LITIGATION AS A POLITICAL SAFEGUARD OF FEDERALISM

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ABSTRACT

When federalism scholars write about judicial review, they routinely focus on adjudication and neglect or ignore the process of litigation. Nowhere is this approach clearer than in the literature on the "safeguards" of federalism, which contrasts the "judicial safeguards" of federalism (constituted by what judges do and say at the end of judicial review proceedings) with its "political safeguards" (constituted by an array of interactions and institutional connections outside the courtroom). But the reduction of judicial review to adjudication has obscured the significance of the interactions among federal and state officials and institutions, citizens, and interested members of civil society in and around the litigation of judicial review cases, and particularly the ways in which those interactions may help to maintain and protect American federalism. In other words, it has prevented us from seeing that the process of litigation might constitute a neglected political safeguard of federalism.

In this paper I offer a perspective on the litigation of judicial review cases—a perspective that I call "Litigation as Process," as a complement to the dominant view of "Litigation as Adjudication"—and identify some ways in which it may protect the federal character of the U.S. constitutional order. I argue that Litigation as Process may contribute to the maintenance of American federalism in at least four ways: (1) by providing a forum for direct public opposition between elements of the federal system; (2) by protecting what I call the "independence of voice" of elements of the federal system; (3) by clarifying the lines of responsibility and accountability on which a meaningful federalism depends; and (4) by helping to solve "incentive

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problems" that may prevent levels of government from opposing one another in the ways contemplated by federalism theory.

The implications for federalism of seeing Litigation as Process clearly—toward which this contribution is just a first step—are at least three-fold: first, it advances the ongoing interpretive project of better understanding the institutional relations that structure "Our Federalism"; second, it provides grounds for treating with caution the prescriptions offered by those writing in the "political safeguards" tradition who favor barring the court door in federalism cases; and, third, it suggests grounds for re-thinking the substantive, institutional, and procedural rules that structure judicial review, in order to maximize the benefits of this unique form of federalism's politics.

INTRODUCTION

As a starting point for thinking about "The Future of Federalism," my contribution to this Symposium offers a reappraisal of a part of its present. My subject will be the so-called "safeguards" of American federalism: the devices, mechanisms, and practices that keep the U.S. constitutional order meaningfully "federal."[1]

The extensive literature dealing with these safeguards almost invariably divides them into two categories. The first category contains the *judicial safeguards of federalism*: these are constituted by what judges do and say when they exercise their powers of judicial review to measure federal or state action against the Constitution's commitment to federalism. These judicial safeguards are on display, for example, when a court invalidates a federal statute for reaching beyond the bounds of Article I, or for improperly "commandeering" a state institution.[2] The second category contains the *political safeguards of federalism*: an array of rights, relationships, and practices among various non-judicial actors—institutions, officials, voters, interest groups, political parties, and all the rest of civil society—in what is broadly called the "political process." These are on display, for example, when a U.S. Senator considers the interests of her home state as well as those of the nation,[3] or when a federal official displays sensitivity to state

1. There is, of course, significant difficulty in pinning down what exactly "federal" means in this context. *See infra* note 37 and accompanying text.

2. *See* United States v. Lopez, 514 U.S. 549, 567–68 (1995); New York v. United States, 505 U.S. 144, 176 (1992).

3. *See* 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, 546–48 (1954).

prerogatives as well as national ones because he is bound by ties of party allegiance to state officials and legislators.[4]

But the literature on political safeguards has so far neglected one important form of political process that appears to play a key role in the maintenance of American federalism: the process of *litigating judicial review cases*. For most of the thoughtful scholarship on federalism and its safeguards (and indeed much of the work on judicial review more generally) reduces judicial review to judicial action—to *adjudication*—on the implicit assumption that the only actors that really matter in a judicial review proceeding are those in robes. Litigation appears only as a "trigger" for adjudication.

I will call this dominant account "Litigation as Adjudication," and a central purpose of this paper is to criticize it on the ground that it obscures a significant and distinctive political process: one, moreover, that may provide a valuable safeguard of federalism in the United States. In the following pages, I am going to talk about judicial review extensively but I will pay hardly any attention to what judges do or say. Instead, I will argue that litigation provides an institutional frame in and around which the component institutions of the U.S. constitutional order, along with members of the political communities to which they are accountable, engage and interact in highly specific, and largely public, ways. If we are attentive to these forms of engagement and interaction—if we adopt a perspective that I will call "Litigation as Process" and which I offer as a complement to Litigation as Adjudication—we may find a significant and almost entirely overlooked safeguard of American federalism.

This short contribution aims to identify and explore some of the ways in which the availability and operation of Litigation as Process may help to safeguard meaningful federalism in the United States. I will begin with a short sketch of Litigation as Process and some ways in which it diverges from and complicates Litigation as Adjudication (Part I); in the heart of the paper, I will provide a slightly more detailed discussion of four specific ways in which Litigation as Process may serve as a safeguard of American federalism (Part II); and finally I will survey some implications, objections, and further questions raised by the view I offer here (Part III).

This paper is a preface to an extended effort to unearth the importance of Litigation as Process to American federalism. That broader project has three goals. The first goal—toward which this Article is a first step—is to chart the contours of Litigation as Process, as both an institutional safeguard of the U.S. federal system and as a forum for realizing its benefits. The second goal

4. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 277–79 (2000).

is to understand the institutional complementarities and tensions that structure the relationships between litigation, adjudication, and representative politics in the U.S. federal system. The third goal is to propose reforms to doctrine and practice that reflect the insights thus developed.

A fuller appreciation of Litigation as Process promises to change our thinking about federalism in at least three ways. First, it would advance the ongoing interpretive project—currently spearheaded by the persuasive writing in the "nationalist federalism" school—of understanding "Our Federalism,"[5] and its components and operation, more clearly. Second, it may provide reasons for caution when assessing familiar proposals that "federalism cases" should be rendered entirely non-justiciable and kept out of the courts.[6] Third, it may provide reasons to revisit doctrinal norms—the substantive, procedural, and institutional rules that frame litigation—and to see them as aspects of institutional design that might be tweaked to shape and improve the political benefits of the process of litigation.

As befits the beginning of a project, my intention throughout this Article will be to raise questions and possibilities, and to identify lines of inquiry, rather than to provide comprehensive answers, compelling empirical cases, or all-things-considered prescriptions for institutional change. To borrow from Heather Gerken, whose superb work on federalism has influenced much of my own thinking, "the point is not to do the math in advance, but simply to illuminate a set of arguments that are too often excluded from the equation."[7] My aim is the exceedingly modest one of suggesting that there may be good reasons to think that litigation constitutes an important, if oddly under-appreciated, political safeguard of federalism.

I. THE GREEK ORACLE AND THE ROMAN FORUM

If I were pressed to distill the whole of this paper into a single sentence—with bonus points available for a slightly hackneyed classical reference—I might come up with something like the following: "When thinking and writing about federalism, we would do well to remember that in some important ways the litigation of judicial review cases works in a way that is nothing like a Greek oracle but very much like a Roman forum." This Part is devoted to explaining and developing that proposition.

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5. *See* Younger v. Harris, 401 U.S. 37, 44 (1971) (coining "Our Federalism).

6. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175 (1980).

7. Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 11 (2010).

A. The Oracle of Adjudication: Litigation as Adjudication

The literature on American federalism is suffused with a basic, and tremendously appealing, picture of judicial review and its relationship to what is customarily if vaguely called the "political process." With the usual caveats about oversimplification—I am drawing a stylized picture here—this picture is something like the following. The process of politics rattles along from day to day, dealing with most issues of public concern in the rough and ready (or noble and high-minded, if you prefer[8]) way that is its familiar stock-in-trade. Every once in a while, though, a conflict emerges of such difficulty and intransigence that one side, or both sides, decides to refer the matter to the judicial oracle. A messenger is dispatched to put the question to the oracle; the oracle speaks; the oracle's utterance is conveyed to the political actors; and politics resumes. The actors in the drama of the political process may adjust their behavior in light of the oracular pronouncement: they may argue amongst themselves about what it means or how it should be applied, and they may even try to defy it outright. But the central point is that, from this perspective, judicial review is something that a court—above all a *judge*—"does" when activated by other actors. This is Litigation as Adjudication.

For Litigation as Adjudication, then, judicial review amounts to the occasional punctuation of politics by adjudication. This adjudication may itself be "political" in various ways—of which, more in a moment—but the point is that adjudication is what is interesting and salient about judicial review.[9] Any *process* that takes place between the moment of resort to litigation and the moment of adjudication is largely ignored.

The perspective of Litigation as Adjudication pervades some of the most important and influential writing on judicial review. Perhaps the most famous books ever written on judicial review in the United States are Alexander Bickel's *The Least Dangerous Branch* and John Hart Ely's *Democracy and Distrust*.[10] Each is premised solidly on Litigation as Adjudication. Bickel's work is a response to the difficulty that "judicial review may . . . have a

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8. *See* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 1–2 (1999) (noting that legal scholars tend to focus on an unduly negative stereotype of legislative activity).

9. *See* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 348 (1997) ("Writers often refer to adjudication as if it were . . . a self-contained, autonomous entity arising solely from the judge's own will.").

10. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

tendency over time seriously to weaken the democratic process."[11] Despite his recognition that it is unpromising "to view the function [of judicial review] as a whole without examining the process,"[12] it turns out that the "process" he has in mind is the process of judicial reasoning and decision-making,[13] and his prescription is in great measure the wise development, by the judge, of the "passive virtues" of restraint and deferral.[14] What judicial review might involve *other* than adjudication is virtually ignored. Likewise, Ely's project develops the notion that the desirable role of judicial review is the reinforcement of democratic representation: a task that is "entirely supportive of the American system of representative democracy" and one that judges are—on his account—"conspicuously well situated to fill."[15] But despite the auspicious framing of his project, any comparison of the *process* of judicial review with the *process* of representative or administrative government is ignored: Ely's business is with adjudication.[16] By picking these examples I do not mean to suggest that Litigation as Adjudication is the exclusive preserve of scholars of the U.S. Constitution: many of the leading writers on judicial review in Europe, like Alec Stone Sweet and Miguel Maduro, adopt a similar perspective.[17]

There are a couple of important things I should hasten to say about Litigation as Adjudication quickly, lest I be misunderstood or over-read. The first is that it is often a perfectly appropriate and helpful way to think about judicial review: adjudication is undoubtedly right at the core of what makes judicial review salient for most purposes. When we focus (as we so often do) on the counter-majoritarian difficulty, it is the enormous power of a single, typically unelected, judge—or bench of judges or Justices—with which we are primarily concerned.[18] When we think about the ways in which judicial review is affected by, and affects, "politics," critical theorists have found much to discuss in adjudication itself;[19] legal philosophers in the moral nature

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11. BICKEL, *supra* note 10, at 21.
12. *Id.* at 34.
13. *Id.* at 34–35.
14. *Id.* at 111–13, 133–43.
15. ELY, *supra* note 10, at 102.
16. *Id.* at 105–25.
17. *See* MIGUEL POIARES MADURO, WE, THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION 25–30 (1998); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 12–19 (2000).
18. *See* BICKEL, *supra* note 10, at 16–23; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335–36 (1998); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1389–95 (2006).
19. *See, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 23–25 (1998).

of judicial work;[20] and social scientists in the ways in which a judge's behavior is shaped by, and shapes in turn, the conduct of others outside the courtroom.[21] My point here is that very often we are quite right to see judicial action as the most interesting aspect of judicial review—frequently it is precisely what we should be most interested in. (It is probably also true that, as lawyers and judges, judicial opinions are often the research materials most easily available and familiar to us.[22])

Second, I am *not* claiming that the prevailing Litigation as Adjudication view posits or presupposes that judicial review is somehow divorced from politics. Quite the contrary: it is perfectly compatible with the notion that judges are "political," including to the extent that they have political commitments of their own, and to the extent that they anticipate the political consequences of their adjudicative actions—including the behavior of the representative branches—and adjust, or should adjust, their behavior accordingly.[23] Likewise, it is entirely compatible with the basic insight that judges are "activated" by litigants,[24] the observation that court decisions can spur political and social change of various kinds,[25] and the recognition that actors, including officials and institutions, bargain with one another in the shadow of the anticipated behavior of courts.[26]

So what, then, is *missing* from—or otherwise problematic about—relying on Litigation as Adjudication in federalism scholarship? What is missing is serious attention to the fact that "the court" is not just an adjudicating actor (or a collection of adjudicating actors) but a venue, and to the fact that there is a distinctive form of interaction among officials, institutions, and members of civil society—*apart* from their interactions with judges—that takes place in litigation. These facts, and their implications, come to the fore when we adopt the lens of Litigation as Process.

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20. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 1–3 (1986).

21. *See, e.g.*, STONE SWEET, *supra* note 17, at 27.

22. For example, when Heather Gerken and Ari Holtzblatt identify interactions between states that are characterized by economic "spillovers," each of their factual examples except one comes from and cites to a litigated judicial proceeding. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 79 (2014).

23. *See* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1761 (2005).

24. *See* STONE SWEET, *supra* note 17, at 25.

25. *See* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 546 (2009).

26. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 856 (1998).

B. The Forum of Litigation: Litigation as Process

To adopt the perspective I am calling Litigation as Process, we turn away from the Greek oracle and toward the Roman forum: we see litigation as a dedicated public institutional space at the heart of the polity, in which politicians, institutions, political parties, and interested members of civil society interact with one another through disputation, demonstration, and bargaining. From this perspective, what we care about in litigation is how the parties engage with one another: how they act, what they choose to do and the entities with which they choose to do it, what they teach to and learn from one another, what facts or propositions they make known, and the implications of the publicity and interactivity of the whole procedure. The *act* of adjudication recedes into the background and the *process* of interaction, of litigation, dominates our view.[27] And bringing Litigation as Process to the safeguards of federalism means investigating the ways in which these activities and processes might help to preserve the federal nature of the U.S. constitutional order.

Thinking about Litigation as Process may also offer grounds—though I will not develop the point here—for a contribution to familiar questions about the legitimacy of judicial review.[28] Because we so readily identify judicial review with adjudication, we tend to think that the legitimacy of judicial review is more or less exhausted by the legitimacy of the judge as decision maker on the one hand, and the legitimacy of the decision as product of law (or vindication of right), on the other.[29] But what we can miss on this traditional, decisional account is litigation's processual, participatory dimension: if there is any salience at all to the process of litigation, then the design and operation of that process—including the participation of elected officials and democratic institutions, and of affected or interested members

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27. The closest contribution in the literature that I have found to Litigation as Process is Christopher Peters' thoughtful article *Adjudication as Representation*. Peters, *supra* note 9. Peters' emphasis on the multilateral, participatory character of litigation chimes neatly with mine. *See id.* at 347–48. But our approaches are entirely different: for Peters, the importance of litigation lies in its contribution to adjudicated outcomes, and the institutional function as one of representation rather than participation. *Id.*

28. For seminal treatments, *compare* Waldron, *supra* note 18, at 1348 ("[J]udicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society."), *with* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1700 (2008) (arguing against Waldron's reasoning and developing an affirmative case for judicial review).

29. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 68 (2004) (noting that courts "must claim legitimacy by grounding their decisions in some external source of law").

of the public—will have an effect on its legitimacy too. There is a limited but important sense in which Litigation as Process casts the judge in a role akin to a decision rule in a legislature, and in this sense the legitimacy of judicial review may have as much to do with the participants and process as with the judge and outcome. But this is a tentative digression that I will not pursue further here.

What I am calling Litigation as Process has obvious roots in other (*i.e.*, non-federalism) fields where it would raise few or no eyebrows. Scholars of litigation have focused on some of the party-facing dimensions of litigation;[30] analysts of social change have explored the relationship between litigation and political reform;[31] philosophers and political theorists have explored "public reason" and other aspects of the kind of argument and reasoning used in public spaces like litigation;[32] experimentalists have expounded the "jurisgenerative responsibility" of parties in litigation;[33] and so on. But these insights, by and large, have yet to find much application within the field of federalism scholarship.

Once again, a few swift clarifications are in order. First, and most importantly (at the risk of making the point to death) Litigation as Process is a complement, not a replacement, for Litigation as Adjudication. Any account of judicial review that minimizes or neglects the function of the judge—as Litigation as Process surely does—is absurdly incomplete. Litigation as Process is simply designed to highlight some bits of the federalism story on which we do not usually focus.

Second, I am not claiming that *everything* on which we might focus through the lens of Litigation as Process has been *entirely* ignored by *all* federalism scholars. That would be a foolish and unnecessary over-reach. My point is a much milder one: I claim that the dimensions of litigation that Litigation as Process emphasizes have not been given as much attention as they deserve in federalism scholarship.

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30. *See, e.g.*, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 99 (2003).

31. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–41 (2d ed. 2008) (criticizing the claim that litigation of socially salient matters significantly helps to drive social change); *see also* Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–1995*, 26 LAW & SOC. INQUIRY 631, 632 (2001).

32. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 231–40 (expanded ed. 2005); *see also* NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 7 (1978).

33. *See, e.g.*, Oliver Gerstenberg & Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 289, 330–31 (Christian Joerges & Renaud Dehousse eds., 2002).

Finally, the fact that I am talking here, and will talk throughout, about "the states" and "the federal government" for ease of exposition should not conceal the more complex reality that each layer of government, and indeed each institution of government, is a "they" and not an "it," and this is just as true in litigation as elsewhere.[34] Gillian Metzger, for example, has pointed out that in litigation regarding the Affordable Care Act, Governors and Attorneys General have found themselves at odds, with one official participating in the litigation and the other refusing to do so.[35] Relatedly, much of what I have to say about "vertical" federalism (*i.e.*, federal-state interactions) will be applicable *mutatis mutandis* to "horizontal" interactions among states, and to separation of powers issues within individual state governments (or within the federal government). Polycentricity, not federalism as such, drives many of the dynamics I will discuss.

II. LITIGATION AS A SAFEGUARD OF FEDERALISM

This Part offers a short review of the "safeguards" concept and details four specific ways in which Litigation as Process can, under appropriate circumstances, discharge the safeguarding function.

A. The Safeguards of Federalism

The literature on the "safeguards" of federalism is concerned *not* with the benefits or difficulties of a federal system as such, but with the features of that system that ensure that it remains meaningfully "federal" in principle and practice. It would be logical to start, then, with a short account of what "federalism" in this sense actually means, so that we clearly understand what exactly its safeguards are supposed to protect, and therefore how Litigation as Process might qualify as such a safeguard. But on this foundational issue of definition the literature is embarrassingly vague.[36] Various definitions are

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34. *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992).

35. Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 580 n.62 (2011).

36. *See* Roderick M. Hills, Jr., *Is the Fostering of Competition the Point of American Constitutional Federalism?*, 48 TULSA L. REV. 339, 339 (2012) ("'[F]ederalism' is an umbrella under which lots of sometimes mutually contradictory conceptions of law huddle: praising them all is to say nothing usefully specific about any."); Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2045 (2014) ("[F]ederalism means, at a minimum, viewing both the states and the federal government as legitimate sources of legal and political authority, but little consensus exists as to what that general principle of multiplicity should mean in practice.").

offered, but none has really stuck: some scholars see the distinctive "core" of federalism as a degree of decentralization in government[37]—even though even highly centralized systems of government devolve or delegate meaningful forms of governance out to sub-regions;[38] others see it as a degree of regional "autonomy" in some sense[39]—although others deny that "autonomy" is necessary for a federal polity or that any such state autonomy exists in the modern United States.[40] As a descriptive matter, the best that can probably be said is that "federalism" (as far as the United States is concerned) is a term for what we do, in scholarship and doctrine, about the fact that the Constitution creates a national government of substantial power *while also* limiting that power and contemplating that the states will continue to exist, owing neither their existence nor their right to govern to the national center.[41]

As a practical matter, what the safeguards of federalism are in the business of protecting, at least on my account, is the *meaningful polycentricity* of the system.[42] By this I mean the ability of the states to participate saliently in governance, regulation, and political life, and to do so independently—that is, neither with the prior permission nor at the direction of the federal government.[43] In principle, we might also want to ensure that the federal

37. *See, e.g.*, Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 518 (2007) ("Roughly defined, federalism refers to a system of government in which power is divided between a central authority and regional political sub-units, each with authority to directly regulate its citizens.").

38. *See, e.g.*, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910–14 (1994).

39. *See, e.g.*, James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 4–5 (2013) (making this claim and defining state autonomy as "the freedom or ability of a subnational government . . . to do the things it wants to do"). I have offered my own, rather different, account of what "autonomy" might mean for a political unit elsewhere. Daniel Francis, *Exit Legitimacy*, 50 VAND. J. TRANSNAT'L L. 297, 326–33 (2017).

40. *See, e.g.*, Metzger, *supra* note 35, at 607 ("[E]quating federalism with independence from national policy would render it largely irrelevant in a vast array of governance contexts.").

41. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2246–47 (1998) ("[T]he Constitution clearly does contemplate and require two levels of sovereign government—joined in acting under the Constitution, but with separate sources of sovereignty arising from different, though overlapping, constituencies. This structure suggests a commitment to the viability of those governments, and hence a constitutional basis for special rules concerning federal interferences with the functioning of state governments and their constitutionally contemplated legislative, executive, and judicial branches." (footnotes omitted)).

42. I am very grateful to Alon Agmon for encouraging me to make this critical point more clearly.

43. *Cf.* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1488 n.5 (1994) ("[T]he critical feature of a federal system is that officials of the subordinate units are not appointed, and cannot be fired, by officials of the central government.").

government likewise retains meaningful independence, but—however much Alexander Hamilton and James Madison may have worried that the balance of practical political power would tip in favor of the states[44]—the lesson of history has been that the national government has been more than capable of looking after itself.[45] If safeguards are needed today, it is the states that need them.[46]

Scholars of these safeguards of federalism typically recognize two varieties: judicial safeguards, found in judicial review, on the one hand; and political safeguards, found in something called the "political process." I will say something briefly about each.

1. Judicial Safeguards

Federalism scholars use the phrase "judicial safeguards of federalism" to refer to what judges do—in the exercise of their Article III powers of judicial review and pursuant to an eclectic variety of individual doctrines—to police the border between federal and state action.[47] It is broadly appreciated that, in a series of developments broadly associated with the phrase "New Federalism," these judicial safeguards of federalism have enjoyed something of a fillip since the advent of the Rehnquist Court in 1986, and particularly the appointment of Justice Thomas in 1991.[48] In a series of decisions in a

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44. *See* THE FEDERALIST NO. 17, at 119 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities."); THE FEDERALIST NO. 25, *supra*, at 163 (Alexander Hamilton) ("[I]n any contest between the federal head and one of its members, the people will be most apt to unite with their local government."); THE FEDERALIST NO. 31, *supra*, at 197 (Alexander Hamilton) ("[T]here is greater probability of encroachments by the members upon the federal head than by the federal head upon the members."); THE FEDERALIST NO. 45, *supra*, at 289 (James Madison) ("The more I revolve the subject, the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the [state governments] than of the [federal government]."); THE FEDERALIST NO. 46, *supra*, at 294 (James Madison) ("[T]he first and most natural attachment of the people will be to the governments of their respective States.").

45. *See* Young, *supra* note 23, at 1789 ("The pendulum of federalism has swung far indeed since [the founding]. The federal government is here to stay, and its supremacy over the states is largely unquestioned.").

46. *Id.* at 1806–07 ("I think the basic intuition—that the power of the national government has grown to the point of tilting the constitutional balance at the expense of the states—is widely shared.").

47. *See, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312 (1997).

48. David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 FORDHAM L. REV. 2081, 2081 (2006) (noting the "federalism revival").

variety of areas, the Court has adjusted the doctrinal balance in ways that generally tend to favor state action and to apply new (albeit fairly indulgent) limits on federal action.[49] Thus, the Court has enforced limits on the Commerce Clause for the first time since the New Deal,[50] developed and applied the "anti-commandeering" principle,[51] dramatically weakened the dormant Commerce Clause,[52] and so on.[53]

Judicial action has obvious appeal as a guardian of federalism. As in so many other contexts, the availability of a roughly neutral, broadly legitimate decision-maker that resolves disputes according to a mostly public and more-or-less rational and principled framework offers tremendous benefits to parties that expect to engage in iterated disputes with one another over an extended period of time.[54] In addition, the presence of a judicial supervisor in constitutional matters may partly insulate aspects of political structure from the winds of electoral change, promoting long-term political stability.[55]

But the judicial protection of federalism is also profoundly controversial for several reasons. First, the usual specter at the feast of American judicial review—the counter-majoritarian difficulty—makes its customary appearance here.[56] Second, the support in constitutional text for certain forms of "federalism judicial review" is particularly weak, raising unusually sharp legitimacy concerns.[57] The third problem is rooted in the idea—developed

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49. The change in jurisprudence was associated with a broader shift in the political winds in the United States. *See* John Ferejohn & Barry R. Weingast, *The Politics of the New Federalism*, *in* THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 157, 157–58 (John Ferejohn & Barry R. Weingast eds., 1997). Note that not all of the Court's "federalism developments" have been pro-state: the inflection of preemption doctrine, for example, seems to tilt against state power. *See* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968–72 (2002).

50. *See* United States v. Morrison, 529 U.S. 598, 617 (2000); United States v. Lopez, 514 U.S. 549, 567 (1995).

51. *See* Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 170 (1992).

52. Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 257 (2017).

53. *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 434 (2002) (identifying substantive conservatism as a dominant explanatory force for the Rehnquist Court's decisions).

54. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1–2 (1981).

55. *See* Young, *supra* note 23, at 1811 ("[F]rom a Burkean standpoint, slowing the pace of change is itself a valuable office.").

56. I do think of this as peculiarly an American problem, or rather a problem that is unusually salient in American legal discourse. *See id.* at 1827 ("[T]he controversy over a judicial role in federalism disputes is a relatively unusual feature of American constitutional law.").

57. *See* Barron, *supra* note 48, at 2095 n.72 (noting that many of "the new federalism doctrines" are "open to the critique that they are made up out of thin air").

most prominently by Jesse Choper and others in the "political safeguards" school to which we will turn in a moment—that judicial review of federalism cases is particularly *unnecessary* because of the existence of political mechanisms that will adequately protect American federalism.[58]

2. Political Safeguards

On the other side of the line are federalism's political safeguards, and if the story of the judicial safeguards is primarily a story of what the Court has *done*, the story of the political safeguards is primarily a story of what scholars have *noticed* about the non-judicial mechanisms, relationships, and practices that help to keep America recognizably federal. I will offer here a very broad overview, focusing on a few of the most important contributions.

The tradition was inaugurated by Herbert Wechsler in his short 1954 piece *The Political Safeguards of Federalism*.[59] His basic idea was that the structure of American government, and particularly of the Federal Congress, would ensure that the federal government would in practice respect the interests of the states. He pointed in particular to: a traditional presumption in favor of state, rather than national, action;[60] the power of the states to obstruct legislation in the Senate;[61] the likelihood that the House would be "slanted somewhat in the same direction" by state powers to establish congressional districts and voter qualifications;[62] and the salience of the states in the Electoral College.[63] As a result, he concluded, the Court is "on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states."[64]

Jesse Choper gave a much fuller and somewhat more convincing treatment in his 1980 book *Judicial Review and the National Political Process*.[65] The nutshell version of his claim is that, as between the three main categories of

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58. CHOPER, *supra* note 6, at 175–76 ("Numerous structural aspects of the national political system serve to assure that states' rights will not be trampled, and the lesson of practice is that they have not been.").

59. Wechsler, *supra* note 3, at 544.

60. *Id.* at 544–45.

61. *Id.* at 546–48. Wechsler did acknowledge the impact of the Seventeenth Amendment but expressed confidence that his intuitions nevertheless remained sound despite the shift to popular election in the Senate. *Id.* at 546.

62. *Id.* at 548–52.

63. *Id.* at 552–58.

64. *Id.* at 558–59. As Ernest Young rightly emphasizes, Wechsler did not claim that courts could or should withdraw from judicial review in light of his insights about political safeguards. *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1367 (2001).

65. CHOPER, *supra* note 6.

constitutional judicial review cases—separation of powers, federalism, and individual rights—the Supreme Court should save its finite political capital for the final category and avoid the first two.[66] For, he argued, while the states and institutions of the federal government can look after themselves in the political process, individual rights cases commonly involve the protection of minorities, who cannot.[67] Thus, federalism cases should be non-justiciable,[68] given (for example) the regard that Senators and Members of Congress will have for their states,[69] the importance of the states in presidential elections and the need for Presidents to work with Congress,[70] the strength of the "inter-governmental lobby,"[71] and the "record of experience" demonstrating that the federal government has in practice respected state interests.[72]

The line was given its seminal modern treatment in 2000 by Larry Kramer, who invigorated the work of Choper and Wechsler with the claim that it was not the formal allocations of constitutional rights and obligations but rather "real politics, popular politics" that has protected the states from the federal government, from the Founding to today.[73] In addition to the practical power conferred by the importance of states in enforcing and implementing federal law,[74] he emphasized the transformative role of American political parties in ensuring that federal officials would in significant measure internalize the concerns of state governments and state officials.[75]

More recent treatments have filled out more of the picture: Bradford Clark, for example, has influentially expounded the claim that the burdensome procedures of federal lawmaking constitute political safeguards of their own, simply by ensuring that federal law—the tool of intervention in the lives of the states—is difficult to make.[76] Heather Gerken and Ari Holtzblatt have explored the applications of the line of thought to the "horizontal" interactions among states.[77] And so on.

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66. *Id.* at 169–70.
67. *Id.* at 69–70.
68. *Id.* at 175.
69. *Id.* at 176–79.
70. *Id.* at 179–80.
71. *Id.* at 180–81.
72. *Id.* at 184–90.
73. Kramer, *supra* note 4, at 257.
74. *Id.* at 284.
75. *Id.* at 277–79.
76. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1323–24 (2001); Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1681 (2008).
77. Gerken & Holtzblatt, *supra* note 22, at 59.

The political safeguards tradition has always had something of a dual identity. In addition to its affirmative claim that these "political" connections and practices help to preserve American federalism, it is closely associated with a distinct negative claim that, because the political processes will do the job adequately, judicial review is particularly unnecessary—and therefore need not be accorded its usual grudging toleration—in this area.[78] On this ground, for example, Jesse Choper argued that federalism cases should be non-justiciable,[79] while Larry Kramer uses a similar argument—combined with a general attack on the legitimacy and historical pedigree of judicial review[80]—to defend minimal rationality review.[81]

The political safeguards, like the judicial safeguards, have been controversial. But if critics have been skeptical of the *legitimacy* of the judicial safeguards, it is the *adequacy* and *salience* of the political safeguards that they have doubted.[82] Wechsler's article, for example, has been criticized for wildly over-stating the importance of constitutional links between federal officials and the states;[83] Choper's book is theoretically under-developed and its empirical dimension is brazenly anecdotal;[84] and Kramer's account is vulnerable to the charges that it fails to reflect the reality of modern political parties,[85] that it rests constitutional prescriptions too heavily on "fluid and contingent" informal institutions,[86] and that it fails to explain why federal-state links should favor the interests of states as such, rather than (for example) running in the other direction.[87]

Likewise, the claim that political safeguards make judicial review unnecessary in this area has met with stern criticism. Giving just "two cheers"

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78. *See, e.g.*, Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001).

79. CHOPER, *supra* note 6, at 175.

80. Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism "Born" in the First Place?*, 22 HARV. J.L. & PUB. POL'Y 123, 124, 135 (1998).

81. Kramer, *supra* note 4, at 291.

82. Prakash & Yoo, *supra* note 78, at 1479 ("While the structure of the national government may be a political safeguard of federalism, it cannot be a *perfect* safeguard of federalism.").

83. Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1351 (1994) (referring to "the dubious argument that the representation of the states in Congress assures that the interests of state governments are taken into account by the national legislature").

84. Larry Kramer seems to share my view. Kramer, *supra* note 43, at 1521 (1994) ("Choper spends six pages recounting anecdotes to show that states are able successfully to protect their authority . . . .").

85. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1086 (2014).

86. Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 960 (2001).

87. *See* Gardner, *supra* note 39, at 17.

for process federalism rather than an unqualified three, Ernest Young has warned that "judicial review may play its most important role as a referee within [the political] process, policing and maintaining the system of political and institutional checks that we ordinarily rely on to prevent or resolve most problems."[88] He has also argued that, given the Constitution's textual commitment to a federal balance,[89] it is simply not open to a court in the U.S. constitutional order to decline jurisdiction in the belief, however earnest and well-founded, that another branch of government might resolve the problem more aptly.[90] Broadly similar arguments have been advanced by Andrzej Rapaczynski[91] and Vicki Jackson,[92] as well as Saikrishna Prakash and John Yoo,[93] who have developed an originalist case for the role of courts in this area.[94]

3. The Ascendancy of Litigation as Adjudication in Federalism Scholarship

Such are—in very short summary at least—the safeguards of federalism, judicial and political. For our purposes, the crucial thing to notice is that they perfectly enshrine and reflect the premise of Litigation as Adjudication. Writers about the judicial safeguards tend to look at judicial review and, almost without exception, see adjudication to the exclusion of all else. Thus, for example, leading treatments of judicial action, including contributions by John McGinnis and Ilya Somin,[95] Saikrishna Prakash and John Yoo,[96] and Ernest Young[97]—seem to evince relatively little interest in litigation as such, focusing solely on judicial action. Courts almost invariably appear, to use Robert Schapiro's phrase, as "agents of federalism,"[98] rather than venues *for* federalism. Likewise, most political-process federalists seem to be interested

88. Young, *supra* note 64, at 1354 (footnote omitted).
89. Young, *supra* note 23, at 1766.
90. *Id.* at 1816.
91. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 379.
92. Jackson, *supra* note 41 , at 2245.
93. Prakash & Yoo, *supra* note 78, at 1462.
94. *See id.* at 1489–521; Yoo, *supra* note 47, at 1313.
95. John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 89–91, 127–30 (2004).
96. Prakash & Yoo, *supra* note 78, at 1461; Yoo, *supra* note 47, at 1313.
97. Young, *supra* note 29, at 92–95 (discussing "[t]he Courts as an Institution" without mentioning litigation, parties, and so on); *see also* Young, *supra* note 63, at 1353–55.
98. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249 (2005).

in inter- and intra-governmental interactions in every setting except the courtroom. Thus, for example, Jesse Choper dedicated an entire book to the relationship between judicial review and the national political process, and a chapter of *that* book to federalism issues, without ever taking seriously the notion that the interactions within judicial review might constitute an important *part* of the political process.[99] Larry Kramer, in his modern revival of the political safeguards theory, paid no serious attention to interactions in or around judicial review.[100] Heather Gerken and Ari Holtzblatt capture it perfectly when they write that "most vertical federalism scholars think that the political arena, not the judiciary, is the right forum for [resolving conflicts between state and federal governments]. Political institutions, not the courts, represent the true 'safeguards' of federalism."[101] The notion that political safeguards might be found *in* the courts is out of sight.

This is not to say that the neglect has been complete: some writers on federalism have acknowledged the significance of some aspects of litigation for federalism. Perhaps the most prominent branch of such work is the line of scholarship dealing with state amicus participation in the Supreme Court.[102] But even the book-length treatment *Litigating Federalism* deals almost entirely with amicus participation as a way to "'lobby' the Supreme Court": that is, as a method of procuring or influencing *adjudication*.[103] Other work on *amicus* participation comes closer to the kind of thing for which I advocate here: thus, for example, Margaret Lemos and Kevin Quinn have

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99. CHOPER, *supra* note 6, at 2–3.

100. Kramer, *supra* note 4, at 234–35.

101. Gerken & Holtzblatt, *supra* note 22, at 61. Curiously, Gerken and Holtzblatt even directly nod, later in their piece, to the view that I develop here, without giving it serious attention. *Id.* at 105 ("If you value the role that spillovers play in teeing up conflict and shaking us out of our enclave-induced stupors, however, courts become a less appealing forum for resolving interstate disputes (*unless you view courts as nothing more than another site of contestation*). While courts surely play a role in teeing up debates and working out conflict, the advantage of the political safeguards of horizontal federalism is that they offer political solutions to interstate conflict." (emphasis added)).

102. *See* Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 934, 936–37 (2008); Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1231–32 (2015); Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS 451, 451–52 (2014); Michael E. Solomine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 362–70 (2012); Sarah Esty, State Federalism Preferences Under Bush and Obama: An Empirical Assessment of Partisan Federalism (July 25, 2016) (unpublished draft) (on file with author).

103. ERIC N. WALTENBURG & BILL SWINFORD, LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT 5 (1999).

investigated the "sides" taken by state *amici* in matters litigated before the Supreme Court.[104] Outside the *amicus* field, Gillian Metzger has noted—albeit largely in passing—some of the positions and arguments raised by the Obama administration in the context of litigation.[105] And Cristina Rodríguez has, very much in the spirit of my own work, specifically demonstrated the utility of the process of litigation for framing political interactions in immigration federalism.[106]

But the overall point should be clear: in federalism scholarship, Litigation as Adjudication reigns. And so it should not be wholly surprising that the significance of the political process of litigation as a safeguard of federalism is still waiting for its time in the sun.

In the following sections, I consider four ways in which Litigation as Process might help to maintain the meaningful polycentricity that characterizes American federalism. First, litigation offers a forum for *direct public opposition* between elements of the national hierarchy, including state and federal officials and institutions. Second, it offers a space in which elements of the federal system retain a degree of what I call "*independence of voice*" in their interactions with one another and with the public, even when they are cooperating in the implementation or administration of a national scheme. Third, litigation protects the lines of *accountability and responsibility* necessary for effective federalism. Fourth, litigation provides an important mechanism for solving (or at least helping to solve) the *incentive problems* that can arise when federal and state actors fail to oppose one another in the ways contemplated by traditional federalism theory.

Two preliminary observations are in order. The first is that the kind of litigation at issue here does not need to be a "federalism case"—in the sense of having an aspect of federalism doctrine as the subject-matter of the litigation—at all. The kind of "federalism function" that I am describing here can be performed by cases that are "about" virtually anything at all. Federal and state governments do not even need to be present in the same proceeding in order for litigation to serve many of the "safeguarding" functions that I identify here. The second is that these mechanisms are in no sense "judicial safeguards": they do not depend on judges doing or saying anything. (That is not, of course, to say that judicial action cannot or does not promote the effectiveness of these safeguards.) These are *political* safeguards: but they happen to be found in and around judicial review litigation.

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104. Lemos & Quinn, *supra* note 102, at 1229.

105. Metzger, *supra* note 35, at 596–97.

106. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 596 (2008).

B. Direct Public Opposition

The first way in which Litigation as Process safeguards federalism is by providing a forum for *direct public opposition* between federal and state officials and institutions.

It is widely appreciated that a recognizable federalism depends heavily on the ability of each element of the whole to oppose, diverge from, and disagree with others: a system in which one tier of government decides, and the other obediently executes, is not federal at all.[107] (Whatever "federalism" means, it cannot mean *that*.) Indeed, *The Federalist* repeatedly demonstrates the importance, for Hamilton and Madison at least, of federal-state opposition as a central pillar of the U.S. Constitution's version of federalism.[108] In our own time, even the cutting-edge work of the nationalist federalism school—centrally committed to the notion that modern federalism makes most sense if understood as a *national* system—recognizes that federalism is fruitful precisely because, even amid the largely cooperative integration and

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107. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1284 (2009); Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1378 (2013) [hereinafter Gerken, *Exit, Voice, and Disloyalty*] (noting that "one of federalism's core insights" is that "it is useful for governing institutions to serve as challengers to the national government"); Gerken & Holtzblatt, *supra* note 22, at 61 ("State-federal friction has long been understood to be both a problem and a valuable part of a well-functioning democracy. Vertical federalism's goal, then, has not been to eliminate friction but to harness it, allowing productive state-federal contests to play themselves out."); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) ("Federalism's value, if there is any, lies in the often competitive interaction between the levels of government."); Young, *supra* note 64, at 1372–73 ("The Federalists . . . sought to distribute power to different actors, creating a constructive tension from which—they hoped—liberty would emerge.").

108. *See* THE FEDERALIST NO. 26, *supra* note 44, at 168 (Alexander Hamilton) ("[T]he state legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent."); THE FEDERALIST NO. 28, *supra* note 44, at 176–77 (Alexander Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."); THE FEDERALIST NO. 46, *supra* note 44, at 294 (James Madison) ("[S]hould an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand."); THE FEDERALIST NO. 51, *supra* note 44, at 320 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

intermingling of modern American government, its component institutions remain free to oppose one another, disagree, and dissent.[109]

Indeed, it does not seem too strong to say that the capacity for the institutionalization and accommodation of disagreement and opposition is one of federalism's core virtues.[110] The kind of disagreement we might value could be directly confrontational (as when we express Madisonian faith that each level of government will resist the attempted tyrannies of the other[111]) or something more collaborative (as when we expect different levels or organs of government to have a productive discourse about how best to govern or implement specific programs of governance[112]). Or we may care more about the fact that federalism constantly splits the difference of politics: those who lose today in one channel may retain or regain a foothold somewhere else in the system—keeping them "in the game" rather than reduced to exclusion, exile, and dangerous Coriolanian opposition from without[113]—while the polycentricity of institutional power makes political

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109. *See* Bulman-Pozen & Gerken, *supra* note 107, at 1284; Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1746 (2005); Gerken, *supra* note 107, at 1378; Rodríguez, *supra* note 106, at 571.

110. *See* Gardner, *supra* note 39, at 57 ("If we acknowledge the existence and potential power of informal and extraconstitutional channels of intergovernmental influence, then it becomes hard to imagine what it would look like for the national government truly to accumulate 'all' powers in its own hands, or to interpret the facts described here as fitting that description. Instead, we must conceive of intergovernmental relations as consisting of multiple methods and channels of influence, along many dimensions of political relations." (footnote omitted)); Cristina Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2127 (2014) ("The clearer value of federalism from the popular point of view stems precisely from its creation of multiple electorates—a design feature that channels the complexity of public opinion by creating varied political communities with institutional features that can serve as vehicles for the realization of multiple and contradictory preferences. These communities may be overlapping and connected, but they do not blend into an undifferentiated mass. By expanding the capacity for politics, our federal system amplifies opportunities for the expression of popular preferences through law." (footnotes omitted)). Note that much of what I say here—like much in the piece as a whole—obviously applies to separation of powers issues.

111. *See* THE FEDERALIST NO. 51, *supra* note 44, at 318–19 (James Madison).

112. *See* Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1946 (2014) ("[S]tates' role in federal statutory schemes empowers them to instantiate competing views of national policy—in particular, competing Democratic and Republican views—that exist at both the state and federal level."); Gerken, *supra* note 107, at 1373 ("Federalism and diversity make space for the loyal opposition in the legislative sphere. . . . Actions that involve direct challenges to federal mandates can be undertaken in the spirit of the loyal opposition. In these instances, minorities share the same basic goal as national policymakers (good education policy, sensible environmental regulation) even as they differ as to how to achieve it.").

113. *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1293 (2005) ("Groups will

hegemony tremendously difficult to achieve and thus operates to check the excesses of today's winners.[114]

Focusing on inter- and intra-governmental opposition leads us to the observation that not only does Litigation as Process create an *additional* institutional space for such opposition: it creates one that is particularly *complementary* of the "traditionally political" processes in a number of ways. First, the primary indices of political power in the traditionally "political" arenas—money, votes, and patronage or influence—are of somewhat less salience within the frame of litigation.[115] Second, the agenda-setting power of Litigation as Process confers a distinctive power of posing (and forcing answers to) questions that would never make it onto the agenda of the traditionally political institutions: perhaps because the balance of interests tips against raising the issue, or because those affected simply cannot get themselves heard.[116]

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disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them or their perception that the process is stacked against them, or when the political process imposes fundamental burdens on them or threatens their group identity or cohesion."); Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America*, *in* THE DEMOCRACY SOURCEBOOK 76, 87 (Robert Dahl et al. eds., 2003) (noting that, for democracy to succeed, groups "must be willing to accept defeat and wait, confident that these institutions will continue to offer opportunities the next time around").

114. *See* Rapaczynski, *supra* note 91, at 390 ("[T]he independence of the very process of state government, without seriously hampering the national authorities in regulating most private activities, assures the existence of an organizational framework, more efficient than any private institution could provide, that may always be used as an effective tool for bringing together otherwise defenseless individuals with some stakes in resisting the overreaching of the national government. The value of this organizational apparatus thus lies not so much in any of its concrete regulatory activities that the national government could not do as well (or better), as in the very fact that it eliminates the national monopoly on the power to coerce.").

115. *See* ROSENBERG, *supra* note 31, at 23 ("Neither access nor influence depends on connections or position. Access to all affected interests is guaranteed by judicial rules, and influence depends on strength of argument, not political position."). I do not mean to suggest that "lawmakers . . . just sit around counting votes and dollars," Kramer, *supra* note 43, at 1522, but rather that votes and dollars are, much of the time, particularly salient for elected officials, and particularly that they affect interactions in the traditionally political branches more than they affect interactions in litigation. *See also id.* at 1553 ("I said above that members of Congress don't spend all their time counting votes and dollars, which is true; but let's be honest: they do spend a lot of time doing this."). I do not mean to obscure the fact that advantages of resources, repeat play, and so on commonly confer significant advantages in litigation: I claim only that the effect is probably less significant in the judicial than the representative institutions and that the patterns of influence are at the very least different and thus at least potentially complementary. *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 138 (1974).

116. There is a measure of similarity with Jessica Bulman-Pozen's observations about the ways in which direct democracy at the state level—referenda and other citizen initiatives—can

Third, where many traditionally political processes are "bundled" (*e.g.*, an elected official faces the ballot on the basis of countless individual decisions, while officials negotiate with one another across a wide range of issues simultaneously), litigation is typically "unbundled" and allows—indeed *forces*—specific issues to be isolated and treated individually.[117] Fourth, where many traditionally political processes focus on *ex ante* participation (legislative debate, for example), Litigation as Process is almost always conducted *ex post* and with the benefit of a factual record about effects in the world (and not uncommonly the direct participation of those most directly affected).

Fifth, Litigation as Process is for the most part *public*. Clashes of personal and institutional will take place behind closed doors all the time, and no doubt on many such occasions these forms of private opposition do fine work of the kind that federalism theory dictates.[118] But private conflicts, by their very nature, are susceptible to the kind of horse-trading resolutions that turn on the personal or institutional interests of the participants: the engagement may not always be conducted on the terrain of policy or principle.[119] Publicity provides some measure of confidence that the valuable forms of conflict and disagreement on which federalism is premised will not be short-circuited by an off-stage horse-trade, or avoided altogether because the parties refuse to engage with one another's claims and instead simply resolve their dispute with (say) the generous provision of funding. It also may increase the likelihood that the conflict will serve as a focal point for political organization in civil society more generally.

Sixth, and finally, there are reasons to think that inter- and intra-governmental opposition as conducted in Litigation as Process may be particularly productive, to the extent—variable as that may be in practice—that interaction in litigation is constrained by norms of responsiveness, by

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"create a space for lawmaking outside the usual partisan processes" and "provides a forum for Americans nationwide to participate in political contests that may fall outside of national party politics." Bulman-Pozen, *supra* note 112, at 1952. Direct democracy creates an institutional space that is complementary to traditional national politics in her account; Litigation as Process does so in mine.

117. *See* Jane Mansbridge, *The Fallacy of Tightening the Reins*, 34 ÖSTERREICHISCHE ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 233, 234 (2005) (Ger.) (noting that "the electoral process," premised on the "binary tool" of the vote, is an "extremely blunt instrument").

118. *Id.* at 236.

119. *See* Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 963 (1985) ("[B]attles among factions are resolved not on the floors of Congress but in the hallways of bureaucracies and, ultimately, the chambers of federal judges. This system of policymaking circumvents many of the political safeguards that are supposed to make national policies sensitive to state and local concerns." (footnotes omitted)).

obligations to provide and respond to evidence, and by the need to express one's claims in the language of a shared source of normativity. Parties seldom litigate cases—and virtually never litigate cases successfully—on the basis of a naked appeal to their own interests.[120]

For all these reasons, and doubtless a few more, the availability of litigation affords valuable, and above all *complementary*, institutional space to entities and arguments that did not encounter much success, or find much opportunity to participate, in the "regular" political process.[121]

Let me close by making this a little more concrete with a short example: *Massachusetts v. EPA*.[122] In 1999, a private rulemaking petition was filed by a group of environmental organizations with the EPA, requesting that the agency use its rulemaking power to regulate carbon dioxide emissions from new motor vehicles.[123] In 2003 the EPA denied the petition, on the grounds that regulation of carbon dioxide lay outside the EPA's statutory authority and would, moreover, be imprudent.[124] The petitioners sought judicial review, and the matter reached the U.S. Supreme Court.[125] Twelve states, including Massachusetts (along with a number of local governments), intervened in support of the application for review, challenging the EPA's denial;[126] ten states intervened on the other side.[127] The Court concluded that—regardless of whether the private environmental organizations had suffered the necessary "particularized injury" to confer standing and thus federal jurisdiction under Article III[128]—the "special position and interest of Massachusetts" as an intervenor justified the exercise of jurisdiction.[129] In holding that Massachusetts had standing to press the claim, the Court laid heavy emphasis upon the extensive scientific evidence adduced by Massachusetts regarding the "environmental damage yet to come" from

120. There is an evident resonance here with the concept of public reason. *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997), *reprinted in* JOHN RAWLS, THE LAW OF PEOPLES 129, 131–32 (1999); RAWLS, *supra* note 32, at 243.

121. *See* CHOPER, *supra* note 6, at 167–68 ("[T]he minorities who call on the Court for assistance have already failed (in one degree or another) to secure their rights in the political process . . . ."); STONE SWEET, *supra* note 17, at 198 ("The rules governing the exercise of constitutional review differ radically from the rules governing parliamentary decision-making. This difference is exactly what attracts the opposition to the court, since under majority decision rules, the opposition always loses.").

122. Massachusetts v. EPA, 549 U.S. 497 (2007).

123. *See id.* at 510.

124. *Id.* at 510–13.

125. *Id.* at 514–16.

126. *Id.* at 505 & n.2.

127. *Id.* at 505 & n.5.

128. *See id.* at 516–18.

129. *Id.* at 518–21.

global warming, and upon the EPA's failure, in the forum of litigation, to dispute any "causal connection between manmade greenhouse gas emissions and global warming."[130] Proceeding to the merits, the Court concluded that the EPA did indeed have statutory authority to regulate carbon dioxide emissions from new motor vehicles,[131] and that—as the EPA had offered no reasons for its determination that regulation of carbon dioxide would be imprudent—the case would be remanded back to the EPA for a decision on that issue.[132] The EPA subsequently *did* decide, following a process of public consultation, to regulate carbon dioxide emissions.[133]

I am abbreviating the story—there was more litigation and the Supreme Court subsequently invalidated some of the EPA's eventual regulations[134]—but the rest of the narrative need not concern us. The point is that Litigation as Process appears to have done the real work here: the adjudicative component was limited to a decision to grant standing to Massachusetts, an interpretation of the statute, and a decision to remand to the EPA to give reasons. Pretty thin gruel. But the core of what really happened here was that Massachusetts—along with eleven other states, and in direct conflict with ten more[135]—was able to press its opposition to the politically charged exercise of the EPA's discretion in a public forum, and hold the EPA to standards of public rationality and evidence-based argument. Following that engagement, even though the EPA had to do no more than furnish reasons, it reversed its policy. Litigation as Process in action.

C. Independence of Voice

The second way in which Litigation as Process safeguards federalism is by guaranteeing something that I will call "independence of voice."

Independence of voice is my term for what I take Robert Schapiro to emphasize in his account of "polyphonic federalism."[136] On this view—or at least the view I will attribute to him—the source of federalism's distinctive benefits is not the existence of some special sphere of state autonomy, nor regionalism or localism as such, but rather the existence of "multiple,

130. *See id.* at 521–23.
131. *Id.* at 532.
132. *Id.* at 534–35.
133. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2436–38 (2014).
134. *Id.* at 2449.
135. Massachusetts v. EPA, 549 U.S. at 505 & nn.2 & 5.
136. *See generally* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009) [hereinafter SCHAPIRO, POLYPHONIC FEDERALISM]; Schapiro, *supra* note 98.

independent sources of political authority," "alternative centers of power," or what I will call independent regulatory voices.[137] On this voice-valorizing account, which I largely share, there is a distinctive kind of value in ensuring that federal and state entities alike retain their ability to speak for themselves, to articulate their own norms and values, and to speak on behalf of the political communities that each entity represents.[138] From this vantage point, whether the norms and rules enacted by an entity in the federal hierarchy are formally supreme or binding or applied in an "autonomous" way is in an important sense beside the point. What is crucial is that each institution of government retains the right to speak for itself in the discursive and normative spaces of national politics, to issue its own account of normativity in the language of law[139]—even if its regulatory pronouncements are formally subordinate to another source of law and doomed to reversal or defeat.[140] Doctrinal principles such as the anti-commandeering rule, and perhaps also the prohibition on coercive funding, might be understood as promoting the states' independence of regulatory voice.[141]

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137. SCHAPIRO, POLYPHONIC FEDERALISM, *supra* note 136, at 95; Schapiro, *supra* note 98, at 285. Perhaps the most famous examples of independent voice in the history of the U.S. polity are the Kentucky and Virginia Resolutions on the (un)constitutionality of the Sedition Act: however legally immaterial, they represented the authoritative, dissenting voices of their political communities. The closest example in modern history may be state denunciations of aspects of the federal USA PATRIOT Act. *See* Bulman-Pozen & Gerken, *supra* note 107, at 1278 (describing same and noting that "five [states] declare[d] that the state will not participate in enforcing [the denounced] portions of the Act").

138. *See* Gardner, *supra* note 39, at 18 ("Even the most minimal theory of federalism must contemplate that states have the capacity, if not actually to thwart national action, *at least to dissent from the substance of national political decisions*." (emphasis added) (footnote omitted)).

139. Barry Friedman has put it delightfully, noting that states offer "an independent means of calling forth the voice of the people." Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 403 (1997).

140. Yet again, Heather Gerken's work is on point, as she emphasizes that the power of the "servant" can be effective in ways that are unavailable to a formally autonomous external player. Gerken, *Exit, Voice, and Disloyalty*, *supra* note 107, at 1379 ("There is a risk . . . that we overestimate [the costs of formal "defeat" or reversal] in thinking about dissent. That's because we ignore the trade-off that the notion of agency illuminates: protection from reversal also means one is outside of the system, and it might sometimes be just as useful to be making policy inside the system even if one risks reversal."); *see also* Gerken, *supra* note 7, at 36–37 ("[T]he inquiry for both accounts rarely ends—as it typically does for both the separation of powers and sovereignty—with the conclusion that one institution gets to trump the other. Co-governance is instead the model—an ongoing, iterated game which may continue even after a trump card is played—and what matters is how the two institutions partner with one another. The key is not to figure out who wins, but to understand how the center and periphery interact and to maintain the conditions in which they can productively cooperate, conflict, and compete." (footnotes omitted)).

141. *See* Printz v. United States, 521 U.S. 898, 919 (1997); New York v. United States, 505 U.S. 144, 202 (1992); *see also supra* text accompanying note 49.

We could fill dozens of pages expounding the distinctive value of independence of voice—the epistemic advantages of internal criticism and multiplicity of perspective, familiar from at least as early as Aristotle;[142] the various public benefits of deliberation as expounded by the deliberative democrats;[143] the dignity interest that we recognize in political communities and their members when we accord them a full and equal voice in our political system;[144] the Hayekian virtues of a decentralized system with multiple points of access to the regulatory system; and so on—but we will resist the siren call to chase the benefits of federalism,[145] and stay focused instead on its safeguards.

The kind of independence of voice that I am describing here may be particularly useful in the modern United States for two reasons. First, the allocation of formal legal power is highly asymmetric: given a federal government armed with an open-ended Article I and the broad-gauged Supremacy Clause, on the one hand, and a state government armed with the rather slender Tenth Amendment, on the other, any theory of the public political value of conflict that relies on both sides having a roughly comparable chance of "winning" in a formal sense is likely to find itself in some trouble.[146] But if we valorize independence of regulatory voice—the right to issue an independent account of normativity and political meaning—we can see a way in which federalism can be valuable even when the states are constitutionally outgunned. The position of the state in the nation then becomes something a bit like the position of the subject in Kant's political theory—subject to an absolute duty to obey the legislator but with a virtually

142. *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS (c. 350 B.C.E.), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1736–37 (Jonathan Barnes ed., 1984). I borrow this transposition of Aristotle's comments about happiness into political epistemology from JEREMY WALDRON, THE DIGNITY OF LEGISLATION 106–07 (1999).

143. *See, e.g.*, Thomas Christiano, *The Significance of Public Deliberation*, *in* DELIBERATIVE DEMOCRACY 243, 244–46 (James Bohman & Williams Rehg eds., 1997).

144. *See, e.g.*, *id.* at 251 ("When I submit my views and my arguments to you for your evaluation and response and I listen to your ideas and arguments with an eye to learning something from you, I express a kind of respect for you. I am treating you as a kind of rational and intelligent being who has something to offer.").

145. For a leading account, see Friedman, *supra* note 139, at 319–21 ("[Despite] politicians [who] talk at length of the importance of federalism . . . literature is surprisingly devoid of any serious study of these supposed values . . . . The values are invoked regularly in much the same way as "Mom" and "apple pie": warm images with little content.").

146. *See, e.g.*, Yoo, *supra* note 47, at 1323 (noting that "the Constitution contains few affirmative descriptions or enumerations of a state's sovereignty").

inviolable right to speak and criticize, and give voice to his or her own capacity for reason.[147]

Second, independence of voice may be particularly useful when the levels of government exhibit significant *inter*dependence of *action*. In modern America, state institutions and officials are deeply enmeshed in federal programs: state officials administer federal programs, enforce federal law, and interpret federal norms, formally subject in all cases to federal decision-makers.[148] Independence of voice may be particularly salient when it is the only form of independence available.

So there are excellent reasons to think independence of voice an important element of American federalism: and the contribution of Litigation as Process should by now be clear. Howsoever close the cooperation, howsoever supreme the federal law, *every* party (and *every* third party participant) speaks for itself in litigation: regardless of whether they are in some relevant sense opposed.

Again, we close with an example. The power of the federal government is particularly broad, and the federal-state relationship particularly tangled, in the field of immigration. Litigation provides a forum in which state and local governments can speak for themselves—can issue their own accounts of the normativity *even of a federal law*—wholly independently of the complex web of federal agencies and officials that direct much of their work. This was apparent in the recent litigation that reached the Supreme Court as *Arizona v.*

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147. IMMANUEL KANT, ON THE PROVERB: THAT MAY BE TRUE IN THEORY, BUT IS OF NO PRACTICAL USE (1793), *reprinted in* PERPETUAL PEACE AND OTHER ESSAYS 61, 82 (Ted Humphrey trans., 1983) ("The cooperative subject must be able to assume that his ruler does not want to wrong him . . . [that] the wrong that in his view befalls him occurs only as a function of error, or from ignorance of certain of the consequences of the supreme power's laws. Thus, regarding whatever in the ruler's decrees seems to wrong the commonwealth, the citizen must retain the authority to make his opinions publicly known, and this authority must receive the ruler's approval.").

148. *See, e.g.*, Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 473–74 (2012) ("While state implementation of federal regulatory regimes is a relatively recent development, state enforcement of federal law has a long pedigree. Today, a variety of civil federal laws confer enforcement authority on the states, and Congress has also provided for deputized state or local officers to perform certain functions of federal immigration officers." (footnotes omitted)); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 536 (2011) ("[E]very branch of state government is squarely in the midst of creating, implementing, and interpreting federal statutory law."); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 702 (2011) ("[E]nforcement authority can serve as a potent means of state influence by enabling states to adjust the intensity of enforcement and to press their own interpretations of federal law.").

United States.[149] I want to isolate just one piece of this complex case. In response to local pressures, the State of Arizona took up a federal statutory rule requiring the registration of aliens and made violation of the federal rule a misdemeanor under Arizona law.[150] The United States challenged that measure on the ground that the federal rule preempted even complementary state laws like Arizona's, and prevailed in the Supreme Court.[151] The crucial point is that, while Arizona was directly and uncomplicatedly subject to supreme federal statutory law (and was at least arguably engaged in supporting and enforcing it), the institution of litigation gave Arizona space to offer its own public account of the legal rule, the policy of its enforcement, and its own role in the federal scheme—room, that is, for independence of voice.[152]

D. Accountability and Responsibility

The third way in which Litigation as Process protects federalism is by clarifying the lines of accountability and responsibility on which a federal system depends.

It is widely appreciated that a meaningfully federal system can operate only if and to the extent that voters and other members of the political community have a reasonably clear idea of which levels of government are responsible for particular policies and practices, and can hold them to account, electorally and otherwise, for their conduct.[153] Accountability makes democratic federalism possible.

Unfortunately, the need for accountability presents a huge practical problem for American federalism. Empirical work repeatedly shows that citizens have a shockingly low level of knowledge about the basic distributions of powers in the U.S. political order—any allocation of responsibilities that is not entirely straightforward is likely to get hopelessly

149. Arizona v. United States, 567 U.S. 387 (2012).

150. *Id.* at 400.

151. *Id.*

152. *See* Brief for Petitioner at 51, *Arizona*, 567 U.S. 387 (2012) (No. 11-182) ("Section 3 . . . overlap[s] precisely with federal direction in both its substantive elements and its penalty. In our system of cooperative federalism, the States may assist the federal government in tackling national problems.").

153. *See, e.g.*, Young, *supra* note 64, at 1360; *see also* Bernard Manin et al., *Elections and Representation*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29, 40 (Adam Przeworski et al. eds., 1999).

lost in the fog.[154] And matters are *far* from entirely straightforward: state and federal lawmaking, interpretation, and enforcement are hopelessly entangled in the modern United States.[155] The source of the trouble, ironically, is the very polycentricity and interactivity that drives so many of federalism's benefits.[156]

Against this unpromising backdrop, any system for untangling the complex lines of responsibility and accountability represents a step toward a viable federalism. And Litigation as Process constitutes just such a device. It provides an additional forum in which individuals or institutions of government alike can ensure that those responsible for some kind of adverse action are publicly identified—and *rights* to litigate provide a device for calling this forum into action and triggering the process of public exposition.[157] Litigation promotes blame-taking, reason-giving, and fact-finding.

For, in litigation, each party is effectively forced to appear, stand up, and tell something like the truth about what it has done, what it is doing, and why—and to address the consequences of its actions, in something like what

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154. *See, e.g.*, McGinnis & Somin, *supra* note 95, at 94. *See generally* MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 62–104 (1997).

155. *See* Bulman-Pozen, *supra* note 112, 1922 ("[S]tate and federal governance and interests are deeply intertwined and, in many cases, indistinguishable."); Gluck, *supra* note 148, at 603 ("[I]t is not clear that state citizenries are capable of properly discerning whom to hold accountable in an intrastatutory federalist scheme."); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 327 (2012) ("Even if vigilant members of the public or civic groups tried to untangle complex lines of authority, they might find the necessary information delineating federal and local government roles inaccessible.").

156. Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1336 (2009) ("[M]ultiple tiers of government . . . reduce transparency and make it harder to hold officials at all levels to account for their decisions."(footnote omitted)); Jackson, *supra* note 41, at 2201 (noting difficulties); Schapiro, *supra* note 98, at 291 ("The overlap of state and federal authority prevents citizens from understanding where ultimate responsibility lies.").

157. *See* PHEDON NICOLAIDES ET AL., IMPROVING POLICY IMPLEMENTATION IN AN ENLARGED EUROPEAN UNION: THE CASE OF NATIONAL REGULATORY AUTHORITIES 46 (2003) ("Accountability is strengthened not when the actions of the agent are constrained but when the agent is required to explain and justify his actions to those who have the necessary knowledge to understand and evaluate those actions."); Bulman-Pozen & Gerken, *supra* note 107, at 1291 ("[A]ccountability is not simply about knowing who is responsible, but also being able to appeal to them."); *see also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2343–44 (2006) (describing "intragovernmental accountability" mechanisms, through which one element of government can monitor and hold to account other elements, as a complement to electoral accountability).

Jane Mansbridge would call "narrative accountability."[158] At a minimum, the standards of basic rationality that structure much public-law litigation demand that governmental actors have, and that they publicly provide, *reasons* for choices that invade or implicate the interests of others—whether institutions of government or citizens—and that they expose those reasons and choices to scrutiny and criticism.[159] Moreover, participants in litigation will be put to proof of anything contested that seems doubtful, and forced to contend with "the authority of [litigants'] own experience."[160] By contrast with the "cheap talk" that can characterize rhetoric in other institutional contexts, arguments and statements in litigation will be tested for coherence, and inaccuracy or dishonesty can have sharp consequences. Vicki Jackson, Robert Schapiro, and others have discerned in the Court's federalism jurisprudence an increasing attention to the importance of reason-giving and the pursuit of accountability.[161] And the Supreme Court has referred explicitly to this concern in developing its anti-commandeering jurisprudence.[162]

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158. Mansbridge, *supra* note 117, at 240 ("Not only a numerical but also a narrative account is inherent in the concept of accountability. It is not just a matter of the principal monitoring and sanctioning; it is a matter of the agent showing, explaining, and justifying . . . .").

159. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 390 (1998) ("[Through an experimentalist lens,] [c]onstitutional review in particular becomes a jurisprudence of impermissible arguments and obligatory considerations—the former forbidding the actors to pursue ends found to be unconstitutional; the latter enjoining them to give particular attention to their choice of means when constitutional values appear to be at risk."); Jackson, *supra* note 41, at 2245 ("The Court's task would be to make sure Congress takes a serious look when Congress acts to extend the existing exercise of its implied powers, and that it has a reasonable basis for concluding that a federal law is needed to address conduct substantially affecting interstate commerce."); *see also* William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 295 (2013) ("Bootless reasoning and scapegoating may get the job done in the short term, but they can be counterproductive . . . in the longer term.").

160. *See, e.g.*, Dorf & Sabel, *supra* note 159, at 388 ("Experimentalist courts, like the traditional courts of constitutional democracy, function by a form of direct deliberation . . . ." (footnote omitted)).

161. Jackson, *supra* note 41, at 2234 ("Insisting on showing a connection between legislative acts and legislative authority may help enhance the legislator's sense of accountability to law and may make more palpable to the electorate the questions of constitutional power (and public policy) at stake."); Schapiro, *supra* note 98, at 291 ("[C]oncerns for accountability appear in both the Commerce Clause and the 'anticommandeering' branches of the Court's federalism jurisprudence." (footnote omitted)); Young, *supra* note 64, at 1375 ("[T]he anticommandeering cases, *New York* and *Printz*, can be understood as efforts to ensure that lines of political accountability are clear and that the federal government has to internalize the cost of its regulatory endeavors.").

162. New York v. United States, 505 U.S. 144, 169 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of

Our example needs no introduction. While there are few areas where the lines between state and federal activity are as blurred and as complex as the formulation and implementation of healthcare regulation, the pursuit of litigation by state Attorneys General (and private persons) against the federal government regarding the Affordable Care Act—the "Obamacare litigation"[163]—made an obvious and significant contribution to the public understanding of responsibility for the contentious reforms in question.[164] Regardless of the legal merits of the challenges, and regardless of the ultimate judicial dispositions, the pursuit of litigation made the federal-state dynamics of the health reforms much more visible to many more people than could all the back-room protests, or all the earnest press conferences, that state officials might furnish. Litigation promoted accountability.

E. Incentive Problems

The fourth way in which Litigation as Process operates as a safeguard of federalism is by empowering third parties—that is, entities *other* than organs of federal and state government—to bring a claim, trigger the process of litigation, and precipitate inter- and intra-governmental engagement, and perhaps opposition, when such conflict might not otherwise be observed.

Recall that classical federalism theory contemplates that different elements of the national hierarchy will engage in forms of disputation or opposition with one another, to the public benefit.[165] But it is now widely appreciated that in practice, very often elements of the federal and state governments will *not* oppose one another: rather, they may find it advantageous to defer or avoid difficult or politically dangerous conflicts, leaving important issues of principle or constitutional propriety off the table in favor of a tactful silence or a mutually beneficial horse-trade.[166]

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public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

163. *See generally* EINER ELHAUGE, OBAMACARE ON TRIAL (2012).

164. The most famous proceeding, of course, was the Supreme Court battle in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); *see also* Gluck, *supra* note 148, at 543 n.18 (listing litigated challenges); Metzger, *supra* note 35, at 580 n.62 (listing litigated challenges).

165. *See, e.g.*, *New York*, 505 U.S. at 182.

166. *See id.* (noting that "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests"); Gerken, *Exit, Voice, and Disloyalty*, *supra* note 107, at 1355 (noting that "ambition is unlikely to counteract ambition if state and national actors are united in their ambitions"); Schapiro, *supra* note 98, at 279

There are a variety of reasons to expect to see "unhealthy collusion"[167] rather than elegant Madisonian opposition. State governments may fail to challenge federal intervention "if it means more funding for popular initiatives or political cover for unpopular ones."[168] And as Jessica Bulman-Pozen and Larry Kramer have both observed, there are excellent reasons to think that the development of national political parties, with their "cross-cutting attachments," has created incentives for actors to promote the interests of a political party, rather than the institutional prerogatives of their own element of government.[169] So too might substantive specializations lead federal and state actors sharing a specific interest to align in what has become known as "picket fence" federalism.[170] More generally, Daryl Levinson argues that there is no reason to expect that state officials, concerned primarily with their own re-election, will aim to systematically promote state power and limit federal power, nor is there any reason to think that federal officials will seek the converse outcome: what is crucial is how the officials think, in the particular case at hand, that they can best secure their own re-election, or otherwise promote their objectives.[171]

The availability of Litigation as Process exerts a disruptive influence upon such accommodations because it breaks the oligopoly of political initiative. To the extent that third parties can bring litigation touching on the underlying disagreements, they can effectively force the issue onto the political agenda, making it all but impossible for relevant organs of government to avoid taking and defending a position on the issue.[172] This has at least three consequences. First, to the extent that such litigation is actually brought, it can disrupt an

("Without constitutional boundaries to restrict them, the states and the national government may work together in ways that could be detrimental to the people. For example, state officials may collude with the national government to avoid accepting responsibility for their actions.").

167. Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, *in* THE NEW FEDERALISM: CAN THE STATES BE TRUSTED?, *supra* note 49, at 3, 31–34.

168. Lemos & Quinn, *supra* note 102, at 1230 (footnote omitted); *see also* Rodríguez, *supra* note 110, at 2096.

169. Bulman-Pozen, *supra* note 85, at 1091–92; Kramer, *supra* note 4, at 224, 269; *see also* Levinson & Pildes, *supra* note 157, at 2316–25 (examining ways in which political party organization has undermined the Founders' expectations about interbranch competition).

170. *See* Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J. L. & PUB. POL'Y 181, 192–93 (1998).

171. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 940–41 (2005).

172. *See* Dorf & Sabel, *supra* note 159, at 388–89 ("[T]he courts . . . are the place where individuals can insist that the polity, and the government that works in its name, justify again, by reference to its deepest values and its best understanding of relevant experience, the justifications given so far for particular actions.").

explicit or implicit agreement to let sleeping dogs lie, facilitating a ventilation of the issues in something like the way that traditional federalism theory contemplates. Second, to the extent that federal and state entities know *ex ante* that such litigation is possible, or even likely, they may be less likely to engage in such conflict-stifling practices in the first place, because they will recognize that the equilibrium of silence will be unstable. Third, to the extent that federal or state governments are unwilling to defend their own rights, or to challenge those of another level of government, individual litigants may be able to effectively act as surrogates in a peculiar kind of reverse *parens patriae* dynamic and protect or challenge the relevant issue in Litigation as Process instead.[173]

Again we close with a recent example, and again I choose one that needs no introduction. One of the great "federalism issues" (as well as individual rights issues) of our time is marriage equality—a matter on which the nation's various political communities have, historically, differed dramatically—and the correlate issue of the right of the states to define and limit the scope of marriage. While federal and state governments might have had reason to fear the costs and outcomes of open political or legal conflict on the issue, preferring instead to let the "political process" play out gradually, it was individual litigants in a series of cases that created an institutional space in which federal and state governments were forced to engage decisively with one another. Thus, for example, in the crowning case of *Obergefell* in 2015, the petitioners in the Supreme Court—fourteen same-sex couples, and two men whose male partners were deceased—invoked the process of litigation, as a result of which four states (Michigan, Kentucky, Ohio, and Tennessee) were forced to appear to defend their discriminatory laws, and the United States—faced with a choice between participating and sitting on the sidelines—chose to intervene in support of the petitioners' claim.[174] The result—*even setting aside the actual adjudication of that case*—was that one level of government stood beside a group of citizens in support of their rights-claim and in opposition to another level of government that was denying and infringing that rights-claim. Madison would have been proud. But note that it took litigation, brought by private parties, to bring this about—the federal government was hardly pursuing a vigorous civil-rights campaign all of its own in opposition to discriminatory state laws until the question was called by private parties in the process of litigation.[175]

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173. For example, one might think of much dormant Commerce Clause litigation like this—a private individual asserts the national interest in a common market against a state government whether or not the federal government is interested in involving itself.

174. Obergefell v. Hodges, 135 S. Ct. 2584, 2588–91 (2015).

175. *See, e.g.*, KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL 1, 34–39 (2015).

III. CONCLUSIONS, IMPLICATIONS, AND DIRECTIONS

In the preceding pages I have made the case for including Litigation as Process among the array of mechanisms and subsystems that constitute the political safeguards of federalism in the United States: Wechsler's constitutional connections, Choper's array of formal and informal state powers, Kramer's political parties, Clark's federal lawmaking procedures, and so on. In closing, I will very briefly summarize some conclusions and some directions that cry out for further development.

If my claims are accepted, I think it would mean at least three things for the scholarship and law of American federalism. First, it would represent another incremental step forward in the interpretive project of better understanding the elements of American federalism and their significance for modern political life. Much excellent interpretive work of this kind is underway in other corners of the federalism field: Abbe Gluck, for example, has advanced our understanding of federal-state interactions in the interpretation and implementation of federal statutes;[176] Matthew Waxman has untangled some of the dynamics of federal-state interactions in national security and intelligence policy;[177] and Cristina Rodríguez has done the same for immigration policy.[178] Seeing Litigation as Process clearly—toward which this is at least a beginning—will give us another piece of the puzzle.

Second, if we believe that Litigation as Process contributes something worthwhile to American federalism, we may have reason to pause before we accept the prescriptions offered by Choper and those who believe with him that "federalism cases" should be non-justiciable. For barring the door of the court (and particularly the door of the Court) would preclude the unique form of federalism's politics that we have charted here, and sacrifice a number of benefits that have nothing much to do with the *adjudication* that is usually the source of the concern. Indeed, an appreciation of Litigation as Process might lead us to investigate ways to promote litigation while minimizing the scope of adjudication: maybe there is a role for a judicial technique like Cass Sunstein's "minimalism" here.[179]

Third, and perhaps most concretely, taking Litigation as Process seriously might encourage us to see doctrinal rules—institutional, procedural, and substantive—as institutional rules somewhat like those that structure a

176. Gluck, *supra* note 148, at 537.

177. Waxman, *supra* note 155, at 290–91.

178. Rodríguez, *supra* note 106, at 570.

179. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix (1999); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–7 (1996).

legislative process. Obviously a great deal of work remains to be done before implications can be offered for doctrine, but we can look ahead to some possibilities.

- *Standing and rights of action.* Rules defining the scope of rights and causes of action, and rights of standing, become rights of political participation through the lens of Litigation as Process.[180] Similarly, allocation of powers to officials and institutions *within* state and federal governments to bring suit (including *parens patriae* litigation, as well as challenges to the constitutional propriety of regulatory action) come to define points of entry into the politics of federalism. On the flip side, doctrines of ripeness, mootness, and so on become limitations on participation. Thus, appreciating the value of Litigation as Process may give us an additional reason to construe such doctrines in order to maximize participation.
- *Third party participation.* We might reach a similar conclusion regarding rules structuring the involvement of third parties, from rules of joinder to intervention and *amicus* participation. We may even find here a reason to consider *amicus*-like systems in courts of first instance.
- *Publicity and transparency.* The rules and practices of litigation's publicity take on the character of standards of political transparency. Thus, we may find an additional reason to consider making transcripts and party briefing easily available on websites designed for (and comprehensible to) the lay public; and perhaps even to introduce cameras into courts.
- *Standards for dispositive motions.* We may find that seeing Litigation as Process gives us reason to think afresh about the standards under Rule 12 and Rule 56. For example, *Twombly*'s "plausibility" standard may form a threshold separating two types of political process.[181]
- *Tools of deference.* Appreciating the benefits of Litigation as Process may spur a re-examination of the principal doctrinal tools of deference to the will of the representative institutions. We may conclude that categorical immunities (particularly when they can be asserted early in litigation) may have the effect of foreclosing

180. *Compare* Massachusetts v. EPA, 549 U.S. 497, 520 (2007) (granting "special solicitude" to Massachusetts), *with* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (denying standing to proponents of California's Proposition 8).

181. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007).

Litigation as Process, while deferential rationality standards do not.

Turning from implications to next steps, I want to acknowledge that what I have offered here is—with apologies to Robert Dahl—something like a preface to a theory of Litigation as Process, not a comprehensive account of one. At least three directions invite pursuit. The first is an empirical one. I have given some good reasons to think Litigation as Process is a salient element of federalism's portfolio of political protections, but my claims invite empirical attack from several directions. First, I have not shown here that citizens—all citizens or some appropriately defined subset—pay sufficient attention to the litigation of cases to make the public-facing aspects of Litigation as Process genuinely salient.[182] Second, I have not shown here that participants in litigation pay sufficient attention to one another's conduct in litigation—rather than simply paying their lawyers and focusing on adjudicated outcomes—to make the inter-party aspects of Litigation as Process genuinely salient. Third, I have not shown here that important "federalism issues" are actually litigated in any significant measure: litigation could be the exception rather than the rule. If federal and state institutions simply do not litigate the most important matters, Litigation as Process may not crunch the meaty issues.

The second dimension in which my work in the preceding pages invites development is a theoretical one. Litigation as Process demands to be evaluated, not just as a safeguard for federalism, but also as a forum in which its distinctive benefits can be realized and manifested. Litigation as Process, in other words, can be a place where federalism *happens*. There are several ways in which this appears to be true: these dimensions deserve the same kind of treatment that we have afforded here to the aspects of litigation's safeguarding function. Moreover, the somewhat one-sided view I have given here, focusing on litigation's processual benefits, begs an even-handed treatment of the benefits *and drawbacks* of litigation, particularly compared to those of adjudication and traditional representative politics. Only in light of such comparative institutional analysis can doctrinal (or other) prescriptions be helpfully offered.[183]

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182. *Compare* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 545–47 (2009) (describing a "demosprudence" of judicial communication with the public), *with* Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 564 (2009) ("[F]or decades social science researchers have repeatedly found that judicial opinions neither educate nor teach. Ordinary people do not know about them, are unlikely to find out about them, and are not interested.").

183. *See generally* NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

The third dimension in which this contribution invites development is beyond federalism's frontier altogether. As I note above, many other sub-disciplines of legal scholarship already pay considerable attention to the issues that I highlight under the heading of Litigation as Process.[184] But others do not. It seems to me, for example, that the wealth of scholarship on the European Union has always paid remarkably little attention to the *process* of litigation: no doubt impeded by the relatively unpromising procedural rules of the European Court of Justice, where briefing is both non-public and non-responsive. Doubtless a number of other fields of scholarship could benefit from paying a little less attention to adjudication and a little more attention to everything else. Here in the United States, it might be interesting and worthwhile to explore ways in which separation of powers issues, or partisan tensions, play out in Litigation as Process when we turn our attention away from the judge and focus on the other participants. Indeed, Litigation as Process is not even necessarily limited to judicial review cases: even "regular" litigation may be worth a look through this lens.

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My core claim has been very simple. We have many careful analyses of the ways in which federal and state actors interact in legislative chambers, within administrative systems, and at the ballot box, but much less insight into the theory and practice of their interactions in the courtroom. Likewise, our extensive literature on "federalism judicial review" has been transfixed by the figure of the judge, to the neglect of other participants. It may be time to expand our horizons.

We are familiar with the observation that accounts of "process federalism," including theories of political safeguards, are really accounts of judicial review. This contribution aims to make the case that the reverse is also true: an account of judicial review is also an account of a political safeguard.[185] If we see it as such, we might learn something new about our centuries-old, but continually surprising, constitutional system, as we accompany it onward into federalism's future.

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184. *See supra* notes 30–33 and accompanying text.

185. *See* Kramer, *supra* note 43, at 1515 n.64 ("Contemporary scholars treat judicial review as something separate and distinct from other 'political' safeguards in the structure of government. This distinction would have sounded foreign to members of the founding generation.").