
NOTES

DEFENDING FEDERALISM: REALIZING PUBLIUS'S VISION

*It is impossible for any man of candor to reflect on this circumstance without partaking of the astonishment. It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution.*¹

I. INTRODUCTION

In the *Federalist Papers*, Publius² defends a Constitution focused on creating power — power the national government lacked during the period of the Articles of Confederation, the lack of which had brought the country to “almost the last stage of national humiliation,” where there was “scarcely anything that [could] wound the pride or degrade the character of an independent nation which [the country did] not experience.”³ But while creating power was essential, the Founders understood that power always brings tyranny in its wake.⁴ They were thus committed to the endeavor of creating a government that was capable of governing both the country and itself.⁵ To this end, they created a system flush with “auxiliary precautions” against tyrannical usurpations.⁶

¹ THE FEDERALIST NO. 37, at 198–99 (James Madison) (Clinton Rossiter ed., 1999). In other words, figuring out how to make the United States work was no easy task. This Note discusses one hurdle that had to be overcome: preserving a meaningful role for the independent and autonomous states.

² “Publius” is the collective pseudonym used by Alexander Hamilton, John Jay, and James Madison.

³ THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 1, at 74.

⁴ Two prominent commentators on the Supreme Court’s recent federalism jurisprudence have defined tyranny as “the unjustified responsiveness of governmental policies, or actions, or decisions, to particular groups or persons.” Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 80. This Note uses the term in a similar fashion except that it focuses on the fact that the particular groups or persons to whom the national government may be unjustifiably responding may be the citizens or officials of states intent on enacting policies other states (or their citizens) find oppressive.

⁵ As Publius put it, the task was to “first enable the government to control the governed; and in the next place oblige it to control itself.” THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 290.

⁶ *Id.* (“A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”); THE FEDERALIST NO. 63 (probably James Madison), *supra* note 1, at 353 (defending the Senate and noting that, notwithstanding his arguments about the benefits of an extended republic in guarding against tyranny in *The Federalist No. 51*, “this advantage ought not to be considered as superseding the use of auxiliary precautions”).

Federalism is one such precaution. In contrast to the Senate,⁷ and despite some nationalist sentiment at the time, the continued existence of the states was not a bow to pragmatism or political compromise. Publius's justification for the states was that they would be one of the securities in his "double security" scheme against tyranny⁸ — a second sovereign looking out for the liberties of its citizens if the first sovereign became corrupt.

This was their role, but how would it be carried out? The *Federalist Papers* seems to contemplate two possibilities. First, sometimes the states would keep the national government honest by outcompeting it for the affections of "the people." Second, even in areas where the states could not compete,⁹ they would remain vigilant on behalf of their citizens and sound the alarm when they perceived the national government beginning to creep out of its confines.¹⁰ In this model, the states would be like guard dogs against tyranny, resisting tyrannical encroachments by the national government. In both conceptions, the states would also be useful for governing in those areas that the national government either could not or did not choose to reach.¹¹

But Publius's vertical competition model is flawed. Because the *individual* states cannot compete for the affections of "the people" — they can only compete for their citizens' affections — they cannot protect their citizens from perceived tyranny through vertical competition. And because the Constitution leaves states with few legal or political tools with which to successfully safeguard their sovereignty,¹² their role

⁷ See THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 198 (noting in veiled reference to the Senate that "[t]here are features in the Constitution which . . . show[] that the convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations"); THE FEDERALIST NO. 62 (probably James Madison), *supra* note 1, at 345 (stating that "it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of theory, but 'of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable'"). Yet Publius was never content with justifying anything in the Constitution as a mere matter of political necessity. Even the compromise elements had important roles to play. See *id.* at 346 (stating that notwithstanding its theoretical impropriety, the "advantage accruing from this ingredient in the constitution of the Senate is the additional impediment it must prove against improper acts of legislation. . . . [A]s the facility and excess of lawmaking seem to be the diseases to which our governments are most liable, . . . this part of the Constitution may be more convenient in practice than it appears to many in contemplation").

⁸ THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 291. Separation of powers is the other part of this two-part system. *Id.*

⁹ See U.S. CONST. art. I, § 10 (denying states the ability to enter treaties, issue money, lay tariffs, maintain troops, or make war unless invaded or threatened with imminent invasion).

¹⁰ THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* note 1, at 140.

¹¹ See THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 1, at 86 (claiming that the primary policy objectives of the states would "hold out [only] slender allurements to ambition" to national officials).

¹² Sovereignty denotes "a power to make choices — about how to use public monies and direct public attention, and about how to vary the choices as the needs of the community change."

as guard dogs is also compromised. A guard dog that is a toothless guard dog is not of much value.

This Note argues that while Publius's notion of federalism as vertical competition is defective, the Supreme Court's recent forays into anticommandeering jurisprudence have given life to his vision of states as guard dogs against tyranny. These cases ensure that, as a constitutional matter, the power of the Supremacy Clause does not destroy the independence of the states. These cases provide states with a *legal* means to disregard the otherwise controlling dictates of federal law,¹³ by ensuring that the states do not become mere administrative units of the national government. Thus, the anticommandeering cases allow the states to protect the interests of their citizens by raising the price of oppressive policies, slowing the spread of those policies, and/or affording time for opposition to those policies to take root and organize. Even if they can only partially fulfill these goals, the states may deter the national government from even trying to carry out its schemes of oppression in the first place. If any one of these four things occurs, the states will have succeeded in providing the type of "double security" from tyranny that Publius envisioned.

The argument begins with a notion of federalism as a limited right of independence held by each individual state.¹⁴ It is not simply a line of demarcation between the powers of the national government and the states, but should be understood as the right of each individual state to *resist*, but not nullify, national intervention in certain areas of public life.¹⁵ This may be an unusual way to think about federalism,

Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 851 (1979).

¹³ *But cf.* *Testa v. Katt*, 330 U.S. 386 (1947) (allowing federal commandeering of state courts).

¹⁴ *Cf.* 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, 942 (1998) (stating that "there is no reason to exclude categorically nonfederal governments from enjoying at least some of the rights protected by the U.S. Constitution" and suggesting a functional theory of federalism to accomplish that goal). One reason why federalism is not generally conceived of as a right possessed by each state may be that it treads dangerously close to (but does not devolve into) two fully discredited constitutional ideas: nullification and interposition. "Nullification posits that each individual state has the power to declare a federal law unconstitutional . . . and to treat such a law as null and void within its borders." CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE* 46 (2004). Interposition "is a more variable concept, sometimes synonymous with nullification, sometimes something less than nullification but more than mere protest." *Id.* (footnote omitted). The recourse of interposition is not "categorical defiance by an individual state, but . . . interposition of its sovereignty against the allegedly unlawful federal action, as long as may be necessary to seek support of other members of the compact. Failing in such support, the interposing state . . . would seem obligated to accede to the unwelcome act . . ." Robert B. McKay, "With All Deliberate Speed": *A Study of School Desegregation*, 31 N.Y.U. L. REV. 991, 1038 (1956).

¹⁵ *See* Hills, *supra* note 14, at 856 (justifying cooperative federalism over dual sovereignty because "the doctrine of state autonomy in *New York* and *Printz* . . . costlessly promotes federalism by distributing power to nonfederal governments without impeding any useful national pro-

but it is justified by three considerations. First, if the states are to be a countervailing force against the national government, the ability to countervail must begin somewhere, possibly even in a single state. Second, checking tyranny is not synonymous with ensuring that states' interests (defined either geographically¹⁶ or institutionally¹⁷) are accounted for in national policymaking debates, as the political safeguards models of federalism contend.¹⁸ A state's interests might be fully accounted for, and yet the national government may enact policies that tyrannize it.¹⁹ Finally, it is historically implausible that those who cared about the autonomy of states at the Founding would have been satisfied with any doctrine that made their state's sovereignty dependent on convincing national legislators from other states not to exercise federal preemptive power.²⁰

grams"); *cf. id.* at 856–915 (explaining that it makes economic sense to allow states to resist implementing federal law under anticommandeering principles because it forces the federal government to bear the costs of its initiatives).

¹⁶ See Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954).

¹⁷ See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222–23 (2000).

¹⁸ This Note does not dispute that one of the primary reasons for the structure of the Constitution was to ensure that states would have a voice in the national government without allowing them to completely obstruct national policies as they had been able to do under the Articles of Confederation. See, e.g., THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 1, at 83 (describing how under the Articles of Confederation's system of requisitions, the only way to compel a state to pay its taxes was, ultimately, armed conflict). But if the only goal was to ensure that various geographical regions' interests would be represented on the national level, there would be very little reason to create states rather than administrative units for governing and organizing elections. The Founding generation believed States were important because being governed by something called "Virginia" — an entity distinct from the national government — was superior to being governed by something called "Federal Administration Unit #3." The task is to understand why this might have been so and to seek another explanation beyond political necessity for why the Constitution preserved the states.

¹⁹ This could occur in two possible ways. First, as Professor Larry Kramer instructs, just because local interests may be represented on the national level does not mean they will be respected. Kramer, *supra* note 17, at 222–23. Second, Professor Andrzej Rapaczynski explains that the national government is likely to be less responsive to minority interests, geographically defined. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 386–87. A state could easily be such a geographically defined minority interest.

²⁰ See Kramer, *supra* note 17, at 222 ("Preferences in Congress are aggregated on a nationwide basis: However sensitive federal legislators may be to state or local interests, if interests in an area represented by a majority of these legislators concur, interests in the rest of the country will be subordinated."). This type of system would have been very disagreeable to the Anti-Federalists (and probably a good number of the Constitution's ultimate supporters) who, fearing that the new "Constitution would create an oppressive national government and destroy the political authority of the states," Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1276 (1989), would hardly have favored a system of state protection that depended on federal restraint alone.

Importantly, resistance, as used here, is a relatively modest concept. The Supremacy Clause, however, does not prohibit states from acting as guard dogs.²¹ Guard dogs, of course, are not always effective; the Supremacy Clause creates a swift and strong central government that may evade them. Nevertheless, if the states were indeed meant to check the national government's tyrannical impulses, the check need not be perfect, only somewhat effective.

This Note proceeds in six parts. Part II lays out the vertical competition model. Part III explains why this model is inherently flawed, as it offers little more protection from tyranny than the political safeguards models. Part IV describes Publius's guard dog model. Part V explains how the anticommandeering cases — *New York v. United States*²² and *Printz v. United States*²³ — offer a foundation for the autonomy required for states to fulfill their role as guard dogs that can effectively monitor the national government, to deter and impede oppressive policies. Part VI concludes.

II. PUBLIUS'S FIRST TYRANNY PROTECTION MODEL: STATE-FEDERAL VERTICAL COMPETITION

The vertical competition model — whereby regulatory power is distributed by the people to the two levels of government based on a competition for the people's affections — appears to have been borrowed by Publius from his discussion of the horizontal competition that defines separation of powers. As he explains, separation of powers does not require strict compartmentalization of powers but rather partial agency of each branch in the affairs of the others.²⁴ This partial agency has three fundamental characteristics. First, each branch possesses a set of distinct powers that it is to use to carry out its constitutionally mandated functions.²⁵ Second, the branches' powers overlap at the edges such that conflicts arise anytime one branch begins to

²¹ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

²² 505 U.S. 144 (holding that Congress may not compel states to enact legislation).

²³ 521 U.S. 898 (holding that Congress may not require state executive officials to enforce federal law).

²⁴ See generally THE FEDERALIST NO. 48 (James Madison).

²⁵ THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 269 (observing that “[i]n]o political truth is certainly of greater intrinsic value” than that “legislative, executive, and judiciary departments ought to be separate and distinct”); *id.* at 270–71 (noting “that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted”); THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 276 (noting that, in theory, we can discriminate between “the several classes of power, as they may in their nature be legislative, executive, or judiciary”).

assert power at the boundaries of its authority.²⁶ These conflicts are virtually automatic because the branch that sees its prerogatives encroached upon will have an interest in challenging the assertion of power.²⁷ Finally, and perhaps most importantly, the results of these inevitable conflicts are not predetermined by the document. It is these three features — the first two eloquently defended in *The Federalist Nos. 47* and *48*, the third inherent in the structure of the Constitution²⁸ — that have allowed the concept of checks and balances to flourish as one of the defining features of our government. Publius may have thought a similar competition would result in the vertical context.

In fact, Publius's interrelation of the two contexts is evident in his famous statement in *The Federalist No. 51*, describing the states as protectors against national abuses of power. He wrote:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. 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.²⁹

In other words, the vertical competition that a federated republic encourages will amplify the benefits of the horizontal competition of separation of powers.

This passage raises the important question: exactly how will the different governments “control each other”? Publius's answer seems founded on the same concepts that justify the familiar horizontal com-

²⁶ THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 276–77 (noting first that “[i]t will not be denied that power is of an encroaching nature,” *id.* at 276, and then declaring that “some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government,” *id.* at 277, than would be provided by “parchment barriers” created by simply “mark[ing], with precision, the boundaries of [the] departments in the constitution,” *id.* at 276).

²⁷ THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 289–90 (“[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and *personal motives* to resist encroachments of the others. . . . Ambition must be made to counteract ambition.” (emphasis added)).

²⁸ Although Publius expresses great concern that, functionally, the legislative branch will dominate the government, THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 277–78, the powers of the various branches must be “coequal” for partial agency to work. *Mistretta v. United States*, 488 U.S. 361, 380–81 (1989) (noting that “the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty,” *id.* at 380, and that Publius “recognized that our constitutional system imposes upon the Branches a degree of *overlapping* responsibility, a duty of interdependence as well as independence,” *id.* at 381 (emphasis added)).

²⁹ THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 291 (emphasis added).

petition of separation of powers. The only difference is that in the horizontal realm, the competition is between the branches over the allocation of constitutional authority; in the vertical setting, the competition is between the states and the national government over control of certain areas of regulation.³⁰ Publius envisioned that the state and national governments would enter into a competition with each other wherein a sovereign regulating an area of concurrent jurisdiction satisfactorily could “expect to earn an added measure of its citizens’ affection [But] if one government regulates an activity in an *unsatisfactory* manner, the people may be able to shift responsibility to the other sovereign.”³¹ In this model, the people as consumers of public policy will simply take their business to their other sovereign if the first fails to “be found in practice conducive to the prosperity and felicity of the people.”³²

This competition dynamic is clearly laid out in *The Federalist No. 17*. There, drawing upon the centrifugal forces that had ripped apart other federated republics, Publius contends that it is the national government that should fear the destructive power of the states, not the other way around. He writes that the states will hold the “greater degree of influence . . . if *they administer their affairs with uprightness and prudence,*” because “[i]t is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object . . . *unless the force of that principle should be destroyed by a much better administration of the [national government].*”³³ In other words, the states control their regulatory destiny, but they must always be mindful of the possibility that “a *much better administration*” at the national level could compete away their inherent advantages.

³⁰ At least one commentator has pointed out that this vertical competition is often ignored by courts and commentators. Todd E. Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329, 334 (2003) (“Like the scholarly community, however, when the Court discusses competition in the context of federalism, it is almost invariably competition of the horizontal, interstate variety.” (footnote omitted)); see also, e.g., Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (observing that federalism “makes government more responsive by putting the States in competition for a mobile citizenry”); William H. Pryor Jr., *Madison’s Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1174 (2002) (“By harnessing competition among jurisdictions, federalism secures in the political arena the advantages of economic markets” (quoting MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 3 (1999))); see also Steven G. Calabresi, “A Government of Limited Powers and Enumerated Powers”: In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 776 (1995); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493–1500 (1987) (book review).

³¹ See Pettys, *supra* note 30, at 333.

³² THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 1, at 146 (implying that the better-governing sovereign will be able to rally the people to its cause during periods of turmoil between the state and national government).

³³ THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 1, at 87 (emphases added).

That vertical competition for the people's affections was intended as a strong check against national tyranny becomes an inescapable reading of the *Federalist Papers* once some of Publius's statements are placed side by side. For example, he writes that nothing in the Constitution denies that the states' power continues to "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people."³⁴ Yet the national government's powers extend into this realm as well. *The Federalist No. 27* notes that as the national government proves itself to be a good government, it will "enter[] into those objects which touch the most sensible chords and put in motion the most active springs of the human heart."³⁵ These are not errant pen strokes. They are the repetition of a claim made earlier in *The Federalist No. 16*, where — defending the power of the national government to regulate the people directly rather than through the states — Publius says that the national government must be enabled "to attract to its support those passions which have the strongest influence upon the human heart."³⁶

Thus, both governments would come to compete over the right to regulate the areas of life that most directly touch citizens. The competition might look something like the following: Imagine a nation with two corporations that can collectively fully supply a nation's economic needs. These corporations each have a comparative advantage in producing particular products. When the corporations are started, their precise comparative advantages are unknown, and so their mutual creator endows them with rough approximations of their natural portfolio of products.³⁷ Over time, through trial and error, expansion and contraction, these corporations discover their true comparative advantages and leave production of the products outside of that realm to the other corporation. Efforts by one corporation to upset this equilibrium would produce poor economic outcomes and would therefore, in a well-functioning market, be quickly beaten back by the competitor.

Publius seems to have envisioned the state and national governments in similar terms. According to Publius, the Constitution assumes that each type of sovereign has a natural comparative advan-

³⁴ THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 261.

³⁵ THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 1, at 144.

³⁶ THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 1, at 84.

³⁷ On the difficulties of providing a well-defined ex ante distribution of authority between the states and the national government, consider Publius's statement in *The Federalist No. 37*:

Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. *The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.*

THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 197 (emphasis added).

tage. As a result, the national government is endowed with greater abilities in the areas of “[c]ommerce, finance, negotiation, and war,”³⁸ while the states are left to govern “[t]he administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things . . . [that] are proper to be provided for by local legislation.”³⁹

Publius did not see this as a static equilibrium, however. He foresaw that over time the national government would extend “to what are called matters of internal concern” and would begin to “conciliate the respect and attachment of the community.”⁴⁰ Still, the national government would have to earn it; the states, which would naturally enjoy the “love and prejudices of the peoples,”⁴¹ would have a competitive advantage over the distant and mistrusted national government as the two sovereigns began to compete over regulatory domains.

This dynamic of competition between a stronger yet less trusted national government and a weaker yet more beloved state government could work because people’s allegiance to their governors is determined by two variables. First, “[i]t is a known fact in human nature that its affections are commonly weak in proportion to the distance . . . of the object.”⁴² Second, and perhaps more importantly, “it may be laid down as a general rule that [the people’s] confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration.”⁴³ Thus, the national government could win in a competition with the states, notwithstanding its distance from the people, if it regulated well. In practice, however, expansion outside of its core competencies would be difficult for the national government given the initial entrenchment favoring state governments. Before this could happen, the national government would need to outcompete a large enough number of state governments — to the point where enough citizens were dissatisfied with *their* state’s administration — to generate a critical mass of people willing to vote for the national legislature to take over a particular area of regulation.

Publius’s conclusions from this competition model were twofold. First, the state governments need not fear the Constitution if they gov-

³⁸ THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 1, at 86 (stating that “all the powers necessary to those objects ought in the first instance to be lodged in the national depository”).

³⁹ *Id.*

⁴⁰ THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 1, at 144.

⁴¹ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 166 (J.P. Mayer ed., George Lawrence trans., HarperCollins Publishers 2000) (1840) (noting that the Constitution gave “the Union money and soldiers, but the states *retained the love and the prejudices of the peoples*” (emphasis added)).

⁴² THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 1, at 87.

⁴³ THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 1, at 142.

ern well. Second, the national government must be cautious when regulating in new areas pursuant to the Supremacy Clause for fear of misreading the people and unwittingly overpowering state governments that are in fact regulating well in their citizens' estimation.⁴⁴

Thus, the state and the national governments were to be partial agents of each other, and so “[t]he different governments [would] control each other.”⁴⁵ As in the horizontal context, Publius saw the governments as having overlapping powers over which there would be competition, with the people being the final arbiters: “The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.”⁴⁶ Notwithstanding the Supremacy Clause, Publius thought the states could win because, after all, each sovereign was controlled by a common superior — the people.

III. THE FAILURE OF THE COMPETITION MODEL

Although the goal of setting up the states as yet another “auxiliary precaution[]”⁴⁷ is rational and praiseworthy — a valiant effort to craft a powerful, yet contained Union — upon analysis, the vertical competition model is flawed at its core. It offers no protection to the citizens of an isolated state.

There are three major flaws in the vertical competition model. First, it has no corrective for inevitable market failures. Professor Todd Pettys clearly articulates this flaw and advocates a judicial approach to federalism that casts the courts in a role akin to an antitrust court, carefully picking and choosing opportunities to intervene in the market to correct failures by ensuring states have the opportunity to prove their worth to the people.⁴⁸ Yet, even if the Court's so-called federalism revolution corrects these market failures in this way,⁴⁹ the

⁴⁴ Publius even seemed confident that the states would win such competitions with the federal government. As he argued, the people's affection for their state governments can only “be destroyed by a much better administration of” the national government. THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 1, at 87; *cf.* THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 1, at 83 (stating that a national project of subjugation “is little less romantic than the monster-taming spirit, attributed to the fabulous heroes and demigods of antiquity”); THE FEDERALIST NO. 46 (James Madison), *supra* note 1, at 266 (“The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. The reasonings contained in these papers must . . . disprove the reality of this danger.”).

⁴⁵ THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 291 (emphasis added).

⁴⁶ THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 1, at 149.

⁴⁷ THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 290; THE FEDERALIST NO. 63 (James Madison), *supra* note 1, at 353.

⁴⁸ See Pettys, *supra* note 30.

⁴⁹ Professor Richard Fallon has expressed skepticism on this point, noting that *United States v. Lopez*, 514 U.S. 549 (1995), “neither overruled any precedents nor revised the established doc-

competition model still fails to allow the states to play their role as a double security against tyranny. Because of the Supremacy Clause, even a national legislature that is outcompeted by its state counterparts could still enact and enforce poor policies if the people are unable or unwilling to impute these policies to their nationally elected representatives. American history does in fact provide examples of regulatory self-restraint by the national government when the people have expressed a clear preference for state governments.⁵⁰ Yet, given the proclivity of people to use power that is at their disposal even in the face of rational reasons not to use it — a facet of human nature recognized by Publius⁵¹ — market failures can be expected even if the Court successfully intervenes from time to time.

Second, and more fundamentally, the vertical competition model mischaracterizes the relevant competition and thus merges into political process federalism. This is an understanding of federalism that, although accounting for states' interests in the national policymaking process, offers states only collective, rather than individualized, protection from tyranny. Thus, even when it is functioning perfectly, the vertical competition model cannot ensure that an individual state (or small group of states) is not tyrannized by the national government. Imagine a state where 100 percent of the people believe that drug laws are tyrannical. If every other state strongly believes drug use to be immoral and for whatever reason cannot convince their local rulers to outlaw it (bad state government) or simply want to live in a country where no state allows the activity, the first state, although its government has not lost the regulatory competition for the affections of its people, will have to succumb to the national policy.

trinal formulations used to define Congress's commerce power. Instead, the Court's 5-4 ruling rested on . . . factors that gave the decision uncertain precedential status and seemingly made it easy to evade." Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 475-76 (2002) (footnotes omitted). This seems to be correct. After *Lopez*, Congress did amend the Guns Free School Zones Act at issue in the case to require a showing that the weapon has traveled in interstate commerce, "a condition sure to be satisfied in nearly every case." *Id.* at 476. The Ninth Circuit subsequently upheld the revised statute. *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005). Professor Fallon then went on to state that *United States v. Morrison*, 529 U.S. 598 (2000), "undoubtedly goes further, but not much further," and is not a case "that appears to threaten the great bulk of federal regulatory legislation." Fallon, *supra*, at 476. Moreover, the Court's decisions in these cases may amount to little more than providing the federal government with incentive to regulate more broadly, thereby preempting even more state legislation and reducing further the "proving ground" Professor Pettys thinks is vital to federalism. Pettys, *supra* note 30, at 357-58.

⁵⁰ Pettys, *supra* note 30, at 349-52 (noting "the macrolevel shifts in popular sentiment and in regulatory power that have occurred over the course of the nation's history," *id.* at 349, from the nation's first century, when states predominated, through the nationally dominant periods of Reconstruction and the New Deal, to the Reagan Revolution and devolution of power to the states).

⁵¹ For example, he warned his readers about "the encroaching spirit of power." THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 276.

In the vertical competition model, where it is the affection of an undifferentiated “people” that matters to the competition, if enough citizens are dissatisfied with *their own state governments*, they can utilize the power of the Supremacy Clause to push a result on the national level and bind citizens of other states who are in fact pleased with their governments’ administration. Even in circumstances where the regulatory variances among the states are quantitatively different and some subset of states is affirmatively governing poorly, there is no reason to suspect that the national policy will be the “best” policy, rather than a regulatory regime just good enough to get enough citizens from enough states to grant the national government regulatory authority.

This seems to be little more than the political safeguards of federalism theory.⁵² If federalism is understood as promoting a right of each state to a certain measure of autonomy, that autonomy is significantly undercut when states have to rely for protection from national tyranny on either the governments of *other states* to govern well or on the national representatives of other states to stay their hands.⁵³

The vertical competition model does not answer the relevant question, the one that would have concerned people in the Founding era: is my state protecting my liberty better than the national government? Instead, the vertical competition model pretends to have an answer to that question by aggregating the opinions of “the people,” a group which may in fact include none of one’s fellow state citizens. The ver-

⁵² See *supra* notes 16–20 and accompanying text. In other words, if the people trust the states, they will elect pro-state politicians. If they do not, then they will elect nationally minded politicians. This Note does not contest Professor Pettys’s findings that the national electorate can affect the federal-state balance. See Pettys, *supra* note 30, at 349–53. But importantly, here the states gained power because national politicians saw it as politically useful to grant states that authority. See *id.* As stated in the Introduction, this Note seeks to elaborate a source of state protection that does not depend on national electoral processes.

⁵³ It is true that Publius often spoke of federalism in terms of states alerting other states of national tyranny and acting in concert against the national government. This is undoubtedly part of the federalism story, but it is not the whole story. As Publius wrote in *The Federalist No. 46*:

[A]mbitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other.

THE FEDERALIST NO. 46 (James Madison), *supra* note 1, at 266.

True enough. But when, for example, South Carolina protested and threatened to nullify the Tariff of Abominations, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 181–82 (2004), its citizens would likely not have been content with a response that told them that the national policies they opposed were not tyrannical because they comported with the affections of at least half of the country — just not those of their fellow South Carolinians.

tical solution, like other political process theories, does nothing to protect the “discrete and insular minority” state targeted for unfavorable treatment by the national government.⁵⁴ National policies will be implemented within the state’s borders via the Supremacy Clause, and its unique policy preferences will be homogenized. Publius’s hope that this would not happen because of the natural and inherent advantages of state governments over the national government in winning the affections of “the people” thus seems overly ambitious.⁵⁵

Third, the Constitution as described by Publius offers few tools that a state could deploy in this envisioned competition against the inherently centralizing forces of the Constitution.⁵⁶ One tool he discussed is the enumerated powers structure of the document, which he claimed would allow states to maintain their autonomy and independence because the national powers are “few and defined,” while the states’ powers are “numerous and indefinite.”⁵⁷ A secondary claim was a weak argument that, because local matters would “hold out [only] slender allurements to ambition,”⁵⁸ state-federal conflicts would hopefully emerge only infrequently. Finally, there appears to have been some hope placed in the structural elements of the Constitution, like the provision providing for the indirect election of Senators.⁵⁹

⁵⁴ Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that governmental actions that “prejudice . . . discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon,” and thus “may call for a . . . more searching judicial inquiry”).

⁵⁵ These “[t]raditions and ideologies,” as Professor Kramer characterizes Professor Herbert Wechsler’s description of this most important safeguard, “are not self-sustaining. . . . [T]hey will eventually die.” Kramer, *supra* note 17, at 221. This is because the power of the Supremacy Clause means that the dominant force in American government is centripetal. “[S]ome structural or cultural mechanism [must] exist[] to replenish” and ensure the “vitality” of the states over the course of history. *Id.*

⁵⁶ Cf. *id.* at 223–27. Even if the Court suddenly demonstrated a greater willingness to carve out large swaths of regulatory authority for the states, vindicating Professor Pettys’s argument, an individual state might still be the victim of national tyranny outside of those carved-out enclaves. Moreover, the Court seems unwilling to do this. See Fallon, *supra* note 49, at 493 (“The Court has proceeded cautiously along doctrinal paths where previous efforts to protect federalism occasioned embarrassment, where reliance interests make dramatic change difficult, and where the attentive public has conspicuously embraced prevailing doctrine.”).

⁵⁷ THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 260. It is difficult to believe that Publius gave much weight to this argument given his discussion of the Necessary and Proper Clause in *The Federalist No. 33*. In discussing that clause and who is to decide what is “necessary and proper,” he states, “[i]f the federal government should overpass the just bounds of its authority . . . , the people, whose creature it is, must appeal to the standard they have formed” THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 1, at 171. In other words, it seems as if enumeration protects states only insofar as the people of the nation as a whole want such protection. Again, this is not much protection for the singled-out state.

⁵⁸ THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 1, at 86.

⁵⁹ U.S. CONST. art. I, § 3, cl. 1; see also THE FEDERALIST NO. 62 (probably James Madison), *supra* note 1, at 345.

As the Anti-Federalists quickly recognized, these were slender reeds upon which to rest the independent existence of the states. Brutus, for example, lambasted Publius for these claims, presciently realizing that the “uncontrollable powers, of laying and collecting taxes, duties, imposts, and excises; of regulating trade, raising and supporting armies, organizing, arming, and disciplining the militia, instituting courts, and other general powers,” troubling in their own right, were augmented by “the power of making all laws, *proper and necessary*, for carrying all these into execution; and they may so exercise this power as entirely to annihilate all the state governments, and reduce this country to one single government.”⁶⁰ Most notably, echoing Publius’s warnings about “the encroaching spirit of power,”⁶¹ he concluded, “[a]nd if they may do it, it is pretty certain they will.”⁶² That these efforts would enjoy automatic supremacy over state constitutions and laws was not lost on Brutus.

What is more, the “structural” protections afforded the states are exceedingly weak. Aside from the original mode of senatorial election,⁶³ the states seem to have been left with little more than what Publius said was to be strictly avoided: reliance upon mere “parchment barriers” to protect people from tyranny.⁶⁴ These protections, when compared with the powers granted to the national government, make it difficult to conclude that the result of any pure competition between the national and state governments could be anything but a foregone conclusion,⁶⁵ which in turn provides a strong reason why the translation from the horizontal to the vertical contexts is problematic.

⁶⁰ Essay of Brutus (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 367 (Herbert Storing ed., 1981) [hereinafter Essay of Brutus].

⁶¹ THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 276.

⁶² Essay of Brutus, *supra* note 60, at 367.

⁶³ Some scholars believe that federalism’s one and only structural protection fell with the ratification of the Seventeenth Amendment. *See, e.g.,* RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 94 (2001) (quoting George Mason’s statements from the constitutional convention that the states needed the “power of self-defense” and “the only mode left of giving it to them was by allowing them to appoint the second branch of the National legislature” (internal quotation marks omitted)). This may be true, but it seems an exceedingly fragile foundation upon which to rest the future existence of independent states, especially considering the speed with which that electoral system dissolved in the early years of the Republic. As Professor William Riker has explained, the election of senators by the state legislatures was a failure almost from the moment of inception in its goal of infusing the national legislature with state interests. *See* William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 463–67 (1955) (noting that the system of election by state legislatures began to break down as early as the 1830s).

⁶⁴ THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 276. The other structural sources, like the electoral college and equal representation in the Senate, that might provide states with tools with which to compete seem only to aid the type of political safeguards models identified by Professor Wechsler and refined by Professor Kramer. *See* discussion *supra* note 55.

⁶⁵ Critics of this point will note that, as a matter of public preference, the states remained predominant at least up until the Civil War. *See, e.g.,* DAVID L. SHAPIRO, FEDERALISM: A DIA-

Publius also failed to account for the massive advantages, besides the Supremacy Clause, that the national government would enjoy in any vertical competition. These include the power to raise and command land and naval forces and the power to nationalize and command state militias.⁶⁶ Although Publius often referenced state militias as a source of state power, a source that could repel national usurpations,⁶⁷ he casually stepped over the fact that the Congress and the President are constitutionally empowered to turn the militia into a national fighting force. Of course, the Founders hoped that federalism disputes would not devolve into armed conflicts,⁶⁸ but the potential for armed conflict seemed not to be far from Publius's thoughts.⁶⁹ The protection afforded by a militia, however, is greatly undercut when it can be coopted by the very source of oppression it is supposed to protect against — assuming, of course, that the troops will obey the President.⁷⁰ While circumstances in which militiamen might be expected to heed presidential authority may be debatable, it surely could be of lit-

LOGUE 63 (1995). This may be the case not because of any genuine competition for the people's affections, but rather because the states were so entrenched as the dominant force in government that, notwithstanding immense national authority to displace them, it took sixty years for the result to be achieved. Alternatively, it may be argued that for the first sixty years of the country, the national government was too intently focused on the predominantly national needs of ensuring a stable government and successful foreign policy to enter into the regulatory activities of everyday governance. See Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 LAW & SOC'Y REV. 57, 86-100 (1975) (highlighting the breadth of the state governments' economic activity in the early republic).

⁶⁶ See U.S. CONST. art. I, § 8, cls. 12-13, 15; *id.* art. II, § 2, cl. 1 (making the President the Commander in Chief of the army, navy, and state militias "when called into the actual Service of the United States").

⁶⁷ See, e.g., THE FEDERALIST NO. 46 (James Madison), *supra* note 1, at 267 ("To [national troops] would be opposed a militia [of] half a million of citizens with arms . . . , officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether [such] a militia . . . could ever be conquered by [a significantly smaller force of] regular troops." (emphasis added)); see also *id.* ("[T]he existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.").

⁶⁸ See, e.g., THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 1, at 144 ("[A] government like that proposed would bid much fairer to avoid the necessity of using force than the species contended for by most of its opponents [I]n such a Confederacy there can be no sanction for the laws but force"). By destroying the principal vice of that government and allowing the national government to act directly on the states, the Constitution would eliminate that potential source of violence.

⁶⁹ See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1495-1500 (1987) (describing Publius's sincere belief that potential armed conflict between the states and the national government was both a real possibility and a salutary one at that); *id.* at 1498 ("Publius plainly considers the military argument an important one. It is featured prominently in two different papers — one by Hamilton, one by Madison — and alluded to in several others.").

⁷⁰ *But cf.* PAUL E. PETERSON, THE PRICE OF FEDERALISM 8 (1995) (stating that after the election of 1800, the Federalists did not challenge the results in part because "the Virginia state militia was at least as strong as the remnants of the Continental Army").

the comfort to the states that their armed men could be called to serve another master.

IV. PUBLIUS'S SECOND TYRANNY PROTECTION MODEL: THE STATES AS GUARD DOGS

Although the idea of a public policy market was the dominant federalism theme in the *Federalist Papers*, a second theme ran through Publius's narrative: the states as guard dogs against tyranny. Closely related to the competition model, the guard dog scenario posits that the people may be either asleep or lacking the means to obtain the necessary information when the national government begins its move toward tyranny. The function of the states is to keep an eye on national actions in order to deter encroachments and to be ready to alert their citizens that something is amiss with their national government. The states need not outcompete anybody in this model; they need only have an existence independent from the national government.

The guard dog model was most clearly articulated in *The Federalist Nos. 24* through *28*. In those papers, Publius referred to the states as "always . . . not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, [who] 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."⁷¹ Indeed, Publius went beyond mere guard dog federalism into attack dog federalism when he continued that states will "not only . . . be the VOICE, but, if necessary, the ARM of their [citizens'] discontent."⁷²

For Publius, states ward against tyranny so that the people can feel secure notwithstanding a powerful central government. He claimed that "State governments will . . . afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men, as of the people at large."⁷³ Tyranny might somehow be hidden from the people, but it would not go undetected under the watchful eye of their esteemed representatives because the state "legislatures will have better means of information. They can discover the danger at a distance; and *possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition . . .*"⁷⁴ Publius mocked those who

⁷¹ THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* note 1, at 140.

⁷² *Id.*

⁷³ THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 1, at 149.

⁷⁴ *Id.* (emphasis added).

thought that the states could not detect and counteract national tyranny, asking:

When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, *through the medium of their State governments*, to take measures for their own defense, with all the celerity, regularity, and system of independent nations? The apprehension may be considered as a disease, for which there can be found no cure in the resources of argument and reasoning.⁷⁵

Hammering home his argument in his penultimate Paper, Publius wrote, “[i]t is equally evident that . . . [any] impediments to a prompt communication . . . will be overbalanced by the effects of the vigilance of the State governments.”⁷⁶ State executive and legislative branches “will be so many sentinels over the persons employed in every department of the national administration,” and possess a “disposition to apprise the community of whatever may prejudice its interests from another quarter,”⁷⁷ not necessarily because of virtuous representation, but rather because of the baser (but less corruptible) “rivalship of power.”⁷⁸ And because states remain independent, autonomous units in the constitutional scheme, “they can never be at a loss to know the behavior of those who represent their constituents in the national councils, and can readily communicate the same knowledge to the people.”⁷⁹

Close readers of the *Federalist Papers* will recognize that the guard dog model is articulated in the context of then-existing fears that the national government would use its army to militarily oppress the states. This may seem outdated, but the principles that animated these concerns seem generalizable into contexts that are still relevant today if tyranny is defined downward from military incursions to enacting policies that are oppressive to one or a small set of states. Publius even seemed to recognize this more subtle tyranny, when he wrote that the states would be on the watch for anything that might prejudice the interests of their citizens.⁸⁰ Moreover, although Publius believed that the states would be of use because the technology of the day made it hard to disseminate information,⁸¹ his intuition still seems to apply in an age when information is readily available but people are apathetic. All of this is to say that even if tyranny from marching troops may be unlikely, subtle tyranny from oppressive laws is still a

⁷⁵ *Id.* at 150 (emphasis added).

⁷⁶ THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 1, at 484.

⁷⁷ *Id.*

⁷⁸ *Id.* at 485.

⁷⁹ *Id.* at 484.

⁸⁰ *See id.*

⁸¹ *See id.*

possibility. And, while the Internet has replaced committees of correspondence, the states may still be needed as their citizens' guard dogs.

V. THE ANTICOMMANDEERING CASES: SALVAGING THE GUARD DOG MODEL

The discrete and insular minority state can never outcompete the national government and so retain its regulatory authority over its citizens, protecting them from poor national policy choices, but it can still act as a double security by being a tyranny guard dog. It cannot guard our liberties, however, if it can be fully coopted by the national government. Yet, while Publius clearly recognized the need for this guard dog, the *Federalist Papers* does not offer a solution to the problem of cooption via the Supremacy Clause.⁸² The Supreme Court's anticommandeering jurisprudence has revealed a limited, albeit real, mechanism to constitutionally overcome that obstacle and allow the states to remain "ready enough . . . to sound the alarm to the people."⁸³

The Court's federalism jurisprudence has been much maligned, but its anticommandeering decisions in *New York v. United States* and *Printz v. United States* have received some of the harshest criticism.⁸⁴ In a much cited article, Professors Matthew Adler and Seth Kreimer argue that the anticommandeering cases boil down to an action-inaction distinction that defines "impermissible commandeering as a targeted, coercive duty for state legislative or executive officials that *requires action* . . . and permissible preemption as a duty . . . that *does not require official action*."⁸⁵

The authors then argue that this distinction is not justified by the values of constitutional federalism, including the value of tyranny pre-

⁸² Indeed, the *Federalist Papers* appears to endorse cooption. See THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 1, at 144 ("The plan reported by the convention . . . will enable the government to employ the ordinary magistracy of [the states], in the execution of its laws."). But see *Printz v. United States*, 521 U.S. 898, 910–15 (1997) (arguing that *The Federalist No. 27* contemplates cooption of state officers only with state consent). Nullification and interposition were non-starters. James Madison himself believed that "[a] plainer contradiction in terms, or a more fatal inlet to anarchy, cannot be imagined." 9 JAMES MADISON, *Notes on Nullification*, reprinted in THE WRITINGS OF JAMES MADISON 573, 575 (Gaillard Hunt ed., 1910); see also JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 354, at 237 (2d ed. 1851) (asking, if the Constitution "is the supreme law, how can the people of any state, either by any form of its own constitution, or laws, or other proceedings, repeal, or abrogate, or suspend it?").

⁸³ THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* note 1, at 140. If this is true, then the Court's role in federalism is not as a market regulator, see *Pettys*, *supra* note 30, at 353–56, but more simply as a sort of animal welfare inspector, ensuring that states can still act as guard dogs.

⁸⁴ In a particularly biting critique, Professors Adler and Kreimer conclude that the anticommandeering decisions are normatively unjustified; they "consist[] of nothing more than some arbitrary rules of 'etiquette' [that] ought to be . . . soon . . . outgrown." Adler & Kreimer, *supra* note 4, at 143; see also *Pettys*, *supra* note 30, at 370 (calling this and other such critiques "formidable").

⁸⁵ Adler & Kreimer, *supra* note 4, at 95.

vention. After discarding the notion of accountability as a justification on the ground that state officials are as likely to be held accountable for nationally mandated action as inaction,⁸⁶ the authors contest the claim that tyranny is more problematic when state action (caused by commandeering) is involved rather than inaction (mandated by preemption). They offer a convincing hypothetical related to a person, *P*, who is killed as a result of state action or inaction: “[S]tate governmental inaction causes *P*’s death when government fails to regulate the polluters who emit carcinogens State governmental action causes *P*’s death when government prohibits firms from selling *P* the medication that would cure the [resulting] cancer.”⁸⁷ They conclude by asking whether *P*’s death is worse when Congress prohibits states from allowing the medication’s sale than when it forbids states from regulating the polluters.⁸⁸ Their answer is succinct: “We think not.”⁸⁹

Though possibly slight, there does seem to be a difference. When the state is preempted from enforcing its laws that would prevent harmful pollution, *P* may die and his state may be unable to offer him protection. The double security fails, neither *Printz* nor *New York* offers him any protection, and state inaction “causes” his death. When the national government is forbidden to commandeer state officials to enforce its ban on cancer medication, however, cancer medicine may still be sold in the state. The state can put its citizens on notice that, although the national government may be interested in oppressing them, the state is not going to have a hand in it. Doctors prescribing and pharmacists distributing the medication will understand that the cost of defying the law is now lower, because the massive apparatus of state law enforcement will not be knocking on their doors;⁹⁰ instead, the national government must shoulder the burden of enforcing its tyrannical law, sending federal agents to combat the illegal sales. By preserving state autonomy, thereby making enforcement of the bad law prohibitively expensive to the national government, more cancer medicine may be distributed and lives at the margin saved.⁹¹

⁸⁶ *Id.* at 98–99.

⁸⁷ *Id.* at 100.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ The national law enforcement apparatus is much smaller than that of the states. See Daniel C. Richman & William J. Stuntz, *Defining Federal Crimes 2* (Fall 2007) (unpublished manuscript, on file with the Harvard Law School Library) (noting that in 2006 there were about 4400 assistant U.S. attorneys pursuing an array of criminal cases and comparing this to approximately 27,000 state prosecutors nationwide); *id.* at 1 (noting that in 2004 there were only 105,000 federal law enforcement officers — including many customs, immigration, and prison officers — compared to 732,000 state and local officers nationwide).

⁹¹ The same result would, of course, be reached if the stricter state environmental legislation could not be preempted. Yet, simply because the Constitution requires preemption does not mean that allowing commandeering is harmless. In the anticommandeering world, it is true that pre-

Publius's rhetoric teaches that somehow a state government must "sound the alarm" when it sees the national government behaving badly, but he fails to explain how this might work in practice. What *legal* alarm can the state have if it is constitutionally compelled to be complicit in federal tyranny? Extraconstitutional action surely sends a strong message to the people, but if the states were intended to be a *constitutional* countervailing force, why must they act extraconstitutionally to fill their role? Anticommandeering rules provide a state with a constitutional means to sound an alarm. True, this allows states to protect lives only at the margin, but the distinction possibly makes a difference.

Critics of *Printz* and *New York* argue that these are ineffectual doctrines because whatever the national government cannot achieve through commandeering, it can either perform on its own or obtain from the states through conditional preemption and conditional spending.⁹² This is no doubt true, but it also seems to miss the point. The national government may ultimately accomplish whatever policy ends the protesting state believes to be unconstitutional, but faced with a resisting state, it must decide if its end is truly worth the cost of preemption or bribery. Federal usurpations are more costly.

Drawing this out further, imagine that the national government thinks that, as a matter of national policy, it is very important that doctors not prescribe medicinal marijuana. In an anticommandeering world, the government could send FBI agents to the recalcitrant state to arrest doctors, increase penalties for doctors who are caught, or condition federal health funding on the state banning medical marijuana. The first solution means an increased federal law enforcement presence in the state, itself a sign both to the citizens of that state as well as other states that something may be amiss in the national scheme, akin to a troop buildup along a nation's borders. The second solution may have political costs, as the penalties would have to be imposed on offenders in all states — even conforming states — creating problems of overdeterrence that may be politically unpalatable. The third solution brings the problem into sharp focus. If state public officials are truly guard dogs for their citizens and believe the national government is behaving unconstitutionally, one would hope that they would demonstrate their public-spiritedness by refusing to be bought off. But even if state politicians fail at this level, at least anti-commandeering doctrine gave them the opportunity to behave as Publius imagined.

emption might ultimately "cause" the same harms as would be "caused" in the commandeering world, but the source of those harms and the ease with which they can be inflicted on people are important factors to consider when designing a system of tyranny prevention.

⁹² See Hills, *supra* note 14, at 817–18.

By changing the calculus, *New York* and *Printz* cut off one avenue for tyranny. Notwithstanding these rulings, the national government may ultimately succeed in forcing a state to tolerate behavior within its borders that the state would otherwise like to prohibit. But on the flip side, with *New York* and *Printz* standing in the way, if the national government wants to create a nation where partial-birth abortions do not occur or marijuana is not used as a medicine, it will have to face the possibility that it might have to create that country with its own hands, in the face of massive resistance by citizens of certain states. The task is not insurmountable, but it is costly.⁹³

VI. CONCLUSION

Publius was, no doubt, a top notch political theorist,⁹⁴ but his vision of federalism as competition seems to be somewhat undertheorized. His failings in this area, however, are understandable; even he did not purport to understand its precise contours.⁹⁵ Moreover, perhaps it is not surprising that the mechanics of federalism are underdeveloped in the *Federalist Papers*. First and foremost in the mind of Publius was the desperate need for union and centralized power. The defects of the Articles of Confederation had to be cured, and this principally meant that the states had to be controlled. Given the urgency of the matter, the mechanisms by which the states would be able to play the role they were clearly intended to play could be worked out

⁹³ This argument draws from Hills, *supra* note 14. In his article, Professor Roderick Hills argues that *New York* and *Printz* correctly protect state autonomy by forcing the federal government to purchase the services it desires from state governments through voluntary agreements. Although he justifies his theory on grounds of economic efficiency rather than tyranny prevention, the argument seems to carry over. For Professor Hills, forcing the national government to purchase state government services avoids “inefficiencies, distributive injustice, and invasion of expressive autonomy.” *Id.* at 817. In this theory, anticommandeering doctrine makes tyranny more expensive.

⁹⁴ See Martin Diamond, *The Federalist on Federalism: “Neither a National Nor a Federal Constitution, but a Composition of Both,”* 86 *YALE L.J.* 1273, 1285 (1977) (“Publius . . . remains our most instructive political thinker.”).

⁹⁵ See THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 198–99; see also *id.* at 195–96 (noting that the “task of marking the proper line of partition between the authority of the general and that of the State governments” was “arduous,” *id.* at 195, and comparing the task to defining the boundaries in the “kingdom of nature,” *id.* at 195–96, and to defining “[t]he precise extent of the common law, and the statute law, the maritime law, . . . and other local laws and customs,” *id.* at 196); *id.* at 197 (indicating that the nature of federalism would have to come to be understood over time since proper demarcations eluded words and stating that “[a]ll new laws, though penned with the greatest technical skill . . . , are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications”); ROSSUM, *supra* note 63, at 79 (“It is essential for understanding the federalism created by the framers to appreciate that they went into the Convention recognizing only two fundamental modes, or elements, of political organization — the federal and the national — and that they thought they had succeeded for the first time in combining these . . . into a compound system.”).

later. Thus, perhaps it is not surprising that Publius latched on to his favored mechanism of partial agency competition to operationalize his view of the states as liberty-protecting devices.

And so we as a nation have tried to understand federalism and the role of the states for over two hundred and thirty years.⁹⁶ There seems to be a collective national intuition that the states are valuable, somehow, as guardians of our liberty, but we have grappled with different ideas of what exactly that value might be. Some have argued that states create a right of exit that is liberty-enhancing.⁹⁷ Others have focused on the ability of local governments to tailor policies to local constituents, thereby maximizing some measure of utility.⁹⁸ And still others view states as important in that they convey information to national governing bodies, so that national rules are created in ways that maximize national welfare by ensuring that all localities at least have the opportunity to be heard and considered in the formulation of national policies.⁹⁹

Each of these theories carries some normative weight, but none of them explains how the states could act as the primary protector of the liberties of their citizens vis-à-vis the national legislature, a role that Publius clearly conveyed as being intended by the Constitution. By giving the states a way to constitutionally push back against the national government, the anticommandeering cases provide state governments with a tool that can be used to fulfill that role. Increasing through noncompliance the costs faced when the national government contemplates an action that even some small subset of states views as a usurpation of power may allow a state to sound the alarm bells in a way that matters. In short, by protecting state autonomy, the Court has enabled states to act as guard dogs against tyranny. To be sure, the national government may find ways to run past the dogs, and even when the dog slows the invader and alerts its master, the hoped-for resistance may fizzle. Yet the guard dogs are patrolling and barking nonetheless. And ultimately, that is all they can do. As Publius reminds us at many times in the *Federalist Papers*, while the auxiliary precautions are useful, ultimately the responsibility lies with the people to answer the alarm.

⁹⁶ Kramer, *supra* note 17, at 293 (“Federalism has consistently been the most contested, most controversial issue of constitutional law throughout American history.”).

⁹⁷ See Calabresi, *supra* note 30, at 776.

⁹⁸ See McConnell, *supra* note 30, at 1493–95.

⁹⁹ See Wechsler, *supra* note 16, at 546–47.