INTRODUCTION

A mere six years after its brave declaration that it had sworn off federalism for good, the Supreme Court suffered a relapse. Gregory v. Ashcroft,

---

* Professor of Law, University of California, Berkeley.
** Professor of Law, University of California, Berkeley.

This article, part of a larger project by the authors on American prison reform, was supported by a grant from the Guggenheim Foundation. The authors are grateful to Stephen Ross, Kim Scheppele, the participants in the Berkeley Seminar on Federalism and the participants in the Berkeley Faculty Colloquium for their insightful comments, and to Daniel Krislov for his thoughtful assistance on this project. A preliminary version appears in Malcolm Feeley & Edward L. Rubin, Federal-State Relations and Prison Administration, in POWER DIVIDED 63 (Harry N. Scheiber & Malcolm Feeley eds., 1989).


decided in 1991, signalled this regression and New York v. United States,\(^3\) decided in 1992, confirmed it. In Gregory, the Court held that the federal Age Discrimination in Employment Act of 1967,\(^4\) which forbids the discharge of any employee over 40 years old on grounds of age,\(^5\) does not apply to state court judges. While the Act covers state employees, it excludes “an appointee on the policymaking level,”\(^6\) and the Court held that a state court judge was such an appointee.\(^7\) By itself, this result does not necessarily provide evidence of backsliding. Federal statutes are generally interpreted by federal courts, and the Supreme Court’s interpretation that state judges are policymakers, whether right or wrong, is certainly within the realm of reason.

What is striking about the case, however, is the Court’s rationale. Rather than stating that it was seeking the most plausible reading of the statute, the Court declared that principles of federalism created a presumption against the Act’s coverage of the state’s “important government officials” — a presumption that could be overcome only by clear, unambiguous language.\(^8\) The Court justified this presumption with an impassioned encomium to the federalist system: “In the tension between federal and state power,” Justice O’Connor wrote, “lies the promise of liberty.”\(^9\) The Supremacy Clause,\(^10\) which is generally regarded as the basic structuring principle of federal-state relations, was described as a sort of unfair advantage of the central government, “an extraordinary power in a federalist system.”\(^11\) All of this was stated in support of a principle of statutory interpretation, not as an independent, constitutional constraint on federal legislation.

---

\(^5\) Id. §§ 623(a), 631(a).
\(^6\) Id. § 630(f).
\(^7\) Gregory, 111 S. Ct. at 2404.
\(^8\) Id. at 2402–03. This approach is defended, with qualifications, in Eskridge & Frickey, supra note 2, at 629–45; Frickey, supra note 2.
\(^10\) U.S. CONST. art. VI, cl. 2.
\(^11\) Gregory, 111 S. Ct. at 2400.
But, like an ex-addict high on methadone, the Court managed to regain its old euphoria about federalism in the more controlled context that the case permitted.\footnote{For another case in which Justice O'Connor casts a relatively narrow, technical question in the grandiose terms of federalism, see Coleman v. Thompson, 111 S. Ct. 2546 (1991) (holding that the state supreme court's denial of untimely appeal was not subject to federal habeas review because the court clearly and expressly stated that its decision was based on state procedural grounds). The dissent aptly characterized her opinion as follows: "Federalism; comity; state sovereignty; preservation of state resources; certainty; the majority methodically inventories these multifarious state interests before concluding that the plain-statement rule of Michigan v. Long ... does not apply to a summary order." \textit{Id.} at 2569 (Blackmun, J., dissenting).}

A year later, in \textit{New York v. United States},\footnote{112 S. Ct. 2408 (1992).} the Court succumbed completely. At issue was the Low-Level Radioactive Waste Policy Amendments Act of 1985.\footnote{Pub. L. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. \S\S 2021b–2021j (1988)).} This Act, which the Court described as "intricate,"\footnote{New York, 112 S. Ct. at 2415.} requires states to provide for the disposal of low-level radioactive wastes generated within their borders.\footnote{42 U.S.C. \S 2021c(a)(1)(A) (1988).} To induce compliance, the federal government provides various incentives.\footnote{The Act allows states with appropriate disposal sites to impose a surcharge on waste imported from other states. \textit{Id.} \S 2021e(d)(1). The Secretary of Energy collects a portion of that surcharge and places it in an escrow fund to be allocated to states meeting certain requirements under the Act. \textit{Id.} \S 2021e(d)(1)(A). The Act also allows states with disposal sites to increase the surcharge over time, eventually allowing these states to refuse imported waste entirely. \textit{Id.} \S 2021e(d)(2)(C). These particular provisions were held to be valid exercises of Congress's commerce and spending powers. See \textit{New York}, 112 S. Ct. at 2415–17 (summarizing statutory provisions).} In the event these fail, the Act requires an offending state to take title to the waste and be liable for all damages incurred by its delayed disposal.\footnote{42 U.S.C. \S 2021e(d)(2)(C) (1988).} The latter provision, in the Court's view, "crossed the line distinguishing encouragement from coercion,"\footnote{New York, 112 S. Ct. at 2428.} and exceeded the limits of congressional power or, alternatively, violated the Tenth Amendment.\footnote{\textit{Id.}} Thus, the Court struck down a complex federal statute that dealt with a persistent and inherently national...
environmental problem because the statute did not comport with the perceived demands of federalism.

Justice O'Connor, writing for the Court once more, declared that the decision was compelled by the legislative history of the Constitution, even if "one could prove that federalism secured no advantages to anyone." But persuasive interpretations of the constitutional text seldom rest on principles that provide no advantages to anyone. In fact, Justice O'Connor claimed that federalism does indeed secure a variety of benefits, citing to Gregory. And at the end of the opinion, she lapsed into ringing rhetoric, declaring that the Constitution "protects us from our own best intentions: It divides power among sovereigns . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." "States," she added, "are not mere political subdivisions of the United States."

The concept of federalism, it appears, certainly has staying power once it gets into your system. We Americans love federalism or, as the Court has called it, "Our Federalism." It conjures up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard. Imagery aside, a number of appealing arguments have been made on its behalf, and the Gregory opinion, in the process of allegedly interpreting a statute, summarizes the primary ones.

---

21. Id. at 2417-23. For the opposite view, see Charles L. Black, Jr., On Worrying About the Constitution, 55 U. COLO. L. REV. 469 (1984); Field, supra note 1, at 95-103.

22. New York, 112 S. Ct. at 2418.

23. Id.

24. Id. at 2434. The phrase inevitably brings to mind Laurence Tribe's parable of the pigeons, an animal behavior experiment in which pigeons learned to peck a key that removed immediate temptation to which they would otherwise succumb so that they could subsequently receive a more substantial benefit. For Tribe, this is the principle of constitutionalism, in which a ruling democratic majority disables itself from taking certain actions because it knows that different acts will be preferable in the long run. Laurence H. Tribe, American Constitutional Law 10-11 (2d ed. 1988). See also Jon Elster, Ulysses and the Sirens (1979), which involves the somewhat more enabling image of Ulysses lashing himself to the mast of his ship to avoid succumbing to the Sirens' song. Both analogies are problematic because they establish a conceptually dubious analogy between a simple organism and a complex society with differing factions. In addition, both rely upon the fact that there is a third, and presumably later time when the decision-maker recognizes that the first decision (when Ulysses lashed himself to the mast, or a nation constrains itself from responding to a crisis) is preferable to the second (when Ulysses yearns for the sirens, or the national crisis occurs). Federalism can be seen as a first decision, establishing a constraint that limits any subsequent decision to restructure our governmental system in response to modern developments. But we certainly have no national consensus, at this time, that the first decision (favoring federalist constraint) is preferable to the second (responding to modern developments).


Federalism, Justice O'Connor states, "increases opportunity for citizen involvement in democratic processes," it "makes government more responsive by putting the States in competition for a mobile citizenry," and "it allows for more innovation and experimentation in government." But its principal virtue is that it constitutes "a check on abuses of government power" by diffusing power among separate sovereigns. Justice O'Connor thus invoked all the familiar themes regularly cited by legal scholars in support of federalism. The only one she missed was the newly fashionable concept of community. But she did add that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society." This, together with the reference to citizen involvement, resonates with themes sounded in recent communitarian scholarship.

In our view, federalism in America achieves none of the beneficial goals that the Court claims for it. Moreover, the federal courts, despite occasional oddities like Gregory, New York v. United States, or National League of Cities v. Usery, have not favored federalism at any time during their existence. To the contrary, they have been consistent opponents of federalist positions, as recent history demonstrates. The current Court

27. Gregory, 111 S. Ct. at 2399. A similar list appears in her dissenting opinion in Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 788-90 (1982), which was one of the cases leading to Garcia.


30. Gregory, 111 S. Ct. at 2399.


33. The Court has greatly expanded the scope of Congress' powers under the Commerce Clause. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). Moreover, it has subjected state police and prosecutorial procedures to federal rules by incorporating most of the federal Bill of Rights into the Due Process
can proclaim the virtues of federalism with a straight face only because it
does not know what federalism is. Its current usage may well correspond to
“Our Federalism,” if that term is taken to mean whatever it is we have, but
it does not correspond to any coherent political concept.

In fact, federalism is America’s neurosis. We have a federal system
because we began with a federal system; the new nation consisted of a
group of self-governing units that had to relinquish some of their existing
powers to a central government. We began with a federal system because
of some now uninteresting details of eighteenth century British colonial
administration.34 We carry this system with us, like any neurosis, because it
is part of our collective psychology, and we proclaim its virtues out of the
universal desire for self-justification. But our political culture is essentially
healthy, and we do not let our neuroses control us. Instead, we have been
trying to extricate ourselves from federalism for at least the last 130 years.
When federalism is raised as an argument against some national policy, we
generally reject it by whatever means are necessary, including, in one case,
killing its proponents.35 This Article describes that process, and asserts
that, on grounds of political morality, it has been exactly the right thing to
do.

We are not arguing for the abolition of the states. States fulfill the
important governmental function of facilitating decentralization, as we will
discuss below. Yet there is no policy reason why other subdivisions of the

Clause of the Fourteenth Amendment, see, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968); Mapp
v. Ohio, 367 U.S. 643 (1961), and has provided a federal remedy for violations of these rules, see
Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds by Monell v. Department of
Social Services of New York, 436 U.S. 658 (1978). It also has permitted Congress to use the
spending power and taking power as a means of regulating state law. See South Dakota v. Dole,
(1937) (taking power). Even the discredited substantive due process jurisprudence, see, e.g.,
Lochner v. New York, 198 U.S. 45 (1905), which dominated the Court’s decisions during the
first third of this century, had the effect of invalidating state law in favor of nation-wide (albeit
judicially-defined) priorities.

34. By contrast, the federal systems of Australia and Canada reflect nineteenth century
British colonial administration. See generally EDWIN R. BLACK, DIVIDED LOYALTIES: CANADIAN
CONCEPTS OF FEDERALISM (1975); CANADIAN FEDERALISM: MYTH OR REALITY (J. Peter
Meekison ed., 3d ed. 1971); L. F. CRISP, AUSTRALIAN NATIONAL GOVERNMENT (4th ed. 1978);
GEOFFREY SAVER, AUSTRALIAN FEDERALISM IN THE COURTS (1967); GEOFFREY SAVER, FEDERA-
TION UNDER STRAIN: AUSTRALIA 1972–1975 (1977). Canadian federalism, however, has
continued relevance. See infra note 153, and text accompanying notes 138–52. The thirteen
American colonies varied significantly as political communities, but it was British administrative
practice, rather than respect for political diversity, that produced the decentralized pattern of the
colonies. If anything, the British were interested in suppressing these communities, such as the
Dutch in New York and the Puritans in Massachusetts.

35. The Civil War.
nation could not fulfill this function, or why state lines could not be redrawn on a functional, rather than historical basis. To be sure, this would be costly and disruptive; hence, in the final analysis, it is probably best to use the existing states as our primary means of decentralization. What we do argue is that decentralization is the only purpose states serve, and that they do not embody any important normative principle at this juncture in our history. The Supreme Court should never invoke federalism as a reason for invalidating a federal statute or as a principle for interpreting it. Thus, we subscribe to the conclusion stated in Garcia v. San Antonio Metropolitan Transit Authority. Our rationale for this conclusion, however, is not that the states are capable of protecting themselves, as Justice Blackmun's opinion argues, but that there is no normative principle involved that is worthy of protection.

We begin in Part I by defining federalism and distinguishing it from the separate concept of administrative decentralization. On the basis of this distinction, we demonstrate that federalism, once properly defined, does not secure citizen participation, does not make government more responsive or efficient by creating competition, and does not encourage experimentation. Assuming these are desirable goals—and some certainly are—they call for a decentralized regime, not a federal one. Having rejected these essentially instrumentalist arguments for federalism, we then turn to the major normative arguments—arguments that do not merge federalism with decentralization. The two leading arguments are that federalism diffuses governmental power, and that it secures community. In Part II, we argue that federalism does not diffuse power in our system, but may actually act as an impediment to its diffusion. Then in Part III, we argue that federalism does not secure community because our real community is a national one.

37. Id. at 547-55. See Jesse H. Choper, judicial review and the national political process (1980).
I. FEDERALISM AND DECENTRALIZATION

A. The Difference Between Federalism and Decentralization

"Federalism," like most broad political or legal terms, can mean many different things, but any definition that would justify judicial enforcement, to say nothing of the emotional freight that we Americans attach to it, must distinguish federalism from decentralization. Decentralization is a managerial concept; it refers to the delegation of centralized authority to subordinate units of either a geographic or a functional character. Setting aside the political context for the moment, and focusing on the concept of decentralization as a matter of organization or systems theory, the main reason to decentralize is to achieve effective management. Very often, an administrator who is relatively close to the subject matter will be more knowledgeable, more responsive, and more involved than a higher ranking person ensconced in some distant central office. An industrial corporation might decentralize authority to factory managers, or a state university system might decentralize authority to the head of each constituent campus. The Israeli army employs decentralization as a military strate-
gy; while Egyptian and Syrian field commanders are expected to follow
detailed instructions, an Israeli commander in the field possesses virtually
complete autonomy.41

But none of this has anything to do with federalism. All these decen-
tralized systems are hierarchically organized and the leaders at the top or
center have plenary power over the other members of the organization.42
Decentralization represents a deliberate policy that the leaders select, or at
least approve, based on their view of the best way to achieve their goals. A
decentralized system can be, and often is, the product of a purely manageri-
al decision by a centralized authority.

The essence of federalism, as a coherent political concept, is quite
different.43 To be sure, federal systems share certain structural features
with decentralized ones. The most basic is that, within a single system of
governance, decisions are made by subsidiary units and the central authori-
ity defers to those decisions. But in a federal system, the subordinate units
possess prescribed areas of jurisdiction that cannot be invaded by the cen-
tral authority, and leaders of the subordinate units draw their power from
sources independent of that central authority.44 Federalism is not a mana-
gerial decision by the central decision-maker, as decentralization can be,
but a structuring principle for the system as a whole.

In the United States, the partial independence of the two levels of
government is usually defined in terms of rights. Roughly speaking, a right
is a legal claim that can be asserted against others, including, where rele-
vant, the prevailing governmental power. Individuals in our society can
assert certain claims against all governmental institutions, while states can
assert certain claims against the federal government. In fact, states stand in
essentially the same relationship to the federal government as individuals
stand to all governments; they are subordinate, but partially independent by

42. See Martin Diamond, On the Relationship of Federalism and Decentralization, in COOPERA-
TION AND CONFLICT: READINGS IN AMERICAN FEDERALISM 72, 74 (Daniel J. Elazar et al. eds.,
1969).
43. For articles that simply assume the equivalence of federalism and decentralization, see
Michael W. McConnell, Federalism: Evaluating the Founders’ Design, 54 U. CHI. L. REV. 1484,
(1987); Stewart, supra note 29, at 918.
44. WALTER BENNETT, AMERICAN THEORIES OF FEDERALISM 10 (1964); DANIEL J. ELAZAR,
AMERICAN FEDERALISM: A VIEW FROM THE STATES 2 (3d ed. 1984); CARL J. FRIEDRICH, CON-
STITUTIONAL GOVERNMENT AND DEMOCRACY 224–26 (4th ed. 1968); RICHARD H. LEACH,
AMERICAN FEDERALISM 1–10 (1970); K.C. WHEARE, FEDERAL GOVERNMENT 12 (4th ed. 1963);
Scheppre, supra note 39, at 54.
virtue of their rights. The validity of this equivalence between states and individuals has been the subject of considerable debate. For some observers, any demotion of states' rights below the status of individual rights presages the demise of federalism.\textsuperscript{45} For others, the two types of rights are different and should be treated differently. Jesse Choper, for example, proposes that only individual rights be judicially enforceable, and that states' rights, even though they are rights, be enforced exclusively through the political process.\textsuperscript{46} But whatever the differences here, both positions recognize a dual system of rights—individual rights and state rights—and differ primarily on the means of protecting them. These positions are thus quite distinct from one that favors or opposes managerial decentralization.

The point of granting partial independence in this way, and thus the point of federalism, is to allow normative disagreement amongst the subordinate units so that different units can subscribe to different value systems.\textsuperscript{47} Purely instrumental disagreements can be resolved within a unitary system because the criteria for judgment are shared by or imposed on those within the system. Similarly, the adaptation of a single norm or goal to different circumstances can be readily achieved by managerial decentralization.\textsuperscript{48} Once everyone agrees that the goal is to produce more wheat, there may nonetheless be disagreement about whether one growing method is better than another. But the standard way to resolve this question is to investigate the merits of each method, not to give different farmers the right to grow wheat any way they please. When the investigation is complete, it may turn out that the growing conditions are crucial and that these vary markedly from place to place. A natural resolution would be to decentralize the regulation of wheat growing, enabling farm administrators to adapt to the differing conditions of each region. Federalism becomes relevant only when the people in one region want to grow wheat, while those in another want to build factories on farmland or turn all the wheat fields into ecological preserves. It is possible, and indeed quite common, to resolve such normative disagreements by a centralized decision-maker’s fiat.


\textsuperscript{46} Jesse H. Choper, \textit{Judicial Review and the National Political Process} (1980); see also Herbert Wechsler, \textit{The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government}, 54 COLUM. L. REV. 543, 558–60 (1954).

\textsuperscript{47} See Scheppelle, \textit{supra} note 39, at 52–53. The desirability of granting this kind of freedom to subordinate units is discussed \textit{infra} in Part III.

\textsuperscript{48} See \textit{Kochen & Deutsch}, \textit{supra} note 40, at 16–21.
The point is that it is also possible to resolve this problem by federalism, that is, by recognizing that each area has a right to control the use of its own land. More importantly, federalism only makes sense in this context; there is no need to grant such rights in order to choose more effective instrumentalities or to adapt the selected instrumentalities to local circumstances.

This relationship between the rights of governmental units and the normative basis of their choices is an organic one. Rights are deontological, not instrumental, claims. Although we may justify the existence of rights by an instrumental argument, a right, once recognized, stands independent of that argument. It permits the rights holders to act as they choose within the scope of the right, regardless of the practical result. Of course, no society is blind to results or willing to tolerate unlimited frustration of its collective purposes. When the collectivity acts to obtain the results that it desires, however, the right is abrogated. As long as rights exist, they represent the willingness of the society to subordinate its purposes to those of the rights holders, or, alternatively, to recognize the rights holders' choices as a purpose that transcends the pragmatic choices of the collectivity. If the society does not permit deontological choices of this nature by constituent governmental units—if it recognizes only instrumental strategies for achieving its collective goals—then it has not established rights, but has simply developed a specific mechanism for selecting strategies. In that case, federalism will not be needed as a structuring principle or, if already in place for historical reasons, will be otiose.

Clearly, only federalism can operate as a bar to national policy, and only federalism can justify the imposition of that bar by the judiciary. Decentralization, being an instrumental, managerial strategy, is no different in degree from any other policy; like cost or administrative convenience, it is simply one factor that political decision-makers should take into account. Their failure to do so could lead to the charge that they are unwise, but everyone agrees that such debates over policy alternatives are consigned to the ordinary political process. To place a policy beyond the power of the central government, and to enforce that policy by judicial action, requires the assertion that a right has been infringed. That right, in the case of federalism, is the right of states to act independently, in furtherance of goals the national government does not share. The notion that an admittedly valid national policy is best implemented by decentralizing its admin-

49. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 197–204 (1977).
istration cannot support either the rhetoric of federalism or the remedy of judicial intervention.

B. Decentralization in Federalist Clothes: Public Participation, Citizen Choice, State Competition and Experimentation

Once we recognize the distinction between federalism and decentralization, we can see that many standard arguments advanced for federalism are clearly nothing more than policy arguments for decentralization. These are the claims that some nationally-defined policy is best achieved by permitting regional variation. The point is not simply that federalism is unnecessary for implementing such policies, that it represents an unnecessary use of constitutional artillery. Rather, federalism is absolutely antithetical to these policies because it allows the wrong kinds of variation. Implementing a national policy through a decentralized system means that the permitted variations will be those that contribute to achieving the designated policy. In contrast, federalism allows the states to vary as they choose, pursuing their own policies instead of the national one. This can be justified only by arguments favoring a variety of policies, not by arguments favoring the implementation of a single policy by a variety of methods.50

Of the standard arguments for federalism, four are really arguments that specific national policies are best implemented by decentralized decision-making; these are public participation, effectuating citizen choice through competition among jurisdictions, achieving economic efficiency through competition among jurisdictions, and encouraging experimentation.51 All four reflect policies that are applicable to the American political context; while questions can certainly be raised about their desirability,

50. In a recent article, Ann Althouse describes current Supreme Court discourse about federalism as agreeing upon a "normative" approach, because it treats federalism as a means of protecting the people, and not simply a way "to pay respect to the states." Althouse, supra note 2, at 980. But "paying respect to the states" could readily be a norm of the national government, just as "protecting the people" could be. Professor Althouse is probably correct in assuming that the former norm has limited appeal at present, but that does not undercut its normative character. In this Article, we use the term "normative" in virtually the opposite way. A justification for federalism is normative, in our view, if it views federalism (that is, the autonomy of states to choose their own political norms) as inherently desirable. In contrast, a justification for federalism is instrumental if it views federalism as a means to some independent end, such as citizen participation. Thus, the claim that federalism itself "protects the people" is a normative argument, but the claim that federalism protects the people by permitting them to participate in more elections is an instrumental claim, with participation as the underlying norm.

they are at least plausible strategies for governing our country. They are national strategies, however, linked to federalism only by confusing that concept with decentralization, and by the airy, flag-waving-in-the-breeze rhetoric that characterizes the entire subject.

1. Public Participation

The public participation argument is the most complex of the four because it overlaps with a genuine argument for federalism that will be discussed in Part III. Here, the claim is that locating various decisions at the regional or local level will enable more people to participate in these decisions. As the Court stated in Gregory, federalism "increases opportunity for citizen involvement in democratic processes."\(^{52}\)

Participation of this sort may not be as unambiguous a benefit as the Court and many commentators imply. In our present political context, participation, generally a middle and upper-middle class activity, is as likely to exclude and disadvantage less fortunate citizens as it is to help them. Certainly, the story of participation in state and local government regularly features low voter turnouts, entrenched elites, and narrow-minded policies.\(^{53}\) Nonetheless, many people speak well of local participation, and we can certainly concede that it is superior to some alternatives.

If one wants to implement a program of ensuring and increasing local participation, decentralized decisions may well be a valid way to proceed. This would be a national policy, however, because the goal would be to encourage participation in every state or locality. Federalism does not necessarily increase participation; it simply authorizes a set of specified political sub-units—states in our case—to decide for themselves how much participation is desirable. Some might choose to encourage participation but others might choose to suppress it. There are, moreover, a variety of other methods for achieving the same goal, such as hiring community organizers, funding local organizations, and requiring approvals for government decisions from different sectors of the population.\(^{54}\) None of these have

---

52. Gregory, 111 S. Ct. at 2399; see also Powell, supra note 3, at 681–88.
53. See, e.g., THOMAS R. DYE, POLITICS IN STATES AND COMMUNITIES (7th ed. 1991); NICHOLAS HENRY, GOVERNING AT THE GRASSROOTS (2d ed. 1984); BARRY D. KARL, THE UNEASY STATE (1983); LEACH, supra note 44; WILLIAM H. RIKER, DEMOCRACY IN THE UNITED STATES 295–96 (2d ed. 1965).
54. Mechanisms of this nature were a central feature of the federal War on Poverty. See, e.g., JOEL F. HANDLER, REFORMING THE POOR: WELFARE POLICY, FEDERALISM, AND MORALITY (1972); FRANCES F. PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 248–84 (1971); JAMES L. SUNDQUIST & DAVID W. DAVIS, MAKING FEDER-
anything to do with federalism, but if participation is a real goal, rather than an excuse for favoring federalism, they should be given equal consideration.

One might argue that the states, being "closer to the people" than the federal government, are more likely to foster local participation. This is one of many unproven assumptions that fester in this field without either theoretical or empirical support. 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. Actual alignments are likely to depend on the correspondence of substantive policies. For example, the white-dominated governments of the southern states undoubtedly fostered the autonomy of white-dominated towns against federal intervention; on the other hand, the federal government was correspondingly more solicitous of black communities, at least during the Reconstruction and Civil Rights eras. As an empirical matter, support for urban planning generally, or for specific city functions such as schools or police, has often come from the federal government, not from the states.\(^5\)

It is also argued that federalism fosters public participation by enabling citizens to choose their own rulers. But this merely combines decentralization and the independent norm of electoral politics, without involving federalism at all. In a truly federal regime, some states might opt for elections, while others might not; it is the Guarantee Clause, a nationalizing provision, that probably requires states to choose their leadership by election. As a practical matter, elections are deeply ingrained in our political culture. We do not need the Guarantee Clause because every state, no matter how much normative latitude it is given, grants its citizens the power to choose their own leaders by election, at the local level as well as the state level. This phenomenon cannot possibly be attributed to federalism, since federalism does not protect the political systems of localities. Indeed, it has the reverse effect, for it subjects these localities to the plenary control of state government and precludes or limits the ability of the national government to set standards for local politics. Thus, if the electoral principle were under attack in certain states, and Americans decided at a

---

national level that we needed to make sure that every locality held elections, federalism would constitute a barrier to the implementation of this policy.  

2. Citizen Choice

A second standard argument, again in the words of the Gregory opinion, is that federalism “assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society” and that it “makes government more responsive by putting the states in competition for a mobile citizenry.” On its face, these statements seem contradictory, because they elide the familiar distinction between voice and exit. Responsiveness is generally regarded as allied to voice; a government, for example, responds when those within its jurisdiction express their dissatisfaction with its policies. Competition for a mobile citizenry, on the other hand, seems allied to exit; the government attracts those dissatisfied with other jurisdictions, while accepting, or celebrating, the departure of those dissatisfied with its own policies. These arguments can be reconciled, however, through an understanding of exit and voice as alternative ways in which individuals relate to organizations. Individuals will seek organizations that are responsive to their needs, or voice; if their present organization fails to respond, they can exercise their exit option to locate a more responsive one. Conversely, an organization can generate a self-selected membership by resisting some divergent voices, and will then be more responsive to those who have remained or entered.

56. See ROSCOE C. MARTIN, THE CITIES AND THE FEDERAL SYSTEM (1977) (noting that state governments have failed to deal with urban problems). Martin describes state government as dominated by a “spirit of nostalgia,” and possessing only “intermittent and imperfect contact with the realities of the modern world.” Id. at 77.

One might argue that there is a natural tendency for the federal government and local governments to ally against the states. This would correspond to the geopolitical principle that a nation forms alliances with other nations lying on the far side of its immediate neighbors, as France and Russia did. In all likelihood, there is no such general principle in civil government, but one can certainly imagine that the federal government, rather than local governments, would adopt a policy of fostering participation at the local level.


58. The classic articulation of these principles is found in ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).

59. For a discussion of this point, in terms of voice and exit, see Stewart, supra note 29, at 923-27.

60. Thus, the argument that diverse governments are more responsive to their citizenry is largely implicit in the argument that citizens can choose among these diverse governments, seeking one that will be more responsive. Any remaining notion of responsiveness, unrelated to mobility, involves the concept of community, and will be discussed infra in Part III.
The precise claim, as articulated by Charles Tiebout, is that a group of government jurisdictions can offer varying packages of government services with varying means of funding those services and varying costs to their citizens. Citizens can then choose among these jurisdictions, so that they come to rest in one that matches their personal preferences, or utility function. This argument has found much favor in the law and economics literature.

There is something a bit fanciful in the image of people choosing a place to live the way shoppers choose their favorite breakfast cereal, and critics have pointed out that the transaction costs of obtaining information and transplanting one's life may well overwhelm the utility gains from the selection process, particularly for people with limited resources. But there is also much truth to the argument considering our mobile, restless society.

Nonetheless, this argument is unrelated, or only tangentially related, to the concept of federalism. The package of government services and costs that a particular jurisdiction offers is only one element in its overall appeal to potential citizens. Climate, size, location, employment opportunities, and a variety of other factors are likely to loom larger in the utility function of our wandering citizen, even apart from considerations that discourage mobility, like family ties, nostalgia, and local loyalty. In addition, government service packages involve a number of factors, such as education, police protection, social welfare, and recreation, all of which can vary, and all of which can be funded by a variety of mechanisms that produce differential impacts on people in different economic positions. The net result, in economic terms, is that the supply of jurisdictions from which citizens can choose is likely to be less than perfectly elastic.

64. See Inman & Rubinfeld, supra note 63, at 79; see also Kreimer, supra note 39 (states also vary with respect to normative, or generally federalist issues, such as abortion policy). This may induce people to travel from one state to another, as Kreimer suggests, but it only adds more complexity to relocation, or citizenship decisions.
This difficulty can be partially resolved if there is a large number of such jurisdictions, and indeed, if there is a large number in each region of the nation. Thus, the concept of government service packages applies better to localities, like counties, cities, and towns. States are too large to produce the necessary range of choices; telling wheat farmers in Kansas that they can obtain the kinds of schools they want by moving to New Jersey is unlikely to provide an increase in their overall utility function. What would help them, assuming the entire concept makes sense, is a choice of jurisdictions with different educational policies within their own region or city. Nordlinger's discussion of decentralization in a single city, for example, is far more relevant for people's realistic choices among government service packages than any of the literature on the juridical autonomy of states.\(^{65}\)

But federalism only protects the autonomy of states, not the autonomy or variability of local governments.\(^{66}\) Indeed, the very essence of American federalism is that the national government is forbidden to interfere with state policies for managing and controlling local governments. Consequently, federalism does not secure the kind of governmental variability that would provide any realistic choice for citizens; its principal effect in this area is to create a legal barrier against the imposition of such variability as a matter of national policy.\(^{67}\) If we are truly serious about providing

---

\(^{65}\) ERIC A. NORDLINGER, DECENTRALIZING THE CITY: A STUDY OF BOSTON'S LITTLE CITY HALLS (1972). For a discussion of the process by which people choose a residential neighborhood within a city, see BRIAN J.L. BERRY & JOHN D. KASARDA, CONTEMPORARY URBAN ECOLOGY 126–31 (1977) (major factors include income, age, life-style preference, and employment). This process only makes sense within a single metropolitan area; beyond that, a variety of additional constraints would appear.


\(^{67}\) Proponents of federalism continually get this point wrong. Charles Fried and Lino Graglia, for example, argue that one of the great virtues of federalism is that mistakes will be confined to relatively small areas, rather than being instituted nation-wide. See Charles Fried, Federalism—Why Should We Care?, 6 HARV. J.L. & PUB. POL’Y 1, 2 (1982); Lino A. Graglia, In Defense of Federalism, 6 HARV. J.L. & PUB. POL’Y 23 (1982). Their examples of mistaken, but limited, regimes are Santa Monica in the 1970s and New York City under the Lindsay administration. They have forgotten, however, that Santa Monica and New York City are cities, not states, and their boundaries are not established by federalism. The forces that kept the policies of which they disapprove confined within Santa Monica and New York City are political, not constitutional.

The confusion between local variation and federalism is not limited to tendentious legal argument. See, e.g., William C. Birdsall, A Study of the Demand for Public Goods, in ESSAYS IN FISCAL FEDERALISM 235 (Richard A. Musgrave ed., 1965). Birdsall presents a careful study in an
people with the exit option of choice, or the voice option of participation, we should provide those options universally, through a national, decentralized program, rather than by relying on the adventitious impact of a tangentially-related policy like federalism.

Given the variations in local government that in fact exist in the United States, concern about the need for a national policy to encourage competition might seem abstract or fanciful. But the universality of local variation only indicates what will be argued in Part III: That we have a national political culture, and no state is likely to take advantage of the normative independence that serves as federalism's raison d'etre to suppress local variation. In addition, however, we should not be overly smug about the level of variation that our nation provides. Most people cannot freely choose a community that values education and provides high quality schools in exchange for higher taxes. There is a rather distressing correspondence between quality education, for example, and high-income communities. True citizen choice might be enhanced through a national policy to encourage the development of realistic options in each section of the country. That would involve decentralization, but it is the very antithesis of federalism.

3. State Competition

A third argument for federalism, closely related to the preceding one, is based on competition among jurisdictions rather than on choice by citizens. The idea is that jurisdictions will compete for productive assets, such as factories, and desirable people, such as chemical engineers, by creating a favorable economic climate. Asset managers and individuals will then choose among jurisdictions, voting with their well-heeled feet in favor of the most efficient states, thus ensuring the efficiency of the nation as a whole. This argument, unlike the argument regarding citizen choice, does apply to states. Firms, unlike individuals, have a relatively simple utility function based on profit maximization. They do not need to consider their preference for a particular climate, size of community or community location, to say nothing of family ties or local loyalty. These factors only affect

important volume; his study, however, involves variations in voter attitudes among localities in New York State. Id.

the individuals within the firm, and they only matter to the firm, as a
decision-making entity, to the extent that they affect the firm's single
criterion of profitability. As a result, America's fifty-three jurisdictions may
be enough to provide the requisite variation for inter-jurisdictional competi-
tion. To be sure, the competition argument leaves open an interesting
question about the fate of undesirable facilities, like radioactive waste
dumps, and of undesirable people—chemical dependents rather than chemi-
cal engineers. Nonetheless, a central authority might well choose to
decentralize certain aspects of the economy to generate this salutary compe-
tition.

Once again, however, the arguments cannot really be viewed as favor-
ing federalism, because federalism allows a multiplicity of norms and not
simply a multiplicity of rules. In a truly federal system, some sub-units
might not be interested in economic efficiency or social welfare at all; they
might be primarily motivated by the desire to preserve an agrarian lifestyle,
to protect the environment, or to encourage individual spirituality. These
particular sub-units might lose out in the competition for factories and
chemical engineers, as the economic analysis predicts. But rather than
perceiving their losses as a chastening lesson that induces them to change
their laws, they might regard them as a necessary cost or as a positive ad-

vantage. Clearly, this would not achieve the single goal that the pro-
ponents of efficiency desire. What they really want is a unitary system, devot-
ed to efficiency, which delegates instrumental decisions to decentralized
sub-units, but which retains normative control to make sure that every sub-
unit is committed to the general goal.

69. See, e.g., Lucian A. Bebchuk, Federalism and the Corporation: The Desirable Limits on State
Competition in Corporate Law, 105 HARV. L. REV. 1435 (1992) (noting that because of strategic
behavior by corporate managers, state competition for corporate charters often decreases share-
holder wealth and creates more general inefficiencies); William L. Cary, Federalism and Corporate
states engenders a “race to the bottom” that undercuts legitimate regulatory efforts); Alan N.
Federalism, 41 VAND. L. REV. 1019, 1047-48 (1988) (arguing that use of federal police power is
appropriate when competition among the states forces them to the “lowest common denomina-
tor” of regulation, and to neglect “the welfare, safety, or morality” of their citizens); Jerry L.
Mashaw & Susan Rose-Ackerman, Federalism and Regulation, in THE REAGAN REGULATORY
STRATEGY: AN ASSESSMENT 111 (George C. Eads & Michael Fix eds., 1984) (suggesting that
competition among states discourages social welfare programs that increase costs to firms).

New York v. United States, 112 S. Ct. 2408 (1992) demonstrates that this is not a fanciful
concern. The federal legislation was motivated by the perceived need (at both the federal and
state level) to find a rational policy for siting radioactive waste dumps. By striking down this law,
the court subjected the whole issue to the familiar and dreary NIMBY (not in my backyard) phe-
nomenon.
To put the argument more generally, true federalism cannot be regarded as a means of favoring any specific, first-order norm because its essence is to permit a multiplicity of norms. It favors only the second-order norm that no first-order norm should dominate the polity. In practice, a federal regime may turn out to be a means of achieving a specific, first-order norm such as participation, citizen choice, or economic efficiency. This will occur when that norm is so widely shared that every sub-unit will adopt it, even if left to its own normative devices. The United States, despite its federal structure and its self-image as a vast and variegated nation, is in fact a heavily homogenized culture with high levels of normative consensus. It displays less regional variation than Great Britain or Italy, to say nothing of China, India, or the former Soviet Union; the more appropriate comparisons might be Finland or Venezuela. In political structure, the states are now virtually identical. There is one state (Nebraska) with a unicameral legislature, one state (Hawaii) with a unitary finance system, and one state (Minnesota) that refers to the Democratic and Republican Parties by funny names, but that is the limit of the variation. In economic struc-


71. Daniel Elazar makes much of the variations in state culture, but the differences he observes are in fact quite small by world-wide standards. See ELAZAR, supra note 44; see also IRA SHARKANSKY, REGIONALISM IN AMERICAN POLITICS (1970). In addition, these differences can be explained by factors other than federalism. For example, Elazar offers an admittedly impressionistic chart ranking states by their degree of political cohesiveness. ELAZAR, supra note 44, at 19-20. The most cohesive states in 1980 were Alaska, Utah, Montana, Nevada, South Carolina, Tennessee, and Vermont; the least cohesive were New York, New Jersey, Connecticut, Ohio, Missouri, Michigan, Maryland and Illinois. Virtually all the variability in this list would seem explicable by a single factor: how much of the state's population resides in a large metropolitan area, and particularly in a large metropolitan area that is divided among several states. States with divided metropolitan areas, New York City, Cincinnati, St. Louis, Kansas City, Detroit, Washington, D.C. and Chicago, rank at the bottom. States whose large metropolitan areas lie entirely within the state, such as California, Colorado, Georgia, Massachusetts, Texas, Washington, and Florida rank in the middle, while those that are predominantly rural rank at the top. There are a few exceptions to this rule (Tennessee and Minnesota rank higher than expected). But Elazar's chart seems to demonstrate that we really have a highly uniform political culture, where people throughout the nation respond to the same kinds of phenomena, rather than indicating extensive regional variation. Id.

72. They are referred to as the Democratic Farmer Labor and Independent Republican parties.

73. There are, of course, numerous variations among states, but they are generally what one would expect from a decentralized system where the individual units share a common culture and purpose but possess enough discretion to make numerous decisions. The structural features of state governments often differ, particularly in areas such as the use of popular initiative, the selection of judges, and the length of time the legislature meets. Similarly, the substantive law and regulatory policies of the states vary, but these fit comfortably within a single political culture. No state is as different from the others as it is from Australia, to say nothing of Sri Lanka.
ture, every state has the same general goal of maximizing material welfare, and has chosen the same mixed free enterprise economy for doing so. This is why the Guarantee Clause can be safely declared non-justiciable. If some American state were to establish a monarchy or adopt Communism, national institutions, in particular the United States Marine Corps, would respond quickly, and the Supreme Court would approve that response.

Thus, the Supreme Court and the commentators can argue in favor of federalism when they mean decentralization because the general absence of normative variation in the United States has made the two concepts functionally equivalent. If our federal system in fact provides opportunities for voice, options for exit, or economic efficiency, the reason is that every subunit of our federal system shares that goal. But this lack of variation makes federalism vestigial; it is simply decentralization in fancy clothes, and the rights that it grants to each state protect little more than their own continued existence.

4. Experimentation

A final and somewhat different instrumental argument for federalism refers to a technique, not a policy: that federalism gives the states an opportunity to experiment with different programs. Presumably, this is desirable, not because of an abiding national commitment to pure research, but because the variations may ultimately provide information about a number of governmental programs and enable us to choose the best one. To quote Justice Brandeis: "It is one of the happy incidents of the federal

74. But see Merritt, supra note 29 (observing that the Guarantee Clause protects states from excessive interference by the federal government). It may be true, as Merritt argues, that the Clause was also seen during the ratification debates as a protection of state governments. Id. at 29–36. But the principle situation that the Clause envisioned was that some state would establish an unacceptable regime, and the federal government would feel obligated to invade it to secure a Republican government for its citizens. This is certainly the way the Radical Republicans interpreted the Clause after the Civil War, when they used it as the primary constitutional basis for Reconstruction. See ERIC FONER, RECONSTRUCTION, 1863–1877: AMERICA'S UNFINISHED REVOLUTION 232–33 (1988); WILLIAM M. WLECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 180–81 (1972). The current improbabity that the Clause would be used seems to stem precisely from the uniformity of state governments at present. Thus, the real concerns of the Guarantee Clause seem quite remote from the "cooperative federalism" of the present day. See infra note 106 (citing sources). As will be discussed in Part III, the expansion of national government power does not remotely compromise the basic political processes of the states.

system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.\footnote{New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).} This has a certain ring to it, but on further examination experimentation turns out to be a happy incident of managerial decentralization, not of federalism.

In a unitary system, the central authority will generally have a single goal, but it may be uncertain which of several policies will best achieve that goal.\footnote{An interesting example is the experiment of the People’s Republic of China with essentially unrestrained capitalism in the Shenzhen Economic Zone. See HARRY HARDING, CHINA’S SECOND REVOLUTION: REFORM AFTER MAO (1987); JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 673–74 (1990). A more unitary regime than the P.R.C. would be hard to find; it is so committed to central control that it has placed the country’s entire 3000 mile expanse on Beijing time. Yet, it is fully capable of establishing a sub-unit whose governance structure varies markedly from that of the central authority.} To resolve this uncertainty, it could order different sub-units to experiment with different strategies until the best way to achieve the goal emerges. Experimentation of this sort is an instrumental concept, useful only when the sub-units share a single goal. It is not particularly relevant to sub-units whose goals are different from each other. But true federalism allows governmental sub-units to choose different goals, not to experiment with different mechanisms for achieving a single one.

The experimentation argument for federalism, therefore, is an effort to justify a normative regime by invoking the appeal of an instrumental one. The instinct to do so is understandable in this instrumental age, but the argument for experimentation, like the argument for participation, citizen choice, or competition, supports only managerial decentralization. A unitary manager can experiment with different policies for achieving the same goal, just as it can encourage different sub-units to compete against each other in pursuit of that goal.\footnote{Rapaczynski, supra note 31, at 408–09.} But these arguments would be inapplicable to federalism if our country consisted of sub-units with truly different goals. Consider, for example, precisely what experiment one would design to tell the French Canadians whether they should retain their language. The experimentation argument, like the competition argument, seems applicable to federalism only when there is no normative disagreement among sub-units so that federalism merges into administrative decentralization. The fact that this is true in the United States today is what gives this argument its surface plausibility.

In fact, even decentralization creates problems for the kind of experimentation that is needed to select policies in a highly regulated administra-
tive state. To experiment with different approaches for achieving a single, agreed-upon goal, one sub-unit must be assigned an option that initially seems less desirable, either because that option requires changes in existing practices, or because it offers lower, although still-significant chances of success. Allowed to choose their own strategies, as they are in a decentralized system, no sub-units would choose these unappealing options; they must be forced or encouraged to do so by the centralized authority. Economic theory underscores this conclusion. Experiments are likely to be public goods; once produced, their products are available to all states regardless of each state's investment. As a result, individual states will have no incentive to invest in experiments that involve any substantive or political risk, but will prefer to wait for other states to generate them; this will, of course, produce relatively few experiments.

The standard solution to this dilemma is either coercion or coordination through some inclusive entity, such as the central government. Assuming that the decentralized states are rational actors who desire to experiment (a heroic assumption, but certainly one that is required for the entire states-as-laboratories argument), they might agree among themselves to share the costs of such experiments. More typically, they might agree to subject themselves to coercive discipline to overcome the free rider problem, just as a patriotic citizenry that supports strong national defense might opt for a military draft and a system of taxation, rather than a volunteer army supported by individual contributions. In either case, the natural consequence of their agreement would be centralization. It is thus hardly surprising, even given the most favorable assumptions about the rationality and conscientiousness of state governments, that most significant "experimental" programs in recent years have in fact been organized and financed by the national government. The effect of federalism, to the extent that it is still operative, has not been to encourage experimental state programs or state-sponsored coordinating agencies, but simply to keep some truly innovative national efforts limited, tentative, and vaguely apologetic.

79. See id. at 411-12; Susan Rose-Ackerman, Risk Taking and Reelection: Does Federalism Promote Innovation?, 9 J. Legal Stud. 593 (1980).


81. For example, some of these efforts have been characterized as advisory. One example is the National Center for State Courts. See The National Center for State Courts, Ann. Rep. (published annually since 1972). The Center publishes studies of the state courts. See, e.g., William E. Hewitt et al., Six Courts That Succeed: Six Profiles of Successful Courts (1990); Barry Mahoney et al., Changing Times in Trial Courts (1988); John A.
Finally, even if decentralized states establish a mechanism by which they can coerce themselves to experiment, they will need to collect massive amounts of data if proper choices are to be made; in technical areas particularly, the virtues of a specific policy are unlikely to be self-evident. Decentralized states, acting on their own, will have little incentive to generate this information; they may be motivated to articulate politically palatable justifications for their policies, but they are unlikely to gather data directed to its replication or modification. And if the information is gathered and assimilated, it will not be helpful unless the original policy choices are coordinated by a centralized authority. Even in the absence of normative, truly federalist variations, state-initiated experiments are unlikely to be truly useful to other states because of more specific, technical variations. The tall smokestacks developed by one state may not work under the climatic conditions of another, or may conflict with a policy of installing scrubbing devices that the other state has already instituted. Of course, data and experience developed for one set of conditions can be applied to another, but such applications require information and analysis that no state is likely to undertake on behalf of others. Thus, centralization is not only necessary to initiate the experimental process, but also to implement that process in any reasonably effective fashion.

All of this is implicit in the imagery of scientific experimentation, once that imagery is taken seriously. Experiments generally involve variations among subsets of a total population, but those variations are carefully and minutely prescribed by the researcher—a centralized authority if ever there was one. In medical research, for example, it would be unusual for the researcher to authorize her subjects to follow whatever course of treatment they desire, even if all the subjects agree on the general goal of finding a medical cure. The more common practice is for the researcher to prescribe the treatment for each group. This allows the use of therapies that would not otherwise be chosen, and provides usable data regarding their effects.

II. FEDERALISM AND THE DIFFUSION OF POWER

As demonstrated above, much of the rhetoric favoring federalism really refers to a managerial policy of decentralization. There remain, however, two important arguments that genuinely support the basic principle of federalism: an older one, which emphasizes federalism's role in diffusing governmental power, and a more recent one, which emphasizes its protection of communitarian values. These arguments, unlike the argument for participation, citizen choice, governmental competition, or experimentation, do not champion one substantive policy; instead they favor the rights of political sub-units to adopt whatever policy they choose, and they justify this position on the basis of overarching moral values like liberty or community. Concern about the concentration of power was one of the guiding forces in the design of our entire political system. The Founders of our nation, according to the current view, were motivated by their commitment to liberty and defined themselves as revolutionaries because of their opposition to the unchecked authority that Britain exercised over their lives. Federalism can be seen as responding to this basic concern because it insulates certain decisions from the power of the central government. By doing so, the argument goes, power is diffused among different governmental entities; in particular, the central government is disabled from imposing norms upon the states, at least in certain subject areas. The enormous growth of the national government during the course of the last century is


83. See sources cited supra note 31. The community argument is considered infra in Part III.

84. There has been considerable debate about whether their break with the British political system was radical or incremental, but both sides seem to acknowledge that the debate turns on whether the Founders saw the British system as supporting or opposing liberty. According to the incremental school, the mildness of the Founders' revolutionary fervor, and their continued commitment to the ideals of the nation whose sovereignty they rejected, was based on a recognition that the British system secured liberty for those it chose to include. See, e.g., Andrew C. McLaughlin, A Constitutional History of the United States (1936); Robert H. Webking, The American Revolution and the Politics of Liberty 119–24 (1988). The opposing view holds that the Founders' break with Britain reflected a radical change because they saw the British political system as incapable of securing liberty. See, e.g., Bernard Gailyn, The Ideological Origins of the American Revolution (1967); Gordon S. Wood, The Creation of the American Republic 1776–1787 (1969).
thus seen as a threat to liberty, a threat that can be counteracted by the principle of federalism.

This argument can be viewed in either formal or functional terms. The formal version is that the dispersion of power among the states is required by the Tenth Amendment. But the language of the Tenth Amendment is too opaque to support such an interpretation. This conclusion is not based on a general opposition to using the intent of the Framers to determine the meaning of the constitutional text. Intentionalism has been subject to a blistering attack by legal scholars, although it continues to be popular in governmental circles. But even those who believe that the intent of the Framers should control must acknowledge that our ability to discern that intent varies from one clause to another. The Tenth Amendment stands at the bottom of any list of comprehensibility; it employs no recognized language and invokes no established concepts. It was adopted without discussion and thus lacks the legislative history that the main body of the document possesses. Recognizing this, no Supreme Court decision has ever rested on its language, and even federalism's most enthusiastic proponents, such as Justice O'Connor, cast their arguments for federalism in functional, or policy terms.

The functional argument regarding the dispersion of power is that it secures liberty by protecting the populace from the unconstrained control of a single governmental actor. But to assess the relationship between the doctrine of federalism and the diffusion of governmental power, one needs to know precisely what is meant by power, and how the process of diffusion operates. As an initial, and perhaps obvious, matter, power cannot mean the physical power of the state. If it does, the United States does not have a federal regime, and it is inconceivable that we would develop one. There is no period of history when a central government possessed such overwhelming physical power, compared to its governmental sub-units, as the present time. Our federal armed forces have the capacity to turn any


86. James Madison regarded the state militias as a control on the physical force of the central government. See The Federalist No. 46 (James Madison). This may have been a conceivable position at the time, when organizing a military force consisted of giving a group of men some guns and uniforms and a bit of training, but the overwhelming power of a modern standing army makes Madison's views about physical power look rather quaint. It should be recognized, however, that the force responsible for this change—modern technology—renders many other notions about the abilities of local government equally outdated.
state, any segment of humanity, or humanity in general into a thin gas, and to do so, like the seventh seal’s silence, in “about the space of half an hour.” 87 This situation will not change. Even the rapidly dispersing republics of the former Soviet Union quailed before the possibility that they would secure their independence from the center by maintaining nuclear arsenals of rival strength; 88 the likelihood that, within our infinitely more cohesive union, Nebraska would develop a deterrent force of nuclear missiles, or New Jersey would launch a fleet of nuclear submarines to patrol its seacoasts, is not particularly great.

If the power that federalism is intended to diffuse is not physical power, perhaps it is political power—the power of the central government to carry out its policies. Federalism grants governmental sub-units the right to choose their own officials and to develop their own policies within their areas of jurisdiction. In a fully centralized regime, sub-unit officials are appointed by a central authority and all policies emanate from that authority. Clearly, political power is more diffused in a federal regime because the leaders and representatives of each sub-unit possess a legally-protected political base from which they can voice their opposition to the central authority. 89

While there is an undeniable validity to this argument for federalism, it can readily be overstated. Like other constitutional doctrines, federalism memorializes a deeply-felt element in our political culture, rather than creating it by fiat. 90 The election of chief administrators, lawmaking bodies, and other officials is our instinctive approach to government at any level, not a result of the legal rights that federalism grants our states. City and county officials are also chosen by election. 91 These local officials do not owe their independence from state government to federalism or any other juridical principle, however; as stated above, a basic tenet of American federalism is that the national government will not interfere with a state’s supervision of its counties or municipalities. 92 The autonomy of

87. Revelations 8:1.
89. ELAZAR, supra note 44, at 2; Miller, supra note 82, at 207–08.
90. On the primacy of political culture as a restraint on government power, see JAMES M. BURNS, THE DEADLOCK OF DEMOCRACY (1963); ROBERT A. DAHL & CHARLES E. LINDBLOM, POLITICS, ECONOMICS AND WELFARE: PLANNING AND POLITICS—ECONOMIC SYSTEMS RESOLVED INTO BASIC SOCIAL PROCESSES (1953).
92. See sources cited supra note 66.
local officials is the product of American political culture, not of the Constitution.

In any event, political power cannot be the subject of our concern about the growth of the national government, or serve as a basis for invoking federalism. The political power of the states, whether cultural or constitutional in origin, is not under attack.93 No one is suggesting that state governors be appointed by the President, or that the U.S. Department of Agriculture cancel elections for the state legislatures in rural areas.94 The political independence of the states has not changed over the course of this century and has not been challenged since the Reconstruction Era.

The facts of New York v. United States95 demonstrate the political independence of the states. Siting odious facilities like a nuclear garbage dump is difficult precisely because the governmental sub-units among which the choice must be made possess political power. The statute that was partially invalidated in this case was a reflection of this power, not an invasion of it. As Justice White's separate opinion points out, the original Low-Level Radioactive Waste Policy Act was proposed by the National Governors' Association and enacted after extensive negotiation among state governments. The 1985 amendments were the result of further negotiation.96 They provided a uniform mechanism by which states could deal

---


94. Even those who express concern about the decline of federalism do not make any such assertion. See, e.g., Cooper, supra note 45; Epstein, supra note 29; Fried, supra note 29; Friedlich et al., supra note 45; Graglia, supra note 67; Kaden, supra note 67.


96. Id. at 2435–38. In the late 1970s, there were only three radioactive waste disposal sites in the United States, and the three states in which these sites were located were becoming quite truculent about serving as a dumping ground for other people's lethal garbage. "In December, 1979, the National Governors' Association convened an eight-member task force to coordinate policy proposals on behalf of the States." Id. at 2436. The task force drafted a proposal which was adopted by the National Governors' Association, and that organization in turn recommended to Congress that it enact legislation based on the proposal. The original Low-Level Radioactive Waste Policy Act followed in 1980. Id. at 2437. But since this legislation proved ineffective, Congress reconsidered the 1980 Act in the light of further meetings of the National Governors' Association and extensive negotiation among the states, and between the states and Congress. Id. That some states, like New York, were unhappy with the ultimate result does not suggest that Congress rode roughshod over state interests. Of course, sometimes Congress does precisely that, but the Low-Level Radioactive Waste Policy Act Amendments were an example of the opposite tendency, and thus a poor case for reaffirming judicial protection of the states.

Saikrishna Prakash, supra note 3, argues that New York is wrongly decided, but that there is a constitutional limit on this type of legislation: Congress may not "commandeer" a state legislature, i.e., order it to legislate. Perhaps such action, which is rare and, according to Prakash, not present in the Low-Level Radioactive Waste Policy Act, would threaten the political indepen-
with a problem they all shared and which could not be resolved without coordination. While New York brought suit because the ultimate resolution of the legislative process was contrary to its interests, several other states intervened on the opposing side because they preferred the result. In other words, the Act that the Court invalidated on federalism grounds was actually a compact among the states that they had fashioned by using their undiminished political power.

The issue of federalism arises, and the jeremiads about its demise seem plausible, because of concerns about administrative, rather than physical or political power. If physical power is control over soldiers, airplanes, missiles, and artillery, and political power is control over votes, offices, and public opinion, then administrative power is control over appointed officials, public resources, and regulatory rules. While complaints about the demise of federalism often speak in terms of political power, they invoke the centralization of administrative power as their principal evidence.

The vast growth of federal regulatory programs, from the banking, antitrust, and conservation programs of the Progressive Era, through the labor, agricultural, and social security programs of the New Deal, to the consumer, environmental, social welfare, and civil liberties programs of the 1960s and 1970s, all involved administrative power. These programs left the political structure of the states entirely intact; their effect was to expand the central government's administrative apparatus.

Having identified the nature of the power that is at issue in debates about federalism, it is now necessary to determine what the concept of diffusion means. The image that seems to underlie this concept is that there exists some fixed amount of power—administrative power in this case—which can either be concentrated in the central government or spread between the central government and the states. In fact, 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. Rather, the power of government at all levels has been steadily increasing...
in our culture for a substantial period of time. One hundred years ago, the workplace was essentially unregulated other than by judicial enforcement of individual contracts. Now, a formidable panoply of labor, health, and safety regulations emanates from both the federal government and the states. Similarly, the government’s involvement in environmental matters once consisted essentially of selling off the environment in hundred-acre parcels; now, governments at all levels monitor the quality of air and water, and regulate the emissions of factories which once spewed their fumes into the air with laissez-faire abandon.

One cannot even be certain that this increasing power of government at all levels has necessarily led to a reduction in the power of private entities. The power of human beings in general has increased immeasurably in our modern age. We have changed the physical features of our planet, which for so long, under the designation “nature,” were assumed to be predominant and immutable. While the deforestation of the Spanish Meseta and the Indo-Gangnetic plain attest to the rapacity of prior eras, we have far surpassed these feats, raising the Earth’s temperature, punching photo-chemical holes through its ozone layer, transforming large lakes into porridges of synthetic substances, and covering the landscape with vast networks of asphalt and plastic. To this may be added the less concrete phenomena that Weber noted, whereby control of economic behavior has been transferred from ritual and tradition to self-conscious, bureaucratic enterprises. Thus, there is much more human activity for governments to govern, and it is entirely conceivable that the power of the federal government, of the state governments that complain about its usurpations, and of the private enterprises that complain about them both, are all increasing at a rapid and roughly proportional rate.

But even if we assume that the administrative power of the federal government is growing at the direct expense of states and private enterprises, we cannot conclude that this growth reduces the dispersion of governmental control over the people, and thereby threatens liberty. The crucial question is not the gross aggregation of power, but the way power is exercised in each area of human life. Once we focus on particular areas, it becomes apparent that the growth of the national government often increases the diffusion of administrative power by adding a second decision-maker to the previously comprehensive power of the state.

101. For discussion of private power’s role in our federal system, see LEACH, supra note 44, at 59, 73–76.
Edward Corwin, and more recently Harry Scheiber, characterize the first seven decades of our republic as the classic period of "dual federalism." Under this regime, the national and state governments exercised authority in virtually exclusive spheres. The essence of their relationship was jealous protection of their legally-established jurisdiction, rather than interpenetration or cooperation. As Scheiber recounts, the Civil War began a gradual but inexorable expansion of the areas where the federal government exercised its authority, with cooperation, grants-in-aid, parallel administrative systems, and outright competition displacing the prior exclusivity of state control. Again, this does not mean that the state governments exercised less overall power, given the general growth in governmental power and the simultaneous growth of the activities over which such power could be exercised. What clearly decreased, however, was the number of areas where state power was unaffected by federal authority.

Thus, federal intervention generally means that two governmental hierarchies will be involved in a particular area of governance instead of one. This is sometimes described as cooperative federalism; Milton Grodzins invokes the image of marble cake, with state and federal power intertwined in innumerable, complex ways. Of course, the federal government can preempt state authority in its entirety, but this is not the typical pattern; more often, federal action alters state governance, or simply adds to it. Whether one regards our political system as cooperative, competitive, or simply a mess—whether it resembles marble cake or mush—there is little doubt that state and national powers overlap, and that national policy is regularly implemented by state officials. All the advantages associated with power dispersion can flow from this intervention. The second decision-maker can introduce new standards, subject old ones to debate, increase popular awareness, decrease arbitrary power, restrain corruption and

103. Scheiber, supra note 102, at 636–43. The reality thus corresponded to the theory propounded by K.C. Wheare. See Wheare, supra note 44.
104. Scheiber, supra note 102, at 639, 650–51.
thereby expand liberty—the liberty of individuals from excessive or inappropriate government control.\textsuperscript{107}

To be sure, the federal government might take complete control of a particular area, thus transferring exclusive jurisdiction from the state to itself. This would mean that federal intervention neither increased nor decreased the dispersion of power. In our system, however, federal intervention has almost always resulted in increased dispersion, because the expansion of federal power into areas that were previously the exclusive province of the states has generally involved the sharing of power between federal and state officials. Even congressional action follows this pattern; federal courts are still more securely committed to it. Thus, diffusion of power virtually never provides a rationale for courts to stay their hand or to strike down national legislation.

Perhaps it could be argued that the aggregation of federal power across a broad range of governmental areas represents a dangerous concentration of power, even if its effect, in individual areas, is to disperse power among multiple authorities. But this assumes the point at issue—whether federalism has moral force that justifies its invocation as a constraint on governmental action. If one wants to argue this point, rather than asserting it, one must show that federal aggrandizement impinges on some independent value, such as individual liberty. As indicated, however, federal intervention tends to increase liberty in each area of governance, and thus with respect to each group of people. One might argue that the general size of our federal government creates the danger that it will act oppressively in each area by virtue of its elephantine bulk. But this is a fantastically abstract argument that relies on little besides metaphor for its plausibility. Could anyone seriously assert that the existence of Social Security or the Environmental Protection Agency has affected the Federal Reserve Board’s regulation of banks or the behavior of the federal courts in prison cases? Would the federal government’s program in any area become more extensive if its budget in other areas were doubled, or smaller if its budget in

\textsuperscript{107} A variant of the dispersion of power theme is Charles Fried’s and Lino Graglia’s argument that federalism confines governmental mistakes within limited areas. Fried, supra note 67; Graglia, supra note 67. Assuming that they are referring to states, not cities, see note 67, the problem with the argument is that federalism also increases the likelihood of such mistakes by insulating states, or localities within states, from the countervailing power of the federal government. In fact, as Part III will discuss, this insulation becomes particularly problematic if one does not assume, as Graglia does, that there is an objective standard for determining when a particular government policy is a mistake. Once that assumption is relaxed, one must recognize that the federal government represents our collective sense of political morality; excluding it from supervision of states or localities may well permit divergent actions that “we,” as a polity, would regard as seriously mistaken.
other areas were halved? Assertions such as these belong to the imagery of Fourth of July parades and tire swings, not to an analysis of real governmental operations.

Another argument is that federalism disperses power precisely because it allows different states to adopt different policies, rather than following a single, nationally-established one. In other words, the value of federalism is not derived from its ability to diffuse power within a single state, but to create variations among states. This phenomenon is certainly characteristic of true federalism, but it is difficult to understand how it would contribute to liberty. Very few people argue that normative variation within a polity is inherently desirable. Rather, arguments in favor of the variability that federalism offers are usually advanced by those who happen to disagree with the normative position of the central government. During the Kennedy-Johnson era and the heyday of the Warren Court, states' rights became a rallying cry of those who opposed desegregation, social welfare, and controls on law enforcement agents. During the years of the Reagan and Bush administrations and the Rehnquist Court, proponents of abortion, gay rights, and abolition of the death penalty became enamored of federalism for equivalent reasons. This is perfectly good political strategy, but it is hardly a convincing argument for federalism. In fact, it demonstrates the weakness of federalism as a normative principle; because federalism's force is symbolic and not truly normative, it quickly becomes a proxy for more compelling substantive views that it happens to support.

A somewhat more peculiar version of the norm dispersion argument is that government is inefficient, and that federalism creates the possibility that some part of the nation will stumble on the right answer, or at least a better one. This could be seen as a restatement of the experimentation argument, and thus subject to the response given above. Experiments are characteristic of unitary regimes, and norm dispersion can only destroy the comparability of the different approaches. But if the argument rests entirely on norm dispersion, it has the odd effect of consigning some people to bad policies so that others may benefit from good ones. Social welfare is not greater in a federal system unless one can show that the states, operating separately, will produce a statistically higher level of good policies than the central government. As a purely empirical matter, this appears implausible unless one has a definition of good policy that incorporates notions of federalism. It becomes demonstrably wrong, however, if one accepts the claim that we advance in Part III—that the United States is a single, functioning nation, and that it generally defines good policy through a national decision-making process.
III. FEDERALISM AND COMMUNITY

The long-standing argument that federalism defuses government power has recently been joined by another—that federalism secures community. If this argument is to be more than a free-floating slogan, however, it cannot be applied indiscriminately to any group of people. When we speak of community colleges, the European Community, the intelligence community, and so forth, we are simply using the word in the slovenly way that words get tossed about in ordinary speech; we are not advancing a political argument. To have any significant meaning, the term “community” must be used in a stronger, more restrictive sense to refer to a group of people linked by a common bond that plays a central role in their existence.

The argument, in essence, is that our community determines who we are; it is the context in which we exist and which gives meaning to our actions. When communities are empowered, therefore, decisions about people’s lives are made within their own context, their own system of relationships and meaning, not by a remote, external force. To some extent, this argument overlaps with the argument that federalism facilitates participation in government activities. But disaggregating the term “community” into specific elements, such as participation in decision-making, seriously underestimates its significance. The value of participation can be accommodated within traditional liberalism simply by noting that participation is part of many people’s individual utility function. True communitarian arguments begin from a different conception of the self. They reject the idea that individuals are an aggregation of identifiable preferences that exist prior to, or apart from, any group, and perceive them as members of a group whose sense of identity, meaning, and personal fulfillment is constituted by that membership. Thus, one participates in one’s community through one’s sense of identity with that community as well as by traditional modes of political action. Assuming Lithuania is a community, for example, it can be said that its citizens participate not only by being involved in governing it—which the present elites may have done before its independence—but also by joining private organizations, speaking their own language, and rooting for the Lithuanian team in the Olympics.

110. See supra note 31.
Thus conceived, the argument for community is a complex claim, sounded in modern scholarship by epistemologists like Richard Rorty, political philosophers like Michael Walzer, Michael Sandel, Robert Wolff, and Hannah Arendt, political scientists like Benjamin Barber, historians like J.G.A. Pocock, sociologists like Philip Selznick and Robert Bellah, and legal writers like Cass Sunstein and Frank Michelman. Obviously, a principle so large that it encompasses so many disciplines, and so slippery that it can be invoked by such divergent thinkers, cannot be analyzed within the confines of the present article. Our question is whether this principle provides normative support for federalism, and thereby justifies the use of federalism as a basis for judicial action. To answer this question, however, one must venture at least part way into the vast and murky realm of modern communitarian thought.

Many different types of community are possible, but there are two that seem particularly relevant for present purposes. First, a group of people may be regarded as a community because its members feel a personal or emotional connection to one another. Borrowing a term from Robert Wolff, this may be called an “affective community.” Alternatively, the members of a group may function as a community because they engage in a collective decision-making process regarding major questions of self-governance. This

112. STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).
114. SANDEL, supra note 109.
119. SELZNICK, supra note 109.
124. WOLFF, supra note 115, at 187–92. Wolff’s use of this term is somewhat different: he states that affective community “is the reciprocal consciousness of a shared culture.” Id. at 187. In exploring the possibility of an affective community, however, he refers to reciprocal relationships between individuals. Id. at 182–83. We use his term to describe the set of such relationships within a group.
is sometimes referred to as a “dialogic” community, by emphasizing the
element of public debate; Wolff uses the term “rational” community be-
cause he, like Jürgen Habermas, regards uncoerced persuasion as essential to
true collective decision-making. A safer term might be political commu-
nity; this acknowledges the sense of a shared enterprise, while not imposing
such high standards that it precludes historical examples.

The important claims about both types of communities involve the
individual’s relationship to the group: that the community is constitutive of
the individual, and that individuals achieve fulfillment of some sort
through participation in that community. A rather persuasive case can be
made for the self-constitutive and participatory roles of these two forms of
community. The image of an autonomous individual, who exists separately
from any emotional attachment or political context, and enlists in those
communities that she ultimately joins only after conscious deliberation, is
certainly a fanciful one. The image of the self-interested individual who
participates only in personal or political relationships to protect his private
interests is highly reductionist. The cynical may dismiss altruism, but they
cannot readily discount personal loyalty or political passion, which impel
many actions unrelated to private interest and occasionally create new
political entities or rip existing ones asunder. Any realistic and comprehen-
sive theory of the individual must recognize a significant role for both
affective and political communities in constructing consciousness and pro-
viding pathways to fulfillment.

While affective and political communities serve many of the same
functions with respect to individuals, they do so in crucially different ways.
Affective communities necessarily consist of small groups; emotional at-
tachments, like the strong force in nuclear physics, are very powerful but
tend to operate only over short distances. As described in a number of
standard sociological studies, including those by Baker Brownell, Robert
Nisbet, and Robert E. Park, one generally establishes affect-

125. Jürgen Habermas, The Theory of Communicative Action 8–42,
273–337 (Thomas McCarthy trans., 1984). Wolff would call this one form of affective commu-

126. Id. at 192–93; Jürgen Habermas, The Theory of Communicative Action 8–42,
273–337 (Thomas McCarthy trans., 1984). Wolff would call this one form of affective commu-

Time of Crisis (1950).


ffective relationships through some form of personal contact, and often through ongoing, day-to-day relationships. It is possible, of course, to become emotionally attached to a remote figure, like "the King," or an abstract entity, like "France." Such relationships, however, lack mutuality. Since the usual image of an affective community involves mutual attachments, personal contact is virtually obligatory. Thus, affective communities constitute that part of the individual consciousness that involves concepts of group membership, personal loyalty, and emotional connection. The sense of participation they offer consists of mutual assistance, sharing, and, less nobly but just as centrally, the exclusion of outsiders.

Political communities can be coextensive with affective communities, but this is rarely the case in advanced societies. Even in ancient Greece, the concept of the self-contained polis that combined affective bonds and political decision-making was seriously outdated; Aristotle's Politics may have been applicable to his little home town of Stagira, but it was irrelevant to Athens, to say nothing of his pupil's empire. The modern world's ability to mobilize large groups of people through bureaucratic organization and technology has produced further increases in the size of operative political units and the arenas of political decision-making. Such larger scale political communities constitute the individual's sense of self as a political actor, and possibly his sense of social position. Participation in them provides a sense of individual importance, and a connection to events that would otherwise be remote and recondite. These are important interactions, but they are qualitatively different from the self-constitution and methods of fulfillment that occur at a smaller scale in affective communities.

Communitarian theorists often conflate affective and political communities for a variety of reasons. One reason is romanticism or pastoralism—an aversion to our complex, pluralistic modern world, and a

130. One possible exception is Switzerland, whose political subdivisions, the cantons, have long histories, distinctive religions and languages (although some, like Fribourg, Grisons, and Valais are mixed) and, with two exceptions (Zurich and Berne), under half a million inhabitants. See Otto Kaufman, Swiss Federalism, in FORGING UNITY OUT OF DIVERSITY 206, 210-12, 217 (Robert Goldwin et al. eds., 1989).

131. Gardbaum, supra note 123, at 728.

132. The other classic example of a political community that also functioned as an affective community was the New England town. Such towns seem virtually irrelevant to modern problems of governance because of their diminutive size, but even they may have been too large and pluralistic to function along affective lines. According to David König, the Puritan communities experienced too many value conflicts to rely on informal controls, and needed to resort to a system of written law to maintain their integrity. See DAVID KÖNIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY 1629–1692 (1979).
desire to find refuge in a simpler, more integrated polity. It is notable how vague these theorists become when called on to explain the way that their ideas about small, essentially affective communities will fit into our current political context. A second motivation is the desire to make extreme claims for the virtues of community at any level. Community, some theorists assert, is totally constitutive of the self, and individuals achieve their highest form of fulfillment, or their only true form of fulfillment, through participation in such a community. Once such extreme claims are asserted, "community" simply becomes equivalent to the totality of forces that constitute the individual and the entirety of pathways to personal fulfillment. This erases distinctions between different forms of community, and replaces them with a single, fuzzy concept, which oscillates between affective and political community like a thaumaturge. In fact, there are many other forces that constitute the individual, the most important being cultural or societal. Similarly, most individuals perceive many means of personal fulfillment besides community participation, such as family, religion, ideology, creativity, and money. Community is not everything—at least, it cannot be if the term is to have any meaning. It is a specific notion about associational groups and their relation to the individual. To make use of this concept, one must contain it within its recognizable boundaries, and distinguish between its different forms.

With these caveats in mind, we can now assess the claim that federalism is justified by the value of community, and thus should operate as a principle for judicial decision-making. We can begin with affective community, and assume that fostering such communities is a desirable goal. This is by no means self-evident; small, tightly-knit groups of people with strong affective bonds among themselves are likely to be xenophobic, intolerant, and repressive. But even if they behave more the way that proponents of community envision, that is, like the people in contemporary beer and wine commercials, such communities do not support an argument for federalism. Federalism, unlike the more general principle of managerial decentralization, only protects the rights of states, and all, or virtually all, American states are far too large to function as affective communities.

134. See, e.g., SANDEL, supra note 109.
135. See TUSHNET, supra note 82, at 42 n.64 ("In a world in which the so-called community school boards in New York City would have represented populations in 1967 only slightly smaller than the population of the entire state of New York in 1790, . . . the "states" that were protected in National League of Cities are not the same entities the framers had in mind . . . ."); see also Gardner, supra note 70, at 837 ("the communities in theory defined by state constitutions simply do not exist").
If we take the notion of mutual bonds of emotional attachment seriously, it seems clear that we are speaking about small towns or urban neighborhoods, not about our nation-size political subdivisions. It may be true that smaller American states are often controlled by a narrow political elite that operates as a community for certain purposes. But since communities tend to be exclusionary, and elites remain elite by that same mechanism of exclusion, a political elite of this sort is unlikely to instill communitarian feelings among its state’s excluded millions. When proponents of affective community become specific, they tend to speak about volunteer groups, PTAs, church congregations, farm cooperatives, and urban self-help programs—all entities that are considerably smaller than a state.

Because of the obvious disjunction between affective communities and states, the communitarian argument for federalism tends to emphasize a different claim: that state governments are more likely to protect and foster local communities than a remote federal government. But no theoretical argument or empirical evidence supports this proposition. Indeed, for reasons previously discussed, the only reliable way to establish a program of this sort throughout the nation is to have the national government implement it. Left to their own devices, some states might foster community, while others might attempt to extirpate it. Affective community, like any other uniform policy, is more likely to be achieved through comprehensive nation-wide action.

Empirical evidence confirms that there is no necessary link between states and affective communities. Much of the supplementary funding for local governments comes directly from the federal government, rather than the states. More importantly, since most local governments are themselves too large to constitute affective communities, efforts to involve neighborhood leadership in government program operation have often issued from the national government. This was particularly true during the War on Poverty, when federal initiatives like Model Cities and the Elementary and Secondary Education Act required participation from what was explicitly referred to as “the Community.”

If federalism does not protect or foster affective communities, perhaps it plays this role for political communities. There is no particular constraint on the size of such communities; indeed, looking around the world, or across the course of history, there appear numerous political communities as large or larger than our states. One finds, moreover, impressive empir-

136. See, e.g., Rapaczynski, supra note 31.
137. See ZAREFSKY, supra note 54, at 120-31.
ical evidence to indicate that federalism protects political communities. Many current nations are alliances of political communities, with the existence of each community being secured by the rights that it can assert against the central government. These political communities often preserve linguistic, religious, and cultural features that would be disrupted or submerged by central control—a control that tends to be exercised quite rigorously in diverse nations unless the political communities have a legal right to resist. Conversely, political rights often contribute to people's sense of identity with each other and to their ability to constitute a political community.

An example of a political community that exists within a larger state is Catalonia. Catalonia, as it developed during the Middle Ages, was actually one component, albeit the dominant one, of the Crown of Aragon, which also included Valencia and Aragon itself.\(^{138}\) It had its own language, Catalan, its own culture,\(^{139}\) and its own political institutions, including a functioning legislature called the Cortes.\(^{140}\) In 1469, Ferdinand, heir to the Crown of Aragon, married Isabella, the heiress of Castile. By 1479 both had succeeded to their thrones and the two kingdoms were united.\(^{141}\) Despite this union and the leading role the resulting Kingdom of Spain played in world affairs during the succeeding centuries, Catalonia remained a distinct political community.\(^{142}\) Its people, from peasants to nobility, continued to think of themselves as Catalans, and to formulate collective decisions through the Cortes. They favored or opposed the central government according to their own sense of advantage, and when its demands became too great in 1639–40, they revolted.\(^{143}\) Throughout this period, Spain was truly a federalized state. Its ever-impecunious King, although he could legally impose whatever taxes on Castile that prudence permitted, could only increase taxes in Catalonia with the concurrence of

---

its Cortes. Moreover, he had no power to alter its political structure or the bulk of its internal laws.144

Catalonia lost these rights in 1715 because it chose the wrong side in the War of Spanish Succession,145 and because the victorious side, the Bourbons, were prepared to indulge their hereditary passion for centralization.146 The Liberals who succeeded them continued this policy, dividing Catalonia into four smaller provinces in an effort to diffuse its separatist tendencies.147 Yet the Catalans preserved their sense of separateness, though stripped of its legal correlative. This expressed itself in a continuing tension with the central government, and flared into rebellions of various sorts in 1822,148 1842,149 1909,150 and again during the Spanish Civil War.151 With the restoration of democracy following Franco's death, Catalonia demanded and received a measure of the political autonomy that its people, however divided among themselves, had never forsaken.152

A political community like Catalonia can advance a powerful demand for autonomy upon the central government.153 From the Catalans' perspective, of course, this demand may express itself in the desire for total independence, thus rejecting centralized authority in any form. But from the central government's perspective, the demand provides an argument for

144. CHAYTOR, supra note 140, at 117-19; ELLIOTT, supra note 138, at 201-06, 303-04, 330-33.
145. ELLIOTT, supra note 138, at 361-78; PI-SUNYER, supra note 140, at 23-24; VICENS VIVES, supra note 139, at 114-20.
146. SAHLINS, supra note 139, at 126-27.
147. This occurred in 1833. See VICENS VIVES, supra note 139, at 133 n.7. The four provinces, which still exist, are Barcelona, Gerona, Lerida, and Tarragona.
148. Id. at 125-26.
149. Id. at 129-30.
150. Id. at 145; see RAYMOND CARR, MODERN SPAIN 1875-1980, at 75 (1980); JOAN C. ULLMAN, THE TRAGIC WEEK: A STUDY OF ANTI-CLERICALISM IN SPAIN 1875-1912 (1968).
152. CARR, supra note 150, at 173-81; DONALD SHARE, THE MAKING OF SPANISH DEMOCRACY 164-65 (1986); Juan Linz, Spanish Democracy and the Estado de las Autonomias, in FORGING UNITY OUT OF DIVERSITY, supra note 130, at 260-99.
153. The province of Quebec provides a similar example. Unlike any American state, the majority of Quebec's citizens speak a different language from the remainder of their nation, and feel their strongest cultural ties to a different European parent. The vigor and perceived legitimacy of their separatism may be one reason why Canadian courts have been more solicitous of federalism concerns, despite the relatively weak support for this position in the Canadian constitution. See BLACK, supra note 34; Martha A. Field, The Differing Federalisms of Canada and the United States, 55 LAW & CONTEMP. PROBS. 107 (1992).
federalism. Creating a federal structure, and thus preserving Catalonia’s right to function as a political community, would recognize and foster a language, a culture, and a shared historical experience. In pragmatic terms, it might also secure the unity of the nation by acceding to some measure of independence for its constituent communities. Of course, a particular regime might reject such a claim, as the Bourbons, the nineteenth century Liberal government, and Franco’s dictatorship all did with respect to Catalonia. But the point remains that, in Spain, federalism is genuinely supported by a normative argument based on the principle of political community.

This is not true of the United States. There are no regions in our nation with a separate history or culture like Catalonia’s. Most of our states, the alleged political communities that federalism would preserve, are mere administrative units, rectangular swatches of the prairie with nothing but their legal definitions to distinguish them from one another. Although some of the original thirteen states had unique political communities resulting from their separate origins, their uniqueness has long since given way to the national culture. Of course, citizens of Nebraska know that they live in Nebraska, and can identify themselves as Nebraskans, just as citizens of Tarragona, one of the provinces into which the Liberals divided Catalonia, can identify themselves as residents of Tarragona. But this level of identification does not exceed that which people naturally establish with a governmental sub-unit that administers numerous decentralized services. If that is counted as a political community, then such communities are not only ubiquitous, but virtually unavoidable in any moderate-size nation. This dilutes the concept to the point of insignificance.

One cannot deny that American society has internal divisions, and the depth of these divisions is a source of ongoing and intense debate. To some, America remains a melting pot, with its various races and nationalities.

154. See Nathan Glazer, The Constitution and American Diversity, in Forging Unity Out of Diversity, supra note 130, at 60-64.

155. As Glazer points out, Utah is something of an exception, having been founded, and continuing to be dominated, by members of a distinct religion. See id. at 64. But the Mormons are a recent group, who emerged from a period of general turmoil in American Protestantism and have no distinguishing features apart from their religious commitment. Thus, while they undoubtedly represent a true community, there are many bonds linking them to the national community as well.

Guam and Puerto Rico, on the other hand, are genuine political communities, with their own language, culture, and history. They are not, however, part of the United States; they are simply ruled by the United States. If we were to grant them statehood status (something they apparently do not want, precisely because of their separate identity), there would be a strong argument for allowing them to follow separate norms—that is, for genuine federalism.
blended into a rather uniform, bourgeois culture. To others, it is more like a stew, consisting of unblended elements. But even if one adopts this latter view, it is apparent that the ingredients are rather evenly distributed throughout the country. Perhaps African-Americans are a distinct, excluded group, but they are no more so in Denver than they are in Baltimore. Perhaps Irish-Americans have clung to a separate cultural identity, but this identity is no different in Brooklyn than it is in San Antonio. Our ethnic and cultural differences do not correspond to geographic sections of the country, and thus cannot be regarded as political communities like Catalonia.  

To be sure, there are affective communities to be found in various parts of the United States: religious groups, Native American tribes, even towns with relatively homogenous populations. Because of the necessarily small size of such communities, they are generally located within the borders of a single state. But they have no particular relationship to the state itself, and we cannot identify any of our states as being uniquely composed of, or identified with, such communities, with the possible exception of Utah. Indeed, states are often hostile to the presence of such communities and the national government is required to intervene on their behalf. Native Americans are perhaps the prime example. Given how cruel our national government has been to Native Americans, the fact that it is nonetheless their principal protector testifies to the truly abysmal attitudes that state governments often display toward affective communities within their midst.

This nation-wide dispersion of ethnic and cultural identities, parallel- ing the dispersion of economic or ideological identities, does not mean that the concept of political community is inapplicable to the United States. What it means, rather, is that the United States has one political community, and that political community is the United States. The arena in which our political consciousness takes shape and our crucial decisions are made is a national one. It is the nation as a whole that constructs our

---

156. On the essentially geographic character of federalism, see RAMESH D. DIKSHIT, THE POLITICAL GEOGRAPHY OF FEDERALISM (1975); IVO D. DUCHARCEK, COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS (1970); FRIEDRICH, supra note 44, at 188-227; LIVINGSTON, supra note 82. Of course, this does not mean that there is a perfect correspondence between geographical divisions and juridical sub-units, even in truly federal regimes. See RONALD L. WATTS, NEW FEDERATIONS: EXPERIMENTS IN THE COMMONWEALTH 67-69 (1966).

sense of self and that provides a sense of participation in a larger group. Thus, American federalism is nothing more than decentralization because the normative claim of political community is not available to it. That claim, in any meaningful sense, belongs only to the nation as a single entity.

Because our political community is so vast, the individual's sense of personal participation is generally quite attenuated. But this does not transform the states, counties, or cities, into true political communities. It simply means that most Americans will not be able to find personal fulfillment by participating in the collective decision-making process that shapes their consciousness and controls their lives. Perhaps that is not a serious problem, given our other opportunities for fulfillment, which include

---

158. Bruce La Pierre suggests that federalism is worthy of judicial protection because it secures political accountability, which is a variant of the diffusion of power. See La Pierre, Political Accountability, supra note 29; 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) [hereinafter La Pierre, Safeguards]. According to La Pierre, both the states and the nation are political communities. See La Pierre, Political Accountability, supra note 29, at 639. He recognizes that the nation is often a more relevant and functional political community than the states, id. at 630–31, and deserves to prevail over state interests for that reason. In some situations, however, the national government is not politically accountable; for example, it can compel the states to make expensive capital improvements on their sewage plants. La Pierre, Safeguards, supra at 1009–10; see also La Pierre, Political Accountability, supra note 29, at 654 (federal tax on sewage plants). Since sewage plants are publicly owned, there is no countervailing force by private interests; since the states, rather than the national electorate, must pay the cost, there is a lack of political accountability in the decision.

This is a sophisticated argument; La Pierre's reason for invalidating regulation of sewage plants is much better than the Court's conclusory reason for invalidating regulation of radioactive waste disposal in New York v. United States, 112 S. Ct. 2408 (1992). It depends, however, upon the assertion, which La Pierre never tries to justify, that the states are political communities. If they are not, then they cannot serve as the crucial loci of accountability; the imposition of costs on them is no less valid than Congress' imposition of costs on any other less than universal group, like farmers, broadcasters, or wealthy people. Accountability exists when public officials must answer to the people. To know what increases or decreases accountability, one must know who "the people" are. Once we recognize the distinctiveness of a group of people, like the Catalans, there is a strong argument that the government that acts upon them should be accountable to them. But if, as argued here, our political community is national, then that is the appropriate locus of decision.

Moreover, there are innumerable ways in which Congress is less than fully accountable; the granting of broad discretion to administrative agencies is an obvious and frequently bemoaned example. See Peter H. Aranson et al., A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 33–36 (1982); David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 Mich. L. Rev. 1223, 1249–74 (1985). As Stephen Ross has suggested to us, it does not make sense to single out one relatively minor example of this general pattern and erect a grandiose constitutional superstructure on it, while accepting other failures of accountability as inevitable features of a modern administrative state.


participation in administrative sub-units of the polity. Perhaps it is very serious, breeding a sense of personal alienation and undermining the legitimacy or effectiveness of the central government. But that is our present condition, powerfully established and supported by our entire history and culture; it will not be changed by granting our administrative sub-units juridical rights.

Recent world events suggest that a nation-wide political community, however alienating, has virtues of its own. Nebraska and New Jersey are not going to break away from the United States, and we will continue to debate and decide the issues that confront us as a single polity. Our great rival, the Soviet Union, was unable to achieve this unity, as its spectacular disintegration indicates. While it is true that the Soviet citizens also rejected their governmental system, the same process occurred in Poland and Hungary without generating any shift in the arena of decision-making. But even after centuries of common rule, the various regions that made up the Soviet Union, and the Russian Empire before it, never coalesced into a single political community. Participation was suppressed and the central government never succeeded in representing or reflecting its citizens' political or cultural identity.

The United States had its own experience with secession, involving its only geographic division that was clearly more than administrative in character. Slavery, although originally legal in every state, was restricted to one section of the nation by the time the intense debate about its legitimacy began. In that section, it created a distinct world view, lifestyle, and set of institutions. Those who favored its continuation, therefore, could probably advance a valid claim of political community on behalf of their desire to avoid a centralized national policy. Nonetheless, the extent to which people of the time believed that the southern states were entitled to protection as separate political communities depended on their feelings about slavery itself. It was an issue, not a culture or a language, that made the South distinct, and its normative claim to separateness rose and fell with the normative validity of that issue. Our national rejection of slavery

161. On the virtues of non-involvement in politics, see Bruce A. Ackerman, Social Justice in the Liberal State (1980).
163. See Glazer, supra note 154, at 63 ("Southern Americans, speaking the same language and professing the same religions as northerns of the same Anglo-Saxon stock, decided that the preservation of their peculiar institution demanded a separate country.").
has led to a consequent rejection of those elements of southern culture that distinguished it from other portions of the nation.

In Part II, we observed that claims of federalism are often nothing more than strategies to advance substantive positions or, alternatively, that people declare themselves federalists when they oppose national policy, and abandon that commitment when they favor it. This is true precisely because the United States has a unitary political consciousness and lacks subsidiary political communities. Disagreements among states, or between the states and the national government, are limited to their own terms, and all alignments shift when the next issue arises. Consequently, there is nothing for federalism to protect, aside from the states' ability to disagree about the particular issue at hand. The term "states" or "federalism" becomes a code word for particular substantive positions, because that is what we really care about. Many of the people who say "federalism" in the 1990s mean gay rights, because the national government's position, as reflected in *Bowers v. Hardwick*, is so disappointing to them, just as many of the people who said "states rights" in the 1950s and 1960s meant "no civil rights." The reason is not that the federalism argument attracts the cynical or insincere. It is because we have a national political community and any claim acquires political meaning in that context. Thus, the demand for federalism in the 1960s was understood as opposition to the civil rights movement because civil rights was the national movement that would have been affected by that demand.

In essence, therefore, federalism protects nothing but itself; it is a sort of endangered species act for political ideas. That may have a certain charm, a quality that evokes small-town America and its homespun values, although not, one hopes, the languid life of the antebellum plantation, with the wind whispering through the magnolias and the slaves singing happily in the fields. Even at its best, sappy imagery of this sort provides no valid basis for constraining national policy. If "we"—the political community of the United States—decide upon a particular course of action, federalism should not constrain its implementation.

This conception of community circles back to the discussion of decentralization at the beginning of this Article. An underlying ambiguity in that discussion—and in virtually every other discussion of federalism—is the locus of the crucial decision-making function. One can ask whether "we" want a decentralized or unified regime, but the underlying question is the

164. See, e.g., LEACH, supra note 44, at 36–38.
165. Gardner, supra note 70.
166. 478 U.S. 186 (1986).
definition of that small, collective pronoun. The way one goes about answering such a question may well depend on whether “we” are the United States, or “we” are the citizens or government of each state taken separately. Determining the identity of the polity to which one speaks necessarily precedes resolution of questions about the desires or interests of its citizens.

The answer suggested here is that “we” means our national polity, because that is the real locus of public debate. Federalism, as opposed to decentralization, acts as a constraint on our ability, as a nation, to achieve the policies we want, including policies of participation, local variation, and experimentation. It may encourage some states to go further with these policies, but, more significantly, it permits other states to fall below the accepted minimum. One can only justify federalism by asserting that there is no “we”—that the nation is not a political community. In that case, the variation among states, and their commitment to different normative positions, is not problematic, because there is no national standard below which they can fall, and, on average, states are as likely to reach the “right” level as the national government. But our nation is indeed a political community; for better or worse, it does constitute our political sense of self and the arena in which our basic normative positions about government must be argued and resolved.

The Supreme Court is an important part of this national political community. That is the reason why the intensity of its enthusiasm for federalism seems inversely related to the significance of the issue at hand; the less politically significant the issue, the greater the Court’s insistence on the principles of federalism. Despite the glowing celebration of the concept in Gregory and New York v. United States, the Court has rejected federalism every time it really mattered, that is, when it permitted genuine normative variation.6 The Court has validated the division of political

---

167. See LEACH, supra note 44, at 80–81. The most notable example is Brown v. Board of Educ., 347 U.S. 483 (1954). Once the nation was finished fighting a war over the normative divergence of the states on slavery, it quickly settled back into a general mistreatment of blacks. When the Court decided Plessy v. Ferguson, 163 U.S. 537 (1896), segregation of the races was a rather general phenomenon throughout the United States, and the Court chose not to intervene. By the time Brown came to the Court, that normative unity no longer existed. In 1947, the Armed Forces, our largest (and at that time probably our most prestigious) national institution, and baseball, our national sport, were both desegregated. See RICHARD M. DALFIOUME, DESSEGREGATION OF THE U.S. ARMED FORCES (1969); JULES TYGIEL, BASEBALL’S GREAT EXPERIMENT (1983). The effect of Brown was not to secure the rights of blacks throughout the country, but to force one divergent portion of the country to conform to emerging national standards.

In a recent article, Professor Martha Field makes the interesting point that the United States Constitution, whatever its absolute commitment to federalism, clearly contains stronger federalism language than the Canadian Constitution of 1867, yet the Canadian courts have been more assiduous in protecting their country’s federal structure. See Field, supra note 153. Field’s analysis
power and has secured the "promise of liberty" only in areas of minor political significance, such as the power of states to compel the retirement of elderly judges, or the process of hazardous waste disposal, an area where Congress can readily design alternative ways to accomplish the same substantive goals. It has remained silent, or granted its approval, when significant national policies have displaced state authority.

This observation poses a final question: Since the Court's doctrine of federalism does not protect federalism, why does the Court promote this doctrine so vigorously? The Court's intermittent embrace of federalist principles is best understood as a form of symbolic politics, one that undermines rather than enhances federalism. The Court's opinions play a minor, but visible role in the continuing national dramaturgy that fosters the myth of small town America. Even as political and social conditions make these institutions unfeasible, they remain powerful and reassuring symbols, part of the myth that we have not really changed as much as we really have. The Court's continued insistence upon "Our Federalism" is an important means for fostering this myth, and thereby obscuring the disappearance of its factual referent. But this myth is a national myth, and its symbolic quality only confirms the national character of our political community.

In other words, federalism is a neurosis, a dysfunctional belief to which we cling despite its irrelevance to present circumstances. As a relatively healthy nation, we do not permit this neurosis to interfere with our major tasks of government. But we nervously declare our continued fealty to federalism so that we can suppress the uncomfortable realization that we have changed in such profound, far-reaching ways. These declarations can be found in executive orders, congressional proclamations, and political campaign speeches, but they sound best when they appear in Supreme Court opinions. Not only do we view the Court as the voice of the Constitution itself, but its decisions possess just enough impact to be taken seriously, and not enough, at least in most circumstances, to be truly disruptive. The Justices, being patriotic Americans, are generally willing to engage in the symbolic politics of federalism on behalf of the national psyche. This is not a matter of cynical calculation. Because their role requires them to mediate between constitutional tradition and current realities, they

only emphasizes the extent to which American federal courts have been willing to impose national standards.

experience the conflict between the two quite immediately. They react with the mixed signals and ambiguous pronouncements that provide just enough reassurance that federalism is alive, while avoiding any serious interference with important national policies. That reassurance is provided in the context of our national political community, the only true political community that we possess.

CONCLUSION

States serve a valuable function in our nation; they are the natural and convenient means to achieve the managerial benefits that flow from decentralizing certain governmental functions. Every nation possesses but one history, and that history generates meanings and associations that merit preservation, if only on pragmatic grounds. The familiarity of our state lines compensates for a great deal of inefficiency when states are viewed as a mechanism for decentralization. It renders the states more workable as sub-units that can govern their populace and elicit the necessary level of participation from their citizens. This does not convert the states into political communities; citizens can make the decisions necessary to carry out state functions, but their political identity is formed by their membership in the nation as a whole. Nonetheless, it is useful to have familiar, historically-situated sub-units through which decentralized governmental operations can be routed. Most nations have retained their historical subdivisions for this reason, just as the states, in turn, have generally retained their historical county lines. Significantly, the nations that have redrawn their boundaries in purely pragmatic form, like France and Spain, have done so because their historical sub-divisions were true political communities that posed centrifugal threats to the central government.

Thus, the rejection of federalism as a norm of governance does not imply that states should be eliminated, or even that their boundaries should be redrawn to achieve more efficient decentralization. What it does suggest, however, is that federalism should not be imposed as a constraint on national policy. When some branch of the national government decides to act in a way that displaces state authority, there is no basis for restricting such action. National policy is as likely to encourage participation as to foreclose it, as likely to encourage citizen or business choice as to impose uniformity, more likely to initiate experiments than to suppress them, more likely to diffuse power than to concentrate it, and more likely to encourage affective communities than to displace them. Most significant, however, is the issue of political community; this not only fails to support federalism, but provides a positive argument for respecting national action. The reason
is that national actions are "our" actions; they are decisions of the polity to which we all belong, and which constitute our decision-making arena. That polity may not constitute our entire sense of self, but it does constitute our sense of political identity.