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Federalism and Public Choice

Roderick M. Hills Jr.

Abstract

This paper is a draft chapter for an edited collection on Law and Public Choice being published by Edward Elgar and edited by Dan Farber and Anne Joseph O'Connell. The chapter provides an overview of public choice literature regarding three aspects of federalism - exit-based normative justifications for federal regimes, voice-based normative justifications for federal regimes, and positive theories for how federal regimes are sustained through the political process. In general, I suggest that the most promising trend in public choice theory is the effort of economists, political scientists, and lawyers to tackle the thorny question of "voice" in federal regimes - that is, how subnational politics differs in federal regimes from the politics of unitary states. Moreover, the case for federalism based on exit critically depends on the argument for federalism based on improvement of "voice." Otherwise, migration from one city or state to another to escape predatory regimes would simply be pointless movement out of a "Leviathan" frying pan into a "Leviathan" fire. Public choice theorists seem to have an inveterate suspicion of claims that subnational government facilitates political participation, perhaps because the entire tradition of public choice is based on the theoretical impossibility that collective action can accurately represent individuals' preferences and values. Yet nothing in the conventional account of how decentralization improves political "voice" is inconsistent with the abstract principles of public choice theory.

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Roderick M. Hills, Jr.

(To be included in an edited volume entitled “Law and Public Choice,” edited by Anne O’Connell & Dan Farber)

The public choice literature on federalism and its near-relation, localism, is voluminous in size but narrow in focus. If one includes articles on fiscal federalism and Tiebout’s spatial economies under the rubric of “public choice literature,”¹ then the articles in law, political science, and public economics that refer to public choice concepts number in the thousands.² Most of this literature revolves around the idea of mobility between competing subnational jurisdictions. Less of the literature focuses on how political activity by voters or politicians in federal regimes differ from unitary states’ politics. The literature, in other words, focuses on exit, not voice.³

The absence of substantial public choice scholarship on democratic behavior in federal regimes oddly contrasts with the political tradition of federalism in the United States. The Anti-Federalists opposed the U.S. Constitution on the ground that only aristocratic elites would be able to compete in large electoral districts required by a continental nation. The Jacksonian Democrats opposed a broad construction of Congress’ power to fund infrastructure on the similar ground that

¹To the extent that public choice theory concerns the application of economic method to politics, then the literature on fiscal federalism emerging from Charles Tiebout’s seminal 1956 article constitutes a form of public choice theory. But fiscal federalism has traditionally been viewed as genealogically distinct from the public choice theory, because it has its origins in the economics of public finance rather than in the application of economic concepts to legislatures or elections. *See* Dennis C. Mueller 1997, at 9). As I shall suggest later, this genealogy might be responsible for the neglect of politics in early economic literature on the Tiebout hypothesis.

²There are, for instance, 733 articles in the westlaw JLR database; There are 2,158 articles in the JSTOR database that refer to “Tiebout” and 395 articles in JSTOR that refer to “Wallace Oates” and “Fiscal Federalism.”

³The contrast between “exit” and “voice” has been a staple of social science discussions of local government since Albert O. Hirschman’s classic book, *Exit, Voice, and Loyalty*.

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wealthy “monopolists” would exert disproportionate power at the metropolitan centers where the federal government’s officials would work. These “voice-based” arguments treat federalism as a device by which to reduce slack between the agent (elected officials) and principal (the voters), by reducing the cost to voters of monitoring the agents’ actions. Public choice theory does not have much to say about the merits of this traditional theory of federal democracy, preferring to focus on the capacity of individuals to discipline officials by exiting, or refusing to enter, badly governed jurisdictions.

In what follows, I will describe three aspects of public choice theory and federalism. First, I will outline public choice theory’s exit-based normative justifications for federal regimes. Second, I will describe voice-based normative justifications for federal regimes that are consistent with public choice theory, although not public choice theory’s central focus. Finally, I will examine public choice theorists’ positive theories for how federal regimes are sustained through the political process.

In general, I will suggest that the most promising trend in public choice theory is the effort of economists, political scientists, and lawyers to tackle the thorny question of “voice” in federal regimes – that is, how subnational politics differs in federal regimes from the politics of unitary states. Public choice theorists may have an inveterate suspicion of claims that subnational government is closer to the people or facilitates political participation: Such positions have a sappy flavor that does not mix well with the public choice theorists’ self-image as hard-boiled realists free from illusions about the capacity of individuals to engage in collective action. William Riker, one of the founders of public choice theory, roundly ridiculed such claims on behalf of federalism.

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(Riker 1964 at 139-49). And yet nothing in the conventional account of how decentralization improves political “voice” is inconsistent with the abstract principles of public choice theory. Moreover, while sketchy and conflicting, the evidence does not disconfirm the account of decentralization as improving democratic accountability. Whatever normative case can be for federalism depends critically on this voice-based defense of federal regimes. In particular, the case for federalism based on exit critically depends on the argument for federalism based on improvement of “voice.”

I. *Exit-Based Theories of Federalism*

Since Wallace Oates revived Charles Tiebout’s *Pure Theory of Local Expenditures* in the late 1960s, there have been numerous refinements of exit-based theories of federalism (Tiebout 1956; Oates 1969). All of these literatures, however, share the common idea that the power of subjects to move to or from a regulating jurisdiction improves how these subjects are governed.

This exit-based literature can be further divided into two categories. In one strand of scholarship, economists specializing in public finance focus on mobility as a device for revealing migrants’ demand for local public goods. The goal of this literature is to determine whether Tiebout’s spatial economy can mimic the competitive economy of private firms and thereby solve the problem posed by Paul Samuelson that no decentralized pricing mechanism can determine the optimal consumption of public goods (Bowen 1943; Samuelson 1954).⁴ In a second strand, economists like James Buchanan and political scientists like Barry Weingast assume not merely that

⁴Paul Samuelson’s elegant three-page article, *The Pure Theory of Public Expenditure*, compares how to define the optimal consumption of private and public goods, observing that “no decentralized pricing system can serve to determine optimally these levels of collective consumption” of the latter. Tiebout’s article was a response to this challenge by Samuelson.

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government officials are incompetent at determining preferences but also that they are predatory. Decentralization is defended as a device to constrain such incompetent or predatory behavior. Both the “public finance” and “public choice” strands share one characteristic in common: Neither has, but both need, a well-developed theory of subnational politics that would explain how, why, and whether subnational officials make decisions in a manner different from national officials.

A. Mobility as device for revealing subjects’ preferences for local public goods

Charles Tiebout’s landmark article, *A Pure Theory of Local Public Expenditures*, provides the most familiar exit-based justification for federalism – that of revealing citizen-consumers’ preferences for local public goods through migration. Under certain idealized circumstances, the individual’s decision to migrate to a particular community would reveal that the individual valued the services provided by the community at the community’s average cost of providing those services. Migration reveals this information perfectly only if one makes some strong assumptions – for instance, costless migration, full information about the different service and tax bundles, a range of local policies the costs and benefits of which are confined to geographic boundaries of the communities responsible for them, a “large” supply of communities from which migrants could choose, and an ideal city size that community managers will obtain by either encouraging or discouraging immigration.

The extent to which these prerequisites either could exist in a theoretical spatial economy or actually exist in real metropolitan areas are both subjects of intense academic debate. (Dowding et al 1994; Donohue 1997). Much of this debate revolves around the problem of what I shall call the

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dilemma of fiscal equivalence, a term I borrow from Olson 1997.⁵ This dilemma arises from the tension between two requirements of the Tiebout hypothesis – the requirement that there must be a “large” number of local governments within a single commutershed and the requirement that each jurisdiction be sufficiently large in land area to internalize the effects of their activities. If there are too few jurisdictions, then homebuyers would have to give up their job to secure their ideal package of taxes and public services, distorting the market for private labor.⁶ Likewise, absent a large number of competing jurisdictions, those local governments with unique land might have the power to reduce inefficiently the supply of buildable land (through zoning or other regulation) in order to extract locational rents from migrants. But the supply of local governments is obviously not infinitely elastic: The supply of land being fixed, the supply of jurisdictions can be enlarged only at the cost of increasing the risk of those governments’ policies leading to external effects.⁷ The dilemma of fiscal equivalence, in short, requires a messy compromise between creating a large number of tiny jurisdictions that bargain imperfectly over the externalities that they impose on each

⁵I borrow the term from Mancur Olson 1969.

⁶The problem could arise if communities with low taxes and excellent services would attract too much labor, leaving badly governed communities with a labor shortage. (Flatters, Henderson, & Mieszkowski 1974).

⁷The problem is even more intractable if one assumes that citizen-consumers have different levels of preference for different public goods. In such a case, public goods ought to be provided by special districts with overlapping boundaries that specialize in individual goods – fire, police, education, etc. The citizen-consumers would migrate to the intersection of those districts that jointly provide their ideal mix of goods and fees. The difficulty with such a solution, however, is that the collective fees charged by all of the special districts would have to reflect not the average cost of supplying the package of goods but also the congestion costs of further migration into the land defined by the intersection. Otherwise, the geographic space defined by the intersection of district boundaries would become overcrowded. (Tolley 1974). Therefore, one would need to create a single “land-use special district” for each intersected area of special districts, replacing the fees of the special districts with a single fee for each area of intersection reflecting the marginal costs of additional migrants to that area. (Wellisch 2000 at 89-90). The number of special land-use districts necessary for a single commutershed would be mind-boggling for even a modest number of public services.

other and a small number of larger jurisdictions that are not genuinely competitive.

1. ***Mobility and “Race to the Bottom” Arguments***

How well do actual federal systems manage the dilemma of fiscal equivalence? American political rhetoric and legal scholarship traditionally have emphasized that mobility of persons and capital disables subnational governments in undesirable ways from dealing with regulatory problems. The idea that interjurisdictional mobility will force states into a “race to the bottom,” undermining regulatory standards in an undesirable way, was a standard trope of Progressive rhetoric in the late 19th and early twentieth centuries (Graebner 1977). Decisions of the United States Supreme Court have offered similar rhetoric. In *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 280 (1981), for instance, the Court stated that nationwide surface mining standards were necessary “to insure that competition in interstate commerce among sellers of coal produced in different states will not be used to undermine the ability of the several states to improve and maintain adequate standards on coal-mining operations within their borders.” Legal scholars likewise frequently invoked the idea that pressure from interstate competition for labor or capital might deter states from regulating at the ideal level. (See, e.g., Farber & Frickey 1991 at 76).

Beginning in the 1980s, however, Tiebout literature began to lead legal scholarship to question this easy assumption that mobility-based constraints on state behavior were necessarily undesirable. In one of the earliest extended uses of Tiebout’s work in legal scholarship, Robert Ellickson offered a defense of local governments’ autonomously setting voting qualifications, arguing that voters could “vote with their feet” by migrating to a local government with the voting

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system that maximized the value of real estate (Ellickson 1982).⁸ Ten years later, Richard Revesz argued that, so long as the benefits and costs of industrial relocation are wholly bestowed on local residents, the local government elected by those residents should make a correct balance of environmental quality and (say) higher wages resulting from extra capital investment (Revesz 1992). Revesz's arguments attracted vigorous critical responses (see, e.g., Engel 1997), but a consensus had emerged in the legal scholarship by the late 1990s that the general "race-to-the bottom" theory had not fared well in the exchange. (Bratton and McCahery 1997, 219 n. 74)).

Revesz did not claim that competitive jurisdictions would race to the "top." He argued only that there was no reason to believe that mobility would inevitably lead to suboptimal levels of regulation, absent such external economies. In certain policy areas, however, it is widely acknowledged that external economies are pervasive. For instance, it has been widely acknowledged that the redistribution of wealth is properly the responsibility of the national government: The mobility of indigent households insures that one jurisdiction's taxation for the relief of poverty will provide spillover benefits to other jurisdictions to the extent that indigent families settle in the more generous jurisdiction. (Paul Peterson 1995). A more controversial sort of externality can arise if a jurisdiction taxes mobile capital and myopically ignores the effects of such taxes on industry's

⁸Without invoking Tiebout, Ralph Winter had argued in 1977 that competition among states for corporate charters did not create a "race to the bottom" in corporate law, because managers would seek out the law most advantageous to shareholders. Winter's article was the first shot in what eventually became a voluminous literature on whether interstate competition improved corporate law. But this literature shed little light on the critical issues that any mobility-based theory of federalism must confront. Corporate decisions about where to incorporate are only metaphorically concerned with mobility: They are actually costless decisions to choose a particular law to govern the corporate contract. Thus, the corporate law literature never addressed the problem of imperfect interstate mobility. Moreover, the literature focused so heavily on whether managers were the shareholders' faithful agents that it said little about the problem of externalities on constituencies other than management and shareholders.

decisions to relocate to other jurisdictions. Such a tax will tend to induce businesses to leave the state, providing a windfall to other states – a “fiscal externality” that the taxing state inefficiently ignores (Gordon 1992; Wildasin 1989).

2. The need for a political economy of unitary states

The possibility of such external effects has led scholars to suggest that interjurisdictional competition might still lead to the “bottom.” (Kirsten Engel & Susan Rose-Ackerman 2001, at 136-38; Farber & Frickey 1991, at 76-77). Such claims amount to no more than the conclusion that actual locational economies do not actually mimic the results of perfectly competitive markets in private goods, because citizen-consumers are not perfectly mobile or perfectly informed. (See, e.g., Bratton & McCahery). This shortcoming of actual federal systems, however, is hardly a damning indictment of federalism, because no one expects perfection from *any* form of government. The appropriate comparison by which to evaluate federal systems is not a perfectly competitive market for private goods but, rather, a unitary state that lacks decentralized decision-making mechanisms (Hills 2006).

The difficulty with much of the exit-based literature on federalism is that it is ill-equipped to make this comparison, because it lacks a theory of unitary government’s behavior. Of course, neither California nor Mayberry perfectly internalizes the costs and benefits of government services: California is too big, and Mayberry is too small. But so what? The issue is not whether federal regimes achieve perfection but whether they outperform unitary states. Do the electoral processes of a unitary state do an equally effective job of ferreting out voters’ preferences?

Much of the fiscal federalism literature seems incapable of asking this question in a coherent

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way, because it simply assumes without any argument that centralized governments are remarkably obtuse and would adopt uniform levels of public goods across the entire nation.⁹ This is an odd assumption: there is no *a priori* reason to believe that (for instance) Congress will provide Arizona and Maine with the same level of grant for snow plows. Indeed, a benevolent and perfectly informed Congress could simply enact local option laws or create special assessment districts to insure policies that varied by region. As public choice theorists correctly observe, the literature on fiscal federalism needs some political economy to explain why and how the unitary state fails to consider the interests of the citizenry in regionally varied policies. (Brennan & Buchanan 1980, at 9.9.18; Besley & Coate 2003, at 2612; Lockwood 2006 at 38).¹⁰ In short, federalism needs a theory of unitary states as well as a theory of federalism to justify federal regimes.

B. *Mobility as a device to constrain incompetent or predatory unitary states.*

Public choice literature on fiscal federalism, accordingly, tends to focus on why the central government might fail to respond to citizens' demand for local variation in public goods. This public choice literature tends to follow a similar pattern: The authors present a model of national legislative behavior that is prone to ignore citizens' preferences and a model of subnational political behavior that is constrained by citizen mobility in ways that improves responsiveness to regional variation. One can conveniently divide these theories of national legislative behavior into (1)

⁹Wallace Oates, for instance, built the premise of the national legislature's incapacity such clumsiness into his "decentralization theorem" by defining the theorem to produce efficiency gains only when compared to a regime in which a "single, uniform level of consumption is maintained across all jurisdictions." (Oates 1972, at 54).

¹⁰Oates has implicitly acknowledged the need for some theory of political economy to explain such excessive uniformity, justifying the exogenous assumption of uniform national policies by citing "political pressures ... that limit the capacity of central governments to provide higher levels of public services in some jurisdictions than others." (Oates 1991 at 1123).

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theories that assume incompetence on the part of the central legislature driven by the individual legislators' collective action problems in forming majority coalitions and (2) theories that assume that centralized legislatures behave in a predatory manner. As I shall suggest below, both sorts of public choice literature lack a persuasive theory of subnational voice, implicitly assuming that, but not explaining why, subnational officials want to maximize the land values, revenues, or tax base of their jurisdiction.

1. *Central Legislatures' misallocation of local public goods resulting from universalistic coalitions*

Consider, first, theories of central legislatures' incompetence. The most prevalent argument that centralized legislatures cannot allocate public goods according to variations in local tastes for them relies on the idea that legislatures cannot form majority coalitions without spreading "pork barrel" spending around a large – ideally unanimous or "universal" – set of electoral districts. (Weingast 1979; Lockwood 2002). This inability follows from two plausible premises. First, public goods provided by the national legislature are funded through uniform taxes.¹¹ Therefore, each good in any electoral district will be cross-subsidized by taxpayers in other districts. Second, the legislature is not governed by any strong majority party leader or other official who could force individual members to adhere to a platform varying local public goods by regional demand through, say, local option laws, user fees, special assessment districts, or other decentralizing devices. Such a leader, enjoying a *de facto* national constituency, might internalize the benefits of a balanced

¹¹This premise is contestable because, in theory, national politicians could supply local infrastructure by authorizing special assessment districts.

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budget. Individual legislators, however, cannot “cut the ribbon” for a balanced budget or a healthy economy. They prefer, therefore, to rely on local public goods that present greater opportunities for individual credit-taking (Cain, Ferejohn, & Fiorina 1987); Weingast & Shepsle 1981).

In such an environment, strategic voters would rationally vote for representatives who aggressively seek national funding for local public goods, anticipating that, if one representative were to abstain from seeking such funding, then the savings in tax dollars would simply be redistributed among other electoral districts in the form of higher spending on local public goods, providing no benefit to the abstemious representative’s district (Lockwood 2006 at 43-44). Therefore, each voter supports spending on local public goods even when the cost in additional taxes exceeds the value of the goods to the median constituent. (Besley & Coate 2003). Moreover, the problem is not simply one of over-spending: Universalism could lead to under-spending as well, because representatives have incentives to vote for the cheapest possible projects when assembling a coalition, since their cost is spread across the entire nation. Expensive projects with high net benefits are, therefore, not funded (Lockwood 2006, at 40-41). In a universalistic legislature, the budget is, in effect, a common-pool resource that individual legislators over-exploit for lack of a dictator – say, a party boss – who could enforce a less wasteful allocation of resources (Inman & Fitts 1990).

The problem of universalistic expenditures is essentially a problem of a fiscal externality – the externality of funding projects that have disuniform geographic benefits with uniform national taxation. One could imagine various centralized solutions to the problem (Besley & Coate 2003, at 26). But federalism provides a plausible solution as well. In theory – assuming that subnational

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politicians were responsive to their constituents' preferences – the voters residing within a subnational jurisdiction would insure that projects with low net benefits would not be approved, just so long as those locally funded projects had modest spillover effects on neighboring jurisdictions. Federalism, therefore, looks like a solution to a legislative dysfunction, internalizing the externality created by uniform tax financing (Inman & Rubinfeld, 1997 at 50-53).

2. *Central Legislatures' misallocation of local public goods resulting from predatory majorities*

Unlike the problem of universalistic cross-subsidies, the problem of predatory legislatures does not involve voters' or legislators' involvement in a self-defeating collective action problem. Instead, predatory legislatures are assumed to be governed by unified majorities who exploit the politically weak. Brennan and Buchanan, for instance, offer a "Leviathan model" of government in which legislators unite around an agenda of maximizing their budget under which officials treat such public revenue as personal wealth. (Brennan & Buchanan 1980 at 9.2.36-9.2.41). Voters cannot control such tendencies because cycling of issues in any legislature with an open agenda allows legislators to enact any legislative program through canny agenda setting. (*Id.* at 9.2.21-9.2.35). But the budget-maximizing power of subnational governments is constrained by the power of taxpayers to flee Leviathan, so long as those subnational governments are governed by a hard budget constraint, meaning that the national government must be barred from financing subnational operations through intergovernmental grants (*Id.* at 9.9.36-42).

Barry Weingast offers a variant of the Leviathan model that is focused on protectionism rather than budgetary expansion. On Weingast's model, the national government is captured by

narrow coalitions of producers with an interest in suppressing market competition. Federalism preserves markets from these well-organized interests if subnational governments have exclusive authority over economic affairs, because the protectionist efforts of any local cartel will be constrained by the capacity of competitive producers to migrate outside the protectionist jurisdiction (Weingast 1995). Weingast's theory requires that the national government enforce a national open market barring any subnational effort to erect tariffs walls around itself. Like Brennan's and Buchanan's theory, Weingast's theory also requires that subnational governments must face a hard budget constraint.

3. *The need for a theory of local voice*

The model of central governments as predatory or cartelizing Leviathans has motivated several defenses of federalism and localism. Richard Epstein, for instance, defended judicial enforcement of Article I limits on the Congress' legislative powers on the ground that such limits protect citizens from redistributive national legislation (Epstein 1987). Likewise, Vicki Been has argued that local governments' capacity to extract benefits from land-use developers is constrained by their capacity to exit predatory jurisdictions (Been 1995).

The ability of citizens to flee oppressive subnational jurisdictions assumes that there will be some non-predatory jurisdiction to which they can flee. Otherwise, every migration will be from the frying pan into the fire. If one does not simply assume that local officials want to maximize real estate values as part of one's model (Epple & Zelenitz 1981), then one must offer some "demand-side" account of local officials' political motives. Somehow they have to want to take in the refugees from oppressive jurisdictions.

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It is not obvious, however, that subnational officials want to attract new migrants. The Leviathan model assumes, for instance, that subnational politicians would want to avoid policies that dissuade taxpayers and owners of capital from settling in the subnational jurisdiction. But there is a plausible model under which the desire for re-election leads subnational politicians to cultivate a loyal political machine based on ethnicity or prior political affiliation by using redistributive policies to drive away voters who oppose that machine.¹² On another model, subnational politicians are able to “disguise” redistributive spending by padding the public payroll rather than through outright confiscation of middle-class wealth (Alesina, Baqir, & Easterly 2000). Either policy might impoverish the city, but there is no reason *a priori* to believe that urban voters are sufficiently well-organized or well-informed to prevent such impoverishment. After all, national politicians have been known to take measures – creating excessive budget deficits or adopting inflationary monetary policies – that are economically short-sighted for short-term electoral reasons. Might subnational politicians be equally prone to ruining the local tax base by imposing confiscatory taxes or exactions on local capital? What precisely is the political feedback mechanism whereby city leaders are induced to care about their jurisdiction’s fiscal survival? Some attention to local voice would seem to be at least an important supplement to the dominant mobility-base theories.

II. *Voice-based justifications for federalism*

Public choice theorists tend to be mystified by claims that subnational governments are

¹²Edward Glaeser, for instance, argues that mayors might drive away members of the “English” ethnic group to maximize the power of the “Irish” ethnic group. (Glaeser & Schleifer 2005). Bryan Caplan argues that voters themselves might migrate to jurisdictions with majorities of citizens sharing their political affiliation (Caplan 2001). Alain Mingat and Pierre Salmon argue that politicians might shape their constituency by adopting “Left” or “Right” policies that will induce the disfavored constituent to emigrate and the favored constituent to immigrate to the jurisdiction (Mingat & Salmon 1982).

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“closer” or “more accountable” to their constituents than national governments, finding such claims “difficult to pin down precisely” (Lockwood 2006, at 45) or “intractabl[e]” (Breton 1986, at 186). Part of the difficulty might be public choice theory’s traditional suspicion that majorities of voters can ever effectively control elected politicians (Green & Shapiro 1992). But there is nothing mysterious about the traditional defenses of small-scale democracy, and these defenses can be re-stated in public choice terms without much difficulty. One of the oldest insights of public choice theory¹³ is that individual voters lack an instrumental reason to cast an informed ballot, because the probability of their ballot’s being decisive is minuscule and, political action being a public good, their capacity to enjoy the benefits of a desired outcome will be undiminished by their failure to vote. That citizens bother to vote at all, therefore, has been a perplexing paradox for public choice theorists, a paradox that they try to resolve by pointing to voting’s non-instrumental value – say, voters’ solidaristic or civic gratifications from casting a ballot or the sheer entertainment value derived from watching a political horse race (Aldrich 1997).

The conventional arguments in favor of subnational democracy can be re-stated in public choice terms as efforts to reduce the costs and increase the benefits of electoral activities including but not limited to voting. Consider five hoary arguments that reducing the scale of a jurisdiction makes government “more accountable” because of the (a) greater homogeneity of subnational populations, (b) lower costs of subnational electoral activities, (c) greater interest of those populations in subnational outcomes, (d) greater information available in federal regimes, and (e)

¹³The theory of voters’ rational ignorance was laid out in detail by Anthony Downs in 1957, but the essential insight dates back to Joseph Schumpeter’s dismissive evaluations of voters’ cognitive capacity. (Schumpeter 1953, at 262-63).

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greater capacity to facilitate cooperation between mutually suspicious groups with different political identities. These arguments are not necessarily consistent with each other. Each, however, fits comfortably into the public choice theory of politics, as a response to the problem of rational ignorance described by Downs.

1. Homogeneity of subnational populations' interests

It is an ancient theme of republican political writing that differences in wealth or religion lead to civil strife that ultimately subverts the republic. James Madison's *Federalist #10* could be described as turning this republican case for homogeneity on its head in arguing that smaller and more homogenous republics would tend to be dominated by "factions" – that is, groups motivated by passion or interest – that would make decisions inconsistent with justice or public interest. But both claims are consistent with the view that more stable majorities can form in smaller republics than in larger republics, because the populations of the former are more homogenous than the populations of the latter. Although Madison did not regard such stability as a cause for celebration, if one is worried that government will be dominated by a small number of producers of governmental services – contractors, bureaucrats, politicians, etc – then greater homogeneity of interests is a benefit and not a bane. Brennan and Buchanan, after all, base their assumption of Leviathan-like behavior on the theory that representatives can evade constituent control by manipulating agendas when there is no stable majority in the legislature. Representatives with more homogenous interests are less likely to be prone to cycling agendas that could be manipulated by a

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canny agenda setter (Kuga & Nagatani 1974).¹⁴ To the extent that subnational governments have more homogeneous populations than national governments, then *ceteris paribus* the likelihood of stable majorities increases. Put another way, by insuring that there is greater similarity of preferences among constituents and their representatives, subnational politics weakens the assumption of an unrestricted domain of preferences on which Arrow's Possibility Theorem depends.

No public choice theorist to my knowledge has ever attempted to measure the difference in homogeneity of preferences between states' population within the United States and the national population. Obviously, the U.S. Constitution itself excludes certain issues such as monetary policy and national defense from even the most heterogeneous subnational jurisdiction's agenda. But the demographic similarity of the population might further limit the universe of possible preferences that could win a majority vote: No one expects, for instance, that the "union shop" will be placed on the Oklahoma legislature's agenda, because pro-labor union sentiment is relatively rare among Oklahomans compared to, say, New Yorkers. But the degree to which demographic homogeneity within a state excludes certain issues from discussion will vary radically between small and large states. California and New York, for instance, would seem to be demographic microcosms of the nation, and it is a contested question whether different states' populations have radically different views on hotly contested "Culture War" issues like abortion and same-sex marriage. (Fiorina 2006) Reducing the scale of government from the federal to the state level, therefore, might not appreciably

¹⁴Gerry Mackie provides a survey of studies suggesting that preferences among voters are similar enough to exclude most cycling (Mackie 2003, at 96-99).

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increase the ideological homogeneity of the government's population: One would have to reduce the scale even further to the county or sub-county level, where populations tend to be sorted not only by race and religion but also ideology. (Bishop 2008). In its extreme form, the argument based on demographic homogeneity suggests a sort of unitary democracy rooted in social consensus that might seem chimerical in an urbanized society with a high degree of cultural and economic diversity.

There is, of course, more to democracy than avoiding instability. One might want also to insure that the population of voters conducts a meaningful debate on issues about which reasonable people can disagree, and, as Madison famously suggested, homogeneity of population reduces the chance of such a debate. Moreover, as suggested below, homogeneity of preferences might undermine subnational "voice" by reducing the salience of subnational politics. To the extent that one's goal is to insure that legislatures reflect the will of the median voter, however, reducing the scale of government is a plausible mechanism by which to secure such a goal.

2. Accessibility of politics in subnational electoral districts

The Anti-Federalist opponents of the Constitution offered a second argument in favor of small jurisdictions: By reducing the size of electoral districts, subnational governments reduced the costs of elections, allowing more obscure candidates with fewer financial resources to compete effectively. Unlike the argument from demographic homogeneity, the argument for smaller electoral districts does not rely on some sort of small-town social consensus to insure effective representation of voters. Instead, the Anti-Federalists assumed that subnational politics would be affected by the same clash of economic and social interests prevalent at the national level. For the Anti-Federalists, the difference between the levels of government was that the national level's larger electoral districts

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would tend to over-represent the interests of the “natural aristocracy” – that is, the well-educated, well-connected, and well-heeled. The intuition underlying the Anti-Federalist theory was that contacting voters in a large electoral district would cost more money, because there would be more people to contact and because informal networks available to laypersons – neighborhoods, workplace, church, etc – would be too limited to enable a candidate with poor financing to compete with a better financed candidate.

There is little doubt that the Anti-Federalists were correct to believe that size of electoral district varies directly with the size of campaign expenditures. (Hogan 2001, at 821-22; Hogan & Hamm 1998). The average member of the U.S. Representatives raised roughly \$2 million in 2005-2006. By contrast, expenditures in state elections tend to be much smaller, ranging from \$10,000 per representative in states like Idaho that have electoral districts with very small electoral districts to \$500,000 in California’s much larger state senate districts.¹⁵ The Anti-Federalist explanation for the greater cost of federal elections remains the working hypothesis of modern political scientists: A larger population increases travel costs and requires use of more expensive mass media to communicate with voters. (Gierzynski & Breaux 1996, at 350-51). Time counts for less and money counts for more in larger jurisdictions. As the Anti-Federalists observed, this varying need for money could affect the relative power of different social classes: There is evidence to suggest a relationship between inequality of voice is exacerbated when political participation depends more on contributions of money than on contributions of time. Simply put, low- and high-income

¹⁵For data on contributions in U.S. House elections, see <http://www.census.gov/compendia/statab/cats/elections.html> For data on state Senate expenditures and contributions in California, see <http://cal-access.sos.ca.gov/Campaign/Candidates/#senate>

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individuals have radically unequal amounts of money to spend on elections but much more equal amounts of time. As expenditures of time become less effective and mass media becomes more effective, then one would expect electoral results to be more skewed to favor the well-off. (Verba, Schlozman, & Brady 1994, at 288-303).

What relationship does this traditional argument in favor of smaller electoral districts have to public choice theory? Public choice theory hypothesizes that political participation ought to increase as the costs of such participation decline and the instrumental and non-instrumental benefits of participation increase. Given that both the costs of voting and the probability of casting the decisive vote in even a small subnational jurisdiction are vanishingly small, one might expect that changes in the scale of the jurisdiction would not have significant effects on the instrumental incentives to vote. Indeed, the evidence suggests that voting rates do not increase as size of jurisdiction decreases. However, one might expect that thicker forms of participation such as contacting officials or showing up at hearings would increase as the size of a jurisdiction is reduced, because reducing the size of constituencies and increasing the number of officials greatly reduces the costs of such activity. (Dahl & Tufte 1973)¹⁶ Eric Oliver has provided evidence confirming these intuitions: Thicker forms of participation—contacting elected officials, showing up at hearings, running or holding office—seem to increase as the size of a local governments' population decreases (Oliver 2001, at 42-52). This finding confirms the much more limited finding of Dahl and Tufte that residents in Swedish communes with no more than 8,000 people have higher rates of political knowledge about, and contact with, local officials than residents of larger Swedish communes (Dahl

¹⁶Daniel Elazar makes a similar point when referring to the problem of “political bigness.” (Elazar 1973)

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& Tufte at 62-65). Eric Oliver finds that the effect of jurisdictions' size on rate of participation increases even in much larger communities containing 250,000 to a million residents. These findings reenforce earlier findings that citizens are more likely to contact their elected state or local representative than their federal representative (Verba, Schlozman & Brady 1994) . Oliver's evidence also suggests a causal theory: Residents of smaller jurisdictions feel more efficacious and knowledgeable when engaging in thick participation in smaller jurisdictions (Oliver 2001, at 63-65), and they are more likely to be recruited by neighbors and generally participate in mobilizing networks in smaller jurisdictions (*Id.* at 61-62). Again, these findings confirm the earlier findings of Dahl and Tufte concerning relative sense of efficacy in national versus local government (Dahl & Tufte 1973, at 56-63) as well as findings by Elinor Ostrom and Gordon Whittaker that residents' perception of police are more favorable in smaller jurisdictions (Ostrom & Whittaker 1999, at 192-93).

The claim that subnational governments are more accessible than national government for citizen participation assumes that groups relying on mass participation enjoy few economies of scale in organizing lobbying efforts nationally rather than subnationally. Examining only environmental groups, Richard Revesz concluded that there does not appear to be much evidence for such returns to scale. (Revesz 2001, at 561-71). More generally, citizen groups – that is, groups with large numbers of members who share diffuse ideological interests – tend to rely more on an “outside strategy” of mobilizing citizens through meetings of local chapters, letter-writing campaigns, writing of op-eds, etc. Industry groups, by contrast, tend to rely on an “inside strategy” of button-holing legislators, showing up at agency hearings, or making campaign contributions. (Berry 1999 at 379-

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85; Kollman 1998, at 34-49; Goldstein 1999, at 22-28). It seems intuitively implausible to believe that groups relying on an outside strategy would compete more effectively through centralization of policy-making: If one's comparative advantage is mobilizing large numbers of people through personal contacts, then it is difficult to understand why one would choose to compete in a congressional committee mark-up session or agency. Whatever returns to scale that they would enjoy would seem to be dwarfed by the greater scale returns of their opponents. Revesz's description of environmental groups' activities and organization lends support to this skepticism about returns to scale in lobbying: Environmental groups tend to have federated structures with numerous subnational chapters and intense state and local activism (Revesz 2001, at 583-614).

Shrinking the size of electoral districts is not costless. To the extent, for instance, that one can shrink district size only by multiplying the number of districts, one might increase the costs of universalistic spending described above: More members of city council means more officials who must be bought off with their share of pork to create a working majority (Baqir 2002). The advantage of subnational government is simply that one can reduce the size of electoral districts without excessively multiplying the number of legislators in a single legislature: Even the largest city council is likely smaller, and therefore less "porky," than the Congress.

The evidence described above that scale affects democratic accessibility is sketchy and inconclusive at best. Robert Inman, for instance, has produced evidence suggesting democratic participation, the likelihood of an orderly transition between governments, and political and civil rights are higher in decentralized than unitary democracies, where the degree of decentralization is defined by subnational governments' share of national revenues . (Inman 2008, at 15). But this

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measure of decentralization, like every other, is controversial (Sharma 2006). Other scholars using different measures of decentralization find that federal regimes are more corrupt than unitary states. (Treisman 2002).

One might concede that reducing the scale of government increases a sense of civic efficacy and, hence, frequency of political participation without also conceding that reducing the scale of government is desirable. After all, there is no *a priori* reason to believe that more participation leads to more efficient production of public goods. If increased participation has no effect on public outputs, then perhaps it would be better if people just stayed home and watched their favorite soap opera or sports team. To the extent, however, that reduction in the scale of government reduces the costs of political participation, then such reductions can broaden the range of interests capable of monitoring governmental decisions and thereby reduce the possibility of producer cartels' dominating subnational decision-making. Moreover, the public choice theorist cannot ignore the value of participation as itself a "consumption good," an output of government, because it is precisely this value that is supposed by public choice theorists to explain the otherwise irrational prevalence of political participation (Aldrich 1997). If one regards civic trust in government as *ceteris paribus* a local public good, then reduction in the scale of government more efficiently produces this participatory good even if the record of subnational governments is no better than the national government in producing outputs other than participation itself.

3. Salience of politics in subnational government

Reducing the costs of political participation, however, does not result in better representation of residents unless residents are motivated to participate. It is, therefore, useful to distinguish

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between the costs of political participation for the already mobilized resident and the costs of mobilizing the otherwise apathetic resident. As a convenient shorthand, I call the capacity of an already-mobilized citizen to affect political outcomes, “access,” while I call the capacity of a political system to mobilize an otherwise apathetic citizen, “salience.” It is a familiar point that people are mobilized by rival parties or interests seeking their support. (Rosenstone & Hansen 1993, at 74-76, 134-36).. There is a longstanding view of political scientists that subnational politics lack a sufficiently diverse array of interest groups, political parties, or attentive media to allow for much mobilization through this political competition. (McConnell 1967). The result is that subnational politics are said to be “accessible” in my sense of the term but also non-“salient” to all except those with a large material interest in the outcome – for instance, government contractors, public employees, local business elites, real estate developers seeking developing rights, or other elites with concentrated interests in the provision of governmental services. The school of so-called “regime theory” in urban politics can be viewed as a species of the view that subnational politics are non-salient: According to regime theorists, city politics are dominated by coalitions (or “regimes”) of business elites and politicians who mute mass movements and popular demands by defining local political agendas in terms of local business elites’ interests. (Stone 1988). There is also an economic model presented by Bardhan and Mookherjee that implicitly relies on the non-salience of local politics under which capture of local government by economic elites is more likely where one political party dominates at the local level. (Bardhan & Mookherjee 2000, at 137-38). The essential assumption of Bardhan and Mookherjee is that political knowledge is a function of wealth and campaign contributions by the wealthy – assumptions that are akin to the claims of regime theory

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and traditional political science that subnational politics are non-salient.

It is surely correct that the democratic accountability of subnational government is a function of both access and salience. One cannot assume that subnational governments are “closer to the people” merely because an individual can get easy access to subnational officials and their constituents. One must also show that subnational politics hold sufficient interest that the individual will bother making the effort.

Unfortunately, there is very little evidence about the relative salience of national and subnational politics. The classic literature from the 1960s simply declared that subnational politics involved suppression of conflict over big issues without offering much in the way of evidence to support the claim. Grant McConnell, for instance, asserted that “[m]aterial values are much more characteristic of narrow than of broad constituencies,” (McConnell 1967, at 117), but he did not offer any evidence to support this assertion. E.E. Schattschneider offered a similar assertion based on his theory that under-represented groups are best mobilized by conflict: In homogeneous jurisdictions where such conflict is less likely, it logically followed that mobilization is also less likely (Schattschneider 1960 at 1-19). V.O. Key’s analysis was driven by his view that the Democratic Party of the Solid South suppressed conflict to the detriment of the disadvantaged (Key 1950). None of these claims about mobilization go much beyond the analytically true claim that greater homogeneity of interest implies lower levels of conflict and, therefore, conflict-based mobilization.

There is, indeed, powerful evidence that broadening the scale and scope of social conflict mobilizes a broader range of people to participate in politics, insuring more socio-economic equality

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in participation rates. (Rosenstone & Hansen 1993, at 238-45). The relationship between diversity and participation has been specifically confirmed in local politics with J. Eric Oliver's finding that greater racial or economic diversity within a local jurisdiction will lead to higher levels of "thick" political activity such as lobbying an official, showing up at a rally, or running for office (Oliver 2001 at 82-93). But it is not *a priori* true that subnational constituencies lack the social diversity necessary to fuel mobilizing conflict: States can be populous and demographically diverse jurisdictions. At most, one can plausibly hypothesize an inverse relationship between access and salience: As a jurisdiction's population gets smaller, the costs of mobilizing the apathetic citizen will increase (*i.e.*, salience will decline), but the costs of participation for the already-mobilized citizen will decrease (*i.e.*, access will increase). From the point of view of maximizing political participation, the jurisdiction would reach its ideal size when gains from increasing the salience of the issues addressed by the jurisdiction are offset by the losses of making in-person political participation more costly.

Both salience and access can be affected by technology and institutional choices. Telephone banks, C-Span, larger congressional staff, and the internet can reduce the costs of participating in national affairs. Likewise, one can design subnational institutions to be more or less salient. Grant McConnell, for instance, attributed the capture of California's politics to the prevalence of specialized boards, commissions, and executive officials under the California Constitution (McConnell at 182-90). David Schleicher offers another model in which local political competition is suppressed because candidates run under national party labels even when national parties' platforms have nothing much to do with locally important issues. The result is that party labels

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convey no politically relevant information to voters, reducing the salience of elections and contributing to one-party dominance of cities in which voters overwhelmingly adhere to a single national political party even when they are divided on local issues. (Schleicher 2007). Schleicher makes several recommendations for reforming election law to encourage the creation of purely local political parties that would reduce the problem of voter ignorance.

To the extent that low salience is the result of contingent legal arrangements, then the case for nationalizing issues to increase mobilization weakens considerably: One might simply reform the subnational institutional arrangements. In particular, the salience of subnational politics can be affected by the legal definition of subnational jurisdiction's legal powers. National issues are simply more interesting than subnational matters: War and peace, income redistribution, stabilization of the economy against recessions, and monetary policy are simply more gripping than the policy menu before state and local legislatures. But that policy menu is not a fact exogenous to constitutional decisions: To the extent that the stakes of subnational politics increase because subnational governments are given more to do, one would expect that the quality and quantity of mobilization for subnational politics would also increase.

William Fischel has set forth a model for how the high stakes of local decisions can improve the quality of residents' monitoring of local politicians. According to Fischel's "Homevoter Hypothesis," homeowners and other owners of undiversified interests in local real estate are motivated to monitor local land-use decisions, because such monitoring is the only way that they can protect an otherwise difficult-to-insure asset from regulatory changes that could reduce the value of their investment. (Fischel 2001) Critical to Fischel's theory of resident mobilization is that local

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governments' regulatory decisions are capitalized into the value of immobile assets, because potential homebuyers are well-informed about the ways in which local governments' policies affect real estate in the jurisdiction (*Id.* at 39-71). To avoid driving away potential buyers from the local market, local "homevoters" carefully monitor local governments' decisions even when they do not directly consume the services produced by local governments. (*Id.* at 72-97). Thus, childless couples may nevertheless care about the quality of local public schools simply because they want to maximize the value of their home. Under Fischel's model, in other words, citizen mobility enhances immobile citizens' voice – a conclusion contrary to Hirschman's familiar contrast between "voice" and "exit."

Fischel's hypothesis rests on both a particular allocation of powers to local governments and a particular sociological profile of local residents. If those residents do not own undiversified shares in local real estate – a down payment or other equity in their home, for instance – then they will lack the incentive to monitor local politics. Cities inhabited by renters on short-term leases would not enjoy the benefits of resident monitoring hypothesized by Fischel. Likewise, cities that lack control over decisions affecting the value of the immobile asset that motivated local participation would not inspire citizen participation with their policies. The theory applies most powerfully, therefore, to zoning and property taxation decisions in jurisdictions dominated by homevoters. In such jurisdictions, Fischel rejects the idea pressed by "regime theorists" that land-use decisions are driven by a "growth machine" of developers and downtown business owners (Molotch 1976). Instead, local governments with a majority of resident homeowners will reflect the will of the median (home)voter and stop growth whenever the costs of growth to homevoters exceed growth benefits.

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The decisions of state governments are unlikely to be capitalized into the value of land simply because homebuyers cannot generally choose between living in competing states. Therefore, Fischel's theory does not explain how residents are mobilized to participate in state politics. However, it is possible that the sheer existence of elected officials constitutes a further source of subnational mobilization.¹⁷ If so, then subnational governments may have "voice" advantages over the national government, because the ratio of elected officials to appointed policy specialists is greater at the subnational level. The empirical literature seems to confirm the intuition that elected and appointed officials behave differently from each other, with the former more attuned to the wishes of majorities. Studies of insurance and utility commissions both suggest that elected officials are more likely to make pro-consumer decisions than appointed commissions, even controlling for state fixed effects (Besley & Coate 2000; Formby, Mishra, & Thistle 1995 (utility commissioners); Fields, Klein, & Sfiridis 1997 (insurance commissioners)). These specific studies seem to replicate older and more general empirical evidence that elected officials systematically differ in their willingness to press broad claims of justice and organize unorganized political constituencies than appointed policy experts. (Aberbach, Putnam & Rockman 1981, at 106-114).

The idea that elected policymakers will mobilize their constituents to participate in politics is not necessarily comforting to public choice theorists who tend to regard political activity as merely instrumentally valuable. Mobilizing majorities to take exploitative or inefficient actions is hardly

¹⁷Rosenstone and Hansen observe that "[p]eople are more likely to be mobilized to participate in politics when issues come before legislatures than when they come before bureaucracies and judges" and that "local governments are undoubtedly more responsive to arguments made by the many than those made by the few. Consequently, even in local politics, political leaders have incentives to mobilize other citizens to induce them to participate." (Rosenstone & Hansen 1993, at 36, 106).

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the sole benchmark of successful politics. Public choice theory, however, relies heavily on the notion of minoritarian tyranny – the idea that predatory elected officials or producer cartels dominate government in the name of the people, treating public revenue as personal wealth. If reducing the scale of democracy can improve access without reducing the political salience necessary for mobilization, then subnational government is more likely to resist these minoritarian pressures than national government. Although empirical confirmation of the majoritarian benefits of subnational government for “voice”-based accountability are sketchy, they are an important part of the public choice case for federalism.

4. Costs of acquiring information about policy outcomes in federal regimes

Since Brandeis’ famous phrase in *New State Ice v. Liebmann*, 285 U.S. 262, 310 (1932), subnational governments in federal regimes are said to be “laboratories of democracy” in which each jurisdiction can learn from the successes and failures of neighboring jurisdictions. The “laboratories” metaphor implies that information rather than people or capital moves freely across subnational borders: The advantage of federal regimes is, therefore, that they produce more information than unitary states.

A unitary state could theoretically launch pilot programs in subparts of the nation to obtain information available in federal regimes. Therefore, one would need some account for why politicians in a unitary state would neglect such experiments absent some entrenching of federal principles even when those experiments could yield useful information. One such account might rest on the asymmetry of information between elected officials and constituents: If incumbents know more about the actual costs of governmental programs than their constituents, then the former might

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want to suppress information that would deprive them of their informational advantage. Entrenching federal divisions of power might prevent the loss of information supplied by neighboring jurisdictions' performance. (Salmon 2006 at 73-77). Besley and Case test such a model of "yardstick competition" by comparing governors' reelection chances when their states' taxation decisions run counter to the decisions of neighboring states. They find some evidence that voters vote against incumbents who increases tax burdens relative to the tax burdens imposed by their neighbors. (Besley & Case 1995).

Yardstick competition is more a method by which voters control costs of existing governmental programs than promote novel experiments with new programs. In this sense, yardstick competition is only remotely analogous to Brandeis' laboratories of democracy. Economists have been more skeptical about whether federal regimes induce subnational governments to experiment with new policies. The objection to such a "laboratories" theory, first formally modeled by Susan Rose-Ackerman, is that information about new policies in one jurisdiction is a public good that generates spillover benefits for neighboring jurisdictions. Prudent politicians, therefore, have an incentive to wait until neighboring jurisdictions attempt an experiment and see how that experiment fares in practice before they undertake the political risks of trying something new that might fail (Rose-Ackerman 1980, at 604-05).

Rose-Ackerman's proof rests on the assumption that subnational politicians have weak incentives to seek higher office and, therefore, will not be motivated by the "first mover" advantage of making an issue their trademark area of expertise (*Id.* at 615). This assumption that politicians ambitious for higher office do not take risks in order to stand out from their competitors seems

contrary to substantial empirical evidence. (Schlesinger 1966 at 10).¹⁸ There remains, however, an open question as to whether launching policy innovations from a subnational jurisdiction confers any “first mover” advantage to an ambitious politician seeking higher office. It might be that being an imitator after an experiment has already been test-driven in a neighboring state is a better strategy for winning name-recognition than being a pioneer. The answer to this question rests on a difficult and unresolved empirical issue of voter behavior – whether voters have the capacity and interest in distinguishing political entrepreneurs from copycats, rewarding the former over the latter in their quest for higher office (Galle & Leahy forthcoming 2009).

5. **Cooperation among national subgroups with distinct political identities**

Since John C. Calhoun published his theory of concurrent majorities in his *Disquisition on Government*, political theorists have explained federal regimes as a means for facilitating cooperation among subgroups with distinct political identities that inhabit a single state. Following Feeley and Rubin, I define “political identity” to refer to those aspects of an individual’s culture, interests, and beliefs that form the basis for his or her allegiance to a political community (Feeley & Rubin 2008 at 7). While political identity might be based on shared language, religion, or ethnicity, it could also be based on some shared economic interest or mode of life: Calhoun, for instance, regarded slave-holding as a basis for group cohesiveness that seems akin to Feeley’s and Rubin’s concept of “political identity.” The critical point about political identity is that it creates

¹⁸Abramson, Aldrich, and Rohde provide evidence that many incumbent politicians are “progressively ambitious” for higher office, are prepared to take political risks to win such office, and change their voting behavior in preparation for elections to higher office. (Abramson, John H. Aldrich, & Rohde 1987, at 11-14). David Rohde provides evidence that being a “risk takers” in House of Representatives has relationship with seeking senatorial office (Rohde 1979).

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loyalties sufficient to hold together a political alliance against the usual pressures of self-interested defection. Subgroups united by a common political identity, therefore, can form a stable winning coalition if they capture control of the government. Other subgroups, fearing exploitation at the hands of a this coalition, may refuse to form a single state with the dominant subgroup, either by seceding from an existing state or refusing to form a new state, out of fear that they will otherwise forever be excluded from political power. But both secession or political independence will be a self-defeating strategy for all subgroups insufficiently numerous to sustain a state capable of withstanding external military threats. Therefore, subgroups confronting military conquest have incentives to cooperate with each other by forming a federal alliance just so long as they can each avoid being dominated by each other within that alliance. William Riker, indeed, argued that, as a positive historical matter, federal regimes are formed exclusively as a result of these incentives for constrained cooperation between mutually suspicious groups as an effort simultaneously to resist external military threats while avoiding internal political domination (Riker 1964 at 11-16).

Whether such regimes are sustainable depends on whether they succeed in overcoming the centripetal and centrifugal forces that lead either to the domination of a single dominant subgroup or the secession of subgroups that fear such domination. The next section of the paper addresses the literature various mechanisms – mutual vetoes by subgroups, judicial review, political parties that keep divisive issues off the agenda, etc – that might make a federal regime sustainable. The question presented by this section is the distinct question of whether facilitating cooperation among subgroups is normatively desirable in terms familiar to public choice theorists. (Riker never addressed this normative question, as he purported to offer a purely positive theory of federal

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cooperation).

One might re-phrase Riker's positive argument in economic terms acceptable to a public choice theorist by arguing that it is beneficial to facilitate cooperation among otherwise mutually suspicious subgroups whenever the costs of either internal exploitation (through political domination by a subgroup) or external exploitation (through military conquest) exceed the costs of maintaining the federal regime. Federalism, in this sense, is an antidote to a problem that is exactly the opposite of universalism. In universalistic regimes, the governing coalition is so unstable that it can govern only through inefficient cross-subsidies to every region of the nation. In regimes dominated by a single subgroup, the governing coalition is so stable that it can exploit all non-members with impunity, extracting wealth from them to such an extent that they are provoked into attempts at secession and civil war. To appeal to the economic mindset of public choice theorists, one can sidestep the usual distributive misgivings about such exploitation, which are, after all, highly contingent on the specifics of who is exploiting whom. (Northerners' exploiting Southern slave owners in post-Civil War United States by confiscating their slaves is not obviously a distributive injustice, while Turks' exploiting Kurds in Turkey by banning the use of Kurdish might seem intuitively unjust). Putting these considerations of political justice to one side, even a public choice theorist or economist can appreciate that civil war might be more costly than credible commitments to maintain mutually acceptable boundaries on each group's power. In this sense, public choice theory can accept the idea that federal regimes could be normatively desirable as a means by which to avert costly civil strife between subgroups with weak allegiances to the larger nation. Such a defense of federalism is akin to Arend Lijphart's defense of "consociation" in societies riven by

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strong ethno-cultural or religious divisions, in which cooperation is protected by institutional rules that give each group some veto over collective decisions. Where civil war or military invasion are the only alternatives to consociational arrangements, then there is an intuitive sense that they make normative sense. (Lijphart 1968)

As Feeley and Rubin note, this justification for federalism would seem to have little application to advanced industrial democracies like the United States in which the citizens feel a strong sense of loyalty to the nation rather than any regional subgroup. In the 21st century, there is little danger of any civil war between, say, Hessians and New Yorkers: Ties to regional cultures simply are not very powerful compared to Americans' shared sense of national citizenship. For Feeley and Rubin, therefore, federalism is just a temporary halfway house between a true nation-state with a full-blown concept of national political identity and a federation of polities that can cooperate only in consociational terms because they lack such powerful national loyalties.

Feeley and Rubin, however, may overlook the ways in which federalism can relieve national politicians of the need to engage in fruitless and divisive debates over hotly contested cultural issues. One can concede that Americans feel a primary sense of emotional loyalty to the nation rather than to any region within the United States. But it hardly follows that there are not many issues about which Americans are more deeply divided at the national than at the subnational level. Reserving such issues for subnational decision is an obvious way to avoid divisive, protracted, and perhaps unresolvable conflict in the national legislature.

The national legislature might, of course, have sufficient political incentives to delegate such issues downwards to subnational jurisdictions without any constitutional prompting. But interest

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groups seeking the exclusion of an issue from the national agenda face a commitment problem: While it might be in the long-term interests of all interest groups to avoid addressing a divisive issue, no interest group enjoying a legislative majority would forego the opportunity to pass such a law absent a credible commitment from rival interests that those rivals will also forego such policy-making when they enjoy a legislative majority. Constitutionalizing a doctrine of enumerated powers is one method for making such a credible commitment: By excluding certain divisive issues from the national agenda altogether, such a doctrine frees each side of the disagreement from the temptation to address the issue when they gain a temporary legislative majority.

III. How is Federalism Preserved? “Political Process” Theories of Federalism and the Challenge of Public Choice Theory

Assume that one accepts the arguments offered above that federal regimes provide a solution to problems of public choice plaguing unitary states. The question then arises of how one sustains the federal regime. The obvious answer is that some appropriate rule could be enacted as part of a constitution. But the obvious answer has an equally obvious rejoinder: How can one be assured that the terms of the federal arrangement will be enforced? One cannot assume that the national judiciary will enforce the constitution, because the process by which judges are appointed might be afflicted by the same centripetal or centrifugal tendencies that made the federal constitution necessary in the first place.

The conundrum of preserving federal regimes through judicial review has led legal scholars and political scientists to seek some political mechanism for making federalism self-sustaining through the national political process. In what follows, I will outline this scholarship on “political

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process” theories of federalism. In doing so, I will suggest that “political process” theories must meet a daunting challenge posed by normative justifications for federalism outlined in Parts I and II of this chapter. Merely protecting the power of state officials does not protect federalism unless one can show that the particular sort of power being protected does something to alleviate the dysfunctions of unitary states that federal regimes are hypothesized to cure. A pervasive problem with the scholarship defending “political process” theories of federalism is that they do not make this link between their positive theory of national politics and some normatively attractive theory of federalism.

To understand the challenge posed for “political process” theories of federalism, it is helpful to rehearse why the various theories of federalism outlined in Parts I and II cannot be vindicated by ordinary electoral politics. On one simple model, national politicians assign powers to that level of government that maximizes their political support, and voters vote for those politicians who choose policies that maximize the voters’ welfare. (Macey 1990). Driven by fear of voters’ displeasure, national politicians delegate duties to national agencies only when these agencies will likely outperform subnational agencies. The result is ideally decentralized policy-making.

Public choice theory, however, is committed to rejecting this simple model. The premise of all of the normative justifications for federalism offered in Parts I and II is that electoral processes only imperfectly translate voters’ interests into legislative outcomes. The costs of political participation in large electoral districts, the costs of monitoring the budget effects of national spending on local infrastructure, the power of producer cartels, all preclude voters from enforcing norms of federalism at the ballot booth. Voters’ imperfect information about the costs of different

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assignments of responsibilities in a federal system means that national politicians do not fully internalize the costs of their assignment decisions (Gillette 2000, at 1382-84): They may assign politically risky functions to subnational officials even though those functions are properly national (Macey 1990), or they may meddle in subnational infrastructure even though such spending wastes the national budget. If federalism is the answer to problems of political economy, in short, then protecting federalism through mere elections puts the electoral cart before the institutional horse.

“Political process” theories, therefore, must provide some mechanism in addition to elections to safeguard federalism. Since Herbert Wechsler published *The Political Safeguards of Federalism* in 1954, both legal scholars and political scientists have proposed some mix of formal constitutional institutions (for instance, bicameralism, equal representation of states in the U.S. Senate, etc.) and informal political norms (for instance, decentralized or multi-sectional political parties, numerous subnational elections, etc.) as limits on the national legislature’s power over state governments. Wechsler, for instance, emphasized that the Congress was likely to be responsive to the interests of state officials, because the U.S. Constitution’s formal rules gives state officials or state constituencies an important role in selecting the membership of the Congress. Larry Kramer has emphasized that the organization of American political parties creates political alliances between federal and non-federal politicians (Kramer 2000). Bradford Clark has argued that the structure of the national law-making process under Article I insures that Congress cannot easily preempt areas of state legislative responsibility (Clark 2001). In light of these political protections for federal regimes, Jesse Choper has argued that principles of federalism ought generally to be deemed to be non-justiciable by federal courts. (Choper 1980).

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Less concerned with the democratic illegitimacy of judicial review, political scientists have offered a mix of formal constitutional institutions, informal political norms, and judicial enforcement as devices by which federal regimes can be sustained. (Phillipov, Ordeshook, & Shvetsova 2003; Bednar, Eskridge, & Ferejohn 2001). For instance, Phillipov, Ordeshook, and Shvetsova argue that American federalism has been sustained by a combination of the weak set of constitutional powers enjoyed by Presidents, the numerous elections provided by traditions of state and local government, and the decentralized and multi-sectional nature of American political parties, which require Presidents to forge consensus from a wide array of subnational stakeholders in order to make national policy. (Phillipov *et al.* 2003, at 229-41). Bednar, Eskridge, and Ferejohn suggest that judicial review can be added to the mix if the courts are sufficiently insulated from national legislative power: They note that the Judicial Committee of the British Privy Council successfully protected provincial powers from the Canadian Federation for eighty years, enforcing the limits on Federation power contained in Article 91 of the British North America Act until 1949, when Parliament transferred the judicial function from the British imperial body to the Canadian Supreme Court. Because the judicial committee stood completely outside of the power of the Canadian legislature, it could enforce federal rules more vigorously than a conventional national court. But they, too, rely heavily on informal political organization to sustain political decentralization in nations lacking the anomaly of an extra-national court: the powers of Justices of the Peace in the United Kingdom, for instance, lasted only so long as Parliament was dominated by non-programmatic political parties. (Bednar *et al.* 2001, 243-46).

Whatever the mix of formal and informal institutions, however, there is a difficulty with all

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such political methods for sustaining federal regimes. These theories show only that political processes can indiscriminately preserve subnational officials' power, but preserving subnational power is not a sufficient condition for normatively desirable federalism. Federalism is a set of normative theories concerned with ameliorating unitary democracy's failure to translate individual interests into political outcomes. Indiscriminately promoting non-federal officials' power does not advance these normative theories. Indeed, promoting state officials' power could actually exacerbate the failures of unitary democracy that federal regimes are supposed to solve.

For instance, if the point of federalism is to match tax burdens with expenditures and thereby achieve fiscal equivalence, then Congress' predilection for bestowing federal grant revenue on state and local officials undermines does not promote federalism but undermine it: By breaking the link between taxes and benefits, mere decentralization of expenditures through grants invites the sort of over-use of public revenues that federalism was supposed to constrain. (Rodden at 697). Likewise, if the point of federal regimes is to broaden political access by shrinking the size of electoral districts and multiplying the number of elected officials, then fostering alliances between federal and state bureaucrats undermines federalism rather than promotes it, because such alliances might insulate non-federal agency specialists from the oversight of non-federal elected officials.¹⁹ Inducing gridlock at the national level does not preserve federalism in any meaningful sense unless the national legislature responds to the legislative "vetogates" by enacting only or primarily those programs that serve purposes that subnational jurisdictions are unsuited to pursue. This is not, however, how gridlock necessarily operates: As Paul Peterson has argued, however, the national

¹⁹Roderick M. Hills, *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 *Stan. L. Rev.* 1225, 1255 (2001).

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legislature may limit its power by devolving politically controversial poverty programs to the states while retaining control over the more politically rewarding grants for local infrastructure. (Paul Peterson 1995).

The futility of preserving federalism simply by protecting subnational power is well-illustrated by what Fritz Scharpf calls “the joint decision-trap” in German federalism. Because the Länder’s chief executives maintained a veto over most domestic policy-making through their representation in the Bundesrat, the political party that controlled a majority of the Länder could frustrate the policies of the governing majority in the Bundstag whenever the two houses were held by different parties. The Länder’s veto certainly protected their political position in the federation – but it also prevented most substantial policy reforms and forced the majority government to purchase consent with exorbitant side payments to recalcitrant regions to equalize every Land’s fiscal capacity (Scharpf 1988). The result is that individual Land are prevented from reaping many of the fiscal benefits of their individual policy initiatives – exactly the opposite of what at least some normative theories of federalism require (Larson 1999). William Eskridge suggests that the “veto gates” within the United States Congress can have an analogous effect on policy-making: By giving different regions or factions a veto over policy, these “veto gates” force Congress to bundle together several different policies into a single bill in order to facilitate majority log rolls, creating more national legislation that is unrelated to the functional capacities of different levels of government. (Eskridge 2008 at 1452).

In short, the point of federalism is not simply to insure that state officials have a lot of power but rather to insure that they have the right sort of power. As Daryl Levinson notes, “political

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process” theorists have understood federalism principles as an effort to constrain the national government’s allegedly insatiable appetite for power (Levinson 2005 at 938-44). But Levinson astutely notes that this factual premise is as erroneous as the normative aspiration: There is no reason *a priori* to believe that the national government is inveterately avaricious for power as opposed to simply lazy, and there is no reason to doubt that federalism as a normative theory can be destroyed just as easily by federal under-regulation as by over-regulation.

Despite Weingast’s argument to the contrary, however, it is difficult to argue that such a system of vetoes could sustain the more subtle versions of exit-based federalism necessary for market preservation or control of producer cartels. As Rose-Ackerman and Rodden observe, Weingast’s theory of market preservation assumes that some national actor will act vigorously to suppress protectionist legislation by subnational jurisdictions, and it is difficult to imagine that a national government mired in gridlock could perform this function. (Rose-Ackerman & Rodden 1997).²⁰

This is not to say that a purely veto-based “political process” theory could not sustain any normative theories of federalism whatsoever. For instance, if the goal of federal regimes were simply to insure that one of two factions with rival political identities did not capture the national government and thereby dominate the other faction, then a system of what Calhoun called ‘concurrent vetoes’ might do the trick in sustaining the federal alliance. Weingast makes a strong

²⁰In some models, national courts perform this function of policing local protectionism (see, e.g., Eskridge & Ferejohn 1995). It is difficult to believe, however, that this important function could be turned over to the national judiciary without national legislative oversight: During the late 19th century, for instance, the clumsiness of the national courts in enforcing dormant commerce clause restrictions against states’ anti-liquor laws inspired a popular backlash that eventually resulted in wholesale nationalization of Prohibition (Hamm 1995, at 56-91).

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case that the “balance rule” in the U.S. Senate (under which the Southern slave-owning states maintained sufficient seats to block legislation proposed by northern states) served this function until 1850 (Weingast 1995). Likewise, if the only goal of the federal regime were to preserve the existence of subnational governments as significant centers of policy-making, then “political process” theories based on gridlock might be sufficient. Such a theory of federalism would be unlikely to constrain universalistic legislation or protectionist state laws: Indeed, regional vetoes might promote such inefficiencies and “joint decision traps.” However, by preserving the power of state elected officials, such a version of federalism serves the goal of enhancing political access. The “political process” theories of self-sustaining federalism defended by public choice theorists, in short, imply a focus on voice- rather than exit-based federalism.

IV. Conclusion

Public choice theory has come a long way since William Riker dismissed federalism as little more than a device to protect American racism. (Riker 1964, at 155). But it needs to come farther. The theory and evidence for why scale is relevant to exit-based accountability is well-developed in the public choice literature, perhaps because the analogy between competitive firms and subnational governments “selling” locational rights seems so intuitively plausible and seems to avoid the need for collective expression of values and preferences. But the exit-based account of subnational government must be supplemented by some theory of subnational voice. Important work remains to be done in exploring whether and to what extent scale affects democratic accountability. The burden of this chapter is that this work fits neatly into the public choice tradition.

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