights, the Court in *Hammer v. Dagenhart*<sup>59</sup> struck down a federal attempt to discourage the use of child labor. Congress enacted legislation that prohibited the shipment or delivery in interstate commerce of goods produced in factories employing children under the age of fourteen or employing children between the ages of fourteen and sixteen for more than eight hours a day.<sup>60</sup> Congress enacted this law under the Commerce Clause, but the Court characterized the act as an

---

51. *Id.* at 11.

52. *See id.* (holding that section 5 “does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against State legislation, or State action”).

53. *Id.* at 15.

54. 83 U.S. (16 Wall.) 36 (1872).

55. U.S. CONST. amend. XIV.

56. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74-75 (“Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State . . . only the former . . . are placed by this clause under the protection of the Federal Constitution . . .”).

57. *Id.* at 77.

58. *Id.* at 78.

59. 247 U.S. 251 (1918).

60. *See Hammer*, 247 U.S. at 268 (describing federal statute).

attempt to require states to exercise their police power, and it therefore found a violation of state prerogatives under the Tenth Amendment.<sup>61</sup> The Court held firm for state power in *Bailey v. Drexel Furniture Co.*,<sup>62</sup> rejecting Congress' attempt to circumvent *Hammer* by placing a federal excise tax on goods produced by child labor and shipped in interstate commerce. The *Bailey* majority made clear that child labor was a matter for state, not federal, regulation, and the tax therefore violated the Tenth Amendment.<sup>63</sup> Thus, in the name of state power,<sup>64</sup> the Court not once, but twice, allowed the exploitation of children for labor.<sup>65</sup>

The present Court has employed both the *Civil Rights Cases*' limitation of constitutional rights and *Hammer*'s cramped account of federal power to undermine personal freedom in the name of state power. In *Kimel v. Flor-*

61. *See id.* at 273. The Court found that:

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition . . . . The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

*Id.*

62. 259 U.S. 20 (1922).

63. *See Bailey*, 259 U.S. at 39-40 (reiterating holding in *Hammer* that regulating child labor was matter of state authority and emphasizing that Congress could not use taxing power to achieve purpose clearly within state authority).

64. The Court in the early twentieth century showed no greater solicitude for states' own efforts to protect workers' rights. *Compare* *Carter v. Carter Coal Co.*, 298 U.S. 238, 316-17 (1936) (striking down federal minimum wage and other labor protections as exceeding congressional power), *with* *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down state maximum hours regulation under Due Process Clause). Arguably, then, the child labor cases demonstrated no special fervor for state prerogatives but merely disdain for workers' rights. A more straightforward conclusion, however, is that both federalism and substantive due process as conceived in *Lochner* lent themselves to assaults on basic rights. In any event, even to dismiss the rhetoric of state power as a mere pretext for judicial activism against rights is to indict federalism as a value. *See* Cross, *supra* note 47, at 1307 (contending that "federalism is consistently [and inherently] employed only derivatively, as a tool to achieve some other ideological end, rather than as a principled end in and of itself"); Rubin & Feeley, *supra* note 10, at 948 (arguing that "claims of federalism are often nothing more than strategies to advance substantive positions"); *cf.* William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 144 (1998) (making same point as to arguments about federalism among policymakers).

65. "[I]f there is any matter upon which civilized countries have agreed . . . it is the evil of premature and excessive child labor." *Hammer*, 247 U.S. at 280 (Holmes, J., dissenting). Of course, one could read all the cases I discuss in this section in exactly the opposite way, as defenses of liberty. In *Hammer*, for instance, one might argue that the Court invoked federalism as a device to protect a vulnerable minority—business interests—from the federal government's excessive regulatory initiatives. Which reading one accepts depends on one's normative beliefs about whose rights matter and why. *See* ERIC FONER, *THE STORY OF AMERICAN FREEDOM* xv (1998) ("Freedom has always been a terrain of conflict, subject to multiple and competing interpretations, its meaning constantly created and recreated.").

*ida Board of Regents*,<sup>66</sup> the Court struck down an amendment to the Age Discrimination in Employment Act of 1967 (“ADEA”),<sup>67</sup> which had provided a remedy against discrimination by state employers,<sup>68</sup> as beyond congressional enforcement power under section 5 of the Fourteenth Amendment.<sup>69</sup> Again, the Court emphasized state prerogatives: the section 5 issue mattered because Congress had abrogated the states’ Eleventh Amendment immunity,<sup>70</sup> thereby improperly redefining the states’ legal obligations with respect to age discrimination.<sup>71</sup> Similarly, in *United States v. Morrison*,<sup>72</sup> the Court held that a federal civil remedy for the victims of gender-motivated violence pursuant to the Violence Against Women Act of 1994<sup>73</sup> exceeded congressional authority under both the Commerce Clause and section 5.<sup>74</sup> The majority emphasized that suppression of violent crime had always been the “prime object of the State’s police power[s].”<sup>75</sup> Thus, the Court concluded that only the states, not the federal government, may redress gender-motivated violence.<sup>76</sup> The present Court’s preoccupation with state regulatory prerogatives exceeds its concern with age discrimination or sexual assault.<sup>77</sup>

---

66. 528 U.S. 62 (2000).

67. 29 U.S.C. §§ 621-634 (1994).

68. In 1974, Congress extended the application of the ADEA to the states by amending the definition of “employer” to include “a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State . . . .” 29 U.S.C. § 630(b) (1994). Congress simultaneously amended the Act’s enforcement provisions to extend to state actors. *See* 29 U.S.C. § 203(x) (1994) (amending definition of public agency to include “a State, or a political subdivision of a State”).

69. *See Kimel*, 528 U.S. at 82-85 (concluding that ADEA’s disproportionate effect on state employment decisions demonstrated that it was not designed to prevent unconstitutional behavior).

70. *See id.* at 81 (noting that “[s]ection 5 of the Fourteenth Amendment . . . does grant Congress the authority to abrogate the States’ sovereign immunity.”).

71. *See id.* at 87-88 (explaining that lack of congressional findings of patterns of age discrimination by states reinforced determination that Congress improperly redefined states’ legal obligations).

72. 529 U.S. 598 (2000).

73. 42 U.S.C. § 13981(c) (1994). The Act states:

[A] person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any state) who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive relief, and such other relief as a court may deem appropriate.

*Id.*

74. *See Morrison*, 529 U.S. at 627.

75. *Id.* at 615.

76. *See id.* at 627 (noting that “remedy must be provided by the Commonwealth of Virginia, and not by the United States”). For a thorough dissection of the Court’s assault on women’s rights in *Morrison*, see generally Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907 (2001).

77. The Court’s priorities have carried over into other cases that have pitted state prerogatives against personal rights. *See Alden v. Maine*, 527 U.S. 706, 709



These three periods of judicially-enforced federalism stand in sharp contrast to the Court's proudest moment of intervention in the name of personal freedom: the Civil Rights era. The Warren Court's vindication of African Americans' basic human rights required persistent and forceful rejection of state assertions of sovereign power to discriminate.<sup>78</sup> For example, in *Jones v. Alfred H. Mayer Co.*,<sup>79</sup> the Court not only permitted Congress to regulate private acts of discrimination pursuant to the Thirteenth Amendment but also recognized congressional authority to determine just what constituted such a "badge of slavery."<sup>80</sup> Similarly, in *Katzenbach v. McClung*,<sup>81</sup> the Court permitted Congress to reach discrimination by private actors pursuant to the Civil Rights Act of 1964. The majority characterized the act as a valid extension of Congress' "broad and sweeping" power under the Commerce Clause.<sup>82</sup> In *Katzenbach v. Morgan*,<sup>83</sup> the Court held that section 5 gave Congress independent authority to eliminate state literacy tests as barriers to voting rights.<sup>84</sup> In each of these cases, the Court rejected a broad account of exclusive state power, instead expanding congressional power to protect personal freedom. The fact that

---

(1999) (striking down on federalism grounds employee's statutory right to sue state employer under Fair Labor Standards Act); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down religious liberty protections afforded against states by Religious Freedom Restoration Act, deeming Act's effect on states contradictory to "vital principles necessary to maintain . . . the federal balance"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (strengthening state's Eleventh Amendment immunity from suit and striking down Indian tribe's statutory right to enforce state's obligation to negotiate in good faith under Indian Gaming Regulatory Act); see also Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong With Conservative Judicial Activism*, 45 VILL. L. REV. 201, 212 (2000) (criticizing current Court's Eleventh Amendment decisions as denigrating value of "protecting citizens from the over-concentration of power"). The Court's decision in *Bush v. Gore* may be an exception: there, the Court constrained states' power to manage elections in the name of a sweeping concern with equal protection. 531 U.S. 98, 109 (2000) ("When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."). Alternatively, *Bush* may illustrate that the Court's allegiance to federalist values varies directly with the substantive interests at stake. Cf. Cross, *supra* note 47, at 1311-12 (concluding, based on voting patterns of Burger Court, that Justices "are, in general, influenced more by the ideological posture of the case at hand than by any interest in deferring to state courts").

78. Dean Choper accurately describes race as "[a]part from economic issues, the foremost issue of true regional conflict" and accordingly commends the Supreme Court for upholding federal authority to combat state-sponsored racism. See Choper, *National Power*, *supra* note 7, at 1572-73.

79. 392 U.S. 409 (1968).

80. See *Jones*, 392 U.S. at 440-41 (reasoning that "burdens and disabilities" of slavery included violations of fundamental rights that were entitled to protection by Congress).

81. 379 U.S. 294 (1964).

82. *McClung*, 379 U.S. at 305.

83. 384 U.S. 641 (1966).

84. See *Morgan*, 384 U.S. at 646-47 (holding that states lack authority to withhold franchise on conditions inconsistent with Fourteenth Amendment and Constitution).

many of today's leading jurists came of age during the political battles over federalism in the Civil Rights era may help explain why some of them are strongly committed to vindicating state prerogatives,<sup>85</sup> even though states have grown more powerful since the Civil Rights era, often with the federal government's help.<sup>86</sup>

The most heated judicial battles over federalism demonstrate that, throughout our history, the states have sought to abridge essential personal freedoms; the federal government has sought to protect those freedoms; and the federal government's efforts often have required the Court to expand federal power at the expense of the states. This is not to suggest that states may not make important contributions to expanding personal freedoms, as Justice Brennan, among others, convincingly contended.<sup>87</sup> But freedom has not been well served when state prerogatives have been exalted over federal authority, as Justice Brennan's own persistent opposition to "states' rights" claims underscores.<sup>88</sup> The personal freedom ratio-

---

85. See Shane, *supra* note 77, at 233 (associating present Court's solicitude for state prerogatives with opposition to activist national government characteristic of "contemporary cultural conservatism"). Professor Friedman has offered a parallel explanation for the positions of some current opponents of state prerogatives. See Friedman, *supra* note 3, at 384 (suggesting that opponents of expansive state prerogatives "who came of age with pictures of foaming segregationists cursing civil rights marchers, or African-American students trying to enter schools desegregated by order of national courts, are likely to be enamored of national authority"). Of course, ideologically colored positions on federalism are not the exclusive province of any one generation. See, e.g., Calabresi, *supra* note 29, at 807-08 (arguing that cabal of federal judges, "liberal national journalists," and "law professors and law students at elite national law schools" safeguards federal power).

86. See Shane, *supra* note 77, at 239-41 (noting that state workforces and expenditures grew far more quickly than federal workforce and expenditures between 1952 and 1992 and discussing federal legislation designed to enhance state prerogatives). The fact that thirty-six states filed an amicus brief opposing the "state" position in *United States v. Morrison*, 529 U.S. 627 (2000), exemplifies the irrelevance of many present federalism disputes. See Brief of the State of Arizona et al., *United States v. Morrison*, 529 U.S. 627 (2000) (Nos. 99-5, 99-29).

87. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) (commending state courts for "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions"); see also Hans Linde, *On Reconstituting "Republican Government"*, 19 OKLA. CITY U. L. REV. 143, 211-12 (1994) (emphasizing need for state court judges to abide by their state Constitutions to preserve standards embodied in Guarantee Clause). The only branch of the federal government to undermine states' efforts to expand personal freedoms has been the Supreme Court, led by one of its most dogged defenders of federalism. See *Michigan v. Long*, 463 U.S. 1032, 1039 n.4 (1983) (O'Connor, J.) (reversing state court's finding of Fourth Amendment violation and holding that U.S. Supreme Court may "review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied").

88. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989) (Brennan, J.) (holding that Congress may abrogate states' Eleventh Amendment immunity when legislating pursuant to commerce power); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-57 (1985) (adopting, in decision joined by Justice Brennan, political safeguards critique of federalist judicial review and rejecting

nale for protecting state prerogatives resoundingly fails the nexus requirement that any justification of federalism must meet.

B. *A Proposed Alternative Justification: Political Self-Determination*

The complementary failings of the two major justifications for promoting federalism inspire consideration of how those justifications might be combined to overcome their flaws. The good government justification lacks constitutional magnitude. Good government, however, has a personal freedom dimension—the people’s right to expect some measure of participation in and protection from government. The personal freedom justification overestimates the capacity and suitability of states as defenders of personal freedom against governmental power. Personal freedom, however, has a good government dimension—the people’s freedom to form governmental institutions and direct governmental protection of popular interests. The intersection between the personal freedom and good government justifications defines a principle of “political self-determination”: the people’s liberty interest in participating in the political process and using it to form governmental bodies that will serve the common good.<sup>89</sup> This interest has clear constitutional magnitude, rooted in the right to vote.<sup>90</sup> Although such a broad constitutional principle requires far more than federalism to effectuate it, a measured protection of state prerogatives can advance the interest in political self-determination in two important ways.

1. *The Participation Value*

First, state prerogatives can advance political self-determination by giving people additional opportunities to be active in the political process and to form and direct governmental institutions. This is the “participation value” of federalism. Lewis Kaden has maintained that states facilitate

---

Tenth Amendment challenge to application of Fair Labor Standards Act to state employers).

89. Robert Nagel has used the term “self-determination” in critiquing Dean Choper’s version of the political safeguards theory. See Nagel, *supra* note 43, at 91-92. Although Professor Nagel does not define the term, he appears to associate it with a structural theory of self-government in which local control should play a prominent part, a theory he favorably contrasts with Dean Choper’s focus on rights. See *id.* That understanding comports with Dean Choper’s own use of “self-determination” to mean “that special brand of ‘freedom’ that is afforded by federalism: that ‘liberty’ achieved through decisionmaking in small political units by locally elected officials who are peculiarly sensitive to local concerns.” Choper, *National Power*, *supra* note 7, at 1619-20. As will become apparent, I mean something very different by “self-determination.”

90. See U.S. CONST. art. 1, § 2, cl. 1 (setting forth people’s right to elect Members of House of Representatives); U.S. CONST. amend. XV (barring race-based denials of right to vote); U.S. CONST. amend. XVII (setting forth people’s right to elect senators directly); U.S. CONST. amend. XIX (barring gender-based denials of right to vote); U.S. CONST. amend. XXIV (barring poll taxes); U.S. CONST. amend. XXVI (extending franchise to all citizens eighteen years of age or older).

liberty not in the sense of “merely the absence of public or official constraint on official action” but rather “political liberty,” which he defines as “a freedom to influence that same process of political choice that defines the essence of sovereignty.”<sup>91</sup> In a related vein, Barry Friedman has contended that states promote personal freedom in a procedural sense, by “serv[ing] as an independent means of calling forth the voice of the people, if and when this is necessary.”<sup>92</sup> The participation value I have in mind is similar, but less instrumental and more intrinsic. Some theories of the First Amendment have rejected or subordinated instrumental values associated with expressive freedom<sup>93</sup> and emphasized instead the inherent value of self-definition through expression.<sup>94</sup> A similar emphasis is appropriate in assessing how the states’ role in the federal system serves the constitutional principle of political self-determination. The acts of voting for and participating in a layer of government below the federal level strengthen the bonds between the citizen and his or her political community, yielding both personal fulfillment and a stronger degree of cohesion among individuals engaged in a common political exercise.<sup>95</sup>

The participation value does not set states in opposition to the federal government. Rather, states serve this value, and the broader principle of political self-determination, by replicating and multiplying the opportunities the federal government provides for political participation. By their very existence, states constitute political communities distinct from the nation as a whole,<sup>96</sup> and while states may not bring citizens closer to government, they increase the points of contact between citizens and government and the number and nature of forums that allow citizens to participate in constituting government.<sup>97</sup>

91. Kaden, *supra* note 3, at 856.

92. Friedman, *supra* note 3, at 403.

93. The most prominent instrumental values are the search for truth in the “marketplace of ideas,” and facilitation of the political process. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (reasoning that ideas should be left open to “the market” to test their validity); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 9 (1948) (urging exclusion of speech unrelated to self-government from First Amendment protection).

94. See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 966 (1978) (advancing “liberty model” of scope of First Amendment, which justifies protection because speech fosters individual self-realization and self-determination); Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591, 593 (1982) (arguing that “free speech ultimately serves only one true value . . . ‘individual self-realization’”).

95. Cf. Rapaczynski, *supra* note 3, at 400 (conceptualizing political participation “not as instrumental toward achieving a proportionate share in the distribution of available resources . . . but rather as a good in itself, something essentially implicated in the very concept of human freedom”).

96. See, e.g., SHAPIRO, *supra* note 2, at 123 (discussing states as “active polities”).

97. Professors Rubin and Feeley dismiss the benefits I describe. See Rubin & Feeley, *supra* note 10, at 944-47 (rejecting idea that states constitute political com-

Contrary to the arguments of Professor Friedman, Professor Kaden, and others, my contention that states as separate governmental units provide valuable opportunities for public participation in the political process does not hold that states, because of their size and “closeness to the people,” provide better opportunities for participation than the federal government does.<sup>98</sup> That position rests on dubious assumptions about the relative attitudes and accessibility of the national and state governments. Peter Shane has pointed out that the federal government “might actually be easier to monitor and approach effectively, and, to that extent, more accountable to the average citizen than are state and local governments.”<sup>99</sup> Others have noted that smaller political units tend toward greater insularity and factional dominance, thus discouraging political participation by minorities.<sup>100</sup> Moreover, any “remoteness” of the national government may be counteracted by the greater scope and importance of the decisions it makes, thus evening the value of participation at the state and national levels.

## 2. *The Supplemental Regulation Value*

State prerogatives also can advance political self-determination by providing an additional layer of regulatory protection against concentrations of private power and wealth, which pose an enormous threat to personal freedom in contemporary society. This is the “supplemental regulation value” of federalism. Charles Reich has contended forcefully that “[p]rivate economic government”—the control that powerful corpo-

---

munities distinct from nation as whole, and as consequence rejecting possibility of personal fulfillment through political participation at state level).

98. See Friedman, *supra* note 3, at 390 (“Intuition suggests that more people would and could participate in smaller levels of government, and common experience seems to bear that out.”); Kaden, *supra* note 3, at 853-54 (arguing that “decisionmaking in smaller units makes possible more direct public participation in both the process of representative selection and the process of policy determination by the delegates chosen” and that “proximity increases accountability by increasing access”); see also SHAPIRO, *supra* note 2, at 139 (arguing that states “bring[ ] democracy closer to the people”); Merritt, *supra* note 3, at 7 (“The greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decisionmaking.”); Rapaczynski, *supra* note 3, at 402 (arguing that “within our political structure, practically all the local political bodies that may be suitable for the development of participatory politics function under the umbrella of state governments”).

99. Shane, *supra* note 77, at 242 & n.198; see also D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternatives to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 631 (1985) (“The process of political choice in the states and local governments is further from the democratic ideal than the national political process.”); Rubin & Feeley, *supra* note 10, at 916 (“As a matter of theory, there is simply no reason why an intermediate political unit would be more favorable to local units than the nation’s central authority.”).

100. See Chemerinsky, *supra* note 3, at 527 (noting “greater danger of special interests capturing government at smaller and more local levels”); Choper, *National Power*, *supra* note 7, at 1618 (concluding that smaller, localized government increases likelihood of minority exclusion from political process).

rate interests exercise over people's lives by virtue of the corporate form—"is a far more important factor in the lives of individuals than public government."<sup>101</sup> Concentrations of power in the private sector threaten to undermine people's ability to govern themselves and to use the political process to serve their interests. "[T]he big corporations . . . command more resources than do most government units. They can also, over a broad range, insist that government meet their demands, even if these demands run counter to those of citizens expressed through their polyarchal controls."<sup>102</sup> Corporate threats to personal freedoms run the gamut from downsizing and other assaults on workers' rights, to environmental degradation, to concentrated control of the mass media. A central reason for the magnitude of the private sector threat to personal freedom is that corporations, although enabled by government through the corporate form, are not subject to the individual rights guarantees by which the Constitution constrains government.<sup>103</sup> Only the people, through their political institutions, can check corporate power.

This insight is important for understanding the relationship between federalism and personal freedom because it debunks the truism that the libertarian value of states depends on their opposition to the federal government.<sup>104</sup> In fact, states serve freedom primarily by supplementing the power of the federal government, giving people additional institutional recourse against concentrated power in the private sector.<sup>105</sup> The empha-

---

101. CHARLES REICH, *OPPOSING THE SYSTEM* 29-30 (1995); see also Laura Anker et al., *The Ties That Bind Business and Government*, in *THE STRUCTURE OF POWER IN AMERICA: THE CORPORATE ELITE AS A RULING CLASS* (Michael Schwartz ed., 1987), at 98-100 (explaining how business interests can prompt governmental social controls to limit personal freedoms and undermine public interest); Karl E. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW*, *supra* note 47, at 67 ("There simply is no 'prelegal' realm of social life to which legal outcomes can be referred, at least not in the modern age."); Rand E. Rosenblatt, *Social Duties and the Problem of Rights in the American Welfare State*, in *THE POLITICS OF LAW*, *supra* note 47, at 91 (discussing "the 'new class war' launched by the Reagan administration and much of American business on the income, legal rights, social benefits, and bargaining power of vast numbers of low-income Americans").

102. CHARLES E. LINDBLOM, *POLITICS AND MARKETS* 356 (1977).

103. REICH, *supra* note 101, at 30, 37-39 (explaining how corporations threaten personal freedom); see, e.g., *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) (imposing state action requirement under Fourteenth Amendment); cf. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668-69 (1990) (upholding state's prohibition on independent expenditures of corporate treasury funds in state elections).

104. For a discussion of arguments that states protect against federal tyranny, see *supra* notes 42-44 and accompanying text.

105. Michael Shuman points out that states have constrained private power more aggressively than the federal government has in ways ranging from taxing polluters to increasing minimum wages to reforming campaign finance. See Michael H. Shuman, *Going Local: Devolution for Progressives*, *THE NATION* (Oct. 12, 1998) at 11. As Shuman notes, such state-level regulation "safeguard[s] well-established national standards and empower[s] creative local legislators to build a new generation of protections on top of them." *Id.* at 14.

sis of state power advocates on the danger of "federal tyranny" obscures the essential truth that the Constitution seeks to protect personal freedom generally, not to protect it only from one particular threat.<sup>106</sup> The federal government has been the most assertive regulator of private power throughout the past century, but its efforts to vindicate peoples' interests against corporate interests often have fallen short.<sup>107</sup> Protecting state prerogatives in the federal system serves the principle of political self-determination to the extent states effectively can supplement the federal government's regulation of powerful private interests.<sup>108</sup>

The supplemental regulation value might lead to enhanced prerogatives for states in two areas of federalism jurisprudence. Under the Dormant Commerce Clause, the Court frequently strikes down state regulations of private conduct to preserve federal power, despite the absence of any competing federal regulation.<sup>109</sup> Similarly, under the doctrine of federal preemption, the Court may strike down state laws based on nothing more than a judicial inference that Congress intended to regulate a given subject exclusively.<sup>110</sup> Professor Friedman notes that such decisions may "create a regulatory vacuum, leaving interests traditionally pro-

---

106. See Shane, *supra* note 77, at 243 (noting that "the burgeoning of private economic power that is largely unaccountable to any policy whatever" presents threats to personal freedom that "cannot be resisted effectively without a sympathetic national legislative authority").

107. See REICH, *supra* note 101, at 34-36; Friedman, *supra* note 3, at 400-01 (questioning whether federal government could fulfill functions states perform in protecting citizens' health, safety and welfare); Merritt, *supra* note 3, at 5-6 (discussing instances during 1980s in which states enacted progressive regulations that federal government had rejected). See generally WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY (1992) (contending that national political process is dominated by corporate interests and thus unlikely to respond to popular will).

108. Erwin Chemerinsky has argued that "federalism should not be seen as a basis for limiting the powers of either Congress or the federal courts" but rather "as an empowerment; it is desirable to have multiple levels of government all with the capability of dealing with the countless social problems that face the United States . . ." Chemerinsky, *supra* note 3, at 504; see also Rubin & Feeley, *supra* note 10, at 931 (noting that "there is no fixed supply of administrative power such that increases in federal power necessarily cause decreases in state power through a zero sum exchange"). Similarly, Professor Amar has argued that federalism should be understood as empowering each level of government to check abuses of rights by the other. See Amar, *supra* note 19, at 1512-19 (proposing an analogy to 42 U.S.C. § 1983 under which states would provide remedies to compensate their citizens for constitutional violations by federal government). I believe these accounts of federal-state power sharing place too little emphasis on the importance of private threats to personal freedom and on the primacy of federal over state regulatory authority. For a different conception of concurrent federal and state regulation, premised on a normative preference for federalism, see Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996).

109. See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 678-79 (1981) (invalidating Iowa provision on trucking regulation).

110. See, e.g., *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 237-38 (1947) (holding that state regulation of grain elevators licensed by federal government was preempted even though Congress had not expressly precluded such state regulation).

ted by the police power in jeopardy.”<sup>111</sup> Restrictions on state power under these doctrines may be appropriate where the Court finds that a state regulation seriously complicates the prospects for federal regulation. The supplemental regulation value, however, indicates that the Court’s principal concern should be with the power of some level of government to regulate in the public interest.

If federalism serves the principle of political self-determination, then federalism must be subordinate to the political will. Judicial enforcement of state prerogatives in contravention of the political will necessarily would stifle political self-determination. Thus, my proposed answer to the question “Why federalism?” provides a normative underpinning for the political safeguards critique: the political process is not merely the sole necessary guardian of state prerogatives in our constitutional system; it is the sole proper guardian.<sup>112</sup> The remaining task is to examine the principal accounts of the political safeguards theory itself to determine whether the particular features of the political system on which they rely, and that they accordingly extol, serve the self-determination principle.

### III. THE SELF-DETERMINATION PRINCIPLE AND THE POLITICAL SAFEGUARDS OF FEDERALISM

#### A. *Theories of the Political Safeguards of Federalism*

Professor Wechsler, Dean Choper and Professor Kramer have offered distinct accounts of how the political system can safeguard state prerogatives in the federal system. The Court itself once adopted the political safeguards critique, prominently citing Professor Wechsler and Dean Choper, in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>113</sup> Each of

111. Friedman, *supra* note 3, at 401; *see also* Amar, *supra* note 20, at 1505 (stating that “federalism abhors a remedial vacuum”).

112. I do not mean to suggest that the self-determination principle delegitimizes all judicial intervention to vindicate the policies of smaller governmental units against the actions of larger ones. The Supreme Court occasionally has intervened to protect local prerogatives against state actions. *See* *Romer v. Evans*, 517 U.S. 620 (1996) (striking down state’s ban on local antidiscrimination measures to protect gays and lesbians); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (striking down state’s ban on busing by local school boards to reduce racial segregation). Those decisions invalidated states’ discriminatory actions targeted against minorities—actions not consistent with the self-determination principle, let alone shielded by it. Similar judicial intervention would be entirely appropriate if the federal government sought to discriminate through the device of barring state practices that ameliorated discrimination. My point is that federalism, as a distinct constitutional basis for protecting states’ prerogatives, is categorically subordinate to the political will.

113. 469 U.S. 528, 550-54 & n.11 (1985). Although the Court never has expressly overruled *Garcia*, the political safeguards critique obviously has fallen out of judicial favor. *See supra* notes 66-77 and accompanying text (discussing Court’s recent aggressive intervention on behalf of state prerogatives); Choper, *Update*, *supra* note 7, at 590 (noting, even prior to *Lopez*, that “[a] majority of the Justices now on the Supreme Court are plainly unsympathetic to the *Garcia* approach); Yoo, *supra* note 35, at 1334-57 (arguing that Court has tacitly overruled *Garcia*).



the key political safeguards theorists wrote long enough after his predecessor to consider new and useful lessons about the actual experience of state influence on the national political process. Examination of these three accounts, however, reveals a common shortcoming. Measured against the right to political self-determination, each account calls for extraneous protections of federalism, unmoored to the self-determination principle, while also relying on some safeguards that undermine political self-determination.

In 1954, Herbert Wechsler articulated the first version of the political safeguards critique.<sup>114</sup> His approach was more descriptive than normative; rather than expressly advocating an end to federalist judicial review, he simply asserted that “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states . . . .”<sup>115</sup> Even that assertion rested on his approving observation that the Court in fact had focused most of its federalism jurisprudence on “maintenance of national supremacy against nullification or usurpation by the individual states . . . .”<sup>116</sup> Professor Wechsler emphasized two types of political safeguards that allowed this judicial inattention to states’ prerogatives. First, he pointed out that “Congress has traditionally viewed the governance of matters by the states” as “something to be left alone unless a need for change has been established.”<sup>117</sup> For Professor Wechsler, “the existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism . . . .”<sup>118</sup> Second, Professor Wechsler emphasized various structural features of the constitutional system that he claimed preserve state prerogatives against the federal government. These included equal state representation in the Senate;<sup>119</sup> state control over voters’ qualifications<sup>120</sup> and the drawing of congressional districts;<sup>121</sup> and the role of the states in se-

---

114. *See generally* Wechsler, *supra* note 1.

115. *Id.* at 559.

116. *Id.*

117. *Id.* at 545.

118. *Id.* at 546.

119. *See* U.S. CONST. art. I, § 3, cl. 1 (providing that Senate shall be composed of two Senators from each state); *see* Wechsler, *supra* note 1, at 547-48 (arguing that Senate functions as guardian for state interests).

120. *See* U.S. CONST. art. I, § 2, cl. 1. (requiring voters for House of Representatives to “have the qualifications requisite for Electors of the most numerous branch of the State Legislature”); U.S. CONST. amend. XVII (imposing same requirement for popular election of Senators); *see also* Wechsler, *supra* note 1, at 548-49 (discussing these constitutional provisions as guarantors of states’ influence over federal government). These allowances, of course, are subject to the constitutional prohibitions of disenfranchisement based on race, sex or age. *See* U.S. CONST. amend. XV (holding that right to vote may not be abridged because of race); U.S. CONST. amend. XIX (stating that right to vote may not be abridged because of sex); U.S. CONST. amend. XXVI (stating that right to vote may not be abridged because of age if citizen is over eighteen).

121. *See* U.S. CONST. art I, § 4, cl. 1 (providing that states may prescribe time, place and manner of national elections); *see also* Wechsler, *supra* note 1, at 549-52

lecting the President through the electoral college and the provision for state delegations in the House of Representatives to break electoral deadlocks.<sup>122</sup> Professor Wechsler found these elements “intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.”<sup>123</sup>

Professor Wechsler’s political safeguards are primarily rooted in the explicit text of the Constitution. His account, however, also depends on normative preferences that, although consonant with the interests of states in the federal system, clash with the very self-determination principle that makes state interests matter. First, the “tradition” of federal reluctance to intrude on state prerogatives, posited and extolled by Professor Wechsler, fundamentally contradicts the right to political self-determination. The states serve the people’s interest by offering additional opportunities for political participation and supplemental protection against private encroachments on personal freedom. Neither of those goals requires regulatory restraint by the federal government. Indeed, the federal government provides the primary means toward each of those ends, while the states merely enhance the federal contribution.<sup>124</sup> Second, Professor Wechsler’s reliance on state control of voting qualifications and congressional district lines gave no consideration to the ways in which states were abusing those powers to prevent political participation by African-American and other minority voters.<sup>125</sup> Subsequent congressional and judicial limits on state control over federal elections<sup>126</sup> stand among the most important advances for political self-determination of the past half century.

---

(noting that state congressional districting is derived from Time, Place, and Manner Clause).

122. See U.S. CONST. art. II, § 1, cl. 2 (allowing each state to appoint presidential electors “in such Manner as the legislature thereof may direct”); U.S. CONST. amend. XII (providing for states’ delegations in House of Representatives to break deadlocks in presidential elections); see also Wechsler, *supra* note 1, at 552-58 (discussing states’ role in presidential elections).

123. Wechsler, *supra* note 1, at 558. Numerous commentators have questioned the vitality of the structural political safeguards first suggested by Professor Wechsler. See, e.g., A.E. Dick Howard, Garcia: *Of Federalism and Constitutional Values*, PUBLIUS, Summer 1986, at 17, 22 (noting that “[e]ven as Wechsler wrote, some of his institutional devices which arguably might have given the states less occasion to seek a judicial reform had already undergone change”); Marshall, *supra* note 64, at 144 (arguing that protection of states through political process is dead); Moulton, *supra* note 4, at 911-12 (asserting that weaknesses of political safeguards theory have been “well documented”); John C. Pittenger, Garcia and the Political Safeguards of Federalism: Is There a Better Solution to the Conundrum of the Tenth Amendment?, PUBLIUS, Winter 1992, at 1, 1 (noting that even in 1954 many factors had undermined Wechsler’s position); Rapaczynski, *supra* note 3, at 391-95 (examining “process failure” of political processes alleged to protect states).

124. See *supra* notes 105-08 and accompanying text.

125. See *South Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966) (noting that seven states had enacted tests specifically designed to prevent African Americans from voting).

126. See, e.g., Voting Rights Act of 1965, Pub. L. No 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1994)) (enacting various measures to pre-

A quarter century after Professor Wechsler first articulated the political safeguards critique, Jesse Choper built on his predecessor's foundation a full-scale normative argument against federalist judicial review. Dean Choper's central contention was that federal courts should hear individual rights claims to the exclusion of state power claims, both because courts possessed a distinctive competence in the former setting that they lacked in the latter<sup>127</sup> and because adjudicating state power cases would expend precious institutional capital better directed toward protecting rights.<sup>128</sup> In order to make his argument, Dean Choper saw a need to provide reassurance that the national political process protected state prerogatives in ways that it did not protect individual rights.<sup>129</sup> He relied in the first instance on a litany of structural safeguards patterned on the Wechsler account: equal state representation in the Senate, state control over qualifications for congressional electors, and the electoral college.<sup>130</sup>

Dean Choper, however, refined the Wechsler account by placing greater weight on practical safeguards in the political process.<sup>131</sup> He emphasized, for example, that bipartisan state congressional delegations tend to work cooperatively to advance their states' interests<sup>132</sup> and that the

---

vent states from discriminating in voting based on race). *See generally Katzenbach*, 383 U.S. 301 (upholding congressional power to enact antidiscrimination measures in 1965 Voting Rights Act); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (striking down Georgia's apportionment of U.S. congressional districts as inconsistent with "one person, one vote" principle).

127. *See Choper, National Power, supra* note 7, at 1556 (advocating more active judicial role in individual rights cases as opposed to federalism disputes); *see also Rapaczynski, supra* note 3, at 413-14 (characterizing judicial branch as poorly equipped to make economic judgments essential to efficiency-based rationales for federalism and stating that perceived attempts to make such judgments have caused resistance to Supreme Court's federalism-related jurisprudence). *But see Althouse, supra* note 33, at 809-12 (denying congressional competence to resolve federalism problems). Indeed, Dean Choper argued that courts lacked jurisdiction over claims in which private individuals asserted state power claims, because "[t]here can be no assurance that the states' interests will be properly represented by the private parties." Choper, *National Power, supra* note 7, at 1579.

128. *See Choper, National Power, supra* note 7, at 1579-83.

129. *See id.* at 1585 ("Judicial review of individual rights claims is justified in view of the unsatisfactory representation in the political process of the beneficiaries of such rights.").

130. *See id.* at 1560-65.

131. Dean Choper's theory of political safeguards might imply a need for some measure of representation-reinforcing judicial review to preserve key features of the political system, such as vetogates. *See infra* notes 158-60 and accompanying text (discussing role of representation-reinforcing review in context of Professor Kramer's political safeguards). Dean Choper, however, made no such suggestion, and he hedged his bets on judicial oversight of the political safeguards. He contended that the political process protected state prerogatives so thoroughly as to compel judicial intervention to protect the federal government, *see Choper, National Power, supra* note 7, at 1585, but he also invited courts to use statutory interpretation as a mechanism for reining in federal power. *See id.* at 1605.

132. *See id.* at 1562 (noting that members of Congress are sensitive to local concerns despite party allegiances).

President has a political need “to maintain [a] rapport with Congress.”<sup>133</sup> He noted the fact that most federal elected officials began their political careers as state officeholders, a path that, he contended, inculcated a concern for advancing state interests at the national level.<sup>134</sup> Most interestingly, Dean Choper recognized the value for state interests of what scholars of the legislative process call “vetogates”—slowing mechanisms built into the legislative process to prevent precipitous decisionmaking and allow competing interests to be asserted.<sup>135</sup> As Dean Choper explained:

Imposition of the states’ attitudes on the national lawmaking system is facilitated by the negative mechanisms of the congressional process, such as bicameralism, the committee system, and the filibuster. Such devices permit Representatives elected by very few citizens and Senators representing an insignificant fraction of the national electorate to block the enactment of laws. The executive veto, moreover, allows one stroke of the presidential pen to nullify the will of both legislative chambers. As a consequence, if proposed federal legislation touches the nerve of states’ rights in any meaningful way, it is vulnerable to its opposition on all sides.<sup>136</sup>

For Dean Choper, vetogates provided an especially powerful argument against federalist judicial review: they ensured that any congressional action challenged as an intrusion on state prerogatives had already passed through narrow procedural straits substantially controlled by state interests.<sup>137</sup>

Like Professor Wechsler’s, Dean Choper’s political safeguards include features that, however favorable for state interests, conflict with the self-determination principle. First, Dean Choper’s appeal to congressional delegations’ bipartisan pursuit of state interests counteracts the participation value. If, as I suggest below, the primacy of the two-party system degrades political participation by diminishing voters’ opportunities to express distinct preferences,<sup>138</sup> then collapsing the two parties into one is

133. *Id.* at 1563-64.

134. *See id.* at 1562-63 (noting that three-quarters of members of Congress have held office at the state or municipal level). Professor Kramer also places some stock in this fact as a political safeguard. *See Kramer, Politics, supra* note 1, at 285 (noting that states are training ground for federal officials); Kramer, *Understanding, supra* note 8, at 1551-52 (same).; *But see Marshall, supra* note 64, at 149 (emphasizing that “many federal officeholders do not rise through party ranks”).

135. *See generally* WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 66-67 (3d ed. 2001) (defining and discussing vetogates).

136. Choper, *National Power, supra* note 7, at 1567-68 (footnote omitted).

137. *See id.* at 1570 (noting that “[l]egislation affecting states’ rights must also clear the imposing hurdle of active congressional concern for state sovereignty”).

138. *See infra* notes 162-200 and accompanying text.

even worse. Second, although the vetogates upon which Dean Choper relies undoubtedly serve the public good to some extent, they also may undermine the self-determination principle. To the extent vetogates render the national legislative process cumbersome and ineffectual, they restrict governmental regulation of powerful private interests, which defines the supplemental regulation value. If vetogates diminish the importance of governmental institutions, they likely will discourage citizens from participating actively in the political process.

Larry Kramer, the most recent architect of a detailed political safeguards theory, largely disdains the formal, structural safeguards relied upon in the earlier accounts of the political safeguards critique.<sup>139</sup> Instead, he advances and refines Dean Choper's insight that practical features of the national political process protect state prerogatives.<sup>140</sup> The most important of these features, according to Professor Kramer, is the institution of political parties.<sup>141</sup> He emphasizes two relatively consistent characteristics of American political parties over time: they are non-programmatic, by which he means that they "are concerned more with getting people elected than with getting them elected for any particular

---

139. See Kramer, *Politics*, *supra* note 1, at 221-27 (distinguishing between state interests and state institutions); Kramer, *Understanding*, *supra* note 8, at 1504-11 (discussing weaknesses of Wechsler's structural argument).

140. Although Professor Kramer's theory of political safeguards primarily emphasizes the role of political parties, *see infra* notes 139-53 and accompanying text, he also argues that several other factors of the national political process—the federal government's reliance on state administrative bureaucracies, the simple existence of states as distinct units within the federal structure, and the cultural force of the idea of federalism—work together with parties to safeguard state prerogatives. See Kramer, *Politics*, *supra* note 1, at 283-87; Kramer, *Understanding*, *supra* note 8, at 1542-59.

141. Professor Kramer introduced his ideas about the importance of political parties for federalism in Kramer, *Understanding*, *supra* note 8, at 1523-42. He provides a historical grounding for those ideas in Kramer, *Politics*, *supra* note 1, at 268-87 (discussing background for thesis). Professor Kramer's connection of political parties to federalism draws on a rich political science literature. See, e.g., MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 254-76 (1966) (demonstrating how "undisciplined political parties function to produce government decentralization"); Theodore J. Lowi, *Party, Policy, and Constitution in America*, in *THE AMERICAN PARTY SYSTEMS: STAGES OF POLITICAL DEVELOPMENT* 238, 253-56 (William Nisbet Chambers & Walter Dean Burnham eds., 1967) (arguing that political parties strongly advance federalism); WILLIAM RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 129-36 (1964) (suggesting that success and shape of federalism in any country depends on nature of country's political parties); David B. Truman, *Federalism and the Party System*, in *POLITICS AND SOCIAL LIFE* 513-27 (Nelson W. Polsby et al. eds., 1963) (analyzing impact of political parties on federal system). *But see* Calabresi, *supra* note 29, at 792-95 (denying Wechsler and Choper accounts of political safeguards because they fail to account for weakening of political party system, which has undermined states' interests); Kaden, *supra* note 3, at 862-67 (arguing that political parties have declined in importance as protectors of state prerogatives in federal system); Marshall, *supra* note 64, at 149-53 (arguing that "the culture of political parties" does not effectively protect state prerogatives).

purpose,"<sup>142</sup> and they are noncentralized, by which he means that historically they have been "only loose confederations of interdependent, semi-autonomous state and local organizations."<sup>143</sup> Political parties, according to Professor Kramer, affect the state-federal balance in two ways. First, state and local party organizations historically have been important, if not essential, to the chances of aspirants for national office.<sup>144</sup> Second, "parties provide a fraternal connection among officials that helps expedite the day-to-day affairs of governing."<sup>145</sup> Both of these party functions protect state institutions by "linking the fortunes of officeholders at state and federal levels, fostering a mutual dependency that protects state institutions by inducing federal lawmakers to take account of (at least some) desires of state officials."<sup>146</sup>

Professor Kramer's thesis depends on the primacy of the American two-party system. He maintains that parties' "weakness" as nationwide organizations is what makes them valuable in safeguarding state prerogatives.<sup>147</sup> The need for American parties to form pragmatic coalitions that transcend ideology, an important aspect of their federalism-protecting "weakness,"<sup>148</sup> reflects the realities of our single-member district, plurality voting system, in which the need to win the political "center" tends to produce a two-party arrangement.<sup>149</sup> Similarly, the asserted nationwide

142. Kramer, *Understanding*, *supra* note 8, at 1524; *see also id.* at 1528 (describing American parties' "general commitment to victory over ideology"). Professor Wechsler also noted this feature of American political parties, unapologetically crediting the two-party system with "the success of our politics in the elimination of extremists . . . ." Wechsler, *supra* note 1, at 557.

143. Kramer, *Understanding*, *supra* note 8, at 1527.

144. *See id.* at 1529-39.

145. *Id.* at 1528 (footnote omitted).

146. *Id.* at 1523; *see also* Kramer, *Politics*, *supra* note 1, at 276 (noting that political parties "linked the fortunes of federal office holders to state politicians and parties and in this way assured respect for state sovereignty"). *But see* Marshall, *supra* note 64, at 149 (arguing that state parties fail to protect states' prerogatives because "[s]tate officeholders may likely conclude that the more their party succeeds in Congress, the more likely they are to succeed at the state level . . .").

147. *See* Kramer, *Politics*, *supra* note 1, at 282 (noting that parties are important to federalism because of their weakness); Kramer, *Understanding*, *supra* note 8, at 1536 (same).

148. *See* Kramer, *Understanding*, *supra* note 8, at 1526 (explaining that "the parties generally work hard to minimize ideological strife to the extent necessary to win, and by election time the ranks usually have closed (more or less)").

149. *See* Theodore J. Lowi, *Toward a Responsible Three-Party System*, in *A REPUBLIC OF PARTIES* 3, 9 (Theodore J. Lowi & Joseph Romance eds., 1998) (recognizing that in three-party systems "no party needs to seek a majority or pretend that it is a majority" in order to capture an election). The powerful tendency of plurality or "winner take all" voting regimes to produce two dominant political parties is commonly known as "Duverger's Law." *See* MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 217 (Malcolm Anderson trans., 1954) (reviewing electoral systems of several nations and contending that use of simple majority, single-ballot voting favors two-party system). Subsequent analyses have noted that the use of single-member legislative districts helps to perpetuate two-party duopoly. *See, e.g.*, JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN*

reach of American parties, which allows them to form bonds between state and national officials, characterizes only the two major parties; minor parties, when they have achieved any prominence in American politics, generally have been regionally based.<sup>150</sup> Professor Kramer emphasizes several factors in recent political history that have threatened the role of American parties in protecting state prerogatives, including intraparty democratizing reforms<sup>151</sup> and the increasing importance of private funding for national candidates.<sup>152</sup> These developments have primarily affected the two major parties.<sup>153</sup>

Professor Kramer does not flatly advocate the two-party system. His analysis is mainly descriptive, and he forswears any normative baseline of state power in the federal system that parties, or anything else, are sup-

---

AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 56, 303 n.24 (1995) (contending that "having single-member districts instead of at-large elections or multi-member districts accentuates the pressures plurality elections impose toward two-party systems"). A regime of plurality voting with single-member districts strongly limits the electoral opportunities of minor parties. See Paul S. Herron, *Two-Party Dominance and Minor Party Forays in American Politics*, in PAUL S. HERRON & JOHN C. GREEN EDs., *MULTIPARTY POLITICS IN AMERICA*, 21, 24 (1997) (noting that single-member, winner-take-all district arrangement is especially harmful to minor parties). This effect is evident in the United States. See STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO THE MAJOR PARTY FAILURE* 16-18 (1984) (maintaining that single-member district, plurality voting system explains two-party dominance in United States). Steven Calabresi makes an explicit connection between federalism and the two-party system when he points to "the rise of independent personality-driven third parties" as undermining states' power on the national political scene. Calabresi, *supra* note 29, at 793.

150. See JOHN F. BIBBY & L. SANDY MAISEL, *TWO PARTIES—OR MORE* 58 (1998) (noting that minor party candidates George Wallace in 1968 and James Weaver in 1892 had concentrated support in selected states but lacked broad-based appeal of major parties that is essential to gain Electoral College majority); WILLIAM GOODMAN, *THE TWO-PARTY SYSTEM IN THE UNITED STATES* 49 (1956) (recognizing that "with these few [successes] on the local level, minor parties, in the full sense, are not parties at all"). See generally LAWRENCE GOODWYN, *THE POPULIST MOMENT* (1978) (discussing regional political success of populists in late 19th and early 20th centuries).

151. See Kramer, *Understanding*, *supra* note 8, at 1531 (noting that internal party reforms are weakening political parties as protectors of states); see also Calabresi, *supra* note 29, at 793 (suggesting that "the collapse of traditional state-party machines, and the substitution of primaries for state caucuses" have undermined states' interests).

152. See Kramer, *Understanding*, *supra* note 8, at 1532-33 (noting that campaign process was "profoundly affected by changes in election financing"); see also Calabresi, *supra* note 29, at 794-95 (arguing that increasing cost of national political campaigns and rise of political action committees have undermined states' interests); Marshall, *supra* note 60, at 150-51 (same).

153. See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 SUP. CT. REV. 331, 350-55 [hereinafter Hasen, *Entrenching*] (describing effects since 1960s of intraparty reforms and campaign finance changes on Democratic and Republican parties).

posed to guarantee.<sup>154</sup> His ideal for federalism, however, is that states have “the capacity to compete effectively for political authority,”<sup>155</sup> and he portrays the two-party system as the primary method by which states can do so. He also portrays the resilience of the major parties, in forms such as the limited success of intraparty democratizing reforms and of party spending restrictions, as good news for the political safeguards of federalism.<sup>156</sup> Professor Kramer, then, shares with Professor Wechsler and Dean Choper a normative commitment to the features of the national political system that he identifies as safeguards of federalism.

Although Professor Kramer vigorously denounces the present Court’s forays into federalist judicial review,<sup>157</sup> he identifies a role for the Court in his posited system of political safeguards. If some baseline of state power (or, in Professor Kramer’s formulation, the states’ capacity to compete for power) is constitutionally mandated, and if the political system rather than courts is to serve that mandate, then courts will have to engage in some measure of representation-reinforcing judicial review,<sup>158</sup> not to protect

---

154. See Kramer, *Politics*, *supra* note 1, at 292 (“[T]he substantive content of any normative theory of federalism can never be other than open-ended and contestable[.]”).

155. *Id.* at 286.

156[W]hile primaries opened up the presidential selection process a bit, a candidate still needs support from party regulars to have a chance of winning. . . . The parties similarly found ways to preserve a role for themselves in fundraising and campaign financing, through techniques like general ads and coordinating PAC spending.

Kramer, *Understanding*, *supra* note 8, at 1535 (footnote omitted).

157. “Stripped of what turns out to be a phony originalist justification, the Court has no excuse for continuing to stumble around the United States Code, heedlessly striking down federal laws in what amounts to a treacherous game of blind man’s bluff with the Constitution and American government.” Kramer, *Politics*, *supra* note 1, at 291.

158. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (suggesting appropriateness of “more exacting judicial scrutiny” of “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (elaborating theory of representation-reinforcing judicial review). The sort of representation-reinforcing review needed to sustain political safeguards of federalism differs dramatically from the “cueing” function some have suggested as an alternative to full-scale federalist judicial review. Under the cueing theory, the Court needs to fire the occasional shot across Congress’ bow to remind it to maintain political safeguards. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 191-95* (1982) (characterizing *National League of Cities v. Usery*, 426 U.S. 833 (1976), as “a cue to a fellow constitutional actor, an incitement to Congress to renew its traditional role as protector of the states”); Althouse, *supra* note 33, at 803 (noting that uncertainty of what court might do gives Congress an incentive to enforce federalism); Bednar & Eskridge, *supra* note 3, at 1484 (characterizing Court’s limitation of congressional power under Commerce Clause in *United States v. Lopez*, 514 U.S. 549 (1995), as “a remand for Congress to attend to federalism values more explicitly”); Jackson, *supra* note 13, at 2226-27 (arguing that “the possibility of judicial review and disagreement may be necessary (or at least helpful) to promote the likelihood that the political process in fact works” to consider states’ interests”); see also Young, *supra* note 20, at 1352-73 (advocating



the mandated baseline directly but to preserve the features of the political process that protect the baseline.<sup>159</sup> Professor Kramer provides what he characterizes as two negative examples of this sort of judicial review as to political parties: (1) the Supreme Court's attacks on party patronage practices;<sup>160</sup> and (2) its privileging of private sources of campaign financing over campaign spending by the parties.<sup>161</sup>

In fact, the Court in recent Terms has intervened vigorously on behalf of the two major political parties, and its decisions manifest the inconsistencies between the self-determination principle and Professor Kramer's thesis.

B. *Tension Between Political Safeguards of Federalism and the Self-Determination Principle: Representation-Reinforcing Review and the Court's Recent Decisions on Political Parties*

Professor Wechsler and Dean Choper advocated some political safeguards of federalism that undermined the principle of political self-determination.<sup>162</sup> Similarly, an assessment of the relationship between the major political parties and the right to political self-determination, as opposed to the relationship between the parties and federalism in the abstract, reveals that representation-reinforcing judicial review along the lines suggested by Professor Kramer's theory of political safeguards may do more harm than good. At the same time the present Supreme Court has been reviving federalist judicial review, it has almost as aggressively been propping up the Democratic and Republican parties against various

---

aggressive form of process federalism accompanied by judicial enforcement of substantive limits on federal power). Under that approach, the Court continues to hold Congress to some substantive standard of respect for state prerogatives. Under the approach suggested here, the Court simply acts to preserve essential features of the political system.

159. See Kramer, *Understanding*, *supra* note 8, at 1486-87 n.3 (suggesting this sort of representation-reinforcement as explanation for *New York v. United States*, 505 U.S. 144 (1992)); *id.* at 1501 n.30 (arguing that, under political process approach to safeguarding federalism, Court still may strike down federal legislation on the ground "that it interferes with or obstructs the constitutional process for allocating power between state and federal governments"). Professor Kramer's conception of representation-reinforcing review of political safeguards is informed by Andrzej Rapaczynski's effort to adapt process jurisprudence to federalism cases. See Rapaczynski, *supra* note 3, at 364-65. A consequence of this insight about judicial review, which Professor Kramer does not address, is that the Court may need to review not only federal legislation but also state legislation in order to preserve political safeguards. See *infra* notes 163-69 and accompanying text (discussing *California Democratic Party v. Jones*, 530 U.S. 567 (2000)).

160. See Kramer, *Understanding*, *supra* note 8, at 1531 & n.102 (citing, as an example, *Elrod v. Burns*, 427 U.S. 347 (1976)).

161. See Kramer, *Understanding*, *supra* note 8, at 1532-33 & n.110 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). Recent events have undercut the validity of this example. See *infra* notes 170-81 and accompanying text (discussing *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996)).

162. For a discussion of these problematic safeguards, see *supra* notes 119-20, 133 and accompanying text.

challenges to their political primacy. The Court has not cast its solicitude for the major parties in terms of “states’ rights,” but one consequence of these decisions, on Professor Kramer’s account of political safeguards, should be to strengthen the states’ position in the federal system. A brief survey of the decisions, however, demonstrates how they have undermined the self-determination principle and thus disengaged from the best justification for protecting state prerogatives.

In *California Democratic Party v. Jones*,<sup>163</sup> the Court struck down a blanket primary election system, which California voters had enacted by popular referendum pursuant to the state constitution.<sup>164</sup> The blanket primary permitted voters in primary elections to choose freely among candidates of all parties, regardless of the voter’s party affiliation.<sup>165</sup> Such a system prevents disenfranchisement of independent voters and minority-party voters in districts substantially controlled by one party, allowing such voters to participate in selecting the dominant party’s general election nominee without giving up their own party affiliations.<sup>166</sup> It enhances the likelihood that a given voter will feel motivated to participate in the primary election by removing party affiliation as a potential barrier between the voter and the candidate she most prefers. It shifts some measure of control over the identities of general election candidates from private entities—the party organizations—to the people generally, thus increasing the importance of voter participation in primary elections.<sup>167</sup>

The open primary was challenged by four political parties, notably the Democratic and Republican parties, which argued that the system interfered with their First Amendment freedom of political association. The Supreme Court agreed. Brushing aside the blanket primaries’ effects on political participation, the Court characterized the case as pitting the state’s regulatory interest against the parties’ liberty interest. California effectively had “force[d] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affili-

---

163. 530 U.S. 567 (2000).

164. See *Jones*, 530 U.S. at 569.

165. See *id.* at 570-71.

166. See *id.* at 581 (noting that blanket primary opened candidate selection process to persons unaffiliated with party). Even Bruce Cain, a staunch advocate against the constitutionality of the blanket primary, concedes that the blanket primary’s inclusion of nonpartisan voters increased electoral participation by about nine percent in California primary elections. See Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793, 798 (2001) (noting that average turnout increased from 27.4% of eligible vote in closed primaries to 29.8% in blanket primaries). Professor Cain, however, dismisses this effect as “very modest in size.” *Id.*

167. See *Jones*, 530 U.S. at 581-82.

ated with a rival.”<sup>168</sup> According to the Court, this burden on the parties was “severe and unnecessary,” and therefore unconstitutional.<sup>169</sup>

The Court invoked the First Amendment to scuttle another governmental restriction on political parties in *Colorado Republican Federal Campaign Committee v. FEC*.<sup>170</sup> There, the FEC brought suit charging that the Colorado Republican party had violated provisions of the Federal Election Campaign Act (“FECA”) that restricted the amounts of money political parties could spend on behalf of their candidates in general election campaigns.<sup>171</sup> Justice Breyer’s plurality opinion recognized that this restriction on parties’ spending was part of a regulatory scheme designed to prevent the reality or appearance of political corruption and to “level the electoral playing field” to enhance ordinary voters’ participation in the political process.<sup>172</sup> The Court in *Buckley v. Valeo*<sup>173</sup> had held the former aim to be a constitutionally permissible reason for regulating campaign contributions.<sup>174</sup> Moreover, the restrictions on parties’ financial involvement in campaigns naturally favored minor parties, whose comparatively miniscule fundraising capacities prevent them from competing financially with the Democrats and Republicans.

The plurality, however, found the party’s financial efforts on behalf of its candidate to be “independent expenditures” rather than “contributions”<sup>175</sup> and thus subject to the strongest First Amendment protection.<sup>176</sup>

---

168. *Id.* at 577.

169. *Id.* at 586. The *Jones* decision has divided commentators. Compare Cain, *supra* note 166, at 801-10 (extolling *Jones* as a needed victory for political parties’ autonomy), with Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 826-37 (2001) (criticizing *Jones* for needlessly overriding California voters’ chosen process of nominating candidates for elections) [hereinafter Hasen, *Parties*].

170. 518 U.S. 604 (1996).

171. See Federal Election Campaign Act of 1971, 90 Stat. 486 (codified as amended, 2 U.S.C. § 441a(d)(3) (1976) (limiting amounts that national and state party committees may spend in federal elections). Unlike the other cases discussed in this section, *Colorado Republican* involved a question of federal rather than state law. Thus, the case does not illustrate the interaction between state policymaking and the self-determination principle. My focus, however, is on the importance of the political parties as safeguards of federalism, a matter that federal regulation of the parties puts directly at issue.

172. See *Colorado Republican*, 518 U.S. at 609.

173. 424 U.S. 1 (1976).

174. See *Buckley*, 424 U.S. at 26-38 (recognizing that Congress has valid interest in guarding against corrupting potential of large financial contributions to candidates and that such interest justifies placing ceiling on contributions).

175. See *Colorado Republican*, 518 U.S. at 619-23. The Court recently reaffirmed the constitutional difference between contributions and expenditures in upholding a state’s limits on contributions for statewide elections. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386 (2000).

176. The plurality’s reasoning turned on the fact that the Republican party had not coordinated the expenditures at issue with its candidate. See *Colorado Republican*, 518 U.S. at 617-18 (stating that constitutionally significant fact was lack of coordination between candidate and source). The Court this past Term, in a

Recalling the independent expenditure limitations struck down in *Buckley*,<sup>177</sup> the Court held the limitations at issue violated the Colorado Republican Party's "core" First Amendment rights.<sup>178</sup> The plurality further concluded that political parties' independent expenditures did not present "any special dangers of corruption."<sup>179</sup> To the contrary, the Court discerned in FECA's legislative history "Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections,"<sup>180</sup> which made the restrictions at issue all the more suspect.<sup>181</sup>

The Court made its solicitude for the interests of the major political parties most explicit in *Timmons v. Twin Cities Area New Party*.<sup>182</sup> In *Timmons*, the Court upheld a Minnesota law that banned "fusion candidacies," a strategy under which a candidate appears on the ballot line of more than one political party. The challenger, a minor political party, asserted the same sort of associational interest the Court would later uphold in *Jones*. The fusion option assisted minor parties in broadening the political dialogue by raising issues of concern to a substantial number of voters that the major parties might not raise.<sup>183</sup> Using such a tool, minor parties can bring otherwise disaffected voters into the political process while serving as insurance against the danger that the major parties will ignore the people's interests.<sup>184</sup> The Court of Appeals in *Timmons* had recognized that

---

sharply divided 5-4 reprise of *Colorado Republican*, upheld federal limits on political party expenditures that the party coordinates with its candidate. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 121 S. Ct. 2351 (2001).

177. See *Buckley*, 424 U.S. at 51 (concluding that independent expenditure limitation is unconstitutional).

178. *Colorado Republican*, 518 U.S. at 612-16 (holding limitation unconstitutional).

179. *Id.* at 616; see also *id.* at 646 (Thomas, J., concurring in judgment and dissenting in part) ("The structure of political parties is such that the theoretical danger of those groups[] actually engaging in quid pro quos with candidates is significantly less than the threat of individuals[] or other groups[] doing so").

180. *Id.* at 618.

181. In the election cycles following *Colorado Republican*, the major parties' financial efforts in federal campaigns increased dramatically. See Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 628 (2000) (explaining that major parties initially increased independent expenditures on behalf of candidates, then shifted emphasis to increased collection and spending of "soft money" for "issue advocacy").

182. 520 U.S. 351 (1997).

183. See Joel Rogers, *Pull the Plug*, 52 ADMIN. L. REV. 743, 749-50 (2000) (noting that fusion candidacies have "materially affected election outcomes—with the result that minor party members achieve at least some bargaining power with their major party colleagues").

184. See James Gray Pope, *Fusion*, *Timmons v. Twin Cities Area New Party*, and *the Future of Third Parties in the United States*, 50 RUTGERS L. REV. 473, 491 (1998) (suggesting that fusion bans weaken minor parties in their "pressure group" role of "communicating preferences, both of candidates to the voters and of voters to elected officials"); Terry Smith, *A Black Party? Timmons, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 9 (1998) (classifying fusion bans

Minnesota's fusion ban prevented minor parties from "developing consensual political alliances and thus broadening the base of public participation in and support for [their] activities."<sup>185</sup>

The Supreme Court, however, upheld the fusion ban. The Court emphasized states' traditionally broad powers to regulate elections, and it found that "valid state interests in ballot integrity and political stability" justified the state's burden on the minor party's associational rights.<sup>186</sup> More importantly, the Court strongly endorsed the state's interest in supporting the two major political parties. Chief Justice Rehnquist wrote for the majority:

States . . . have a strong interest in the stability of their political systems. This interest does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence. . . . That said, the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system, and that temper the destabilizing effects of party-splintering and excessive factionalism. The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.<sup>187</sup>

The *Timmons* Court's reliance on the state's interest in maintaining "political stability" to justify state legislative discrimination in favor of the major parties complements Professor Kramer's theory of how the major political parties provide political safeguards for states' prerogatives in the federal system.<sup>188</sup>

On Professor Kramer's account of the political safeguards of federalism, *Jones*, *Colorado Republican*, and *Timmons* were salutary decisions. Recall that he refers to the growth of primaries and limits on party campaign spending as factors that have weakened parties in their role of protecting state prerogatives, and his conception of how parties serve that role de-

---

among "barriers to entry intended to prevent outsiders . . . from competing against and ultimately invading the province of the two-party duopoly").

185. *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 199 (8th Cir.), *overruled by Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

186. *Timmons*, 520 U.S. at 369-70.

187. *Id.* at 366-67 (citations and footnotes omitted).

188. The Court showed similar disregard for the interests of minor parties in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), which rejected a First Amendment challenge to a public broadcaster's exclusion of a minor party candidate from a televised debate during a congressional campaign. Although affirming the requirement that public broadcasters' decisions about which candidates to include must reflect "neutrality," *see id.* at 676, the Court concluded that "[o]n logistical grounds alone, a public television editor might, with reason, decide that the inclusion of all ballot-qualified candidates would actually undermine the educational value and quality of debates." *Id.* at 681 (internal quotation marks and citation omitted).

pends on features of the two-party system.<sup>189</sup> By rejecting the open primary, expanding parties' ability to spend in campaigns, and endorsing state restrictions on minor parties, the Court prevented the weakening of the major parties. That action, under Professor Kramer's thesis, preserved a crucial mechanism by which state institutions compete for policymaking authority in the federal system. Measured against the self-determination principle, however, all of these decisions were plainly wrong.

First, the decisions undermine the participation value of federalism. The open primary struck down in *Jones* increased popular input into the selection of candidates, and it encouraged participation by voters who might otherwise be disenchanted with their paucity of influence or options. The restriction on parties' financial support for their candidates struck down in *Colorado Republican* increased the influence that individuals of average or modest means could have in campaigns, and it facilitated minor parties' expansion of the political dialogue. The fusion ban upheld in *Timmons* severely limits minor parties' abilities to organize and to inject their messages into the political dialogue, and the ban thus decreases the likelihood that political dissenters will participate in the electoral process. In each of these cases, the Court stifled political activity, favoring the operational autonomy of the major political parties over the value, essential to the self-determination principle, of maximizing opportunities for political participation.

Second, the decisions undermine the supplemental regulation value of federalism. The Democratic and Republican parties are powerful private interests that have tremendous power over ordinary people's lives. For that reason alone, the self-determination principle suggests that the Court should be wary of shielding the major parties from governmental oversight.<sup>190</sup> Even more important, both major parties are subject to extremely strong influence by corporations and wealthy individuals.<sup>191</sup> The parties provide an important vehicle through which concentrations of cap-

---

189. See *supra* notes 142-50 and accompanying text.

190. "If anything, the evidence of the two major parties' control over the political process should militate toward lesser, rather than greater, First Amendment protection for the parties in the political process." Hasen, *Parties*, *supra* note 169, at 835.

191. See, e.g., GREIDER, *supra* note 107, at 246-69 (discussing corporate control of Democratic party); Anker et al., *supra* note 101, at 100-01 (portraying parties as mechanisms for containing social unrest to benefit business interests); Richard Briffault, *Campaign Finance, The Parties, and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 14 CONST. COMM. 91, 115 (1997) (contending that major parties effectively sell access to candidates). The Court acknowledged some danger in the relationship between the major parties and powerful private interests when, in the subsequent phase of the *Colorado Republican* litigation, it held that coordinated party expenditures created a danger of corruption. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 121 S. Ct. 2351, 2355 (2001) (noting that "even under present law substantial donations turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates") (footnote omitted).

ital may undermine personal freedom. For this reason, the Court's *laissez-faire* attitude in *Colorado Republican* toward the major parties' financial participation in campaigns clashes pointedly with the supplemental regulation value. The decisions in *Jones* and *Timmons*, which more generally elevated the interests of the major parties over those of the people, are especially troubling for political self-determination because of their consequences for state power. In *Jones*, the Court prevented a state from advancing the supplemental regulation value. In *Timmons*, the Court allowed a state to undermine that value. Those results are anathema to a meaningful regard for federalism rooted in the self-determination principle.

Indeed, Justice Stevens dissented from all three of these decisions in terms that resonate with the self-determination principle.<sup>192</sup> In *Timmons*, he emphasized the importance of fusion candidacies for encouraging "voters with viewpoints not adequately represented by the platforms of the two major parties"<sup>193</sup> to participate in the political process, and he condemned restrictions on fusion candidacies as laws designed "to preserve [the two major parties'] positions of power."<sup>194</sup> In *Colorado Republican*, he maintained that a political party's "unique relationship with the candidate it sponsors . . . creates a special danger that the party—or the persons who control the party—will abuse the influence it has over the candidate by virtue of its power to spend."<sup>195</sup> In addition, he departed not only from the majority, but also from *Buckley*, by declaring that "the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns."<sup>196</sup>

Most strikingly, Justice Stevens dissented in *Jones* based on his explicit recognition of the states' role in advancing the self-determination principle. He criticized the majority for failing to draw two essential distinctions:

- (1) the distinction between a private organization's right to define itself and its messages, on the one hand, and the State's right to define the obligations of citizens and organizations performing public functions, on the other; and (2) the distinction between laws that abridge participation in the political process and those that encourage such participation.<sup>197</sup>

---

192. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 590-92 (2000) (Stevens, J., dissenting); *Timmons*, 520 U.S. at 370 (Stevens, J., dissenting); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 648 (1996) (Stevens, J., dissenting); see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("Money is . . . not speech."); *Forbes*, 523 U.S. at 683-95 (Stevens, J., dissenting).

193. *Timmons*, 520 U.S. at 381 (Stevens, J., dissenting).

194. *Id.* (footnote omitted).

195. *Colorado Republican*, 518 U.S. at 648 (Stevens, J., dissenting).

196. *Id.* at 649.

197. *Jones*, 530 U.S. at 591-92 (Stevens, J., dissenting).

These points correspond to the supplemental regulation and participation values of federalism under the self-determination principle. Justice Stevens concluded that “[w]hen a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, [the State] is acting not as a foe of the First Amendment but as a friend and ally.”<sup>198</sup> Thus, “principles of federalism” should have compelled the Court “to respect the policy choice made by the State’s voters.”<sup>199</sup> All the essential attributes of the self-determination principle are present in Justice Stevens’ *Jones* dissent: emphasis on the values of political participation and of governmental regulation in the public interest; recognition of the contribution states can make to this value; and advocacy of state prerogatives without any call for limitations on federal power.<sup>200</sup>

#### IV. CONCLUSION

The political safeguards critique of federalist judicial review is on the right track. The critique correctly views judicial vindication of state prerogatives as unnecessary and even counterproductive in our federal system, and it properly subordinates state prerogatives to the national political process. The effectiveness of the critique, however, has been limited by its uncertain linkage to any explanation of why and to what extent state prerogatives deserve protection at all. This Article has suggested that protecting state prerogatives matters primarily as one important way of guaranteeing the people’s right to political self-determination, because states provide increased opportunities for political participation beyond what the federal government offers and supplement the federal government’s efforts to regulate powerful private interests that threaten personal freedom. The Supreme Court’s recent string of decisions aggrandizing the power of the major political parties, while consistent with the most sophisticated prescription for political safeguards of federalism, has severely undermined the self-determination principle. To the extent the Court must engage in representation-reinforcing review to bolster the states’ contribution to political self-determination, it should concentrate on enhancing opportunities for political participation at the state level and strengthening state regulatory power to supplement federal regulations that protect the public interest.

---

198. *Id.* at 595-96.

199. *Id.* at 591.

200. Justice Stevens has dissented consistently from the Court’s recent federalism decisions. *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91-92 (2000) (Stevens, J., concurring in part and dissenting in part); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 648 (1999) (Stevens, J., dissenting); *Printz v. United States*, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (Stevens, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 615 (1995) (Stevens, J., dissenting).



