

The Conservative Case for Federalism

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The Rehnquist Court was a conservative Court, and conservatives like federalism. That, at least, is the conventional wisdom. But as the late Chief Justice's tenure drew to a close in 2005, there were reasons to question both his Court's conservatism and the connection between conservative ideology and "states' rights." In a number of areas—e.g., free speech,¹ gay rights,² and substantive limits on the death penalty³—the Rehnquist Court pushed liberal causes further than the Warren Court ever dared. One can quibble about the extent to which these developments make Rehnquist's a "liberal" Court, but it seems clear that one of the primary reasons judicial conservatives supported federalism in the 1960s—resistance to broad, nationally defined notions of individual rights—did not motivate the Rehnquist Court's "Federalist Revival." Moreover, current controversies over issues from air pollution to gay marriage to the War on Terror have highlighted the potential of constitutional "states' rights" to shield politically liberal policies.⁴

All this leaves the Rehnquist Court's commitment to federalism as something of a puzzle. Outside One First Street, conservatives control both political branches of the national government.⁵ It is hardly obvious why conservative *politicians* at the national level would want to cede power to the States. The most recent round of federalism cases coming to the Court reflects this change in the politics of federalism. In *Gonzales v. Raich*,⁶ the

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¹ See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (holding that a federal ban on virtual child pornography abridged the freedom of speech); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (holding that a statute requiring cable companies to scramble sexually explicit images in full or limit programming to certain hours violated the First Amendment).

² See *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding a Texas antisodomy statute unconstitutional).

³ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment forbids executing murderers who committed their crimes before the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that executing mentally retarded individuals is "cruel and unusual" punishment).

⁴ See Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1253–57 (2004) (discussing state and local governmental resistance to the USA PATRIOT Act); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 170–72 (1999) (discussing Commerce Clause challenges to a federal statutory ban on gay marriage); Deborah Keeth, Comment, *The California Climate Law: A State's Cutting-Edge Efforts to Achieve Clean Air*, 30 ECOLOGY L.Q. 715, 728–32 (2003) (describing federal law challenges to California's leadership on air pollution control).

⁵ That is true, at least, as this Essay goes to press in the summer of 2006.

⁶ *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

Court held that Congress had power under the Commerce Clause to stifle California's experiment with legalizing marijuana for medical use.⁷ In the Roberts Court's first major federalism decision, the Court rebuffed an attempt by the national executive branch to stamp out similar state experimentation with physician-assisted suicide.⁸ And in a host of statutory cases, antiregulatory forces have asked the Court to invalidate state economic regulation as preempted by more permissive federal laws.⁹ Although the record is mixed, the Court has heeded these pleas more often than not.¹⁰ It is no longer possible to equate a vote for state autonomy with a vote for a politically conservative result.

This Essay proposes an argument for limiting national power grounded in conservative political theory. My purpose is both descriptive and normative. The descriptive goal is to offer an account of why conservative judges might sometimes favor federalism notwithstanding its often poor fit with politically conservative ends. The normative purpose is to encourage those judges to do so more consistently. This argument is not, of course, limited to judges; although elements of the theory may be more compelling for judges than for purely political actors, the basic argument is a general one about the proper allocation of governmental authority between the Nation and the States. It is worth pointing out, however, that this Essay aims to lay out a rigorously conservative case for federalism—not to prove that the conservative approach is the correct one.¹¹

Part I of this Essay addresses some preliminary difficulties in defining American conservatism. Parts II, III, and IV then lay out three connections between federalism and conservative political theory: fidelity to our constitutional past, an incrementalist approach to social and political reform, and the function of the States as intermediary institutions in political society.

I. What is Conservatism?

Peter Smith's thoughtful contribution to this Symposium argues for a particular connection between federalism and conservatism: the Rehnquist Court, in his view, has sided with the States in federalism cases for the instru-

⁷ *Id.* at 2201, 2209.

⁸ *Gonzales v. Oregon*, 126 S. Ct. 904, 922, 925 (2006). Although the Court decided the Oregon case on statutory interpretation grounds, it noted that the "structure and limitations of federalism" counseled a narrow interpretation of the Attorney General's statutory authority. *Id.* at 923.

⁹ *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 434 (2005) (considering whether federal regulation of pesticides preempted state common-law causes of action); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 532 (2001) (considering whether federal statute preempted state regulation of tobacco advertising); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000) (considering whether federal regulation preempted state common-law tort cause of action); *United States v. Locke*, 529 U.S. 89, 94 (2000) (considering whether federal regulation preempted state regulation of oil tankers).

¹⁰ *See Ernest A. Young, The Rehnquist Court's Two Federalisms*, 83 *TEX. L. REV.* 1, 30–32 (2004).

¹¹ *Cf. ROGER SCRUTON, THE MEANING OF CONSERVATISM* vii (3d ed. 2002) ("[T]his work is an exercise in doctrine; it attempts not to prove a political vision, but to express it.").

mental purpose of advancing conservative political outcomes.¹² Crudely put, the Court limited the Commerce Clause power in *Lopez* because conservatives like guns; it refused to protect state regulatory power in various statutory preemption cases, however, because conservatives hate government regulation.¹³ Professor Smith's argument bears a strong family resemblance to the attitudinal model of judicial review in political science, which posits that judges vote their ideological preferences, largely unconstrained by constitutional text or precedent.¹⁴ This way of looking at the federalism cases has serious problems, and I have addressed Smith's argument and the attitudinal tendency at length elsewhere.¹⁵ For present purposes, however, I want to focus on a central truth inherent in Smith's claim—that is, there is no necessary connection between federalism and any number of substantive political positions commonly associated with conservatism, such as the love of guns or the hatred of regulation.

One reason it is difficult to make such a connection derives from the wide variety of positions that are sometimes labeled “conservative,” especially in America.¹⁶ My approach here looks first and foremost to the writings and speeches of Edmund Burke, the eighteenth-century British politician whose critique of the French Revolution launched modern conservatism as a distinct political ideology.¹⁷ As I have developed more fully elsewhere, Burke's is a conservatism of method and institutions, not one of particular political results.¹⁸ It takes as its starting point the inherent limitations of human reason, with the concomitant distrust of rapid change and concentrated power. Although Burke is read less than he should be today, his is the classical version of conservatism in the field of political theory.¹⁹

One may sensibly question the relevance of this sort of conservatism to modern America. The aristocratic element of Burke's thought fits awkwardly in a society “born liberal,” without the rigid class divisions of the Old

¹² Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 909 (2006).

¹³ See *id.* at 918–19, 920–21.

¹⁴ See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

¹⁵ See Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 3–21 (criticizing the attitudinal approach on its face and as applied to *Raich*).

¹⁶ See, e.g., JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* 251–54 (2004).

¹⁷ See, e.g., EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Frank M. Turner ed., Yale Univ. Press 2003) (1790) [hereinafter REFLECTIONS].

¹⁸ See Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1183–87, 1206–09 (2002); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 644–59 (1994) [hereinafter Young, *Rediscovering Conservatism*]; see also MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 423 (expanded ed. 1991) (denying that “a disposition to be conservative in politics” is necessarily connected to any particular substantive political position).

¹⁹ See, e.g., ROBERT NISBET, *CONSERVATISM: DREAM AND REALITY* 1 (1986) (“Rarely in the history of thought has a body of ideas been as closely dependent upon a single man and a single event as modern conservatism is upon Edmund Burke and his fiery reaction to the French Revolution.”).

World.²⁰ Likewise, Burkean conservatism's distrust of human reason jars with a political tradition that prides itself on a government established through "reflection and choice."²¹ In the particular case of federalism, moreover, Burke's career in the largely unitary system of Great Britain left him with little occasion to comment directly on the proper allocation of authority between a national government and constitutionally autonomous subnational units.

This is not the place to tease out the variegated strands of conservatism or to trace the complicated and often schizophrenic evolution of the American variety.²² The best test of Burkean conservatism's relevance is whether its principles provide useful insights on matters of current controversy. I hope to demonstrate in the remainder of this Essay that the issues of political change and the allocation of authority that preoccupied Burke remain at the forefront of our own debates about national and state power.

II. *Fidelity*

Any Burkean conservative should feel a natural affinity for federalism simply because so many liberals think it is old and outdated.²³ Justice Holmes was dead wrong when he said that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."²⁴ For the conservative, the fact that a rule has survived from way back is a very *good* reason for holding on to it. As Roger Scruton has observed, "[C]onservatism arises directly from the sense that one belongs to some continuing, and pre-existing social order, and that this fact is all-important in determining what to do."²⁵

The root of this disagreement over the authority of the past lies in divergent conceptions of human reason. The liberal paradigm would be someone like René Descartes or John Rawls, working from first principles through to a comprehensive and elegantly articulated worldview. For the conservative, by contrast, the rational capacities of human individuals are relatively limited; rather, the best form of reason is immanent in the institutions and traditional practices that have developed over long periods of time.²⁶ As Burke said,

²⁰ See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

²¹ THE FEDERALIST No. 1, at 3 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also OAKESHOTT, *supra* note 18, at 32–33. But see SCRUTON, *supra* note 11, at 38–39 (stressing the conservative elements of the American founding).

²² For influential philosophical surveys, see RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELIOT* (7th rev. ed. 1986), and CLINTON ROSSITER, *CONSERVATISM IN AMERICA: THE THANKLESS PERSUASION* (2d ed., rev. 1962). For a good analysis focusing on contemporary American politics, see MICKLETHWAIT & WOOLDRIDGE, *supra* note 16, at 334–53.

²³ See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908 (1994) (describing federalism as America's "national neurosis" arising out of "some now uninteresting details of eighteenth century British colonial administration").

²⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

²⁵ SCRUTON, *supra* note 11, at 10.

²⁶ See, e.g., OAKESHOTT, *supra* note 18, at 11–17 (distinguishing between "technical" or rationalistic knowledge and "practical" or "traditional" knowledge).

We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.²⁷

This view of human reason provides an approach to the often-intractable debate about the practical benefits of federalism. An elaborate literature addresses whether state autonomy in fact promotes efficiency and regulatory competition, citizen participation in government, and effective checks on central power.²⁸ It is very difficult to tell, for example, whether state-by-state regulatory competition will produce, in any given policy sphere, beneficial innovation or a “race to the bottom.” The functional case for federalism thus often seems highly contingent, and global judgments about whether federalism is efficient or conducive to liberty inspire little confidence. For the conservative, however, the mere fact that we have traditionally relied on federal arrangements to produce these benefits, and that our experience in the very most general sense has been a good one, creates a strong presumption that federalism does indeed produce these advantages.²⁹ That presumption need not be irrebuttable, but it ought to produce healthy skepticism toward, say, the latest game-theory demonstration that federalism is a bad thing.

More fundamentally, the need to keep faith with a constitutional tradition that presupposes a commitment to federalism ought to trump any doubt about the practical advantages of a federal system. Unlike Burke, American constitutionalists operate in a system where certain rights and institutions are constitutionally entrenched. The principle of limits on national authority has been basic to the constitutional scheme not only as originally envisioned and adopted, but also as implemented by successive generations over most of our history. To jettison that commitment now, simply because it seems inopportune in response to this or that policy exigency, is to question the notion of constitutionalism itself. If modern politicians and judges can pick and choose which aspects of the Constitution to respect and which to discard as “out of step” with the times, then entrenchment is a fiction, and adherence to *any* constitutional principle is simply a function of its present popularity.³⁰

For Burke, a people’s very identity depended on its ability to maintain continuity with the past:

²⁷ Edmund Burke, *Reflections on the Revolution in France*, in REFLECTIONS, *supra* note 17, at 3, 74; see also KIRK, *supra* note 22, at 37–47 (describing Burke’s views on reason and custom). For a more recent example, see Roger Scruton, *Thoroughly Modern Mill*, WALL ST. J., May 19, 2006, at A10 (criticizing John Stuart Mill for failing to understand that “wisdom is deeper and rarer than rational thought”).

²⁸ For excellent surveys of that literature, see DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 34–57, 75–106 (1995), and Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

²⁹ Edmund Burke, Speech on the Reform of the Representation in the House of Commons (May 7, 1782), in 2 THE WORKS OF THE RIGHT HON. EDMUND BURKE 486, 486–87 (London, Henry G. Bohn 1841) (“It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it.”).

³⁰ See generally Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1764–65 (2005) [hereinafter Young, *Making Federalism Doctrine*].

[I]t has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity

. . . By a constitutional policy, working after the pattern of nature, we receive, we hold, we transmit our government and our privileges, in the same manner in which we enjoy and transmit our property and our lives. . . . In this choice of inheritance we have given to our frame of polity the image of a relation in blood; binding up the constitution of our country with our dearest domestic ties; adopting our fundamental laws into the bosom of our family affections; keeping inseparable, and cherishing with the warmth of all their combined and mutually reflected charities, our state, our hearths, our sepulchres, and our altars.³¹

To sacrifice this continuity, for Burke, is to forget who we are. That, in fact, is exactly what the French Revolutionaries had done. Burke admonished their would-be imitators in Britain:

By this unprincipled facility of changing the state as often, and as much, and in as many ways, as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No generation could link with the other. Men would become little better than the flies of a summer.³²

Burke thus argued for some degree of presumptive entrenchment even in a British system committed (at least in principle) to the notion of parliamentary sovereignty. His argument is even more compelling in a system like our own, in which constitutional entrenchment is itself one of the defining characteristics of the polity. Federalism thus has a claim on the present generation grounded purely in fidelity irrespective of its policy merits.

But this argument can only take us so far. To say that the Constitution entails a commitment to federalism, and that fidelity binds us to that commitment simply because it *is* a commitment, is to say relatively little about the precise allocation of authority between the Nation and the States to which we are committed. Our Founders left most details of the federal structure to be worked out over time, and this is surely a good thing from a conservative perspective: Burke and his contemporary critics of the French Revolution were skeptical of the very notion of a written constitution that would seek to fix political arrangements in perpetuity.³³ To freeze political institutions at a particular point in time was to exalt the political wisdom of the founding generation and deny the value of subsequent experience.³⁴ It is thus the very open-endedness of the Constitution's structural commitments that make it

³¹ Burke, *supra* note 27, at 29–30.

³² *Id.* at 81. For a magnificent meditation on Burke's metaphor of the flies, see Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029 (1990).

³³ See JOSEPH DE MAISTRE, *Essay on the Generative Principle of Political Constitutions* (1810), in *THE WORKS OF JOSEPH DE MAISTRE* 147 (Jack Lively trans., 1971); Burke, *supra* note 27, at 19 ("A state without the means of some change is without the means of its conservation.").

³⁴ See Young, *Rediscovering Conservatism*, *supra* note 18, at 664–74 (developing this argument as a critique of originalism in constitutional interpretation).

possible to reconcile American-written constitutionalism with the Burkean tradition's emphasis on the organic evolution of political institutions.

Moreover, the powerful national government that was born in the wake of the Civil War and reached fruition in the New Deal and the Great Society has its own claims as a settled part of our constitutional heritage. To actually implement the narrow originalist interpretation of the Commerce Clause set forth in Justice Thomas's *Lopez* concurrence,³⁵ for example, would involve social and political disruption on a revolutionary scale—something no Burkean could contemplate outside the most extreme circumstances.³⁶ As I have argued elsewhere, fidelity to the whole of our constitutional tradition mandates not a return to first principles but rather a strategy of “compensating adjustments” designed to preserve our foundational commitment to federalism.³⁷ This incremental approach should seek to narrow national power at the margins, but only to the extent that modern social and institutional realities permit this to be done without undue disruption.

Fidelity to the past thus requires present-day judges and politicians to take account of federalism. From this perspective, judicial pronouncements that principles of constitutional federalism are simply unenforceable,³⁸ for instance, are simply lawless. But conservative fidelity is itself unlikely to mandate specific doctrines or institutional arrangements to implement this foundational commitment to federalism, and respect for the established institutions of the national welfare state means that limits on national power should not be taken too far. These two cautions are consistent with Burke's suspicion of abstract theory and his constant attention to particular circumstances, as well as with his commitment to incrementalism in advocating reform.

III. Experiments, Reform, and Incrementalism

Although conservatism has always been about resistance to change, it is also more committed than perfectionist ideologies to the constant need for reform. The paradox is more apparent than real: any theory that is confident in the ability of human reason to formulate a “correct” set of political and social arrangements can imagine a state in which further reform would be unnecessary; a more skeptical view, however, will insist that any set of human arrangements is imperfect and in need of further improvement. Burke thus insisted that “[a] disposition to preserve, and an ability to improve, taken together, would be my standard of a statesman.”³⁹ His own public career as an advocate of reform in Ireland and British India, to name just two examples, confirmed this insistence on *some* social and political change as necessary to a viable political community.⁴⁰

35 *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

36 *See, e.g.*, Burke, *supra* note 27, at 27 (“[A] revolution will be the very last resource of the thinking and the good.”).

37 *See generally* Young, *Making Federalism Doctrine*, *supra* note 30.

38 *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 628–55 (2000) (Souter, J., dissenting).

39 Burke, *supra* note 27, at 133; *see also* OAKESHOTT, *supra* note 18, at 431 (“Innovation . . . is called for if the rules are to remain appropriate to the activities they govern.”).

40 *See generally* CONOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRA-*

Conservatives should thus find congenial Justice Brandeis's famous characterization of the autonomous states as laboratories of democracy:

There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . .

. . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.⁴¹

Two aspects of this passage are notable from a Burkean perspective. Most obvious, it reflects an awareness that some degree of change and development are vital in order to adapt to changing circumstances. At the same time, however, Brandeis's skepticism of the particular state experiment at issue in the case—an effort to regulate the supply of ice in Oklahoma—could hardly be expressed in more Burkean terms:

We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of control. . . . Even more serious are the obstacles to success inherent in the demands which execution of the project would make upon human intelligence and upon the character of men. Man is weak and his judgment is at best fallible.⁴²

Federalism thus plays to Brandeis's risk-aversion: a key advantage of *state*-based experimentation is that the ill effects of an experiment gone awry can be confined to a single jurisdiction “without risk to the rest of the country.”⁴³ Our traditional account of state experimentation is thus grounded in the very conservative recognition that we should not presume all reforms to be good.

This last point highlights a significant advantage of state-based reform from a conservative perspective: it is inherently incremental from the perspective of the nation as a whole. Burke stressed a preference for incremental reform in contrast to the tumultuous change of the French Revolution:

By a slow but well-sustained progress, the effect of each step is watched; the good or ill success of the first gives light to us in the second; and so, from light to light, we are conducted with safety through the whole series. We see that the parts of the system do not clash. The evils latent in the most promising contrivances are provided for as they arise. . . . We compensate, we reconcile, we balance. We are enabled to unite into a consistent whole the various anomalies and contending principles that are found in the minds and affairs of men.⁴⁴

PHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE (1992) (stressing the reformist aspects of Burke's political career).

⁴¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴² *Id.* at 310.

⁴³ *Id.* at 311.

⁴⁴ Burke, *supra* note 27, at 143–44; see also OAKESHOTT, *supra* note 18, at 412 (arguing that the conservative “prefers small and limited innovations to large and indefinite . . . [and]

Any given reform adopted by a particular state may be radical in its own right, of course. But where the nation defers to state policymaking, other states may evaluate and perhaps improve upon the innovative state's experiment before undertaking their own ventures. There may be, for example, no incremental way within a single jurisdiction to "try out" physician-assisted suicide or the legalization of gay marriage. Attempting such policies in one state, however, will capture many of the advantages of incremental change from the standpoint of the national community.

State regulatory autonomy is likewise consistent with a conservative recognition that there may not be a single right answer to certain social and regulatory issues. Federalism permits regulatory solutions to be tailored to local circumstances, and "[c]ircumstances," for Burke, "give in reality to every political principle its distinguishing colour and discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind."⁴⁵ Not every state experiment need be a step toward identification of the "correct" policy for adoption at the national level; a state-level reform, while successful in its own setting, may nevertheless be inappropriate for broader application.

The nationalist penchant to ignore local circumstances in favor of uniform solutions, by contrast, is part and parcel of the rationalist "politics of perfection." As Michael Oakeshott has observed, "[A] scheme which does not recognize circumstance can have no place for variety. . . . If the rational solution for one of the problems of a society has been determined, to permit any relevant part of the society to escape from the solution is, *ex hypothesi*, to countenance irrationality."⁴⁶ It is easy to see, from this perspective, why so many academics are tempted by national solutions to social problems. If one's vocation is to come up with rational solutions to these problems, then it is hard to refrain from prescribing them to all—and it is natural to support national institutions with the power to make those solutions stick.

The final point is that conservative political theory sheds light on an important ongoing debate concerning the value of federalism in facilitating state-by-state experimentation and political participation. In an influential article, Edward Rubin and Malcolm Feeley distinguished between *decentralization*, whereby a centralized government may choose for policy reasons to devolve authority to subnational units, and *federalism*, whereby such devolution is compelled by constitutional command.⁴⁷ They argued that all of the policy advantages traditionally associated with federalism—e.g., experimentation and citizen participation in government—are just as readily captured by decentralization.⁴⁸ As a result, the further step of entrenching the devolution of authority as a matter of constitutional command is likely only to lock in state power in cases where it is *inefficient* or otherwise undesirable.⁴⁹

favours a slow rather than a rapid pace, and pauses to observe current consequences and make appropriate adjustments").

⁴⁵ Burke, *supra* note 27, at 7.

⁴⁶ OAKESHOTT, *supra* note 18, at 10.

⁴⁷ Rubin & Feeley, *supra* note 23, at 910–11.

⁴⁸ See *id.* at 914–15.

⁴⁹ *Id.*

Vicki Jackson has argued that decentralization is not, in fact, “just as good” for facilitating experimentation and other benefits of state autonomy, because some arbitrary subnational unit holding powers only at the sufferance of the center will be a less effective institution of government.⁵⁰ It is the conservative perspective, however, that really illuminates why this is true. As Burke’s critique of the French Revolution makes clear, one cannot remodel a government or strip it of its traditional prerogatives and expect it to continue to perform effectively. The States are effective institutions of governance and popular sovereignty precisely because they are well-established parts of the constitutional scheme. As George Carey has observed, “[O]ur constitutional federalism arose naturally out of America’s unique political landscape, its roots firmly planted in colonial experiences.”⁵¹ One cannot simply replace that scheme with some abstract principle of decentralization and expect to achieve equally satisfactory results.

IV. Community and Liberty

The final set of arguments revolves around the traditional notion of federalism as a safeguard of individual liberty. The American Constitution employs two distinct strategies for protecting liberty—one structural and the other grounded in the specific guarantees of particular individual freedoms in the Bill of Rights, the Reconstruction Amendments, and similar provisions. It is familiar history that the Framers’ “Plan A” was to rely almost exclusively on the structural strategy, with only a few specific rights guarantees, such as the prohibition of bills of attainder and ex post facto laws, included in the original Constitution.⁵² “Plan B”—the enumeration of particular rights—was launched primarily at the behest of the Constitution’s Anti-Federalist opponents, who insisted on a Bill of Rights as a condition of ratification.

Contemporary jurisprudence is so preoccupied with individual rights, both enumerated and unenumerated, that we tend to forget the role of federalism and separation of powers in preserving liberty.⁵³ And our national ex-

⁵⁰ Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2217–20 (1998); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 138 n.282 (2001).

⁵¹ George W. Carey, *The Constitution and Community*, in COMMUNITY AND TRADITION: CONSERVATIVE PERSPECTIVES ON THE AMERICAN EXPERIENCE 63, 65 (George W. Carey & Bruce Frohnen eds., 1998) [hereinafter COMMUNITY AND TRADITION]. As Jack Rakove has noted, the States “had a substantial history of internal legislation . . . ; all but two . . . were operating under constitutions of government adopted since the outbreak of the revolution; each could command the loyalty of its residents.” Jack N. Rakove, *Why American Constitutionalism Worked*, in REFLECTIONS, *supra* note 17, at 248, 259–60. The result was that even the Framers themselves “simply could not imagine how they could abandon the existing infrastructure of federalism and start, in effect, from scratch.” *Id.* at 259.

⁵² See, e.g., THE FEDERALIST NO. 51 (James Madison); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1353 (2001) (outlining the Federalists’ commitment to institutional and political checks for preserving liberty).

⁵³ To be sure, one reason for this forgetfulness is the prominent role that federalism played in sheltering oppressive institutions of slavery and racial segregation. My argument is not that constitutional guarantees of basic human rights are unnecessary, but rather that federalism *also* plays an important role in the protection of rights. This is true even in the troubled area of race. See Baker & Young, *supra* note 50, at 143–49.

perience suggests that “Plan A” cannot succeed on its own; we are surely better off with *both* structural and individual rights safeguards built into the Constitution. It is important to remember, however, that we have never tried the experiment of relying on individual rights *alone* to safeguard liberty. And it is here that Burke’s critique of the French “Rights of Man” resonates: abstract individual rights, no matter how perfect in theory, cannot secure liberty without an institutional and historical predicate to back them up.⁵⁴ Conservatives should thus be skeptical of contemporary claims that we can jettison federalism-based limits on national authority and rely exclusively on judicial enforcement of fundamental individual rights.⁵⁵

The communitarian strand of conservative political theory likewise resonates with contemporary arguments that favor states as sites for political participation and building social capital. Burke argued that “[t]o be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind.”⁵⁶ Observers from a variety of political perspectives have decried the decline of community in modern American life,⁵⁷ and at least some of those observers have prescribed a renewed emphasis on state and local politics as a mechanism for reviving a sense of connection and common engagement.⁵⁸

Modern American states, of course, are not exactly “little platoons”; California, for example, has roughly thirty-six million people.⁵⁹ This observation hardly supports a nationalist focus, however. Many states are small enough to offer meaningful opportunities for civic engagement, and even the largest states compare favorably to the national government on this score. Moreover, constitutional limits on national power will often (if not always) tend to protect local governments as well as states. The important point, in any event, is that Burke saw attachment to smaller communities as conducive to the development of broader loyalties. Critics of strong forms of state autonomy in this country have tended to view state-based attachments as *competing* with national identity, in the same sense that Robert E. Lee’s devotion to Virginia led him to side with rebels against the Union.⁶⁰ Burke’s insight

⁵⁴ Burke, *supra* note 27, at 52–56 (criticizing the French Rights of Man).

⁵⁵ See, e.g., *Introduction* to COMMUNITY AND TRADITION, *supra* note 51, at 1, 6 (criticizing “the evolution of a political environment that extols individual rights” and “the simultaneous expansion and centralization of political power”).

⁵⁶ Burke, *supra* note 27, at 40.

⁵⁷ See, e.g., ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER, & STEVEN M. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); *Introduction*, *supra* note 55, at 5–8.

⁵⁸ See, e.g., Jason Mazzone, *The Social Capital Argument for Federalism*, 11 S. CAL. INTERDISC. L.J. 27, 42–57 (2001); Carey, *supra* note 51, at 64, 78–83.

⁵⁹ POPULATION DIV., U.S. CENSUS BUREAU, TABLE 1: ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2005 (2005), <http://www.census.gov/popest/states/NST-ann-est.html> (select document numbered “NST-EST2005-01”).

⁶⁰ See, e.g., Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 40–42 (2001).

suggests that state attachments may instead function as building blocks for national identity at a time when many worry that the latter is under siege.⁶¹

Burke's "little platoons" are important not only as building blocks of broader loyalties but also as "intermediary institutions" that safeguard liberty by interposing themselves between the individual and the central government.⁶² As Alan Wolfe has observed,

Burke anticipated what in the years after World War II would be called the theory of mass society. The essence of this theory is that modern individuals require a stratum of intermediate associations between the individual and the state. When those institutions are weakened, citizen and state come into direct contact with each other, and that is a contest the citizens will inevitably lose, for they will stand naked before the state, unable to protect themselves against its tendency to rule over them.⁶³

Loyalties to intermediary bodies thus both facilitate attachment to the broader political community and serve as checks on the power of the state.

A wide range of observers, from nineteenth-century political theorists like John Stuart Mill and Alexis de Tocqueville to modern sociologists like Robert Bellah and Robert Wuthnow, have linked the decline of intermediary institutions in society to the accumulation and centralization of governmental power.⁶⁴ As I have developed more fully elsewhere,⁶⁵ state governments check the power of the center by serving as rallying points for opposition to national policy; by providing the seedbeds of political change at the national level by facilitating competition between political parties; and by articulating alternative (and often broader) understandings of federal rights.⁶⁶ This role of state governments, however, often has been overlooked in contemporary debates about liberty; as Judge J. Harvie Wilkinson has noted, "Beginning with the 1960s, the role of mediative institutions was sometimes eclipsed by radical assertions of rights."⁶⁷ The Rehnquist Court's renewed concern for

61 See, e.g., SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004).

62 In contrast to the communitarian arguments that I have already canvassed, this "interposition" point is more likely to resonate with the individualistic, libertarian strand that tends to dominate American conservatism. See, e.g., MICKLETHWAIT & WOOLDRIDGE, *supra* note 16, at 343–45 (observing that "American conservatives did not so much make strategic concessions to individualism as embrace it with the lust of a young lover").

63 Alan Wolfe, *Democracy, Social Science, and Rationality: Reflections on Burke's Reflections on the Revolution in France*, in *REFLECTIONS*, *supra* note 17, at 268, 274. On the danger of mass society, see generally JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 115–24 (25th anniversary ed. 1957). Tocqueville likewise extolled intermediary institutions, such as private associations, as an antidote to "democratic despotism." 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 316–30 (Phillips Bradley ed., 1945).

64 See Baker & Young, *supra* note 50, at 136–37 & 137 n.278 (collecting sources).

65 See Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 *BROOK. L. REV.* 1277, 1285–87 (2004).

66 On the last point, see also Althouse, *supra* note 4, at 1250–61.

67 J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 *U. COLO. L. REV.* 1383, 1394 (2002).

the intermediary role of state governments is thus one of the more distinctively conservative features of the Court's jurisprudence.⁶⁸

There is a certain irony, of course, in relying on the States as an antidote to the problem of mass society. The States, after all, are themselves governments and thus potential sources of tyranny.⁶⁹ Certainly one would not want to rely *only* on state governmental institutions as the sole intermediary bodies in a healthy political order, and conservatives have often stressed the importance of all manner of private religious, economic, and philanthropic associations.⁷⁰ But sometimes it may take a government to check a government. The critical aspect of Burke's argument, on this view, is the diversification of individual attachments and the creation of mutually checking institutions. State governments, with their significant resources and independent bases of democratic legitimacy, will often be the most powerful and effective bodies standing between the individual and the central government.

Conclusion

Mark Henrie has observed that “[t]he traditionalist conservative's first feeling, the intuition that constitutes his or her moral source, is the sense of *loss*.”⁷¹ There is more than a little truth to this observation in the context of federalism: reverence for the Founders' vision of a balanced relation between the Nation and the States is, in many ways, a lost cause. One need not embrace reaction, however, to argue that *something* of the notion of constitutional limits on national power can be saved and preserved. It is this impulse, most fundamentally, that gives the case for federalism its conservative character.

I have also argued, however, that federalism resonates with other elements of conservative political theory. In particular, Justice Brandeis's notion of the states as laboratories for social and political experimentation fits the conservative view that change is both essential and dangerous; accordingly, efforts at reform work best when grounded in the particular circumstances of empirical testing and where their (possibly adverse) effects can be confined to a particular jurisdiction. Likewise, the traditional argument for the States as guardians of individual liberty—that state institutions constitute a structural impediment to the centralization of tyrannical authority—is consistent with conservative skepticism of abstract individual rights strategies and emphasis on the role of intermediary institutions.

There is little doubt that my argument here “satisfies the first requirement of all conservative thought: it is not original, nor does it try to be.”⁷² By

⁶⁸ *Id.* at 1392–98; see also John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 507–26 (2002) (arguing that the role of the states as mediating institutions was central to the Rehnquist Court's Federalist Revival).

⁶⁹ See DE TOCQUEVILLE, *supra* note 63, at 109 (warning that “[g]overnments . . . should not be the only active powers”).

⁷⁰ See, e.g., Carey, *supra* note 51, at 79–80.

⁷¹ Mark C. Henrie, *Understanding Traditionalist Conservatism*, in VARIETIES OF CONSERVATISM IN AMERICA 3, 11 (Peter Berkowitz ed., 2004).

⁷² See SCRUTON, *supra* note 11, at xii.

placing these traditional arguments for federalism in explicitly conservative terms, however, I hope both to provide principled reasons for a conservative court to favor federalism and to remind conservatives why they ought to be more consistent in that cause. The latter exhortation may be particularly important in light of the present configuration of political forces, which sees political conservatives in charge of all three institutions of national government. Conservatives, of all people, ought to know that present success is fleeting, and that the day will come around again when they look to the Constitution to restrain the misguided exercise of central authority.