College of William & Mary Law School
William & Mary Law School Scholarship Repository

Faculty Publications | Faculty and Deans

2004

The Judicial Safeguards of Federalism

Neal Devins
William & Mary Law School, nedevi@wm.edu

Repository Citation
Devins, Neal, "The Judicial Safeguards of Federalism" (2004). *Faculty Publications.* Paper 881.
http://scholarship.law.wm.edu/facpubs/881

Copyright c 2004 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
http://scholarship.law.wm.edu/facpubs

Copyright 2004 by Northwestern University, School of Law
Northwestern University Law Review

Printed in U.S.A.
Vol. 99, No. 1

THE JUDICIAL SAFEGUARDS OF FEDERALISM

Neal Devins[*]

I. INTRODUCTION

There is no federalism constituency within Congress. Not only do federal lawmakers and national lobbyists gladly sacrifice federalism in order to advance other interests, but state officials also "have systematic political interests that often cause them to undermine federalism."[1] In explaining why both state and federal officials discount federalism, John McGinnis and Ilya Somin's *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System* provides an important and persuasive critique of the claim that the national political process inevitably protects federalism.[2]

My comments will extend *Federalism v. States Rights* in two ways. First, I will posit an alternative explanation as to why the national political process does not value structural federalism. In particular, I will argue that *even if* the American people were well informed about the benefits of federalism, they would still trade off those benefits in order to secure other policy objectives. For this reason, I think McGinnis and Somin are wrong in suggesting that informed voters would likely value federalism over other objectives and, consequently, that the problem with the political process policing federalism is that Americans are "know nothings" who have little incentive to learn about, let alone "monitor[,] the federal state balance."[3] As I will argue in Section II of this Comment, there is no reason to believe that the problem with federalism is that the principals (the American voters) lack the impetus to check their agents (state and federal officials). The problem is more pervasive: No one really cares about federalism.[4]

---

[*] Goodrich Professor of Law and Professor of Government, College of William and Mary. Thanks to John McGinnis for asking me to comment on his and Ilya Somin's paper and to John and Ilya for writing such an important, engaging paper. Thanks also to Jim Gardner and Alan Meese for helpful discussions about the issues examined in this Comment.

[1] John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, NW. U. L. REV. 103 (2004).

[2] For a collection of leading articles both advancing and critiquing this "political safeguards" claim, see *id.* at 103–04.

[3] *Id.* at ms. 95, 100–01.

[4] In arguing that voters, interest groups, and elected officials care more about underlying policy issues than federalism, I do not mean to cast doubt on the public policy benefits of federalism. After all, federalism may be a bit like liver—good for you, but something that very few people would choose. For additional discussion, see McGinnis & Somin, *supra* note 1, at 106–112 (discussing public policy bene-

HeinOnline -- 99 Nw. U. L. Rev. 131 2004-2005

Second, by looking at congressional responses to the Rehnquist Court's federalism revival, I will argue that the Court could successfully pursue a more ambitious theory of structural federalism. In short, because interest groups, voters, and elected officials care more about underlying policy issues than about structural protections, there is no federalism constituency to block the Rehnquist Court's reinvigoration of federalism. This conclusion is in tension with McGinnis and Somin's contention that federal and state officials strongly support deferential judicial review of federalism issues and, as such, might resist additional judicial tightening of Congress's powers.

II. FEDERALISM AND THE NATIONAL POLITICAL PROCESS

Americans have low levels of political knowledge and almost no knowledge of the division of power between federal and state governments.[5] Extrapolating from social science research on political knowledge, McGinnis and Somin offer a common sense explanation for voter ignorance on federalism: Unlike issues such as gun control, same sex marriage, and the death penalty, federalism is "too abstract and complicated to engage the passion of citizens."[6] What, then, of Americans who are well-informed about the federal-state balance, including the benefits of federalism outlined in *Federalism vs. States' Rights*? Would they trade off federalism for other objectives?

The answer to this question is important. One premise of the principal-agent theory that animates McGinnis and Somin's analysis is that informed Americans would *not* sacrifice structural federalism. Otherwise, there would be no need for judicial enforcement of federalism to protect the interests of voter/principals. Voter/principals, instead, would simply be part of a governmental system that regularly discounts federalism. Under this scenario, the Supreme Court might still protect federalism. But the rationale for such protection would not be moored to principal-agent theory. The justification for judicial protection of federalism, instead, would be tied to judicial efforts to advance the public interest or the Court's belief that the text and original meaning of the Constitution mandate judicial enforcement of federalism.[7]

---

fits of federalism); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1194–1200 (2001) (explaining how judicial enforcement of federalism helps ensure that legislation serves the public good, not simply private interests).

[5] McGinnis & Somin, *supra* note 1, at 95–96 (citing social science research).

[6] *Id.* at 96.

[7] McGinnis and Somin view their principal-agent argument as a "supplement to analyses of text and original meaning." McGinnis & Somin, *supra* note 1, at 92. They also back public interest justifications for judicial enforcement of federalism, noting that "the goals of state and federal officials are not always congruent with the public interest." *Id.* at 91. For an article of mine advancing a public interest justification for judicial enforcement of federalism, see Devins, *supra* note 4, at 1194–1200.

HeinOnline -- 99 Nw. U. L. Rev. 132 2004-2005

McGinnis and Somin, to their credit, call attention to some of the reasons that informed voters might subordinate federalism to substantive policy objectives. They note that our "mass culture has largely extirpated state differences" and that "sentiments that may have previously motivated citizens to take an interest and protect federalism have faded."[8] They also recognize that citizens are more interested in policy issues like civil liberties than they are in "reviving the original constitutional structure."[9] For the most part, however, McGinnis and Somin link this discounting of federalism to voter ignorance about federalism and its benefits. Indeed, consistent with the principal-agent theory that grounds their argument, they suggest that informed voters might not subordinate federalism.

McGinnis and Somin offer no direct proof for this proposition. Rather, they simply note that "even . . . those who would prefer a consistent respect for federalism to their particular first order substantive policies" might nevertheless discount federalism because "they have no assurance that their political opponents will similarly respect federalism."[10] I have no doubt that this claim is correct. At the same time, this claim speaks only to "those who would prefer a consistent respect for federalism." The more important question is whether a credible commitment to federalism would prompt *most informed voters* to place federalism ahead of their preferred substantive policies. That question is never considered by McGinnis and Somin. Moreover, their conclusion seems contrary to the historical record and in tension with their claim that citizens "lack the attachments to their states that may have motivated them to pay attention to issues of federal structure in the past."[11]

Voters, even those who understand and value federalism, may nevertheless have strong overriding preferences about one or more substantive issues. Single issue voters are a classic and extreme example of this phenomenon. These voters are willing to subordinate secondary preferences (including federalism) in order to secure their first order preferences (typically the environment, civil rights, gun control, or abortion). Consider, for example, abortion rights. Pro-life voters embrace the pro-life agenda sometimes by supporting and other times by opposing measures that rely on an expansive view of congressional power. Partial birth abortion bans are approved and freedom of choice legislation resisted—even though both measures rely on broad understandings of congressional power. Likewise, pro-choice voters embrace the pro-choice agenda, opposing partial birth bans and supporting freedom of choice legislation. These voters, in other words, are "willing to contemplate the exercise of power by either level of

---

[8] McGinnis & Somin, *supra* note 1, at 96.

[9] *Id.* at 97.

[10] *Id.* at 100.

[11] *Id.* at 96; *see also supra* notes 8–9 and accompanying text (discussing why McGinnis and Somin think that voters might discount structural federalism).

HeinOnline -- 99 Nw. U. L. Rev. 133 2004-2005

government, depending upon which level can more persuasively demonstrate that it can do the better job."[12]

Single issue voters are certainly the exception, not the rule. But the willingness of lawmakers and interest groups to manipulate federalism in order to secure preferred substantive policies is the rule. Indeed, the historical record is so overwhelming that it is hard to believe that a majority of informed voters would suspend their personal policy preferences in order to reap the benefits of structural federalism.

The propensity of the American people to pay more attention to desired results than to which level of government is acting on their behalf dates back to the Framers. Writing in the *Federalist Papers*, Alexander Hamilton claimed that if either the state or federal government "invaded" their rights, citizens "can make use of the other, as the instrument of redress."[13] Under this view, the state and federal government would compete with each other, and the people would decide which level of government would predominate. Accordingly, during the early Republic, the "rule of thumb seemed to be, when one's rivals or enemies were in control of the central government, one was prone to savor states' rights, but when one's own faction was in control, the doctrine lost its zest."[14]

Consider, for example, the Louisiana Purchase.[15] Northern Federalists, proponents of centralized federal power, and Jeffersonians, who consistently advocated in favor of states' rights, flipped their normal positions when fighting over the Purchase. Northerners feared that the Purchase would shift power to the South and the West and, accordingly, embraced states' rights. Jeffersonians, in contrast, thought it more important to complete the Purchase than to run the risk of waiting for a constitutional amendment that would incorporate the Purchase into the Union.

This pattern of shifting constitutional positions on federalism runs through American history. Rather than adhere to a consistent position on federalism, Americans have always let their views on first order policy priorities dictate their views on federalism. Before the Civil War, abolitionists opposed federal fugitive slave laws on states' rights grounds (while proslavery forces embraced this exercise of federal power).[16] After the start of the Civil War, however, abolitionists embraced nationalistic solutions and

---

[12] James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1010 (2003).

[13] THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For additional relevant quotes from the Federalist Papers, see Gardner, *supra* note 12, at 1088–89.

[14] FORREST MCDONALD, STATES' RIGHTS AND THE UNION 48 (2000). For examples of this practice during the early Republic, see *id.* at 27–70.

[15] This paragraph is based on Forrest McDonald's account of the Louisiana Purchase. *See id.* at 58–62.

[16] *See id.* at 158–61; Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1025 (1997).

HeinOnline -- 99 Nw. U. L. Rev. 134 2004-2005

pro-slavery forces espoused states' rights arguments. Likewise, before workers could turn to the federal government during the New Deal, turn-of-the-century progressives "strove to curb the power of entrenched corporate wealth" (and federal government support for big business) by embracing states' rights.[17] Today, progressives invoke federalism in order to secure gains made in the federal courts, opposing nationwide bans on partial birth abortion and same sex marriage as an improper intrusion on state prerogatives.[18] When pursuing judicial invalidations of state abortion laws and state restrictions on gay rights, however, progressives embraced national standards.

For their part, elected officials ostensibly committed to federalism have proven quite willing to sacrifice this commitment in order to secure desired policy goals. Consider, for example, the Reagan administration. On the one hand, the administration strongly backed federalism—issuing an executive order on federalism, pushing for state control of federal grants, and asking the Supreme Court to return power to states on abortion, school desegregation, and prayer.[19] Despite this commitment to federalism, the administration was willing to intervene at the state and local level to advance its own agenda. In the *Baby Doe Case*, the administration unsuccessfully argued that federal standards, not state and local ones, ought to govern medical decisions involving infants born with severe handicaps.[20] The administration's enforcement of its federalism executive order was also sporadic; sometimes the administration seemed willing to back business interests at the expense of the executive order. Former Assistant Attorney General Douglas Kmiec provides a revealing account of one of these episodes.[21] In response to a California initiative requiring warning labels on products containing carcinogens, business lobbyists successfully pushed the administration to conclude—contrary to the executive order—that federal law preempted this state initiative. Although the preemption regulation never took effect (because of the handover of power from the Reagan administration to the Bush administration), Kmiec's account highlights why it is that presidents are unlikely to value federalism ahead of other policy priorities.[22]

---

[17] Eugene D. Genovese, *Getting States' Rights Right*, ATL. MONTHLY, March 2001, at 82.

[18] Simon Lazarus, *Next on Abortion: Supreme Collision*, WASH. POST, Nov. 20, 2003, at B-4 (partial birth abortion); Wayne Woodlief, *Divisive Issue Groomed to Kerry's Edge*, BOSTON HERALD, Apr. 1, 2004, at 39 (same sex marriage).

[19] *See* NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 68–69, 134–35, 202–04 (2004) (discussing, in order, executive orders, abortion, and school prayer).

[20] Bowen v. Am. Hosp. Ass'n, 476 U.S. 610 (1986).

[21] DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT 143–49 (1992).

[22] For a related argument involving the separation of powers, see Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17 (1995) (arguing that the pursuit of preferred policy objectives makes it impossible for presidents to consistently enforce a unitary vision of the separation of powers).

HeinOnline -- 99 Nw. U. L. Rev. 135 2004-2005

The Reagan administration's practices are hardly unusual. George W. Bush's administration's support for national standards on same sex marriage, physician-assisted suicide, and partial birth abortion are recent examples of this phenomenon.[23] Likewise, notwithstanding the fact that Republicans took over Congress in 1994 by running on the anti-big government "Contract with America," Republican lawmakers strongly backed national standards on tort reform, telecommunications reform, and numerous criminal law initiatives.[24]

The willingness of Republican lawmakers and the Reagan and Bush administrations to subordinate federalism, in part, is tied to their respective beliefs that the nationalist measures they support are politically popular. Consider, for example, Congress's enactment of sex offender notification laws as well as legislation prohibiting carjacking and gun possession near schools. Lawmakers backed these laws because they would bolster their position with voters.[25] In other words, the failure of the political process to police federalism is not simply about the incentives of states, interest groups, and federal officials inside the Washington, D.C. beltway.[26] The problem is also tied to the fact that self-interested voters are able "to move freely from one level of government to another in an attempt to find the level at which they might try most advantageously to get what they want."[27] Unless these voters perceive that the benefits of federalism outweigh their first order substantive policies, they will trade off federalism (even if they think that there is a credible commitment to enforce it).

For this very reason, there is no federalism constituency pushing lawmakers to embrace a broad or narrow view of federal power.[28] Voters, in-

---

[23] McGinnis and Somin point to these three episodes as instances where the "subordination of federalism to other goals" might not take place if there was "a credible commitment to enforcing federalism." McGinnis & Somin, *supra* note 1, at 99. For reasons detailed in this section, I think that informed voters might well trade off federalism *even if* there was a credible commitment to enforce it.

[24] *See Forgotten Federalism*, HOUS. CHRON., Mar. 7, 1995, at 16 (tort reform and criminal law); Saundra Torry, *Tort and Retort: The Battle over Reform Heats up*, WASH. POST, Mar. 6, 1995, at F7 (tort reform); Edmund L. Andrews, *Overhaul Backed in Communication*, N.Y. TIMES, Dec. 21, 1995, at A1 (telecommunications reform).

[25] *See* Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 512–15 (2001) (explaining lawmaker support for so-called position-taking legislation, that is, legislation that is enacted because it allows lawmakers to make pleasing statements to voters); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 145 (1998) (discussing congressional support for Megan's Law and carjacking legislation).

[26] *Federalism vs. States' Rights*, *supra* note 1, does a wonderful job of illustrating those incentives. I too discuss those incentives, focusing on the problem of interest group-driven legislation, in Devins, *supra* note 4, at 1194–1200.

[27] E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE 10–11 (1960).

[28] *See* Whittington, *supra* note 25, at 509–18; Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Tolerate Rehnquist Court Decision Making But Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307, 1318–24 (2002). For additional discussion, see *infra* notes 44–48 and accompanying text.

HeinOnline -- 99 Nw. U. L. Rev. 136 2004-2005

terest groups, and political parties look to democratic outlets to pursue favored policy initiatives. Unless judicial interpretations foreclose the pursuit of first order policy priorities, it is unlikely that lawmakers will formally and consistently embrace a broad theory of federalism. Likewise, unless their substantive policy agenda is threatened, presidents will not use their bully pulpit, veto power, or control over federal agencies to advance a coherent vision of federalism.

To summarize: The political process will not police structural federalism. Elected officials invoke federalism when it comports with their substantive policy preferences, but they otherwise do not care about the federal-state balance.[29] Interest groups and voters will pursue favored policy objectives at whatever level of government will embrace their agenda. In other words, the problem with federalism is far more pervasive than the principal-agent problem identified by McGinnis and Somin. Beyond "know nothing" voters who have little reason to learn about the workings of government, federalism is destined to be a second order concern. Informed voters might well subordinate federalism in order to pursue favored policies—even if they knew that federalism would be consistently enforced. More telling, those who have incentive to understand the workings of our system of government and manipulate that system for their advantage (interest groups and politicians) nonetheless have little stake in federalism.

By providing additional support for McGinnis and Somin's claim that the political process does not value federalism, the above discussion makes clear that the policing of federalism can only take place in the courts. And while I agree with McGinnis and Somin that neither states nor voters are likely to check federal officials on federalism-related issues, I think their principal-agent theory is off the mark. Federalism's second class status is now and has forever been a byproduct of the fact that both voter/principals and elected officials/agents place immediate first order policy priorities ahead of a coherent vision of governmental power. The question remains: How should the courts police federalism? That is the subject of the next Section.

III. JUDICIAL ENFORCEMENT OF FEDERALISM: LESSONS FROM THE REHNQUIST COURT

Assuming that federalism is undervalued in the political process,[30] how should the Supreme Court protect federalism? In addressing this issue, I

---

[29] In addition to examples discussed in the text, opponents of school desegregation have long employed the banner of "states' rights" in framing their opposition to Supreme Court rulings. Prominent examples include the "Southern Manifesto" in which Southern congressmen expressed their disapproval of *Brown* and Richard Nixon's efforts to appeal to Southern voters by attacking Court decisions limiting local control of school systems. For a recent and worthwhile history, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

[30] For some, the fact that federalism is not especially salient in the political process means that the

HeinOnline -- 99 Nw. U. L. Rev. 137 2004-2005

will focus on a very practical question: How far can the Supreme Court go in preserving the federal-state balance?

Lacking the powers of purse and sword, the Supreme Court must make sure that its decisions are acceptable to the American people and their elected officials.[31] Otherwise, the Court risks a political backlash—one that will almost certainly undo any doctrinal innovations that it might pursue.[32] With respect to federalism, can the Court advance an expansive theory without risking political reprisals?

For Justices interested in expanding judicial protections of federalism, *Federalism vs. States' Rights* sounds a cautionary note. Although supporting judicial enforcement of federalism, McGinnis and Somin's principal-agent analysis also calls attention to how it is that elected officials have strong incentive to embrace a system of government that discounts federalism.[33]

Furthermore, by highlighting why elected officials have reason to learn the "rules of the game" governing the division of power among federal and state governments,[34] McGinnis and Somin indicate that increased judicial protections of federalism might well provoke a political backlash. Elected officials will have cause to countermand the Court while voter/principals are unlikely to pay any attention to the Court, and as such, the Court will not pressure elected officials to respect the Court's invigoration of federalism.[35]

On the other hand, if the focus of Congress, the states, interest groups, and informed voters is the underlying policy issue, the Court may have substantial leeway on federalism questions. Specifically, if federalism is of little salience to all affected parties, there is less of a commitment to

---

policing of federalism is neither essential to our constitutional system nor a necessary check on private interests who seek legislation that benefits themselves at the expense of the public. In this Comment, I do not tackle the larger question of whether the policing of federalism is good public policy. My concern is limited to the related issues of why the political process does not value federalism and what that means for courts who are interested in policing federalism. In other writings, I have argued that the policing of federalism serves the public interest. *See* Devins, *supra* note 4, at 1194–1200.

[31] *See* Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 90 (1998).

[32] Social scientists have long argued that political pressures will force the Court to comport with policy views dominant among the American people and their elected representatives. For classic treatments of this subject, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975). For more recent studies, see Devins & Fisher, *supra* note 31; LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998). In citing these studies, I am not making the broader claim that the Court takes social and political forces into account when deciding cases. My claim is simply that the Court's constitutional decisions "are never for long out of line with the policy views dominant among the lawmaking majorities of the United States." Dahl, *supra*, at 285.

[33] McGinnis & Somin, *supra* note 1, at 118–19.

[34] *Id.* at 97.

[35] On why voter/principals will not pressure elected officials, see *id.* at ms. 94–100.

HeinOnline -- 99 Nw. U. L. Rev. 138 2004-2005

preserving lawmaker prerogatives. The key question, instead, is whether there is a satisfactory democratic outlet in which interest groups, lawmakers, and the American people can pursue desired policies. Indeed, absent something as stark as the *Lochner* era (where Supreme Court hostility to New Deal economic policies undermined first order policy preferences),[36] there is little reason to expect voters, interest groups, or political parties to pressure elected officials to take federalism seriously.

For reasons detailed in Section II, I think federalism is a low salience issue. In this section, I will both test this conclusion and explore its ramifications to Court-Congress relations. By examining Congress's response to Rehnquist Court federalism rulings, this Section will explain why the Court can ratchet up its policing of substantive federalism without fear of a political backlash. In so doing, this section will call into question McGinnis and Somin's claims about lawmaker incentives. Rather than push the Supreme Court to embrace doctrines that regularly maximize their authority, lawmakers are interested in their substantive policy agenda and little else. Sometimes that means working around decisions that invalidate favored programs. In particular, rather than challenge restrictive federalism decisions, lawmakers will instead seek alternative ways of pursuing the policy initiatives they support. Moreover, when lawmakers disapprove of the invalidated law, they are likely to support the Court's decision (since their focus is the case's outcome, not the Court's reasoning). By highlighting the lack of lawmaker interest in the Rehnquist Court's federalism revival, this section provides concrete evidence to support Section II claims about the willingness of both lawmaker/agents and informed voter/principals to subordinate federalism in order to pursue favored policies.

From 1995 to 2002, the Rehnquist Court invalidated all or parts of thirty-one federal statutes. Along the way, it revived federalism—limiting the scope of Congress's powers under the Commerce Clause and the Fourteenth Amendment and expanding the scope of state protections under the Tenth and Eleventh Amendments.[37] For its part, Congress is accepting of these decisions.[38] Rather than castigate the Court for limiting its power, Congress has largely ignored these decisions. With the exception of deci-

---

[36] *See* ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 106–13 (2d ed. 1994); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 525–27 (1998). For a thoughtful argument that many of the laws invalidated (while perhaps popular with Congress) were unpopular with the American people, see Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 BUFF. L. REV. 7 (2002).

[37] For an excellent overview of how this 1995 to 2002 revival of federalism represented a clear break from past Court practices, see Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 576–90 (2003).

[38] Several of the examples contained in this paragraph and the paragraph which follows it are drawn from Devins, *supra* note 28, at 1309–24 and Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 52 DUKE L.J. 435, 449–52 (2001). More detailed presentations of the points made in these paragraphs can be found in those articles.

HeinOnline -- 99 Nw. U. L. Rev. 139 2004-2005

sions invalidating the Gun Free School Zone Act and Religious Freedom Restoration Act, lawmakers hardly ever commented on the precedential impact of any of the Court's federalism decisions.[39] When lawmakers have rewritten laws struck down by these federalism rulings, they have accepted the Court's decision as final, limiting their revisions to those which the Court is likely to approve.[40] Correspondingly, today's lawmakers seem quite approving of the Court's power to invalidate federal statutes. A recent opinion poll of members of the 106th Congress (1999–2001) reveals that 71% of lawmakers adhere to a "joint constitutionalist" perspective whereby courts should give either "limited" or "no weight" to congressional assessments of the constitutionality of legislation.[41]

Another measure of congressional acquiescence to Rehnquist Court federalism rulings is the limited relevance of these rulings to legislative hearings. Confirmation hearings of George W. Bush judicial nominees have virtually ignored federalism. The focus, instead, remains on abortion and civil rights.[42] Nor have federalism rulings prompted congressional committees into action. Rather than hold a raft of hearings evaluating the ramifications of the federalism revival, these rulings did not affect the number of congressional hearings held on constitutional questions.[43]

To explain this phenomenon, it may be that lawmakers are comfortable with judicial efforts to cabin their authority. Today's lawmakers often embrace calls to devolve power to the states and otherwise limit the power of the federal government.[44] Another explanation for lawmaker acquiescence is that these decisions do not foreclose democratic outlets. Unlike decisions on abortion, school prayer, school desegregation, and the free speech rights

---

[39] *See* Neal Devins, *supra* note 28, at 1311–12 (2002) (noting that a June 24, 2002 LEXIS database search of the Congressional Record uncovered ten references to the precedential impact of the Court's decision invalidating the Religious Freedom Restoration Act, sixteen references to the decision invalidating the Gun Free School Zone Act, and no more than four lawmaker comments about the precedential impact of any other decision imposing federalism-based limits on congressional power).

[40] *See id.* at 1313–14 (noting examples).

[41] Bruce G. Peabody, *Congressional Attitudes Towards Constitution Interpretation*, *in* CONGRESS AND THE CONSTITUTION (Neal Devins & Keith E. Whittington eds., forthcoming 2005). *See also* Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127, 145–48 (2004). In sharp contrast, 44% of 1960 lawmakers signaled their disapproval of the Warren Court by asserting that the Supreme Court should give a "great deal of weight" or "controlling weight" to congressional interpretations of the Constitution. DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 372–73 (1966).

[42] *See* Devins, *supra* note 28, at 1328.

[43] Keith E. Whittington, *Hearings About the Constitution*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 41.

[44] This, of course, was the centerpiece of the "Contract with America" that House Republicans ran on in 1994 (the year that Republicans took over both Houses of Congress). More generally, Congress has responded to increasing skepticism about the trustworthiness of the federal government by embracing power sharing arrangements that empower states and localities. *See* Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 346–59 (2001).

HeinOnline -- 99 Nw. U. L. Rev. 140 2004-2005

of communists, lawmakers who lose before the Supreme Court can still pursue their favored agenda without calling for the overruling of Court decisions.

Consider, for example, abortion. Following *Roe*, pro-life lawmakers could not regulate abortion in the first trimester (let alone outlaw it) without calling for *Roe's* reversal. In contrast, federalism rulings allow Congress to pursue the same substantive agenda either by making use of another source of federal power and/or pursuing a scaled down version of the invalidated statute.[45] Indeed, Congress responded to Court rulings invalidating the Gun Free School Zone Act and Religious Freedom Restoration Act by enacting less sweeping versions of the legislation invalidated by the Court.[46]

Perhaps more telling, the interest groups which lobby Congress have little reason to push for a fundamental rethinking of Court federalism rulings. Interest groups, for reasons detailed in Section II, care about advancing their policy agenda and little else. Sometimes that policy agenda is consistent with a broad view of federal power (when Congress enacts and a court validates a law that advances that agenda). On other occasions, an interest group's agenda is consistent with a narrow view of congressional power (when a court invalidates a law that advances competing interests).[47]

Unless and until court federalism rulings stand as a significant roadblock to the pursuit of favored policies, interest groups will not organize around federalism. Instead, interest groups will simply pursue their agenda in the forum most likely to validate their efforts. When the Court strikes down a federal program on federalism grounds, interest groups may pursue state reforms and/or federal reforms that do not run afoul of the Court's rulings.[48]

The question remains: How far can the Court go without prompting a political backlash? No doubt, the Court can go further than it has gone. Unlike McGinnis and Somin's claims about lawmaker incentives, this Section has shown that neither elected officials nor national interests are strongly committed to the Court's crafting federalism doctrine that allows

---

[45] Some commentators have suggested that Court federalism decisions do not foreclose more comprehensive federal legislation, so long as it is packaged to avoid the problems identified by the Court. *See* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1330–33 (2001); T.R. Goldman, *Lawmakers Take Steps to Respond After Legislation Is Found Unconstitutional*, LEGAL TIMES, July 14, 1997, at 8. For additional discussion, see *infra* notes 50–52.

[46] *See* Devins, *supra* note 28, at 1313–14.

[47] *See supra* text accompanying notes 11–12 (discussing why it is that neither pro-choice nor pro-life voters have reason to support an expansive or narrow view of congressional power).

[48] Federal reforms, as noted above, were pursued in cases involving the Religious Freedom Restoration Act and Gun Free School Zone Act. State reforms were pursued following the Court's invalidation of the Religious Freedom Restoration Act and Americans with Disabilities Act. *See* Helen Irvin, *Several States Respond to* Garrett *Decision, Consider Waiving Immunity to ADA Lawsuits*, 70 U.S. L. WK. 2003 (2001); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1473–75 (1999).

HeinOnline -- 99 Nw. U. L. Rev. 141 2004-2005

Congress to define the scope of its expansionist tendencies. In particular, Congress is accepting of the Court's federalism revival; correspondingly, interest groups have little incentive to pressure lawmakers to limit the Court. With that said, there are limits to how far the Court can or should go. In the paragraphs that follow, I will sketch some of these limits and offer a suggestion for how the Court might pursue a more ambitious federalism revival.[49]

To start by way of a summary: The Rehnquist Court's federalism revival failed to provoke the ire of lawmakers, interest groups, or the American people for three distinct reasons. *First*, unlike rights-based decision making, federalism rulings rarely foreclose democratic outlets. *Second* (and correspondingly), the Rehnquist Court's federalism revival has not prevented elected officials or interest groups from pursuing their policy agenda. The Court, while limiting Congress's power, has not sought a return of *Lochner* era restrictions.[50] Indeed, notwithstanding its numerous innovations, the Court is yet to limit Congress's spending power.[51] Moreover, while limiting Congress's power to enforce the Fourteenth Amendment, the Court has signaled that Congress may make aggressive use of this power to protect the interests of women and racial minorities.[52] *Third*, the placing of some limits on Congress reflects populist and lawmaker distrust of the federal government. During the 1990s, candidates successfully campaigned against the inside-the-beltway political establishment. Bill Clinton ran for president as a "New Democrat"; Republicans gained control of Congress by running on the "Contract with America."[53]

In sharp contrast, *Lochner* era federalism rulings prompted a political backlash because they significantly limited the dominant political coalition's first order policy priorities.[54] For today's Supreme Court to prompt a similar response, the Court would need to do two things. It would have to invalidate legislation that powerful interest groups and lawmakers care passionately about. It would also have to limit Congress's powers in ways that

---

[49] As I write these words, I recognize that the 2004 presidential elections (and the Supreme Court appointments that will follow them) will almost certainly define the fate of the Rehnquist Court's federalism revival.

[50] *See supra* note 45; *see also* Ramesh Ponnuru, *The Court's Faux Federalism*, *in* A YEAR AT THE SUPREME COURT 131 (Neal Devins & Davison Douglas eds., forthcoming 2004).

[51] On May 17, 2004, for example, a unanimous Supreme Court yet again validated Congress's Spending Clause power in *Sabri v. United States*, 124 S. Ct. 1941 (2004). Upholding a law that makes it illegal to bribe officials at state or local agencies that receive federal funds, the Court rejected the claim that the Spending Clause demands that there be some connection between the bribe and the federal grant. Concluding that Congress employed "rational means" to safeguard federal funds, the Court upheld Congress's power to fight corruption at agencies receiving federal funds. *Id.* at 1946.

[52] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

[53] For a detailed presentation of how social and political forces contributed to anti-Congress rulings by the Rehnquist Court, see NEAL DEVINS, THE MAJORITARIAN REHNQUIST COURT, LAW & CONTEMPORARY PROBLEMS (forthcoming 2004).

[54] *See* Whittington, *supra* note 25, at 509–10.

HeinOnline -- 99 Nw. U. L. Rev. 142 2004-2005

prevent interest groups and lawmakers from pursuing first order policy priorities. For example, a political backlash would almost certainly follow the overturning of commerce clause decisions approving public accommodations legislation and/or the rejection of nondiscrimination requirements grounded in the Spending Clause. Likewise, the overturning of the Clean Air Act would come at a great political cost.

On the other hand, a modest tightening of the Commerce or Spending Clauses would not prompt political retaliation. When enforcing the Spending Clause, courts could take a harder look at whether the conditions Congress imposes on the recipients of federal funds are reasonably related to the purposes for which the funds are expended.[55] Also, by paying closer attention to whether an economic activity, in fact, has a substantial impact on interstate commerce, the Court could more aggressively police federalism.[56]

That the Supreme Court can go further than it has does not prove that increased judicial enforcement of federalism serves the public interest. McGinnis and Somin advance several arguments suggesting that federalism benefits the public.[57] In sorting out whether those arguments are correct, the Court might want to make use of a common law approach—incrementally tightening its federalism doctrine while observing both the political response and possible public policy benefits.

The Rehnquist Court, as it turns out, has done just that. Its initial rulings were tentative. After observing that Congress and the American people were comfortable with those rulings, the Court expanded the scope of its federalism revival.[58] For reasons discussed in this Section, I think that the Court can continue to employ this formula with success.

IV. CONCLUSION

By providing an alternative explanation as to why the political process does not value federalism, this Comment has sought to strengthen the cen-

---

[55] This is precisely what Justice O'Connor called for in her dissenting opinion in *South Dakota v. Dole*, 483 U.S. 203 (1987). Specifically, Justice O'Connor thought that Congress went too far when it conditioned federal highway funds on state action prohibiting liquor sales to those under twenty-one. In particular, O'Connor thought the law impermissibly burdened teenagers who were not about to drive on the interstate (especially since the law did not limit the rights of adults, even those who drove on the interstate). *Id.* at 214–15 (O'Connor, J., dissenting).

[56] By way of analogy, it appears that the *Lochner* era Congress was prepared to accommodate the Court this way. *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 711–12 (discussing Congress's willingness to engage in "sustained and increasingly thoughtful" fact finding to supports its invocations of the commerce clause). The Rehnquist Court has yet to impose similar demands on Congress, although a 2004–2005 Term case squarely addresses this issue. *See* David G. Savage, *Medical Marijuana to Get Justices' Review*, L.A. TIMES, June 29, 2004, at A.20 (noting that the Court will determine whether Congress's commerce power extends to regulating homegrown marijuana).

[57] *See* McGinnis & Somin, *supra* note 1, at 106–112.

[58] *See* Devins, *supra* note 38, at 462–63.

HeinOnline -- 99 Nw. U. L. Rev. 143 2004-2005

tral conclusion of *Federalism vs. States Rights*. Specifically, if the federal-state balance is to be policed, the courts must do that policing. In part, problems of voter asymmetry explain why voter/principals will not police federalism. Likewise, for reasons expertly detailed by McGinnis and Somin, state and federal officials often disregard federalism when pursuing first order policy priorities. But the problem is even deeper than McGinnis and Somin suggest. Informed voters are also likely to trade off federalism in order to advance favored policies. As detailed in Section II, Americans have always paid attention to their substantive policy preferences, not federalism. Moreover, as Section III explains, federalism rulings rarely foreclose democratic outlets. As such, these rulings do not figure in voter efforts to pressure lawmakers to pursue favored policies. Against this backdrop, the problem with federalism seems far more pervasive than the principal-agent theory advanced by McGinnis and Somin. In justifying their theory, McGinnis and Somin must do more than speculate that informed voters would place federalism first *if* they thought that federalism limits would be enforced across-the-board. Instead, they must come forward with evidence supporting their claims about the true preferences of voter/principals.

Correspondingly, McGinnis and Somin go too far in suggesting that lawmakers and national lobbies are strongly committed to deferential judicial review of federalism. No doubt, as McGinnis and Somin explain, elected officials and national lobbies have strong incentives to understand the rule of the game. On the other hand, for reasons detailed in Section III, lawmakers and national interests have little sense of stake in federalism. Sometimes, the pursuit of their favored policies requires the sacrificing of federalism; other times, they see judicial enforcement of federalism as a way to limit the victories of their political opponents. Ironically, the very reasons that explain why the political process is unlikely to police federalism makes possible active judicial review of federalism. Because voters, interest groups, and lawmakers care more about underlying policy objectives than federalism, the court can enforce federalism limits *so long as* there is a democratic outlet available for lawmakers, voters, and interest groups to pursue their favored policies.

HeinOnline -- 99 Nw. U. L. Rev. 144 2004-2005