

# Welcome to the Dark Side

## LIBERALS REDISCOVER FEDERALISM IN THE WAKE OF THE WAR ON TERROR<sup>\*</sup>

*Ernest A. Young<sup>†</sup>*

### I. INTRODUCTION

For several decades now, American liberals have not had much good to say about federalism. The reason is not far to seek: At many key points in our history, the banner of “states’ rights” has been raised in order to defend fundamentally repugnant substantive policies – most obviously, slavery in the nineteenth century and Jim Crow segregation in the twentieth. Many have assumed that the story of state-based racial oppression reveals a fundamental truth about the dynamics of federalism, that is, that the States will always be less “progressive” than the national government. We have tended to forget other points in our history that reveal a different pattern, such as Virginia’s and Kentucky’s protest against the Alien and Sedition Acts, or the abolitionist northern states’ resistance to the federal Fugitive Slave Law.

The worm may be turning, however, in the wake of the conservative Bush Administration’s War on Terror. As Ann Althouse’s thoughtful paper for this symposium discusses,

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<sup>†</sup> Judge Benjamin Harrison Powell Professor of Law, the University of Texas at Austin. B.A. Dartmouth College 1990; J.D. Harvard Law School 1993. This Article is part of the David G. Trager Public Policy Symposium, *Our New Federalism? National Authority and Local Autonomy in the War on Terror*. I am grateful to Susan Herman and Brooklyn Law School for the opportunity to participate, to Garrick Pursley and Beth Youngdale for excellent research assistance, and to Allegra Young for homeland security.

several states and dozens of local governments have taken stands against perceived excesses in the federal USA PATRIOT Act,<sup>1</sup> either simply by expressing their disapproval or, in some cases, by ordering their officers not to cooperate in the administration of the national law.<sup>2</sup> Vikram Amar's contribution urges, in response to similar concerns about federal overreaching, that state legislatures and/or courts should create state-law causes of action against federal officials for violations of federal constitutional rights.<sup>3</sup> More generally, on a range of issues, liberals may be starting to wake up to the fact that they no longer control the national government.<sup>4</sup> On issues ranging from gay marriage to physician-assisted suicide to environmental protection, individual states have staked out "progressive" positions that have then come under attack from the Republican administration in Washington, D.C. As Democratic hopes for quickly regaining control at the center fade,<sup>5</sup> at least some liberals have taken up the cause of state autonomy.

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<sup>1</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). One cannot help but wonder how long it took some enterprising staffer to come up with that acronym. For a survey of the Act's provisions, see Michael T. McCarthy, *Recent Developments - USA Patriot Act*, 39 HARV. J. ON LEGIS. 435 (2002).

<sup>2</sup> See Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004).

<sup>3</sup> See Vikram David Amar, *Converse 1983 Suits in Which States Police Federal Agents: An Idea Whose Time Has Arrived*, 69 BROOK. L. REV. 1369 (2004).

<sup>4</sup> This realization may be at the root of Erwin Chemerinsky's entry here, which mounts a general critique of the Rehnquist Court's preemption jurisprudence for broadly construing federal law to squelch progressive impulses at the state level on a number of issues. See Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004).

<sup>5</sup> As I wrote a draft of this essay in January 2004, President Bush enjoyed a 10 to 20 point lead in the polls over his potential democratic challengers. See Robert J. Caldwell, *Bush Enters Campaign Season with Positive Momentum*, SAN DIEGO UNION-TRIBUNE, Jan. 18, 2004, at G6 (reporting CNN/USA Today/Gallup and NBC News/Wall Street Journal polls taken in mid-January). As I near a final draft in April 2004, the President's lead over presumptive Democratic nominee John Kerry has narrowed to a single point. See *Little Change in Presidential Poll*, USAToday.com (Apr. 9, 2004), available at [http://www.usatoday.com/news/politicsselections/nation/president/2004-04-09-ap-poll\\_x.htm](http://www.usatoday.com/news/politicsselections/nation/president/2004-04-09-ap-poll_x.htm). All this may change radically again by the November election. But structural factors such as redistricting will make it exceptionally difficult for Democrats to retake control of Congress, virtually guaranteeing that the pattern of stable, long-term Democratic control of the national legislature, which existed virtually throughout the period of substantial expansion of federal legislative power after 1937, will not recur any time soon.

This essay seeks to place the role of state and local governments in the War on Terror<sup>6</sup> in the context of broader debates about federalism. Part I follows Professor Althouse's lead in focusing on the question of the national government's ability to require state and local cooperation with federal anti-terrorism initiatives. This issue is evocative for several reasons: It illustrates the several different ways in which federalism promotes and protects individual freedom, resonating with a long, if mostly forgotten, history of state governmental resistance to national measures thought to encroach on civil liberties. The strong concern of nationalists about state and local non-cooperation on anti-terrorism measures, moreover, gives the lie to nationalist assurances that "political safeguards" will always be sufficient to protect the federal balance. Finally, state and local resistance to national anti-terrorism measures demonstrates the *expressive* function of state and local governments as a voice for the People, thereby raising complex questions about First Amendment limits on the federal government's ability to stifle state-centered dissent.

Part II steps back to assess more general questions raised by recent liberal support for state autonomy. I argue that liberals are right to embrace federalism, because state autonomy has no intrinsic correlation to politically conservative outcomes; moreover, in an era when conservatives may control at least important parts of the national government for some time, some states will offer liberals their best source of institutional support. I also address the question of opportunism, concluding that the Framers designed our system of horizontal and vertical separation of powers around the expectation that individuals and groups would support one institution or the other at any given time for politically opportunistic reasons. I suggest, however, that the liberal embrace of federalism now is more likely to be credible to the unpersuaded if it is coupled with a more principled and long-term acceptance of state autonomy.

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<sup>6</sup> "War on Terror" is itself a contested term. See, e.g., PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 19-33 (2003) (arguing that thinking about the struggle against terrorism in terms of "war" is counterproductive). I have no dog in that fight, and I use the term only as a common shorthand for a broad governmental effort to make American society more secure from terrorist attacks.

Two caveats are in order. The first is that I am personally skeptical of – and at best agnostic about – claims that the War on Terror in general or the USA PATRIOT Act in particular actually represent a major threat to civil liberties.<sup>7</sup> There is no doubt, however, that many on both the political Left and Right perceive such a threat, and I do not believe their concerns to be trivial. The War on Terror thus provides a good laboratory for assessing the ability of state and local governments to resist perceived threats to civil liberties.

Second, I have long insisted that the political labels of “liberal” and “conservative” are subject to a variety of interpretations. In this essay, I use those terms in their general *political* senses, as opposed to situational or institutional meanings of those terms.<sup>8</sup> One can make a “conservative” case for gay rights or environmental protection, for example, but that would be counter-intuitive to the sense in which I will generally use the term here. Likewise, one can argue that federalism is a creature of Enlightenment Liberalism’s rationalistic institutional design, or that it facilitates incremental social change congenial to Burkean conservatives. What I want to insist upon here, however, is that federalism has no dependable liberal or conservative valence as those terms are understood today in an intuitively political sense. As the War on Terror vividly illustrates, political liberals ought to be open to the possibility that state autonomy may become their new best friend.

## II. COMMANDEERING, LIBERTY, AND THE WAR ON TERROR

Criminal law enforcement has traditionally been a state and (primarily) local responsibility in this country. The distribution of law enforcement manpower reflects this history: A 2000 census of state and local law enforcement agencies counted over one million full-time law enforcement personnel,<sup>9</sup>

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<sup>7</sup> For arguments that the War on Terror *does* threaten civil liberties, see, for example, HEYMANN, *supra* note 6; David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

<sup>8</sup> See generally Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1182-1203 (2002) (distinguishing between situational, political, and institutional forms of conservatism).

<sup>9</sup> BRIAN A. REAVES & MATTHEW J. HICKMAN, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2000, at 1 (Oct. 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cslla00.pdf>. Over 75 percent of these employees were local police. See *id.* at 2.

while a 2002 survey of federal law enforcement found approximately 93,000 full-time personnel.<sup>10</sup> As William Stuntz recently observed, “[t]he federal government has never employed a sizable fraction of the nation’s law enforcement officers or prosecutors, nor housed a large portion of its prisoners.”<sup>11</sup> September 11 may have changed the general perception that states and localities should take the lead in assuring domestic safety; we have, after all, just created a massive new federal Department of Homeland Security. The practical reality of enforcement resources seems likely to change more slowly, however. At least in the short term, the FBI and other federal law enforcement institutions are unlikely to cover the many responsibilities that “homeland security” entails without substantial state and local assistance.

This federal need for assistance quite properly motivates Professor Althouse’s focus on the anti-commandeering doctrine. That doctrine holds that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”<sup>12</sup> The Federal Government cannot, in other words, simply compel state and local cooperation in anti-terrorism enforcement. This rule eschews “case-by-case weighing of the burdens or benefits” on the ground that “such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”<sup>13</sup> Absent a substantial modification of current doctrine, then, the anti-commandeering principle is unlikely to yield to strong national interests in anti-terrorism enforcement. The federal government’s ability to secure state

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<sup>10</sup> BRIAN A. REAVES & LYNN M. BAUER, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: FEDERAL LAW ENFORCEMENT OFFICERS, 2002, at 1 (Aug. 2003), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/fleo02.pdf>. The later federal figure reflects a six percent increase over 2000 levels, concentrated largely in the Bureau of Alcohol, Tobacco, and Firearms, the Customs Service, and the Immigration and Naturalization Service. *See id.* Although the survey was conducted prior to enactment of the Department of Homeland Security Legislation, it seems likely that the increase in personnel reflects, at least to some extent, federal reaction to the September 11 attacks.

<sup>11</sup> William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J. L. & PUB. POLY 665, 665 (2002); *see also* Ronald K. Chen, *State Incarceration of Federal Prisoners After September 11: Whose Jail is it Anyway?*, 69 BROOK. L. REV. 1335 (2004) (chronicling the national government’s use of *state* facilities in New Jersey to detain aliens suspected of ties to terrorism).

<sup>12</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997).

<sup>13</sup> *Id.*

and local assistance will thus depend on its ability to secure willing – or at least grudging – compliance.

In the overwhelming majority of cases, of course, we can expect such cooperation to be forthcoming. A vocal minority of state and local governments, however, have announced their opposition to many of the federal policies that comprise the War on Terror. The most common form of state or local action consists of resolutions that reaffirm support for civil liberties and diversity, express particular concerns about the PATRIOT Act and other national anti-terror policies, and urge state or local officials to uphold the rights of their citizens.<sup>14</sup> Some jurisdictions have gone further and forbade their officers to cooperate with federal officials in the enforcement of some aspects of the PATRIOT Act. The relevant prohibitions typically prohibit local officials from cooperating only in measures that violate federal constitutional rights.<sup>15</sup> That would not be exceptional in itself; after all, federal officials likewise lack power to act in contravention of such rights. The important point, however, is that these local jurisdiction seem to reserve for themselves the authority to determine what amounts to a violation of federal rights rather than deferring to federal officials (or federal courts) on that issue.<sup>16</sup> This reservation of interpretive authority is important, given that

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<sup>14</sup> For an example of a typical resolution, see CITY OF AUSTIN, TEX., RESOLUTION NO. 030925-66 (2003), *available at* [http://www.ci.austin.tx.us/news/2003/downloads/patriot\\_act\\_res092503.pdf](http://www.ci.austin.tx.us/news/2003/downloads/patriot_act_res092503.pdf).

<sup>15</sup> The ordinance of the City of Arcata, California – which has received a great deal of national media attention – includes the following two provisions:

SEC. 2191: No Unconstitutional Detentions or Profiling.

No management employee of the City shall officially engage in or permit unlawful detentions or profiling based on race, ethnicity, national origin, gender, sexual orientation, political or religious association that are in violation of individuals' civil rights or civil liberties as specified in the Bill of Rights and Fourteenth Amendment of the United States Constitution.

SEC. 2192: No Unconstitutional Voluntary Cooperation.

No management employee of the City shall officially assist or voluntarily cooperate with investigations, interrogations, or arrest procedures, public or clandestine, that are in violation of individuals' civil rights or civil liberties as specified in the Bill of Rights and Fourteenth Amendment of the United States Constitution.

CITY OF ARCATA, CALIFORNIA, ORDINANCE NO. 1339 (2003), *available at* <http://www.arcatacityhall.org/Ordinance%201339.html>.

<sup>16</sup> The Arcata ordinance, for example, provides for a procedure whereby the city administration must notify the City Council if federal authorities make a request for cooperation that would violate the ordinance's requirements, and provides that the City shall provide legal defense for any city official prosecuted for actions in compliance with the ordinance. *See id.* §§ 2193, 2194.

the scope of the federal rights in question – rights against the chilling of free expression, free association, search and seizure safeguards, and equality norms against “profiling” and the like, to name just a few examples – will often be deeply contested.

These assertions of interpretive autonomy by state legislatures and local city councils recall a similar challenge to federal supremacy two centuries ago in the Virginia and Kentucky Resolutions.<sup>17</sup> Those resolutions, authored by James Madison and Thomas Jefferson, respectively, protested Congress’s adoption of the Alien Friends Law, which allowed the President to order deportation of aliens, and the Sedition Law, which made seditious libel a federal criminal offense.<sup>18</sup> Much like the PATRIOT Act, these laws were enacted to enhance national security in the face of foreign threats; like the anti-PATRIOT Act measures, the Virginia and Kentucky Resolutions insisted that the federal laws overstepped the bounds of national power and intruded too far on constitutional liberties. Indeed, the Resolutions may have raised the more specific issue of commandeering addressed by Professor Althouse; as Wayne Moore has pointed out that, they were issued “at a time when the Union depended heavily on cooperation by state governments for enforcing federal laws,” and at least Jefferson’s version “apparently contemplated disregard by state officials of the Alien and Sedition Acts.”<sup>19</sup>

As I have already said, I am somewhat skeptical as to whether the concerns voiced in the contemporary anti-PATRIOT resolutions have much validity on the merits. These state and local initiatives do, however, offer vivid evidence of how federalism protects individual liberties. Much as they did

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<sup>17</sup> See generally Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENTARY 315 (1994).

<sup>18</sup> See generally JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956); Moore, *supra* note 17; GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 134-52 (1999). The resolutions themselves may be found at 7 WRITINGS OF THOMAS JEFFERSON 289-309 (Paul Leicester Ford ed., G.P. Putnam’s Sons 1892-99) (Kentucky), and 17 JAMES MADISON, *PAPERS* 188-90 (William T. Hutchinson & William M.E. Rachal eds., U. Chi. Press 1962) (Virginia). In addition to their arguments that the federal statutes were unconstitutional, the resolutions also articulated various theories of state governmental authority over national law. See Moore, *supra* note 17, at 318 (distinguishing between “nullification, reversal, and interposition”). These more extreme forms of governmental resistance are outside the scope of this essay.

<sup>19</sup> Moore, *supra* note 17, at 321. This non-cooperation seems to have been sufficient to foreclose any actual prosecutions under the Alien and Sedition Acts in Kentucky.

during the eighteenth century controversy over the Alien and Sedition Acts, state and local governments have become a rallying point for political opposition to national policy.

This Part focuses on that interaction between federalism, political opposition, and liberty. Section A catalogs the various institutional and political mechanisms by which federalism protects liberty, each of which finds an illustration in debates over the War on Terror. Section B explores the relevance of the “political safeguards” of federalism, both as a force tending to moderate state and local departures from federal policy and as a possibly inadequate protection for government-centered dissent. Finally, in Section C, I ask whether the ability of state and local governments to mobilize dissent ought not to be protected in the same way that we protect other expressive organizations – that is, by according them rights against governmental suppression under the First Amendment.

#### A. *Federalism and Liberty*

It is worth remembering that the Framers’ original design focused entirely on structure: Specific enumerations of human rights – probably the primary vehicle for talking about liberty today – were added as a political concession following ratification of the original document.<sup>20</sup> That original document built on the assumption that liberty was best secured through a rigorous commitment to federalism and separation of powers. As Madison argued in Federalist 51, these institutional arrangements provide “a double security . . . to the *rights* of the people. The different governments will controul each other; at the same time that each will be controuled by itself.”<sup>21</sup>

Few would argue today that federalism and separation of powers are a *sufficient* condition for individual liberty. The Federalists probably deserved to lose the debate about the need for enumerated freedoms, and few would choose to repeal the Bill of Rights and take our chances with sole reliance on structure. But our modern preoccupation with rights provisions

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<sup>20</sup> The original Constitution did contain a few specific rights guarantees, such as the prohibition on bills of attainder and ex post facto laws. See U.S. CONST. art. I, § 9, cl. 3. But most contemporary discussion of rights focuses on provisions added by amendment later on.

<sup>21</sup> THE FEDERALIST NO. 51, at 351 (J.E. Cooke ed., 1961) (James Madison) (emphasis added).



may have encouraged us to overlook the possibility that structure remains a *necessary* condition for liberty.<sup>22</sup> Especially in times of terror, rights provisions may become “parchment barriers”<sup>23</sup> to governmental oppression. Sometimes it takes a government to check a government.

State and local institutions secure liberty in a number of different ways. The first is by functioning as a rallying point for political opposition to national policy.<sup>24</sup> Individuals are often ineffective speakers when they act alone; that is why First Amendment doctrine has long protected the role of political associations in mobilizing political expression. The Court recognized a right of political association in *NAACP v. Alabama*,<sup>25</sup> for example, and has defended free speech rights for corporations on the similar ground that they are effective organizations for disseminating messages that the public has a right to hear.<sup>26</sup> Yet often the most effective organizations for organizing and transmitting dissent are themselves governmental institutions. This should hardly be surprising. Such institutions, unlike private organizations, generally are constitutionally required to be open to a variety of points of view and responsive to the political will of the People. By transmitting the political dissent of their constituents, state and local resolutions against the PATRIOT Act reflect the Founders’ notion, embodied in the Virginia and Kentucky Resolutions, that state and local governments should “act as

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<sup>22</sup> Cf. *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“It would be a grave mistake . . . to think a Bill of Rights in Madison’s scheme then or in sound constitutional theory now renders separation of powers of lesser importance.”). The same opinion emphasizes the importance of both horizontal and vertical separation of powers – that is, federalism. See *id.* (noting that the Framers “used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts”).

<sup>23</sup> See THE FEDERALIST NO. 48, *supra* note 21, at 333 (James Madison) (“Will it be sufficient to mark, with precision, the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?”). Madison is speaking here of formal demarcations of separated powers, without institutional checks and balances, but his observation is equally applicable to individual rights guarantees.

<sup>24</sup> See, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 403 (1997) (observing that state governments “serve as an independent means of calling forth the voice of the people”); Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?* 33 LOY. L.A. L. REV. 1309, 1324-25 (2000).

<sup>25</sup> 357 U.S. 449, 460 (1958) (recognizing that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association”).

<sup>26</sup> See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-86 (1978).

intermediaries between the people and the federal government.”<sup>27</sup> As Alexander Hamilton observed in Federalist 26, “the state Legislature . . . will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if any thing improper appears, to sound the alarm to the people and not only to be the VOICE but if necessary the ARM of their discontent.”<sup>28</sup>

A second and related mechanism operates where state and local politics serves as the seedbed for political change at the national level. Turnover in government may be an effective guarantee against tyranny; it assures that a particular faction cannot become entrenched and unaccountable in power. Such turnover may become more difficult where the political opposition has no opportunity to demonstrate its own competence to rule. As some observers of British politics have noted, for example, the present “out” party – the Tories – have no governmental sub-units in which they can gain practical experience, try out new policies, and gain governing credibility because Britain remains largely a unitary state.<sup>29</sup> In America, by contrast, the party that is “out” in Washington will almost certainly be “in” in at least a couple of dozen states and literally thousands of localities, and the experience of practical governance at those levels often provides the springboard for successful political takeovers at the national level.<sup>30</sup> Four of our last five Presidents were successful state governors at a time when their party was out of power at the national level.<sup>31</sup> It should thus come as no surprise that in the early stages of the

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<sup>27</sup> Moore, *supra* note 17, at 335.

<sup>28</sup> THE FEDERALIST NO. 25, *supra* note 21, at 169 (Alexander Hamilton).

<sup>29</sup> See *A Tale of Two Legacies – Learning from the Republicans and the Tories*, THE ECONOMIST, Dec. 21, 2002 (arguing that the Tories “face problems in imitating Mr. Bush [by regaining power at the national level] – not least because they lack a testing ground for their ideas”). The new Devolution Acts, devolving some legislative authority to Scotland, Wales, and Northern Ireland, may ultimately change this dynamic. See generally Colin B. Picker, “A Light unto the Nations” – *The New British Federalism, the Scottish Parliament, and Constitutional Lessons for Multiethnic States*, 77 TULANE L. REV. 1 (2002); ADAM TOMKINS, PUBLIC LAW 1-2 (2003) (arguing that the British constitution is less unitary than is often thought). But devolution is unlikely to help the Tories in the short term, since the devolved regions have traditionally not been hospitable to their party.

<sup>30</sup> See Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 70-71 (2001) (noting historical examples in which “the existence of state-level alternatives to the nationally dominant political orthodoxy has made an electoral – if not a military – challenge to that orthodoxy more likely”).

<sup>31</sup> See E.J. Dionne, Jr., *Govs 4, Senators 0. Tough Odds*, WASH. POST, Jan. 4, 2004, at B1; David S. Broder, *Required Reading on Dean*, WASH. POST, Jan. 14, 2004, at A19; *One Cheer for the Democrats*, THE ECONOMIST, Nov. 9, 2002, at 34.

2004 presidential race the candidate who voiced the most effective criticism of the Bush Administration's War on Terror was a former governor of Vermont. And even *within* a particular political party, the necessities of governing and the unique political cultures of individual states may spur state politicians to oppose the party orthodoxy in Washington.<sup>32</sup>

What is true of politicians is also often true of social movements. Both abolition and the civil rights movement started at the state and local levels before they "went national."<sup>33</sup> So did many of the reform currents that came together in the Progressive movement around the turn of the last century.<sup>34</sup> It should surprise no one that as civil libertarians seek to persuade their fellow citizens of the dangers they see lurking in the PATRIOT Act, most of their initial successes have come in city councils and, less frequently, in the state legislatures.

Professor Althouse notes a third mechanism: The ability of state institutions to articulate an alternative – and possibly broader – understanding of federal rights. As she explains, the inability of Congress to "commandeer" Sheriff Printz to enforce the Brady Act enabled him to act upon a broader view of Second Amendment rights than the federal courts would likely have been willing to recognize.<sup>35</sup> Similarly, states like Oregon that permit physician-assisted suicide may be influenced at least in part by a broader view of due process than the U.S. Supreme Court's; states like Massachusetts recognizing gay marriage may likewise seek to articulate a broad view of due process or equal protection not yet accepted in the federal courts.<sup>36</sup> Each of these visions has encountered opposition at the

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<sup>32</sup> See, e.g., *A Green in Wolf's Clothing*, THE ECONOMIST, Dec. 18, 2003, (discussing Republican governor Arnold Schwarzenegger's support for environmental protection in California); *One Cheer for the Democrats*, *supra* note 31, at 34 (observing that "[i]n the 1990s the Republicans almost split into two parties: a pragmatic one based in the governors' mansions, and an ideological one in Congress").

<sup>33</sup> See, e.g., J. Morgan Kousser, "The Supremacy of Equal Rights": The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment, 82 NW. U. L. REV. 941 (1988) (describing abolitionist efforts at the state level); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63, at 128-205 (1988) (chronicling the Montgomery bus boycott).

<sup>34</sup> See, e.g., Harry N. Scheiber, *State Law and "Industrial Policy" in American Development, 1790-1987*, 75 CALIF. L. REV. 415, 432 (1987).

<sup>35</sup> Althouse, *supra* note 2, at 1251-53.

<sup>36</sup> The Massachusetts recognition of gay marriage rested on *state* constitutional grounds. See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003). But such state provisions often provide a vehicle for articulating –

national level, and their survival may depend in part on the strength of federalism constraints on Congress's preemptive power over state law.<sup>37</sup>

We see the same dynamic in the context of the War on Terror. Constitutional concerns about the PATRIOT Act and other anti-terrorism measures are widespread; they include, to name just two examples, concerns about the erosions of Fourth Amendment privacy and chilling effects on First Amendment expression. Despite these concerns, however, few courts have been willing thus far to invalidate any of the Act's provisions.<sup>38</sup> It is thus *Printz's* anti-commandeering doctrine that creates the constitutional space for state and local governments to vindicate their own, possibly broader understandings of these rights by refusing to participate in federal enforcement efforts they consider suspect.

We might think of Professor Althouse's argument as a limited form of state-based interpretive departmentalism. At the federal level, the departmentalist position holds that the branches of the federal government each have authority to render *final* constitutional interpretations in certain instances.<sup>39</sup> The Supreme Court upheld the constitutionality of the Bank of the United States in *McCulloch v. Maryland*,<sup>40</sup> for example, but it had no authority to stop President Andrew Jackson from vetoing efforts to recharter the Bank based on his

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without fear of Supreme Court reversal – an alternative view of federal rights. The ultimate result in Massachusetts is, of course, clouded by the legislature's more recent proposal of a state constitutional amendment to ban gay marriage (but approve civil unions). See *Mass. Takes Step Toward Gay Marriage Ban*, USA Today.com, Mar. 29, 2004, available at [http://www.usatoday.com/news/nation/2004-03-29-mass-gay-marriage\\_x.htm](http://www.usatoday.com/news/nation/2004-03-29-mass-gay-marriage_x.htm). The Massachusetts amendment procedure is drawn out and highly uncertain, making it hard to predict the ultimate result.

<sup>37</sup> Those constraints might take either of two forms. First, a narrow construction of the Commerce Clause might deny federal power over marriage or physician-assisted suicide. See, e.g., Stephanie Hendricks, Note, *Pain Relief, Death with Dignity, and Commerce: The Constitutionality of Congressional Attempts to Regulate Physician-Assisted Suicide in Oregon via the Commerce Clause After Lopez and Morrison*, 37 WILLAMETTE L. REV. 691 (2001); 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 same-sex marriage). More likely, a strong version of the presumption against preemption in statutory construction might raise the legislative costs and narrow the scope of preemptive federal legislation.

<sup>38</sup> But see *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004) (invalidating provisions of the USA PATRIOT Act barring the provision of aid to designated terrorist organizations as unconstitutionally vague).

<sup>39</sup> See, e.g., Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POLITICS 401, 411-12 (1986).

<sup>40</sup> 17 U.S. (4 Wheat.) 316 (1819).

own interpretive conclusion that the Bank was constitutionally illegitimate.<sup>41</sup> Wayne Moore has traced a state-based version of departmentalism to the Virginia and Kentucky Resolutions, suggesting that they “reflect an assumption that the states have authority to interpret and exercise *their* powers even in opposition to authoritative decisions by one or more federal officials.”<sup>42</sup> It is doctrines like *Printz* – and *Lopez* – that make space for this sort of autonomy: Because Congress may not *compel* state and local officers to participate in federal law enforcement efforts, states and localities may decide whether to allow such participation based on their *own* views of whether those enforcement efforts transgress constitutional norms.<sup>43</sup>

The final, simpler point is that the national government’s need for state and local cooperation may enhance liberty by forcing national authorities to moderate their positions. Requiring the consent of multiple actors before the government can act is a pervasive institutional strategy in the Constitution; it is most familiar, obviously, in separation of powers where two distinct legislative organs and the Executive Branch ordinarily must concur before a bill can become law.<sup>44</sup> The autonomy of state governmental institutions often functions in the same way. The War on Terror is only one of a wide range of governing activities that the national government lacks the resources to undertake on its own. Congress also depends on state implementation in areas ranging from environmental law to welfare provision. Although Washington possesses powerful levers by which to “persuade” states to cooperate – such as the conditional spending power<sup>45</sup> – at some level it must still persuade state authorities that federal policy is sufficiently legitimate, wise, and fair to

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<sup>41</sup> See 2 UNITED STATES PRESIDENT: A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576, 581-83 (James D. Richardson ed., 1896). President Jackson insisted that “[t]he authority of the Supreme Court must not . . . be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.” *Id.*

<sup>42</sup> Moore, *supra* note 17, at 345.

<sup>43</sup> As Professor Moore has demonstrated, this view of state interpretive autonomy does not depend on the Virginia and Kentucky Resolution’s more controversial adoption of a “compact” theory of the Constitution, but rather on the more widely-shared notion that the Constitution created a government of limited powers. See Moore, *supra* note 17, at 348-51.

<sup>44</sup> See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1332 (2001).

<sup>45</sup> See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

warrant their participation. This need to rule by persuasion is likely to force compromise and moderation across a wide range of federal endeavors.

Again, the War on Terror illustrates the dynamic. State and local authorities are likely to be willing, even eager, to assist national anti-terrorism efforts in the vast majority of cases. After all, the States' constituents are being protected, too. But the formal declarations of reservations about the PATRIOT Act discussed here are likely to be only the tip of the iceberg in terms of state and local reluctance to cooperate with measures that their citizens find extreme or unfair. On some points, federal authorities may feel strongly enough about a particular measure to devote scarce federal resources to it even without state and local cooperation. But resource constraints will almost inevitably dictate that this cannot be the norm, and the need for state cooperation seems likely to force national authorities to compromise and accommodate state objections into federal policy. In some instances, such objections may come to be seen as valuable feedback about a policy that all acknowledge is a work in progress. That is no doubt one reason why Viet Dinh, a former Justice Department lawyer and one of the authors of the Act, recently welcomed the spate of state and local resolutions as part of an ongoing intergovernmental dialogue about appropriate anti-terrorism measures.<sup>46</sup>

Critics of federalism have often assumed that the libertarian argument for state autonomy must rely on apocalyptic scenarios in which the States somehow rise up and oppose national tyranny through force of arms.<sup>47</sup> The dynamics of the War on Terror, however, demonstrate the emptiness of that canard. Federalism best protects liberty over time, through the day-to-day operations of a government in which nothing much can get done without the cooperation of multiple actors at multiple levels. One must almost always be more reasonable when one must persuade others in order to carry out a policy. And those potential dissenters will surely have more of an impact if they have their own governmental institutions around which to organize their efforts, as well as their own constitutional space in which to implement and

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<sup>46</sup> Viet Dinh, Remarks at the LBJ School of Government, Austin, TX (November 2003). See also Richard B. Schmitt, *Anti-terror Policy Under Criticism from Ex-Insiders*, HOUS. CHRON., Nov. 30, 2003, at 6.

<sup>47</sup> See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 928-29 (1994).

demonstrate the effectiveness of alternative policies. In our history, these dynamics have often come to the fore in times of national stress, and the present tumult is no exception.

*B. The Political Safeguards of National Policy*

One irony of the debate over state and local opposition to national anti-terrorism policy arises out of the fear that such opposition will unduly jeopardize national security. Some critics of the commandeering doctrine have suggested that it may fatally undermine national anti-terrorism efforts.<sup>48</sup> The irony stems from the tendency of such warnings to downplay the immense political pressures that states and localities will face to comply with federal initiatives. After all, proponents of national power are fond of arguing that *state* governments can protect themselves through the political process; these nationalists thus reject the need for hard constitutional rules *requiring* national authorities to respect their autonomy.<sup>49</sup> It seems fair to wonder why similar political dynamics suddenly become inadequate when we speak of protecting the *national* side of the federal balance.

Justice Stevens' prescient dissent in *Printz* is an example. There, Justice Stevens warned that the commandeering doctrine might cripple federal policy in "times of national emergency," when "[m]atters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, *or perhaps the threat of an international terrorist*, may require a national response before federal personnel can be made

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<sup>48</sup> Justice Stevens's dissent in *Printz* itself, discussed *infra* notes 50-53 and accompanying text, is the most prominent example. Most commentators seem to have assumed instead that the Court would simply create an exception to *Printz* if national security were at stake. See, e.g., Seth Waxman, *Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge*, 51 KAN. L. REV. 141, 152 (2002) ("After September 11th, . . . it is difficult to imagine the Court treating lightly the federal government's need to respond to problems of national dimension."). The important point, however, is that few observers stress the *political* dynamics that would buttress national authority in the terrorism context.

<sup>49</sup> See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-54 (1985); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 161-259 (1980). This position has generally drawn inspiration from the more moderate view advanced in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

available to respond.”<sup>50</sup> But in the same opinion, Justice Stevens emphasized “the political safeguards protecting Our Federalism.”<sup>51</sup> “Given the fact that the Members of Congress are elected by the people of the several States,” he argued, “it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents.”<sup>52</sup> But the Justice never explained why, given pervasive bonds of political party and shared administration of existing programs that tie state, local, and national officials together, as well as their common accountability to the same constituents, state and local governments would ignore a request for support from national officials on a matter of imminent national emergency. Why do we presume that federal officials look on the institutions of state government with benign concern, but that state and local officials will be recalcitrant and uncooperative unless the national government can *compel* their obedience?

There are two obvious but contrasting explanations for inconsistency on this point. One is that some opponents of judicially-enforced federalism are really just opponents of federalism *per se*. They do not really think “political safeguards” are ever an adequate substitute for hard constitutional rules providing or limiting power; rather, they advance the political checks argument as a cover for the true position that state autonomy is simply not worth protecting. I certainly would not attribute this view to Justice Stevens; as I have argued elsewhere, he has long been the most ardent defender of state autonomy on questions involving the federal preemption of state law.<sup>53</sup> But to the extent that many in the academy probably *do* feel this way, it would surely be preferable to simply debate the question whether federalism serves important values – and whether courts are free to disregard the state-protective principles embodied in the Constitution’s text and history – straight up. The surprising political valence of state and local autonomy in the terrorism

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<sup>50</sup> *Printz v. United States*, 521 U.S. 898, 940 (1997) (Stevens, J., dissenting) (emphasis added).

<sup>51</sup> *Id.* at 957.

<sup>52</sup> *Id.* at 956. Justice Stevens also joined Justice Blackmun’s majority opinion in *Garcia*, which is the *locus classicus* of the modern “political safeguards” argument. See *Garcia*, 469 U.S. at 530.

<sup>53</sup> See Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1380-84 (2001). For an example of Justice Stevens’s defense of state autonomy, see *Geier v. American Honda Motor Co.*, 529 U.S. 861, 887 (2000) (Stevens, J., dissenting).



context may, of course, have an important influence on that debate.

The second plausible explanation is that some advocates of the “political safeguards” thesis may sour on it when it comes to protecting national policy. That is only natural: One tends to examine arguments more critically when they threaten values one personally holds dear, and nationally-oriented academics (most of whom teach at “national” law schools) may subject the notion of informal guarantees to more searching scrutiny when they are no longer simply protections for often-benighted state policies. That scrutiny would be welcome, even if it raises the same sort of opportunism questions I consider in Part II of this essay. It is likely to take us closer to what I suspect is the truth of the matter: That political safeguards are important in many instances, but unlikely to be a sufficient protection for either state autonomy or national power in all conceivable instances.<sup>54</sup>

A third possibility is that political safeguards actually *do* work better for states than for the national government. The particular political mechanisms involved in each case are different, and it is at least logically possible that the mechanisms protecting state autonomy are stronger than those protecting national power. But any realistic appraisal suggests that the opposite is more likely to be true. The classic “political safeguards” mechanisms protecting state autonomy posited by Herbert Wechsler and others – primarily, the representation of the States in Congress – have been dissected elsewhere and arguably rejected even by the nationalists on the Court.<sup>55</sup> In particular, federal representatives are at best unreliable partisans of state political institutions; in many instances, they may view state politicians as *competitors* for power.<sup>56</sup> More

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<sup>54</sup> I develop that view in Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (forthcoming Fall 2004).

<sup>55</sup> See, e.g., Larry Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 220-27 (2000); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001). For the Court's arguable rejection, see *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995) (rejecting the notion that members of Congress serve on behalf of state political institutions rather than the citizens directly). It's hardly surprising, however, that the nationalist justices in the *Term Limits* majority would reject *Garcia's* theory of representation in a case where that theory favored state autonomy.

<sup>56</sup> See, e.g., ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 9-10 (2001) (explaining why national politicians have incentives to take over local responsibilities from state and local politicians); *id.* at 29 (observing that when

recent scholarship has suggested that states are instead protected by various intermediary institutions – primarily political parties and cooperative bureaucratic arrangements – that tie the fate of state and national politicians together.<sup>57</sup> But these institutions are two-way streets and most likely protect national authority as often as they protect states.<sup>58</sup> *National* power, however, also benefits from Congress's ability to withhold critical federal resources upon which states have become dependent, as well as the President's ability to rally national opinion against recalcitrant states. On balance, the political process would seem to protect national authority at least as well as it does states – and probably *better*.

The debate over commandeering and the War on Terror thus raises two salient points about the “political safeguards” of federalism. First, fears that state and local opposition will cripple national anti-terrorism efforts are surely overblown. Most of the time, immense political pressure – as well as legitimate concern for public safety, of course – will cause states and localities to do whatever national authorities ask.<sup>59</sup> The second point, however, is that nationalist worries that political safeguards might fail in important instances ought to cause everyone to think twice about exclusive reliance on such

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Congress *does* devolve power to states, it is likely to do so to shift responsibility for costly failures).

<sup>57</sup> See Kramer, *supra* note 55, at 278-87. Professor Kramer's view is criticized in Prakash & Yoo, *supra* note 55, and Baker & Young, *supra* note 55. I suspect that the truth of the matter is that political parties and shared administration protect states some of the time, but probably not as often as Kramer supposes.

<sup>58</sup> The linkage between national and state political parties may also cause partisan warfare at the center to undermine local governance. The recent battles in the Texas legislature over congressional redistricting illustrate how political parties at the national level may distort internal state politics. See, e.g., Laylan Copelin & Michele Kay, *D.C. Keeps Eye on Special Session*, AUSTIN AMERICAN-STATESMAN, June 19, 2003, available at <http://www.statesman.com/legislature/content/coxnet/texas/legislature/0603/0619perry.html> (describing pressure on Texas state officials from House Majority Leader Tom Delay and presidential advisor Karl Rove to convene a contentious special legislative session to re-draw federal House districts, in order to help Republican party fortunes in Congress); Dave Harmon, *Representatives Seek Senate's Help for Threatened Bills*, AUSTIN AMERICAN-STATESMAN, May 14, 2003, available at <http://www.statesman.com/hp/content/coxnet/texas/legislature/0503/0515deadbills.html> (describing how the attempt to push redistricting legislation through the state legislature, at the behest of federal officials, endangered important state legislation).

<sup>59</sup> These pressures should at least be enough to overcome libertarian resistance to anti-terror measures in most jurisdictions. The more doubtful question arises from the massive financial and other resource costs that the War on Terror imposes on states and localities. See Jack Weiss, *Orange Crunch*, N.Y. TIMES, Jan. 14, 2004, at A19. As anti-terror begins to trade off with core law enforcement priorities, pressures to opt out of federal measures may increase.

safeguards in the reverse situation – that is, when the question is protecting state autonomy. I discuss one such situation in the next section.

C. *State and Local Dissent as Protected Expression*

If one of the ways that state and local governments protect liberty is by mobilizing dissent against national policies, then maybe it's time we started taking these activities seriously as *dissent*. Dissenting political views held by *private* entities, of course, are protected from suppression through the First Amendment. I have already laid out the basic rationale for extending similar protection to state and local governments: They provide an institutional means, much like political associations and corporations, for mobilizing and organizing the expressive activities of individuals. Judge Richard Posner has thus observed that “[t]o the extent . . . that a municipality is the voice of its residents – is, indeed, a megaphone amplifying voices that might not otherwise be audible – a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents.”<sup>60</sup> But courts and commentators have generally been reluctant to extend such protection to state and local governments.<sup>61</sup> A definitive resolution of that issue would take far more space than I can give it here,<sup>62</sup> but I do want to make a few preliminary observations suggesting that the question is worth pursuing.

The text of the First Amendment itself is specific as to who may not restrict speech – “*Congress shall make no law*” – but not as to whose speech is protected. A plausible first cut at the text would be that *no one's* speech may be restricted, whether they are an individual, a corporation, or a political institution. Indeed, the Court's decisions upholding the free speech rights of corporations have insisted that “[t]he identity

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<sup>60</sup> *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996).

<sup>61</sup> *See, e.g., National Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 (1st Cir. 1999) (expressing doubt whether a state possesses First Amendment rights against federal regulation), *aff'd on other grounds*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

<sup>62</sup> *See, e.g., Matthew C. Porterfield, State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 33-47 (1999); Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1258-66 (1991).

of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."<sup>63</sup> If "the identity of the speaker is not decisive," then it is hard to see why this reasoning should not be extended to state and local governments. And in fact, as the Virginia and Kentucky Resolutions demonstrated in the early Republic, those sorts of governmental institutions have played an important part in articulating political dissent. As Akhil Amar has noted, "state governments in 1798-99 played a role similar to that of the institutional press or the opposition party today: monitoring the conduct of officials in power, and coordinating opposition to central policies deemed undesirable."<sup>64</sup>

What seems to have happened is that, in the wake of the movement to incorporate the Bill of Rights against the States, state and local governments have come to be seen almost exclusively as potential censors rather than as rightholders under the Free Speech Clause. But nothing logically precludes an entity from taking on either role, depending on the circumstances. Private actors may, for instance, be classified as state actors in certain circumstances and become bound not to restrict the speech of others;<sup>65</sup> few would argue, however, that such actors do not retain their own speech rights as well. Likewise, it is clear that government employees retain important free speech rights even though they are part of the government and therefore bound to respect the speech rights of others.<sup>66</sup>

One might argue that government employees have no right to freedom of expression when they speak on behalf of the government in their official capacity. Hence, the "official" political positions taken by state and local governments cannot

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<sup>63</sup> *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

<sup>64</sup> Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 504 (1991).

<sup>65</sup> See, e.g., *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288 (2001) (holding that a statewide interscholastic athletic association of both public and private schools was sufficiently "entwined" with government activities to be subject to the First Amendment); *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that private authorities in a "company town" are bound by the First Amendment).

<sup>66</sup> See, e.g., *Connick v. Meyers*, 461 U.S. 138, 154 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968).

be protected speech. A typical argument thus insists that “[t]he common understanding of the First Amendment as a limit on government, rather than a license for it to speak, is natural given the language of the amendment . . . . To transform a restriction on government into a positive right vested in the state would do violence to the Amendment’s language.”<sup>67</sup> But the “government” is not a unitary entity in our system. The First Amendment’s text refers specifically to “Congress” making “no law,” and we know that some of the most important dissent from congressional measures in the early republic came from state governments. State and local governments are not speaking on behalf of the *national* government when they oppose national policy; the foundation of our system of dual sovereignty is that the national and state governments are *separate* entities, each accountable to the People through independent channels and *not* directly accountable to one another.<sup>68</sup> Nor does the incorporation of the First Amendment into the Fourteenth, so that it binds state and local governments as well as Congress, change this argument. The fact that private individuals now have speech rights against *both* the national and state governments does not logically entail that state governments do not retain similar rights against the center.

Another line of argument would assert that state and local institutions are not *persons* and thus should not bear the same rights as individuals. But we crossed that firebreak long ago when we accorded rights under the Fourteenth Amendment to associations and corporations.<sup>69</sup> The Court has long recognized the critical role that private associations like the NAACP play in organizing and amplifying divergent political views, as well as the individual interest in *hearing* the ideas that associations and corporations disseminate. Moreover, one of the principal objections to *corporate* speech rights – that corporations enjoy an unfair advantage in the political marketplace because of the accumulations of capital they represent – is probably less applicable to state and local governments. Not only are some states and many localities likely to be *poorer* than many corporations, governments can be

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<sup>67</sup> James Forman, Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 518-19 (1991).

<sup>68</sup> See, e.g., *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838-42 (1995) (Kennedy, J., concurring).

<sup>69</sup> See, e.g., *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

held democratically accountable for their expressive activities in ways the corporations cannot.<sup>70</sup>

State and local governments *do* differ from individuals and private corporations to the extent that actions by governmental institutions may have the force of law. Often, however, this is not the case. Most of the resolutions adopted by state and local governments condemning the PATRIOT Act have no legal force; they simply express those governments' disapproval of what Congress has done. It is hard to see how any principled distinction could be drawn between such resolutions and similar political speech by a private actor. Any effort by Congress to ban these anti-PATRIOT Act resolutions would be instantly recognizable as censorship, and that is no doubt why Congress has made no effort to do so.<sup>71</sup>

The more difficult questions arise when we move to governmental actions that have both expressive and regulatory components. A local measure might, for example, forbid federal agents operating within the city to conduct surveillance authorized by the PATRIOT Act. According First Amendment protection to such a measure would pose a serious threat to the supremacy of federal law. Any law that a state or locality enacts has an expressive component: It embodies a particular view on a question of public policy. (If nude dancing has a sufficient expressive component to be "speech,"<sup>72</sup> then surely an enacted law will always qualify.) But the Supremacy Clause clearly requires that state law must yield in the face of a conflict with a valid federal statute. A state might decide to make a political statement in favor of economic growth over environmental protection, for example, by enacting a law

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<sup>70</sup> See Porterfield, *supra* note 62, at 33.

<sup>71</sup> One might invalidate such a ban without ascribing First Amendment rights to governmental actors, I suppose, by arguing that the national government simply lacks any enumerated power to restrict these sorts of state or local action. I doubt whether the enumerated power approach gets us very far, however. Some forms of non-regulatory, expressive activity – such as a state pension fund's refusal to invest in South Africa under apartheid – would plainly be commercial activity that falls within Congress's power under *United States v. Lopez*, 514 U.S. 549 (1995). Moreover, many state and local resolutions – including the USA PATRIOT Act resolutions – deal with subjects that at least arguably bear on foreign affairs. In that area, the federal courts have held state laws dealing with non-commercial subjects preempted by a general "foreign affairs power" even in the *absence* of federal legislative action. See *Zschernig v. Miller*, 389 U.S. 429 (1968). The enumerated powers doctrine is thus likely to provide only sporadic protection, at best, to state and local expressions of disagreement with federal policy.

<sup>72</sup> See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion).

authorizing industry to pollute as much as it likes. No one doubts, however, that such a law would be preempted by federal environmental measures requiring stricter pollution controls – notwithstanding the fact that the state law could be properly viewed as a piece of political expression.

National supremacy means that state and local governments probably cannot enjoy the *same* free speech rights that private individuals, associations, and corporations enjoy. Contemporary First Amendment doctrine has generally been unwilling to draw a sharp distinction between speech and conduct. The relevant questions are generally whether the conduct in fact expresses a message and whether the government's regulation is directed at that message.<sup>73</sup> Where subnational governments are the speakers, we are likely to need something more like a line between actions that simply express the state or locality's own view and those that regulate or otherwise confer legal obligations on others. While these sorts of lines may not always be easy to draw, they are unlikely to be significantly *more* difficult than any number of other doctrinal distinctions in contemporary free speech law. The point is simply that that law will require significant doctrinal adaptations where governmental speakers are involved.

Another reason that state and local governments might enjoy comparatively less freedom of expression than individuals is that – unlike private parties – governmental bodies are also the object of constitutional restrictions. Under the Fourteenth Amendment, for example, state actors are bound by an obligation not to discriminate that is of equal constitutional dignity as the First Amendment that creates rights of free expression. The Seventh Circuit has thus held that “[e]ven if municipalities do have First Amendment rights . . . we do not think they have the right to foment, whether through speech or otherwise, governmental discrimination on grounds of race.”<sup>74</sup> One might similarly argue that a local government could not subsidize an exhibition of Andres Serrano's “Piss Christ,” a photo depicting a crucifix immersed in the artist's urine, on the ground that the exhibition would constitute hate speech in violation of the government's constitutional obligation not to discriminate against religious

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<sup>73</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385-86 (1992); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

<sup>74</sup> *Creek v. Village of Westhaven*, 80 F.3d. 186, 193 (7th Cir. 1996).

groups.<sup>75</sup> Although the government's ability to *restrict* such exhibitions would present a more serious question,<sup>76</sup> its ability to *promote* them would turn not only on the contours of the free speech right but also on the restrictions imposed by the Equal Protection Clause, as well as the First Amendment's religion clauses. That analysis would likely produce a considerably narrower right of governmental speech than a private individual would enjoy in the same situation.

Finally, we might worry that, even when state or local governments express views without any regulatory effect, those views might have uniquely harmful consequences arising from their source in a governmental body. Suppose, for example, a local city council announces to its citizens that the PATRIOT Act is unconstitutional and invalid, and further urges them not to cooperate with investigative requests from federal officials. Such an announcement might be intended simply as expression of an opinion with no regulatory effect, but because it comes from a governmental body its audience might misconstrue it as either an authoritative decision that the Act is invalid or, even worse, a binding governmental directive not to comply. Again, such possibilities show why the First Amendment rights of governmental entities might ought not to be construed as broadly as those of individuals; we might want a lower standard for holding government speech to be unprotected incitement, for example.<sup>77</sup> But such hypotheticals do not, in my view, establish that state and local governments should enjoy no speech protections *at all*.

The anti-commandeering doctrine may serve as one workable accommodation of state and local expressive interests, despite the fact that the Court has never justified it in precisely those terms. Modern First Amendment doctrine recognizes a robust right against compelled speech; as Chief Justice Burger observed in *Wooley v. Maynard*, the Free Speech

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<sup>75</sup> For a description of the Serrano controversy, see Jacqueline Trescott, *NEA Balks At Funding Serrano: Critics See Rejection As Politically Motivated*, WASH. POST, Aug. 6, 1994, at C1. For a similar controversy that occurred not far from the site of this symposium, see Kit R. Roane, *Arguments Heard in Museum's Legal Battle With Mayor*, N.Y. TIMES, Oct. 9, 1999, at B6.

<sup>76</sup> There is a vast literature on hate speech, most of it focusing on race rather than religion. See, e.g., MARI J. MATSUDA, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

<sup>77</sup> Compare *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (permitting restriction of *private* incitement only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").



Clause protects “both the right to speak freely and the right to refrain from speaking at all.”<sup>78</sup> Indeed, one of the few cases in which the Supreme Court has recognized that state governmental entities enjoy First Amendment interests involved precisely this right *not* to speak.<sup>79</sup> From this standpoint, it makes sense to say that national authorities cannot compel state or local officials to express support for federal policy by participating in the enforcement of measures with which they disagree. Commandeering thus distorts the political process – a central concern of both federalism and speech doctrine – not only by blurring lines of political accountability but also by undermining the ability of state and local governments to articulate a different point of view.<sup>80</sup>

I do not want to suggest that this is the only legitimate justification for the anti-commandeering doctrine, or that that doctrine exhausts the circumstances in which the First Amendment ought to protect state autonomy. Nonetheless, this way of thinking about commandeering may have the twin virtues of placing that doctrine on a firmer constitutional footing in some circumstances and of making it easier for liberals to swallow. Liberals have traditionally embraced speech rights, after all, while viewing “states’ rights” with considerable suspicion. But the conjunction of federalism and rights concerns in the commandeering context is only one of a vast range of linkages that ought to lead liberals to embrace state autonomy in a much broader range of circumstances. I turn to that issue in the next Part.

### III. CONSERVATIVES, LIBERALS, AND STATE AUTONOMY

The readiness of some political liberals to embrace state autonomy as a means of opposing the War on Terror represents something of a shift in the traditional political valence of federalism disputes. Liberals have generally viewed state autonomy with profound suspicion. Many have agreed with a much-cited diatribe by Edward Rubin and Malcolm Feeley that “there is no normative principle involved [in federalism] that is

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<sup>78</sup> 430 U.S. 705, 714 (1977).

<sup>79</sup> See *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674-75 (1998) (holding that a state public television station had a protected First Amendment interest in deciding which candidates to include, and which to exclude, in a televised political debate).

<sup>80</sup> For a similar argument, see Cox, *supra* note 24.

worthy of protection.”<sup>81</sup> I argue in Section A of this Part that this suspicion is misplaced at this point in our history. Liberals are right to embrace federalism; the odd point is that it has taken them so long to do it.

Any such embrace does raise questions of opportunism, however. Some may see newfound support of state autonomy as hypocritical, given longstanding liberal opposition to state power in the past. I suggest in Section B that there is nothing inherently wrong with such opportunism; in fact, the Founders anticipated that precisely this sort of political self-interest would play a crucial role in maintaining the balance of our constitutional structure. It does seem likely, however, that structural arguments either for or against state autonomy will be taken more seriously if they are advanced in a principled fashion – that is, if advocates of particular structural arrangements demonstrate their willingness to defend those arrangements even when they do not like the political consequences.

#### A. *It's About Time*

The War on Terror is not the only issue on which state autonomy may serve politically liberal goals. Particular states recently have staked out more progressive positions than the national government on issues ranging from global warming to gay marriage, and political liberals have begun to criticize the shifting of authority from the states to the nation on issues from education to health care. Although many liberals have begun to support state autonomy on a number of these issues, one often detects the same discomfort that one sees in commentary on the War on Terror. Referring to Democratic presidential candidates' criticism of the federalization of education policy, for example, one liberal advocate opined that “[w]hen you start to hear national Democrats talking as if they are keynote speakers at the Federalist Society, that should be a cause for concern.”<sup>82</sup>

I think that instinct is profoundly mistaken. The first point is that, to someone of my own (post-Baby Boom) generation, liberal antipathy to federalism seems so *Sixties*.

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<sup>81</sup> Rubin & Feeley, *supra* note 47, at 909.

<sup>82</sup> Kate Zemike, “No Child Left Behind” Brings a Reversal: Democrats Fault a Federal Education Plan, N.Y. TIMES, Jan. 12, 2004, at A16 (quoting Andrew J. Rotherham, director of education policy for the Progressive Policy Institute).

Seth Kreimer, for instance, has said that “[i]n my formative years as a lawyer and legal scholar, during the late 1960s and 1970s, [federalism] was regularly invoked as a bulwark against federal efforts to prevent racial oppression, political persecution, and police misconduct.”<sup>83</sup> That sentiment is surely understandable, and it probably explains much liberal opposition to federalism in the academy. But while I would never claim that these wars – against racism, for instance – have been won, I do think it is fair to say that the battle to *federalize* those subjects is over.<sup>84</sup> We remain a society divided over race, but few would dispute today that the answers to most racial questions, such as affirmative action, must be sought in national terms.

On many of the rights issues that retain a federalism dimension, by contrast, it is far from clear that liberal distrust of state autonomy makes sense. Some of the most recent controversies at the intersection of federalism and rights have involved physician-assisted suicide, gay marriage, and medical marijuana. Each of these questions has pitted particular states taking a progressive stance – Oregon’s protection of the right to die, Massachusetts’ and Vermont’s moves to authorize gay marriage, and California’s legalization of some medical marijuana use – against strong efforts at the national level to stifle those experiments. The best hope of defending these “liberal” state positions, moreover, may lie in arguing limitations on the scope of the national Commerce Power or restrained notions of federal preemption rather than in reliance on claims of individual right.<sup>85</sup>

Professor Finkelman’s contribution to the present symposium offers a case study in liberal suspicion of state and local institutions.<sup>86</sup> He argues that while Justice Stevens’s *Printz* dissent was correct to predict that denying Congress the right to commandeer state and local law enforcement would

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<sup>83</sup> Kreimer, *supra* note 30, at 67.

<sup>84</sup> See Baker & Young, *supra* note 55, at 147-49.

<sup>85</sup> See, e.g., *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (holding that plaintiffs challenging federal prohibitions on medical marijuana use were entitled to a preliminary injunction on Commerce Clause grounds); see also *Conant v. Walters*, 309 F.3d 629, 645-47 (9th Cir. 2002) (Kozinski, J., concurring) (making an anti-commandeering argument against aspects of the federal law restricting medical marijuana use); Stephanie Hendricks, *supra* note 37; Nelson & Pushaw, *supra* note 37 (discussing same-sex marriage).

<sup>86</sup> Paul Finkelman, *The Roots of Printz: Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 BROOK. L. REV. 1399 (2004).

lead to an expansion of the national police force, we should embrace this scenario because federal law enforcement is more respectful of rights. "The willingness of states to oppress religious and ethnic minorities is well known," he asserts.<sup>87</sup> But it is instructive to look at the sources Professor Finkelman cites for that proposition: *Meyer v. Nebraska*,<sup>88</sup> a case decided in 1923, and a book about "nativism" in education during the period 1917-1927.<sup>89</sup> More recent examples could no doubt be cited, although whether one could find enough to support Finkelman's on-balance judgment of state and local inferiority is far less clear. As William Stuntz has pointed out, two of the most important constraints on police misconduct are democratic accountability and resource limitations, and these restrict local law enforcement to a far greater extent than they do federal authorities.<sup>90</sup> What is more fascinating, however, is the willingness of many liberals simply to assume that if state and local officials were less respectful of liberty than their federal counterparts in the 1920s, the same must be true today.

Professor Chemerinsky's entry provides a useful corrective to this sort of assumption, identifying a different but related set of issues.<sup>91</sup> His essay focuses on a large class of cases involving preemption of state law by federal statutes. Such cases, as I have pointed out elsewhere, implicate the core of the States' capacity to govern themselves; federal preemption, after all, displaces state law in favor of policies enacted at the national level.<sup>92</sup> Moreover, preemption cases generally involve a

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<sup>87</sup> *Id.* at 1416.

<sup>88</sup> 262 U.S. 390 (1923) (involving a state law prohibiting the teaching of foreign languages to young children).

<sup>89</sup> See Finkelman, *supra* note 86, at 1416 n.58 (citing *Meyer* and WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927* (1995)).

<sup>90</sup> See Stuntz, *supra* note 11, at 674:

[T]his much is clear: the FBI is less accountable than local police forces . . . . FBI agents also have more freedom to target the wrong people than do local cops – in part because the local cops have primary responsibility for day-to-day law enforcement. If we are to add to the FBI's power, we would do well to worry about those two problems.

<sup>91</sup> See Chemerinsky, *supra* note 4.

<sup>92</sup> See Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 39-40 (arguing that preemption cases are much more important for state autonomy than cases involving state sovereign immunity, despite the Court's focus on the latter); Young, *Two Cheers*, *supra* note 53, at 1375-76 (arguing that preemption cases are the most important class of federalism cases from the perspective of state autonomy); see also S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 694 (1991) (noting the "jurispathic" effect of federal preemption in killing off state policy choices). For the notion of "jurispathic"

regulated entity – usually a business – challenging relatively rigorous state regulation on the ground that it conflicts with a more lenient regulatory regime adopted in Washington, D.C. To the extent that liberals often favor more rigorous regulation of business and industry, then, they ought usually to take the pro-states side in preemption cases. And, in fact, the pattern that emerges in Supreme Court preemption opinions reflects this political tendency while standing the Justices' usual positions about federalism on their head: The liberal/nationalists on the Court, such as Justice Stevens, tend to vote for the States and against preemption, while the conservatives/states-righters interpret federal measures broadly to preempt state law.<sup>93</sup> I am not as ready as Professor Chemerinsky to explain this pattern purely in terms of political ideology; the pattern of results, in my view, is too complicated and there are too many cross-cutting variables, such as judicial philosophies of statutory construction.<sup>94</sup> Nonetheless, the preemption cases offer a large class of contested federalism issues in which the pro-states side has been more congenial to political progressives.

One hopes that current controversy over the state and local anti-PATRIOT resolutions may encourage more liberal jurists and scholars to be open to federalism-based arguments in contexts beyond preemption of state regulation. I have already noted the example of Justice Stevens, who has been a champion of state autonomy in preemption cases but has little use for the anti-commandeering doctrine. But perhaps if we see that doctrine as fostering state and local dissent from potentially repressive national policies, and as shielding state authority to interpret the Constitution more generously than federal actors who claim interpretive supremacy, then *Printz* will look considerably more appealing to progressives. It may be too much to hope that the Court's nationalists will

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effects, see generally Robert M. Cover, *The Supreme Court, 1982 Term: Foreword – Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

<sup>93</sup> For some representative decisions, see, for example, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Several scholars in addition to Professor Chemerinsky have noted this pattern. See Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 362-78; Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 502-12 (2002); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429-30 (2002); Young, *Two Cheers*, *supra* note 53, at 1349. I develop and analyze this pattern at much greater length in Young, *The Rehnquist Court's Two Federalisms*, *supra* note 54.

<sup>94</sup> See Young, *Two Cheers*, *supra* note 53, at 1384.

reconsider some of their prior dissents, but perhaps they might moderate their unusually adamant opposition – embodied in vows to disregard *stare decisis* and continue dissenting indefinitely<sup>95</sup> – to the Court's federalism precedents.

It is hardly true, of course, that *all* states take a more progressive position than the national government on contemporary issues like environmental policy or gay marriage. But that is precisely the point. National authority can be an effective tool for imposing rights supported by a national consensus on outlier states that refuse to go along. As my colleague Scot Powe has argued, this is basically what happened on race and related issues during the 1960s as a national majority, persuaded of at least some basic commitment to racial equality, imposed its more progressive views on a recalcitrant South.<sup>96</sup> But where no such consensus has been achieved, resolution of a rights issue at the federal level may well stifle progressive change. That is certainly the intent behind at least some aspects of the federal Defense of Marriage Act and, more clearly, proposals for a federal constitutional amendment banning gay marriage.<sup>97</sup> It is only

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<sup>95</sup> See, e.g., *Fed. Mar. Comm'n v. South Carolina St. Ports Auth.*, 535 U.S. 743, 788 (2002) (Breyer, J., dissenting) ("Today's decision reaffirms the need for continued dissent – unless the consequences of the Court's approach prove anodyne, as I hope, rather than randomly destructive, as I fear."); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 98-99 (2000) (Stevens, J., dissenting) (asserting that "[t]he kind of judicial activism manifested in [the Court's 11th Amendment cases] represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises"); see also Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 178 (2002) (observing that "[s]uch explicit commitments to keep dissenting until the dissent becomes the doctrine of the Court are rare"). It may be that the dissenters' unwillingness to accord *stare decisis* effect to the Court's federalism decisions is confined to the Eleventh Amendment cases, which are harder to see in libertarian terms. We simply don't have enough commandeering or commerce clause cases to tell for sure. But certainly we have no evidence of the *Printz* and *Lopez* dissenters' willingness to accept the legitimacy of those decisions in future cases.

<sup>96</sup> LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2001). I would certainly not argue that we have reached national consensus on race issues in general, but I think it is safe to say that the basic equality norms embodied in the 1964 Civil Rights Act or the Equal Protection Clause's prohibition on overt, malign racial discrimination enjoy far broader popular support than, say, a right to gay marriage. See, e.g., *US Opposed to Gay Marriage*, BIRMINGHAM POST, Apr. 12, 2004, at 9 (reporting that respondents to a poll opposed gay marriage by a margin of 55 to 41 percent).

<sup>97</sup> Eugene Volokh has argued – persuasively, in my view – that the portion of the Defense of Marriage Act that relieves states of their full faith and credit obligations to recognize gay marriages permitted in other states may actually *promote* social change on this issue. Email posting of Eugene Volokh, CONLAWPROF listserv (Nov. 18, 2003) (on file with author; cited with permission). The reason is that if, say, Vermont's recognition of gay marriage can bind all other states to recognize such

natural that people who fervently believe in an individual right or some other aspect of reform would want that reform implemented uniformly across the nation. But the hope that the national government will do the “right thing” right away in every case is utopian. In many instances, incremental change beginning at the state and local level will be the best hope for progressive reform.

The politics of the last decade ought to reinforce this point. For many decades it seemed like the Democratic Party’s dominance of Congress would never end, and many liberals no doubt derived their preference for national power from that political fact. But it *did* end, and now the Republican Party controls all three branches of the national government.<sup>98</sup> Long-term demographic trends, as well as redistricting measures in several crucial states, point toward long-term Republican control of Congress even if the Presidency remains competitive.<sup>99</sup> Republican primacy in national politics may still, of course, come crashing down tomorrow. But surely liberals would do well to hedge their bets on that score. In the meantime, their interests will often lie both in promoting progressive reform at the state level *and* in defending the structural principles that will make those local victories stick.

All this points to a truth that history well bears out: The political valences of national power and state autonomy constantly have shifted back and forth throughout our history. In the Progressive Era, liberals were often based in the states and distrusted federal (particularly federal judicial) power;<sup>100</sup> in the 1960s and 1970s, the opposite was more often true. Prior to the Civil War, slaveholders relied on federal authority to recover escaped slaves, while more enlightened state governments in the North sought to preserve some modicum of

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unions entered into in Vermont, then any state opposed to the practice has a stake in snuffing out Vermont’s policy. Better, Professor Volokh argues, to defuse this pressure for a national solution and let each state determine how to handle the issue on its own. The critical point, however, is that this aspect of the Defense of Marriage Act may facilitate incremental reform precisely by decentralizing resolution of the issue. *See also States Represent Best Forums for Gay-Marriage Debate*, USAToday.com, April 1, 2004, available at [http://www.usatoday.com/news/opinion/editorials/2004-04-01-our-view\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2004-04-01-our-view_x.htm).

<sup>98</sup> See Baker & Young, *supra* note 55, at 151.

<sup>99</sup> See *Eatanswill Revisited: America’s Election*, THE ECONOMIST, Jan. 31, 2004.

<sup>100</sup> See EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 1-2, 12-16 (2000).

due process for accused escapees.<sup>101</sup> It is an ahistorical mistake to take the particular political patterns of the last third of a century for immutable structural truth. One simply cannot ascribe a reliable political tendency to federalism.<sup>102</sup>

*B. The Legitimacy (and Perils) of Opportunism*

Perhaps one reason that political liberals have been reluctant to embrace federalism, even in situations like the War on Terror where state autonomy may promote their interests, is that they fear appearing opportunistic. Certainly the tone of much commentary in the popular press – accusing Republicans of hypocrisy for proposing national measures when they are supposed to be the party of “states’ rights,” for example – suggests something wrong with choosing structural principles based on short-term political advantage.<sup>103</sup> And, indeed, I want ultimately to suggest that such a short-term strategy is not a great idea. I do think, however, that the case for opportunism is somewhat stronger than some might think. In fact, such opportunism seems to be exactly what our Founders expected – and counted upon.

Consider, for instance, Madison’s discussion of structural safeguards in Federalist 51.<sup>104</sup> One interesting aspect of that essay is that it treats the division of power among different institutions as both a safeguard of liberty in its own right and, on the other hand, as a somewhat fragile arrangement that must itself be protected against “a gradual

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<sup>101</sup> See Finkelman, *supra* note 86; Baker & Young, *supra* note 55, at 121-24.

<sup>102</sup> One *can* argue that, to the extent federalism fosters incremental change and caters to risk aversion about political defeat at the national level, it is inherently related to a Burkean form of conservatism. But that is quite different from the sort of conservative/liberal dichotomy that we generally refer to when we speak of contemporary politics. See generally Young, *Judicial Activism*, *supra* note 8, at 1181-1203.

<sup>103</sup> See, e.g., E.J. Dionne, Jr., *When States’ Rights Get in the Way*, WASH. POST, June 25, 2002, at A19:

“The doctrine of states’ rights, so often invoked as a principle, is almost always a pretext to deny the federal government authority to do things that conservatives dislike. . . . How do I know this? Because when states have the temerity to try doing [progressive] things . . . , conservatives are quick to use federal power to stop them from exercising their right to act.”

<sup>104</sup> THE FEDERALIST NO. 51, *supra* note 21 (James Madison). Madison’s discussion seems most immediately directed at separation of powers within the national government, but there is little doubt that it applies to federalism as well. Both federalism and separation of powers are part of the “double security” for the “rights of the people” that figures prominently in the essay. See *id.* at 351.



concentration of the several powers in the same department.”<sup>105</sup> Madison’s answer to this danger is to rely on opportunism: We must give “to those who administer each department, the necessary constitutional means, and *personal motives*, to resist encroachments of the others.” Hence, “[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”<sup>106</sup> We do not hope for individuals to defend structural arrangements out of principled commitment; rather, the system operates by a “policy of supplying by opposite and rival interests, the defect of better motives.”<sup>107</sup>

Just as we have misgivings about opportunism today, this sort of solution was not intrinsically appealing to a generation used to thinking in terms of republican virtue. Madison acknowledges that “[i]t may be a reflection on human nature, that such devices should be necessary to controul the abuses of government.”<sup>108</sup> He does not linger long over what cannot be helped, however. “But what is government but the greatest of all reflections on human nature?” he asks. “If men were angels, no government would be necessary.”<sup>109</sup> We may praise republican virtue when we find it, then, but the system must be built in such a way as to hold together even when principled commitment is lacking.

If anything, the issue-based calculations that motivate political liberals and conservatives to embrace and discard federalism may be an improvement on the more venal, patronage-type motivations that Madison seemed to have most directly in mind. In any event, the main point is that there is nothing inherently surprising or wrong about political factions embracing state autonomy when that structural principle supports their preferred policy outcomes. The most reliable “political safeguard of federalism” in the Founders’ scheme is not the hope the federal representatives will be mindful of the institutional interests of their state governmental counterparts back home; rather, it is that whenever a particular federal measure is proposed, the people opposed to that measure on its policy merits will have an incentive to argue that the matter should be left to the States.

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<sup>105</sup> *Id.* at 349.

<sup>106</sup> *Id.* (emphasis added).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

At the same time, I do think that one can raise a pragmatic objection to *too much* opportunism in structural matters. Anytime a proponent or opponent of a particular measure bolsters the policy argument for that measure on the merits with an argument from structural principle, the reason must be that the advocate thinks this additional structural argument will make a difference with some members of his audience. In other words, the choice to engage in structural argument presupposes some subset of decision makers who do not feel sufficiently strongly about the policy merits to be persuaded on those grounds alone, but who *do* care about structure. I will confess that I myself fall into this camp: I remain relatively agnostic on the War on Terror, but I do feel strongly that Congress should not commandeer state and local officers. I suspect that decision makers and observers who fit this particular description do tend to care somewhat whether structural arguments directed to them seem overly opportunistic; they may wonder, for example, whether the advocate of a particular policy would be willing to accept a similar argument for state autonomy on a question where he might not like the policy outcome. There is, in other words, a measure of credibility to be gained by attempting to be at least somewhat principled on structural questions.

A second caveat has to do with the long-term implications of structural safeguards. The point of those safeguards, as I discussed in Part I, is to preserve space for the freedom to disagree by dividing power and governing competence. By arguing for state and local autonomy, then, political partisans not only may serve their short-term interests; they also hedge their bets against defeat on a whole range of issues at the national level. In this sense, state and local autonomy may be in the long-term interests of any group that is not sure of victory at the national level for its entire political program.

The upshot of these musings is twofold: First, observers of political debate should be a little less quick to cry "hypocrisy" when political liberals embrace state autonomy, or when political conservatives opt for national power. That is simply the natural political dynamic that the Framers anticipated. But second, political partisans should – for the sake of their own credibility – be cautious about too much opportunism in these matters. By taking a little longer-term perspective on the need for balance in the federal system, moreover, they may

preserve the necessary institutional space for future disagreement.

#### IV. CONCLUSION

The War on Terror has made for strange bedfellows in any number of respects. Libertarians on the far Right have joined with civil liberties advocates on the Left to oppose the expansion of law enforcement powers. The Labour Prime Minister of Great Britain has tied his political fortunes inextricably to the most conservative Republican President in many, many years. And liberals have come to embrace “states’ rights” – even if they often cannot bear to use the term – as a mechanism for fostering political resistance to the PATRIOT Act. Welcome to the Dark Side, indeed.

My primary point in this essay has been to suggest that this is as it should be. Federalism is about dividing power; nothing much depends on what the power in question is being used for. It is also about providing institutional space for a diversity of political views. As such, it should surprise no one that a commitment to state and local autonomy would take on the hue of political opposition to the prevailing orthodoxy at the center, whatever that orthodoxy happens to be. Relatively few people are likely to embrace federalism for its own sake – that may, in fact, be primarily the office of law professors, who are well-known to suffer from a somewhat tenuous connection to political reality. Rather, support for state autonomy vis à vis national power on both Left and Right has ebbed and flowed throughout our history, according to the dynamics of whatever political issue is most salient at any given time.

This observation does, of course, have a somewhat melancholy implication for those of us who do care more about structural issues than day-to-day politics. In suggesting that liberals are right to embrace federalism in the context of the War on Terror, we have not uncovered any fundamental new truth about state autonomy; there is no reason, in other words, to assume that liberals will – or should – take the States’ side in whatever the *next* big political debate turns out to be. Partisans of state autonomy can nonetheless welcome these new allies while they last, even if we cannot be confident they will stay around for long.