JUDICIAL REVIEW AND THE FUTURE OF FEDERALISM

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ABSTRACT

Modern judicial review poses a unique threat to federalism, because it enables the Supreme Court to preempt state law and impose nationwide policies by a simple majority vote and without the assent of any other institution. And the current Supreme Court has shown little interest in adopting formalistic interpretive methodologies that would constrain its powers to override state law in the name of constitutional interpretation. Modern judicial interpretation of the Constitution is rooted primarily in court-created doctrines and precedents rather than constitutional language, and many of these doctrines and precedents could never have obtained the formal supermajoritarian assent needed to entrench a constitutional rule. These judicial interpretive practices are in tension with the Constitution's efforts to protect federalism and state prerogatives by making it difficult for federal institutions to enact federal laws and impose nationwide policies on the states.

Those who wish to preserve a regime of constitutional federalism should think hard about ways to counteract the Supreme Court's unilateral nationwide policymaking. This is no easy task because the notion of judicial interpretive supremacy over the Constitution is well entrenched in our legal and political culture, and many of the Supreme Court's decisions to nationalize policies at the expense of state decisionmaking enjoy substantial political support. This Essay discusses the challenges that confront efforts to protect state prerogatives against the unilateral policymaking of the federal judiciary, and proposes some strategies that advocates of federalism might deploy in their efforts to chip away at the judiciary's incursions on state authority.

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INTRODUCTION

One cannot assess the future of federalism without considering the future of judicial review. The Supreme Court claims to hold interpretive supremacy over the Constitution, and this enables the Court to unilaterally impose nationwide policies so long as it claims to be interpreting the Constitution when doing so. The modern Supreme Court also does not feel any particular need to tie its constitutional edicts to constitutional text. In a recent decision, the Court claimed that it can impose "fundamental rights" that do not appear in the language of the Constitution but that the Court discerns through the exercise of "reasoned judgment"[1]—an assertion of power that allows the Court to impose almost any "right" it wishes to recognize through a simple majority vote. This supposed prerogative of the Court to impose "fundamental rights" is not limited by a regime of enumerated powers. And there is no need for these court-imposed "fundamental rights" to receive the assent of multiple different institutions, as the Constitution requires before a federal statute, treaty, or constitutional amendment can be enacted into law.

Some have described or defended modern judicial review as a device that enables national political coalitions to overcome the Constitution's obstacles to federal lawmaking: By enabling a simple majority on the Supreme Court to enact uniform federal policies, the Court can impose policies that enjoy nationwide support but are unable to surmount the bicameralism-and-presentment hurdles or obtain the supermajoritarian approval that Article V requires for a constitutional amendment.[2] But those who support federalism and the Constitution's protections for state-by-state decisionmaking should be troubled by a Supreme Court that behaves this way. The entire point of constitutional federalism is to *prevent* national political majorities from having their way in order to capture the systemic benefits that come from allowing the states to choose their own policies, such as facilitating innovation and experimentation in government[3] and increasing political-

1. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

2. *See, e.g.*, Jack Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1137 (2012); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 875–87 (2009). And, of course, not all policies imposed by the Supreme Court enjoy nationwide majority support; sometimes the Court's edicts are blatantly countermajoritarian, especially in the areas of school prayer, flag burning, and criminal procedure. *See* Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 146 (1998) (acknowledging that the Supreme Court "imposes culturally elite values in marginally countermajoritarian fashion" (emphasis removed)).

3. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the

preference satisfaction by enabling citizens to migrate to jurisdictions with more favorable laws.[4] So the idea that the Supreme Court should "overcome federalism"[5] by imposing majoritarian policies from the bench is something that proponents of constitutional federalism will resist.

But there are challenges that confront federalism proponents who seek to push back against the Supreme Court's behavior. This Essay considers the problems that affect efforts to establish and preserve a regime of constitutional federalism, and suggests some tentative strategies that federalism advocates might use to counter the Supreme Court's incursions on state decisionmaking.

I. THE CONSTITUTION'S EFFORTS TO PRESERVE FEDERALISM

There are two mechanisms that the Constitution uses to limit federal power and protect state prerogatives. The first is by defining and limiting the powers of the federal government. The Constitution does this by enumerating the powers of Congress,[6] denying specific powers to the federal government,[7] and providing in the Tenth Amendment that powers not delegated to federal institutions are reserved to the states.[8]

The second mechanism is by establishing rules that make it difficult for federal laws to be enacted. Article I prevents any bill from becoming law unless it obtains approval from three separate institutions — the House, the Senate, and the President — or unless it secures a two-thirds supermajoritarian approval in both the House and Senate after a presidential veto. Article II prevents any treaty from being ratified unless the President and two-thirds of the Senate agree to it. And Article V prevents new constitutional amendments from taking effect unless they receive approval from two-thirds of each house of Congress and ratification by three-fourths

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

4. *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

5. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 741 (2011) ("Political scientists have documented the important role courts play in helping national officials and constituencies 'overcome federalism,' by constitutionalizing dominant national policy preferences and enforcing them against oppositional political forces at the state and local levels.").

6. *See* U.S. CONST. art. I, § 8.

7. *See id.* art. I, § 9; *id.* amends. I–VIII.

8. *See id.* amend. X.

of the states. So even when the federal government has the constitutional authority to act, the Constitution places multiple veto-gates and supermajoritarian-approval requirements in the path of those would displace state-by-state decisionmaking with nationalized policies.

Each of these mechanisms has proven to be a fragile means of safeguarding constitutional federalism. The Constitution's efforts to establish subject-matter limitations on federal power suffer from the problems that afflict any attempt to limit a government's power with "parchment barriers": Written constitutional limits can be interpreted away or ignored by willful government institutions.[9] If Congress, the President, and the Supreme Court all decide to interpret the Commerce Clause in a manner that permits the federal government to regulate almost anything it wants, then there is little that can be done to stop them. The words are not going to jump off the paper and enforce themselves.

And the Constitution's procedural obstacles to federal lawmaking have been eroded by the behavior of courts and administrative agencies. To be sure, neither of these entities has attempted to formally enact a new statute or constitutional provision through unilateral decree. But they have used their powers to "interpret" *existing* statutes and constitutional provisions to impose policies that were never understood to be authorized by the linguistic community that enacted those laws — and that could never have obtained the bicameral or supermajoritarian approval that the Constitution requires before a nationwide policy can be imposed. The loose interpretive methodologies that modern-day courts and agencies deploy enable them to enact federal policies unilaterally, and to displace state-by-state decisionmaking without running the gauntlet that the Constitution establishes for those who seek to impose uniform nationwide policies.

The Supreme Court's recent decision in *Obergefell v. Hodges*[10] provides an example of how the judiciary uses its powers of interpretation to undermine the Constitution's obstacles to federal lawmaking. *Obergefell* claimed that the Fourteenth Amendment's Due Process Clause requires every state to license and recognize marriages between people of the same sex.[11] But the Court did not attempt to explain how the language of the Due Process Clause could support that idea. Its assertion that the Due Process Clause

9. *See* THE FEDERALIST NO. 48, at 310 (James Madison) (Clinton Rossiter ed., 2003) ("[A] mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.").

10. 135 S. Ct. 2584 (2015).

11. *Id.* at 2608.

extends substantive protections to "personal choices central to individual dignity and autonomy" rested on the Court's precedent rather than constitutional language.[12] And the Court did not offer any test for determining what qualifies as a "fundamental right" under this body of court-created jurisprudence. It simply declared that courts should "exercise reasoned judgment" in "identifying interests of the person so fundamental that the State must accord them its respect."[13]

The interpretive methodology deployed in *Obergefell* enables courts to impose nationwide policies that do not appear in the text of a statute, treaty, or constitutional provision—and that could never have obtained the formal supermajoritarian approval that Article V requires before a new constitutional rule can be entrenched.[14] That does not mean that *Obergefell*'s approach to constitutional interpretation is wrong or indefensible. One might plausibly believe, for example, that judge-empowering interpretive methodologies of this sort will produce normatively desirable consequences that justify the Court's incursions on state autonomy.[15] The Court's actions in the areas of racial equality, malapportioned districting, and incorporation of the Bill of Rights are almost universally regarded as improvements in the law, even though they curtail the powers of the states. And some might believe (or hope) that empowering the Supreme Court at the expense of the states will produce beneficial results in the long run—although one must always bear in mind that there is no mechanism to ensure that the Supreme Court will impose only "good" policies from the bench,[16] and there have been plenty of "bad" policies that the Court has imposed on the nation throughout its history.[17]

But there is tension between the modern Supreme Court's interpretive practices and a Constitution that places multiple veto-gates and supermajoritarian-approval requirements in the path of those who seek to

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12. *Id.* at 2597.

13. *Id.* at 2598.

14. *See* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125 ("[T]he Court makes no pretense that its judgments have any basis other than the Justices' view of desirable policy. This is fundamentally the method of substantive due process.").

15. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015).

16. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 44 (1980) ("[T]here is absolutely no assurance that the Supreme Court's life-tenured members (or the other federal judges) will be persons who share your values."); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 12 (2006) ("[P]roponents of ambitious judicial review fantasize that they can have the good without the bad. In fact there is no mechanism for unbundling the outcomes, which means that judicial review must be evaluated by reference to its worst possible outcomes as well as its best.").

17. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); Dred Scott v. Sandford, 60 U.S. 393 (1857).

impose nationwide policies on the states. The Constitution protects state autonomy by making it difficult for federal institutions to enact statutes, treaties, or constitutional provisions, and it requires these sources of federal law to secure approval from multiple different institutions. Those protections become far less valuable when the Supreme Court asserts a prerogative to announce new constitutional rights by applying "reasoned judgment"—and to impose those rights unilaterally and by a simple majority vote.

Administrative agencies have also used their powers of interpretation to impose federal policies that Congress has been unwilling or unable to enact. The EEOC recently declared that Title VII's prohibition on sex discrimination forbids employment discrimination based on sexual orientation or gender identity,[18] even though Congress has repeatedly refused to extend federal anti-discrimination law to homosexuals and transgendered people. And the Obama Administration's Department of Education tried to interpret Title IX to require schools to allow students into the restrooms, locker rooms, and showers that correspond with the gender identity that the student asserts—regardless of whether the student provides a medical or psychological diagnosis, regardless of whether the student is receiving hormone therapy or professional treatment, and regardless of whether the student's parents support or oppose their child's efforts to access facilities reserved for the opposite biological sex.[19] Again, this is not to say that these agencies' interpretive practices are wrong. One might think that agencies *should* interpret existing statutes or agency rules aggressively to advance policies that the executive branch regards as normatively desirable.[20] But it does undermine the Constitution's efforts to preserve federalism by establishing obstacles to federal lawmaking. Modern agencies are interpreting statutes to impose nationwide policies that could never have received congressional approval, just as the courts are interpreting constitutional provisions to impose policies that could never have received the supermajoritarian approval required by Article V.

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18. *See* Baldwin v. Dep't of Transp., EEOC Decision No. 0120133080 (July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf.

19. *See* U.S. Dep't of Educ. & U.S. Dep't of Justice, Dear Colleague Letter on Transgender Students (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

20. *See, e.g.*, Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2015); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 297–98 (2017).

II. THE CHALLENGES TO PRESERVING A REGIME OF CONSTITUTIONAL FEDERALISM

The erosion of the Constitution's enumerated-powers regime and the aggressive interpretive practices of modern courts and administrative agencies are symptoms of larger and intractable problems that confront those who seek to preserve a federalist structure of government.

The first problem is that words are always subject to interpretation. So written constitutional limits on federal power are effective only to the extent of the *interpretations* of those words that government institutions choose to adopt. Consider the commerce power. By empowering Congress to regulate "Commerce . . . *among the several States*," the text indicates that Congress *lacks* the authority to regulate commerce within a single state—and the Supreme Court recognized as much in *Gibbons v. Ogden*.[21] But today all federal institutions accept that Congress may regulate purely intrastate commerce.[22] This is a textually questionable construction of the Commerce Clause, but the text is not self-enforcing, and if there is no political or judicial will to enforce written constitutional limits on federal power then those limits will remain unenforced.`

The second problem is that there is little reason to believe that government officials will want to preserve federalism simply for its own sake. Politicians, agency officials, and judges respond to a variety of incentives, including constituent pressures, partisan loyalties, and their own ideological beliefs. And these influences often induce them to prefer nationalized, one-size-fits-all policies over a regime that allows the states to choose for themselves. Think of the problem this way: Why *should* a politician or judge choose to leave matters to the states if he has the votes to impose his preferred policies on the nation by statute or judicial decree?

The problem is aggravated by the absence of mechanisms to ensure mutual forbearance from one's political or ideological opponents. If a Republican-led Congress has the votes to outlaw partial-birth abortion, but stays its hand because it doubts that the Commerce Clause gives this authority to the federal government,[23] there is no means to ensure that a future Democratic-led Congress will display the same principled restraint when it votes on a bill that

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21. U.S. CONST. art. I, § 8, cl. 3 (emphasis added); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) ("The completely internal *commerce* of a state, then, may be considered as reserved for the state itself." (emphasis added)); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1401–03 (1987).

22. *See* Gonzales v. Raich, 545 U.S. 1, 32–33 (2005).

23. *See* Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring).

would preempt state limits on abortion.[24] The same dynamic exists at the Supreme Court. A conservative justice who declines to incorporate the Second Amendment in the name of constitutional federalism will not through this act of self-abnegation induce his liberal colleagues to embrace federalism when it comes to abortion, same-sex marriage, or other issues favored by modern progressives. All too often, a commitment to federalism will end up as an act of unilateral disarmament, which deters even lawmakers or judges who care about federalism from doing much to preserve it.

None of this means that the cause of constitutional federalism is hopeless. But anyone who wants to design or preserve a federalist structure of government must think hard about ways to counter these incentives that lead to nationalized decisionmaking. One must assume that federal officeholders will often (though not always) face incentives to impose nationwide policies that accord with the wishes of their core constituents, the agenda of their political party, or their own ideological beliefs—and that they will interpret legal texts in a manner that gives them the powers to do so.

The framers of the Constitution recognized that federal officials would often face incentives to aggrandize federal power at the expense of the states,[25] and they provided a partial antidote to this problem: They placed multiple veto-gates and supermajoritarian requirements in the path of those who seek to impose nationalized policies at the expense of state-by-state decisionmaking. Federal statutes, treaties, and constitutional amendments must secure approval from multiple different institutions that respond to different constituencies, which makes it difficult to enact *any* federal law. So even if one imagines a Congress composed entirely of members that respond only to political incentives and do not care at all about preserving federalism or the enumerated-powers regime, the Constitution *still* protects state prerogatives by imposing procedural roadblocks to the enactment of federal law.[26]

But the Constitution does not impose any procedural checks on administrative agencies or federal courts when they announce their "interpretations" of previously enacted laws. Perhaps this is because the framers did not envision the rise of the modern administrative state or the

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24. *See* Freedom of Choice Act, S. 1173, 110th Cong. (2007); Freedom of Choice Act, H.R. 1964, 110th Cong. (2007).

25. *See* THE FEDERALIST NO. 48, *supra* note 9, at 305.

26. Of course, the rules governing the enactment of federal law are written on the same "parchment" as the enumerated-powers regime, so these rules could (at least in theory) be interpreted away or ignored by willful government institutions. Yet these structural rules have been stable and enduring; no one has tried to declare a statute or constitutional amendment to be "enacted" without the formal approvals required by constitutional text. For efforts to explain why the Constitution's structural rules have endured, see Levinson, *supra* note 5, at 692–98.

widespread use of judicial review. Perhaps they did not envision the aggressive theories of interpretation that modern-day agencies and courts would employ. But whatever the reason, the Constitution leaves open the possibility for agencies or courts to unilaterally impose policies on the nation in the guise of interpreting pre-existing laws. And this presents a unique threat to constitutional federalism.

III. STRATEGIES TO STRENGTHEN CONSTITUTIONAL PROTECTIONS FOR FEDERALISM

What does all of this mean for the future of federalism? For those who want to strengthen and preserve federalism, there are two possible strategies to pursue. One strategy focuses on reinvigorating constitutional subject-matter limitations on federal power, either by amending the Constitution or by persuading federal officials to interpret the Constitution differently.[27] The recently proposed "Texas Plan," offered by Texas Governor Greg Abbott, has called for several constitutional amendments along these lines.[28] One of these amendments would prohibit Congress from regulating activity that occurs wholly within one state; another would limit federal powers to those "expressly delegated" in the Constitution.[29] Other reforms have focused on making the enumerated-powers regime more salient to federal lawmakers. When Republicans won control of the House of Representatives after the 2010 elections, they arranged for the Constitution to be read aloud at the beginning of the new Congress, and they established a new requirement that every bill cite the provision of the Constitution that justifies its existence.[30] It is not clear whether these reforms have prevented Congress from enacting laws that it would have otherwise enacted, but they at least serve to remind lawmakers that the Constitution establishes a regime of enumerated federal powers—even though this may not be enough to overcome the political or ideological forces that induce them to expand federal power.

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27. *See, e.g.*, Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J.L. & PUB. POL'Y 475, 479 (2009) (proposing a constitutional amendment that would prohibit the Supreme Court from interpreting the Constitution "by reference to the contemporary laws of other nations").

28. *See* GREG ABBOTT, RESTORING THE RULE OF LAW 4 (2016) [hereinafter ABBOTT, RULE OF LAW], https://gov.texas.gov/uploads/files/press/Restoring_The_Rule_Of_Law_01082016.pdf; *see also* Greg Abbott, *The Myths and Realities of Article V*, 21 TEX. REV. L. & POL. 1, 3–4 (2016).

29. ABBOTT, RULE OF LAW, *supra* note 28, at 4.

30. *See* Jennifer Steinhauer, *Constitution Has Its Day (More or Less) in House*, N.Y. TIMES (Jan. 6, 2011), http://www.nytimes.com/2011/01/07/us/politics/07constitution.html.

Another strategy is to establish new veto-gates and supermajoritarian requirements that must be surmounted before nationwide policies can be imposed. Congress did this in 1946 when it enacted the Administrative Procedure Act and subjected agency actions to judicial review—thereby ensuring that agency interpretations of federal statutes would have to win the approval of the federal judiciary.[31] This goes a long way toward protecting the states from unilateral lawmaking by federal institutions, although these protections have been diluted by court-created agency-deference doctrines that are hard to square with the text of the APA.[32]

The Supreme Court, by contrast, has more latitude to impose nationwide policies through unilateral decree. The Court's claim to interpretive supremacy over the Constitution has led other government institutions to acquiesce to its constitutional pronouncements, no matter how wrong they think the Court may be, and this passivity has enabled the Court to impose its preferred policies on the nation by a simple majority vote. The Court gets to act like an administrative agency without the APA, and without the need to obtain formal approval other government entities. Of course, there are still ways for Congress and the President to push back against court-imposed policies that they disapprove—they can impeach, amend the Constitution, enact jurisdiction-stripping legislation, or try to appoint new justices who will overrule the decisions they oppose. But these are blunt tools and they face the bicameralism-and-presentment and supermajoritarian obstacles that make it so difficult to enact federal law in the first place.

The current regime of judicial interpretive supremacy over the Constitution poses a distinct threat to constitutional federalism, because it empowers a single institution to enact nationwide policies by a simple majority vote—and to do so even when the Constitution offers little if any

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31. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

32. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997). Section 706 of the APA requires the reviewing court to "decide all relevant questions of law," while simultaneously requiring courts a deferential standard of review for agency factfinding. Administrative Procedure Act, 5 U.S.C. § 706 (2012). To require courts to defer to an agency's views of the law is not easy to reconcile with the language and structure of section 706, and the opinions in *Chevron* and *Auer* made no effort to do so. For an effort to defend *Chevron* and *Auer* as compatible with the text of section 706, see Sunstein & Vermeule, *supra* note 20, at 303–05 (noting that "the [APA's] statement that the court shall 'interpret' questions of law is not decisive in favor of independent judicial review, if it is also the case *that under organic statutes, the correct interpretation of law depends on the agency's interpretation of law*," and proceeding to defend "a fictional, presumed [congressional] intent" to delegate interpretive authority to administrative agencies over ambiguities in the statutes that they administer).

textual support for the Court's preferred policy. Those who want to preserve federalism should look for ways to rein in the Court's power, just as Congress acted to check the power of administrative agencies when it enacted the APA. At first glance, this would appear to be a monumental endeavor. The first challenge is that the idea of judicial supremacy is well entrenched in our legal and political culture, as Attorney General Edwin Meese found out thirty years ago when he publicly questioned the Supreme Court's interpretive supremacy over the Constitution and was quickly shouted down.[33] The second challenge is that efforts to reform the practice of judicial review would likely need to be enacted in a statute or constitutional amendment—and few if any members of Congress are likely to be motivated to preserve federalism simply for federalism's sake. Most elected officials respond primarily to constituent pressures, partisan loyalties, or their own ideological beliefs, and these influences have led federal officials to largely subordinate concerns about federalism and adopt expansive theories of congressional powers. One cannot count on these same actors to enact federalism-promoting reforms—unless those reforms coincide with the partisan, electoral, or ideological incentives that they face.[34] A third and related challenge is that the Supreme Court's incursions on federalism have pleased constituencies in both the Republican and Democratic parties. The NRA and religious conservatives are happy with *McDonald v. Chicago*[35] and *Trinity Lutheran Church v. Comer*,[36] while supporters of homosexual rights and abortion rights are happy with *Obergefell*[37] and *Whole Woman's Health v. Hellerstedt*.[38] That makes it difficult for members of either political party to push back against the Supreme Court's current role in expositing the Constitution, even if they (or their constituents) dislike individual decisions that the Court has issued.

Despite these challenges, federalism proponents need not regard the possibility of reforming judicial review as entirely hopeless or quixotic. The first step that they can take is to work to change the rhetoric that is used to describe the Supreme Court and its behavior.

When Congress enacts a statute that some believe exceeds Congress's constitutional powers, the statute is immediately denounced as "unconstitutional"—even before it is challenged or enjoined in court. The

33. *See* Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987).

34. *See* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1758–59 (2013).

35. 561 U.S. 742 (2010).

36. 137 S. Ct. 2012 (2017).

37. 135 S. Ct. 2584 (2015).

38. 136 S. Ct. 2292 (2016).

same denunciations attach to state legislation that is believed to contradict provisions in the federal or state constitutions. Yet when the Supreme Court issues a ruling that disapproves state legislation, one hardly ever hears the critics of that decision denounce the *Court's* behavior as "unconstitutional"—even though the Court is violating the Tenth Amendment whenever it improperly thwarts the enforcement of a constitutional state law. There is no reason why the Supreme Court should be immunized from accusations of unconstitutional behavior.[39] There may not be a forum that allows one to formally challenge a Supreme Court decision, but that does not make the Court into an infallible arbiter of constitutional meaning. If Congress enacted an unconstitutional statute that the courts lacked jurisdiction to review, the statute—and Congress's decision to enact it—should properly be denounced as "unconstitutional," even if there is no formal means available to remedy this constitutional violation.

The unwillingness to accuse the Supreme Court of unconstitutional behavior may be part of a general reluctance to point the finger at government officials and institutions when they act in violation of the Constitution. Professor Rosenkranz has noted that courts and commentators are fond of saying that *statutes* "violate" the Constitution—a pathetic fallacy that shifts the blame away from the *actors* who "violate" the Constitution by enacting or enforcing the unconstitutional law.[40] The rhetoric that constantly accuses *statutes* of violating the Constitution—and that tasks the judiciary as the constitutional policeman who must "strike down" offending statutes—makes it harder to swallow the idea that the courts themselves violate the Constitution when they improperly enjoin the enforcement of a State's laws. But the Tenth Amendment constrains all three branches of the federal government, and a judicial decision that traipses on the states' reserved powers is as "unconstitutional" as a federal statute or executive order that does so.

A rhetorical change of this sort can be brought about gradually, and it does not require any legislation or action from Congress. Any individual with an audience—whether an elected official, scholar, activist, journalist, or

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39. One of the rare instances in which someone accused the Supreme Court of violating the Constitution was Justice Scalia's dissent in *Dickerson v. United States*, 530 U.S. 428 (2000), which chastised the majority for refusing to enforce an Act of Congress that Justice Scalia believed to be constitutional. *See id.* at 446 ("The Court therefore acts in plain violation of the Constitution when it denies effect to this Act of Congress.").

40. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1221–24 (2010). A statute does not "violate" the Constitution because the statute is an inanimate object, mere words on a piece of paper. A statute may *contradict* the Constitution, but no "violation" of the Constitution can occur without an *action*, such as the enactment or enforcement of an unconstitutional law.

blogger — can denounce Supreme Court rulings as "unconstitutional," and each person who does so can make a marginal contribution toward eroding the idea of unilateral judicial interpretive supremacy over the Constitution. As more people hear accusations that the Supreme Court is not only misinterpreting but *violating* the Constitution, the idea of enacting mechanisms to check the Supreme Court's unilateral nationwide policymaking may begin to seem more palatable and less radical. But it is also important not to overplay one's hand; the swift and sudden reaction to Attorney General Meese's speech in 1986 showed that a frontal attack on judicial supremacy from a prominent public official can provoke a ferocious backlash from those with vested interests in preserving the Court's power and the status quo arrangements.[41] If the idea of judicial supremacy is to be defeated, it will need to be chipped away at gradually, and one possible place to start is with individual citizens and low-level politicians accusing the Supreme Court of "unconstitutional" behavior.

Another rhetorical move is to carefully and consistently distinguish the Constitution itself from the court-created doctrines that purport to interpret the document. When a state law or practice contradicts the Supreme Court's Establishment Clause jurisprudence, for example, one should never say that the law "violates the Establishment Clause" unless one actually believes that the language of the First Amendment restricts the actions of state government — and it is hard to believe that when the text says that "*Congress* shall make no law respecting an establishment of religion."[42] A state law that establishes a religion violates not the Establishment Clause, but the Supreme Court decisions that require States to comply with the Court's Establishment Clause jurisprudence. Federalism proponents who discuss "Establishment Clause" challenges to state legislation — whether in briefs, judicial opinions, legal scholarship, or in spoken presentations — should be careful to preserve this distinction. It is often convenient shorthand to equate "the Establishment Clause" with the court-created Establishment Clause doctrines. But the use

41. *See, e.g.*, Anthony Lewis, *Law or Power*, N.Y. TIMES, Oct. 27, 1986, at A23 (accusing Meese of "making a calculated assault on the idea of law in this country"); Stuart Taylor Jr., *Liberties Union Denounces Meese*, N.Y. TIMES, Oct. 24, 1986, at A17 (quoting Eugene C. Thomas, then-president of the American Bar Association, who accused Meese of "shak[ing] the foundations of our system"); *id.* (quoting Laurence Tribe, who declared that Meese's position "represents a grave threat to the rule of law because it proposes a regime in which every lawmaker and every government agency becomes a law unto itself, and the civilizing hand of a uniform interpretation of the Constitution crumbles"); Editorial, *Why Give that Speech?*, WASH. POST, Oct. 29, 1986, at A18.

42. *See* Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 3 (2013).

of this shorthand reinforces the notion that the Constitution is whatever the Supreme Court says it is, and that all of the Supreme Court's incursions on state decisionmaking are therefore constitutionally authorized. Those who wish to preserve federalism and protect state prerogatives from judicial encroachment should take care to preserve the distinction between what the Constitution actually says and what the Supreme Court claims that it says.

Finally, the prospect of a more ideologically uniform Supreme Court may improve the chances for federalism-promoting reforms. One of the difficulties in persuading Congress to limit the federal judiciary's incursions on state decisionmaking is that the Supreme Court has been imposing nationwide policies that please both Republican and Democratic constituencies.[43] But if the Supreme Court were to shift to Democratic control, then the Court's efforts to limit state gun-control measures, campaign-finance reforms, and affirmative-action programs will cease. And if the Supreme Court were to become more reliably conservative, then it will reduce or stop its infringements on state decisionmaking in the areas of voting rights, abortion rights, and capital punishment. Either of these two scenarios could provide the motivational impetus for at least one of the two political parties to support reforms that limit the Court's ability to unilaterally thwart the enforcement of state laws. When judicial review is perceived as having a consistent ideological valence, then there is less downside for politicians who oppose the Court's decisions if they act to limit the federal judiciary's power over state legislation. Previous legislation to rein in the judiciary—such as the Norris-LaGuardia Act[44] and the statute requiring a three-judge district court in lawsuits seeking to enjoin state laws[45]—was enacted during an era when the courts were uniformly imposing a laissez-faire ideology at the expense of state and federal legislation. An ideologically predictable Supreme Court may be just what is needed to prod Congress into enacting further reforms along these lines.

IV. FEDERALISM-PROMOTING REFORMS OF JUDICIAL REVIEW AND THE CHALLENGES TO ENACTING THEM

What are some possible reforms that could bring the judicial power more in line with a federalist structure of government, which requires the assent of

43. *See supra* notes 35–38 and accompanying text.

44. Act of March 23, 1932, ch. 90, 47 Stat. 70 (current version at 29 U.S.C. §§ 101–15 (2012)).

45. Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557; David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 6–8 (1964).

multiple different institutions or supermajoritarian approvals before state laws are displaced with federally imposed policies?

One modest idea is to bring back the three-judge district court, which Congress used to require in any lawsuit that sought an injunction against the enforcement of state laws.[46] The notion that a state law can be blocked, even temporarily, because of a single district judge's interpretation of the Constitution is in tension with a Constitution that requires the assent of multiple different institutions before a preempting federal law can be enacted. And the problem is aggravated by the forum-shopping opportunities available to plaintiffs who can bring suit in divisions of judicial districts where they are likely (or even certain) to draw a friendly judge.

The challenge, of course, will be in motivating elected officials in Congress to enact such a reform when those legislators are unlikely to care about the cause of federalism in the abstract and will more likely be concerned with how such a reform would affect their core constituencies, the agenda of their political party, and their ideological beliefs. And re-establishing the three-judge district court could be well-near impossible at a time when both Republican and Democratic constituencies are benefitting from the status-quo arrangement. If the NRA has its favorite district-court judges when it challenges a state's gun-control laws, then it will be politically difficult for a Republican-led Congress to enact this reform, even if it would help prevent single district-court judges from temporarily enjoining other laws favored by Republican officials.

Another possible reform is to enact narrowly tailored limitations on judicial power that pertain only to certain types of lawsuits. The Norris-LaGuardia Act is an example of this: It limits the ability of federal courts to issue injunctions, but only in labor disputes.[47] The Tax Injunction Act is another example; it forbids courts to enjoin the assessment or collection of any tax.[48] Congress could try to overcome the political resistance to an across-the-board restriction on judicial power by depriving the court of jurisdiction or authority to issue injunctions in only a narrow class of cases that are politically easy targets, such as prisoner litigation,[49] or lawsuits that involve constitutional challenges to overwhelmingly popular laws.

But these types of reforms also face problems that arise from legislative motivations. Consider a proposal that would deprive the federal courts of jurisdiction or the authority to issue injunctions in lawsuits that challenge a state's refusal to recognize polygamous marriages. Although it might be easy

46. *See* Currie, *supra* note 45, at 7.
47. §§ 1–15, 83 Stat. at 70–73.
48. *See* 26 U.S.C. § 7421(a) (2012).
49. *See, e.g.*, Prison Litigation Reform Act, 42 U.S.C. § 1997e (2012).

to persuade legislators to support this proposal if it were put to vote, it will be exceedingly difficult to persuade legislators to put this proposal on the agenda when there is no imminent danger that the Supreme Court might announce a new constitutional right requiring the states to recognize polygamous marriages. Legislators would have to divert scarce time from more pressing matters to vote on a proposal that appears to have no apparent payoff—except in a hypothetical future world in which the federal judiciary suddenly becomes receptive to the constitutional claims of polygamists. The prospect that the Supreme Court might take these claims seriously will likely arise only after the cause of polygamy starts to obtain substantial popular support, and by that point it may be too late for a jurisdiction-stripping proposal to surmount the bicameralism-and-presentment hurdles. So a targeted proposal like this is likely to be enacted only if the federal judiciary is acting against state laws at a time when its intervention remains deeply unpopular, and the judiciary is often careful not to do this.

More radical reforms would impose veto-gates and supermajoritarian requirements on the Supreme Court's constitutional pronouncements. The "Texas Plan" proposes a seven-justice supermajority vote for any Supreme Court decision that invalidates a democratically enacted law, and would allow a two-thirds majority of the states to override a U.S. Supreme Court decision.[50] Proposals of this sort would subject the Supreme Court's policymaking to the multiple veto-gates and supermajoritarian hurdles that confront congressional lawmaking. But again, the challenge is in motivating politicians to enact reforms of this sort when so many Republican constituencies approve of the Supreme Court's nationalization of gun policy and campaign-finance laws, and so many Democratic constituencies approve of the Court's nationalization of abortion policy, same-sex marriage rights, voting rights, and limits on capital punishment. The proposal might become politically feasible if an ideologically liberal Supreme Court withdrew all efforts to impose Republican-supported policies on the states, or if an ideologically conservative Supreme Court overruled the decisions that imposed Democratic-supported policies. If that were to happen, then perhaps something along these lines could make it through Congress on a party-line vote. But it is also likely that the Court, even with a solidly liberal or conservative majority, will take care not to overplay its hand and provoke a reaction of that sort.

50. *See* ABBOTT, RULE OF LAW, *supra* note 28, at 4.

CONCLUSION

For now, the future of federalism remains at the mercy of a Supreme Court that asserts the prerogative to unilaterally impose "fundamental rights" and other nationwide policies by a simple majority vote—but that is careful to do so only after public opinion has shifted to the point that its actions will not trigger a backlash that strips the Court of its authority. Federalism proponents who are dissatisfied with this arrangement can work to erode judicial supremacy as a habit of thinking in our political and legal culture. And they can hope for a more ideologically uniform judiciary that will induce legislators to resist the courts' incursions on federalism out of partisan loyalties or constituent-driven pressures. It will be a monumental task to change the Supreme Court's role as a unilateral national policymaker, but perhaps not an entirely hopeless one.