

JUNE 30, 2014 | NUMBER 751

Libertarianism and Federalism

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EXECUTIVE SUMMARY

Federalism is a political system with multiple levels of government, each of which has some degree of autonomy from the others. The United States has a federalist system that encompasses the national government, states, and localities. The United States adopted federalism in part to prevent abuses of power and to preserve individual liberty. Federalism serves those goals by helping individuals to “vote with their feet,” thereby fostering interjurisdictional competition. Such benefits are most likely to be found in federal systems where subnational governments have an incentive to compete for residents and businesses because they must raise most of their revenue from their

own taxpayers, as opposed to receiving subsidies from the central government. In many ethnically divided societies, federalism can also enhance liberty by reducing ethnic conflict and oppression. However, federalism can also endanger liberty or property by empowering subnational governments to exploit owners of immobile assets, most notably land. Federalism can also permit local majorities to oppress local minorities. Contrary to James Madison’s expectations, federalism in the current era is unlikely to constrain the national government since states have incentives to support the expansion and centralization of power in Washington. Whether federalism enhances liberty depends on circumstances and institutional design.

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INTRODUCTION

Does federalism promote liberty? Or does having multiple levels of government rather than one merely create additional layers of oppression? These are vital questions for libertarians. They also interest many others who seek to protect some measure of individual freedom against the state. In the modern world, federal systems are increasingly common. They include many of the world’s largest democracies, such as the United States, Canada, Germany, India, Mexico, and Brazil. The influence of federalism on liberty therefore matters to libertarians and to many others.

Historically, libertarians have disagreed among themselves about the merits of federalism. Some have been strong supporters of the idea.¹ But many have either largely ignored it,² or attacked specific failings of American federalism, especially the oppression of unpopular minorities.³ Few libertarian writers, however, have systematically rejected federalism across the board. Libertarian economists and legal scholars have considered specific aspects of federalism, especially competition between governments.⁴ But no scholar has recently systematically evaluated federalism from a libertarian standpoint.

This policy analysis begins to fill that gap. I contend that some types of federalism often have net beneficial effects on liberty by limiting the size and scope of government, empowering individuals to “vote with their feet,” and fostering interjurisdictional competition. Such benefits are most likely to be found in federal systems where subnational governments have an incentive to compete for residents and businesses because they must raise most of their revenue from their own taxpayers, as opposed to receiving subsidies from the central government. In many ethnically divided societies, federalism can also enhance liberty by reducing ethnic conflict and oppression.

But federalism is not an unalloyed boon for freedom. Unless properly structured, it can also empower subnational governments to exploit owners of immobile assets, most

notably land. Federalism can also permit local majorities to oppress local minorities. Finally, federalism also creates substantial dangers for liberty in situations where regional governments derive all or most of their revenue from the central government rather than through taxation of their own residents.

In this paper, I first briefly explain what is meant by “libertarianism” and “federalism.” I adopt relatively broad and intuitive definitions of both terms, although I fully recognize that they can be used in more restrictive ways. Next, I outline the ways in which federalism serves to limit government power and enhance liberty. Finally, I explore the dangers of federalism from a libertarian point of view.

The scope of this analysis is necessarily limited. While I try to evaluate federalism from the standpoint of libertarianism, I do not evaluate libertarianism itself relative to other ideologies. Similarly, I do not assess federalism from a nonlibertarian perspective. In considering federalism from a libertarian point of view, I also focus primarily on issues where most libertarians agree on ultimate ends, differing mostly over means. For that reason, I do not consider issues such as the death penalty and abortion, where libertarians have serious internal disagreements over ultimate values.⁵ Finally, I do not weigh the relative merits of judicial review and other mechanisms for enforcing federalism by preventing the central government from exceeding the appropriate scope of its powers.⁶

DEFINING LIBERTARIANISM AND FEDERALISM

Both “libertarianism” and “federalism” are contested terms. For present purposes, I prefer to adopt relatively broad definitions of both concepts.

Defining Libertarianism

With respect to libertarianism, I define it inclusively to encompass the full range of ideologies that set very tight constraints on government power in both the economic and

social realms. Libertarians oppose most forms of government intervention favored by the liberal left, such as economic regulation and welfare-state programs, along with most interventionist policies favored by the socially conservative right, such as the War on Drugs and suppression of sexually explicit speech.

All versions of libertarianism insist on keeping the power of government within very tight bounds. I do not exclude libertarians who favor such constraints on consequentialist utilitarian grounds rather than natural-rights grounds, or vice versa, just as I also do not exclude those who try to combine these two rationales. Similarly, I do not exclude libertarian thinkers who advocate anarchism (e.g., David Friedman and Murray Rothbard),⁷ those who advocate a “minarchist” minimal state (e.g., Robert Nozick),⁸ or those who are willing to allow a very minimal welfare state (e.g., Milton Friedman and F. A. Hayek). These internal disagreements are important for many purposes. But most—although not all—of the points about federalism developed here are applicable to a wide range of libertarian perspectives.

I also have deliberately counted as libertarian some views that are often described as “classical liberal” or “Objectivist”; the former term is sometimes applied to more moderate libertarians,⁹ and the latter to the adherents of Ayn Rand’s political philosophy. While Objectivists and classical liberals may differ from other libertarians on key issues, they are united in favoring tight limits on government power in order to preserve individual liberty.

Defining Federalism

I similarly adopt a relatively broad definition of federalism as any political system where there are multiple levels of government each of which has at least some degree of autonomy from the others.¹⁰ This definition includes many federal systems, ranging from those such as Switzerland’s where the subnational governments have extensive powers, to places where they have very few subnational governments. It also applies to a variety of distributions of fiscal and regulatory authority,

ranging from those where subnational governments have to raise most of their own revenue, as in the United States, to the many nations where they are almost entirely dependent on the central government for funding.

These variations among federal systems are extremely important, and some are far more compatible with libertarianism than others. As discussed below, systems where subnational governments must raise their own revenue are much more compatible with libertarianism than those where they get all or most of their funding from the central government. But in order to understand the significance of these differences, it is important not to exclude some federal systems from the analysis by definitional fiat.

I do not claim that my definitions of libertarianism and federalism are ideal for all purposes. Other scholars might legitimately prefer different definitions for other purposes.¹¹ But these broad definitions are useful for a broad analysis of the implications of federalism for libertarian political thought.

THE LIBERTARIAN CASE FOR FEDERALISM

In one sense, it is paradoxical for a libertarian—or anyone suspicious of government power—to argue that having two or more levels of government is less of a threat to liberty than having just one. As Supreme Court justice Anthony Kennedy puts it, “the insight of the Framers that freedom was enhanced by the creation of two governments, not one,” is a “counterintuitive” one.¹² Intuitively, it might seem that multiplying the number of governments simply multiplies the opportunities for government coercion and restrictions on liberty.

Nonetheless, federalism can enhance liberty and limit government power in several important ways. First and most significant, it offers citizens the chance to escape harmful and oppressive government policies by voting with their feet. Closely related is the possibility of limiting the size, scope, and oppressiveness of government by forcing subnational

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governments to compete with each other for residents and capital. In many countries, federalism also enhances liberty by mitigating ethnic conflict and by shielding vulnerable minority groups from oppression. Finally, federalism can promote liberty simply by reducing the number of people affected by harmful government policies, relative to what would be the case if the same policy were adopted nationwide by the central government.

Historically, many have argued that subnational governments can protect liberty against infringement by the central government. Unfortunately, under modern conditions subnational governments often have incentives to facilitate the growth of central governments rather than resist them.

Foot Voting for Freedom

Federalism promotes liberty by enabling citizens to vote with their feet against oppressive and harmful government policies. In a unitary state, people can only escape such policies at the high cost of leaving the country entirely. By contrast, foot voting between states—and even more so between localities—is usually much cheaper and easier.

Historically, people have often taken advantage of foot-voting opportunities to escape oppressive state and local government policies. A paradigmatic example from American history is the migration of millions of African-Americans from the South to the North and West during the era of Jim Crow segregation.¹³ More recently, gays and lesbians effectively used foot voting to choose jurisdictions that had less repressive policies directed at them.¹⁴ Today, foot voting has led to migration toward states with lower taxes, cheaper housing (caused in part by less restrictive zoning laws), and more job opportunities.¹⁵

For those victimized by government, exit through foot voting often works better than relying on “voice” through the political process.¹⁶ The latter requires political power, or at least popularity with the electorate. The oppressed are often both weak and unpopular. Libertarians and some liberals also criticize

voting as a mechanism for political freedom because the individual voter has so little impact on his fate. There is only an infinitesimally small chance that her vote will actually determine the outcome of an election.¹⁷ Adam Przeworski, a leading left-of-center political scientist, laments that “[n]o rule of collective decisionmaking other than unanimity can render causal efficacy to equal individual participation.”¹⁸ But foot voting helps us get a lot closer to that ideal.

In addition to its purely utilitarian benefits, foot voting also directly enhances freedom in a way many libertarians are likely to value for its own sake. Unlike ballot-box voters, individual foot voters make decisions that really do have “casual efficacy.” They can exercise genuinely effective political freedom—a genuine individual choice about the government policies they wish to live under.¹⁹ This freedom may not have any intrinsic value for purely consequentialist libertarians who support constraints on government power because they believe they lead to greater utilitarian benefits, not because freedom is inherently desirable. But it does matter to those libertarians who decry excessive government at least in part because it is not consensual and denies individuals meaningful freedom of choice.²⁰

Even purely consequentialist libertarians should value the opportunity for decisive choice created by foot voting because it increases the likelihood that decisionmakers will acquire relevant information and evaluate it objectively. Ballot-box voters have strong incentives to be rationally ignorant. Because the chance that any one vote will make a difference to electoral outcomes is infinitesimally small, there is little incentive to spend more than minimal time acquiring political information.²¹ In addition, voters also have very little incentive to avoid falling prey to cognitive biases and wishful thinking in evaluating the information they do acquire; indeed, most of those with relatively high levels of political knowledge usually seek out that information for reasons other than seeking the truth, such as entertainment value or reinforcing their preexisting beliefs and self-

image. Such “political fans” tend to evaluate information in a highly biased fashion, overvaluing any data that supports their preexisting views and discounting that which cuts against them.²² Economist Bryan Caplan calls such behavior “rational irrationality”: when the goal of acquiring information is something other than truth-seeking, it is actually rational to be highly biased in your evaluation of what you learn.²³ A vast literature confirms that most voters have very little knowledge of politics, and often do a poor job of evaluating the little they know.²⁴

By contrast, foot voters have much stronger incentives to both acquire relevant information and evaluate it in an unbiased fashion. Although they certainly do not perform either task perfectly, they generally do far better than ballot-box voters.²⁵ Among many other examples, this is dramatically demonstrated by the effective performance of foot voters even under highly adverse conditions, including that of poor African-Americans in the early 20th century who effectively managed to figure out which jurisdictions had relatively more favorable policies towards racial minorities, despite being poorly educated and despite the efforts of Southern state governments to keep that information from them.²⁶

The political freedom provided by foot voting is far from perfect. It is limited by a variety of factors, most notably moving costs, which prevent people from exiting to more favorable jurisdictions even if they might want to. However, moving costs are not as great an obstacle to effective foot voting as many assume; they have not prevented large numbers of Americans from making interjurisdictional moves. In addition, the problems they create can be mitigated by decentralizing power to lower levels of government. It is usually cheaper and easier to move from one locality to another than from one state to another, for example.²⁷

It must be acknowledged that foot voting does not automatically lead individuals to choose jurisdictions with more libertarian policies. In principle, they might even choose *less* libertarian ones, where there are higher levels of government spending and regulation.

Foot voters might prefer state and local governments with high expenditures on health care and education, or with labor regulations that they believe protect workers from exploitation. They could also prefer jurisdictions that enforce majoritarian cultural norms and are relatively intolerant of other lifestyles. Such possibilities cannot be ruled out a priori.

But real-world migration patterns in fact do tend to favor more libertarian jurisdictions, especially those that have lower taxes, more flexible labor markets, and lower levels of government spending.²⁸ For example, the state of New Hampshire, usually rated as one of the two or three most libertarian states in the United States,²⁹ also attracts an incredibly high rate of in-migration, with some 57% of the population consisting of migrants from other states.³⁰

Insofar as foot voters do sometimes choose jurisdictions with nonlibertarian policies, some libertarians might still prefer that method of selection to ballot-box voting in a unitary state. To the extent that foot voters’ choices are individually efficacious, they are less coercive than those selected at the ballot box, although still more so than most libertarians would prefer.

While foot voting is usually undertaken by uncoordinated individuals or families, it can sometimes be attempted by organized larger groups. A well-known example from American history is the migration of the Mormons to Utah in the 19th century in order to escape persecution in the eastern states. Since 2001, the libertarian Free State Project, founded by political scientist Jason Sorens, has undertaken a coordinated foot-voting effort of its own, seeking to organize the migration of some 20,000 committed libertarian activists to the state of New Hampshire, in order to transform what is already one of the nation’s most libertarian states into a more fully libertarian polity that can serve as both a haven and an example for other jurisdictions. The jury is still out on the long-term impact of the project. But it has already managed to attract thousands of libertarian migrants to New Hampshire and has

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begun to have at least some impact on state government policy.³¹

It is important to emphasize that foot voting can only work effectively if subnational governments are required to respect freedom of movement. If they can instead force residents to stay where they are through restrictions on movement, exit taxes, or other similar devices, foot voters may be out of luck. Thus, effective foot voting may often require centralized enforcement of a right to freedom of movement of the sort that has been provided by federal courts in the United States.³²

Foot voting can often enhance freedom even if subnational jurisdictions make no effort to compete for migrants. Even if variation in policy is purely random or purely driven by the preferences of long-established residents, foot voters can still improve their situation by migrating to localities with more favorable policies.³³ But, as discussed below, foot voting is likely to be more effective when governments compete with each other.

Competition among Governments

For libertarians and others concerned about liberty, the potential benefits of foot voting in limiting government oppression are enhanced by interjurisdictional competition.³⁴ In a federal system, state and local governments often have incentives to compete with each other to attract migrants, both businesses and individual taxpayers. A larger tax base enables the government to fund more public services, charge lower tax rates, or some combination of both, all of which tend to be attractive to politicians. A declining tax base caused by outmigration has the reverse effect—forcing officeholders to cut services or raise taxes, both of which are politically difficult.

Competition forces states to compete for migrants and thus increases individuals’ freedom of choice and the likelihood that they will have options that are to their liking. From that standpoint, it helps make the political system more consensual, a result that should be valued by many—although admittedly not all—libertarians.³⁵ Competitive foot-voting, like foot

voting in the absence of competition, need not automatically result in a smaller role for government. Jurisdictions can and sometimes do compete for migrants by increasing government spending on services that might prove attractive to would-be residents. Overall, however, migration patterns show that foot voters tend to choose states with lower taxes and government spending.

Comparative data show that federal systems where subnational governments are forced to compete for residents because they must raise a high percentage of their own tax revenue tend to have lower levels of government spending.³⁶ This suggests that competitive federalism makes government policy in those states more libertarian than it otherwise would be. The flip side, however, is that federal systems where subnational governments get most of their funding from the central government have little incentive to compete and tend to have even higher government spending than unitary political systems do.³⁷ This suggests that libertarians should be skeptical of federalism in the many nations where subnational governments get all or most of their funding from the center,³⁸ and that they should oppose the growing role of federal subsidies in state government budgets in the United States.

Interjurisdictional competition played a key role in the early economic development of Britain and the United States, and more recently, in the growth of China.³⁹ In the modern United States, it has helped foster the development of the Southern and Southwestern states over the last several decades and forced other states to reconsider dubious policies in order to compete with them.

Interjurisdictional competition does have a potential significant downside. But, ironically, libertarians should welcome this putative problem, to the extent it actually exists. Critics of competitive federalism have long argued that, far from offering migrants good choices, it might instead result in a “race to the bottom” where subnational governments compete with each other to lower regulation

in ways that benefit business interests at the expense of everyone else.⁴⁰ The system would end up in equilibrium, where levels of regulation are suboptimally low. Similarly, some scholars argue that competitive federalism leads subnational governments to abjure redistributive welfare spending that benefits the poor to avoid becoming “welfare magnets.”⁴¹

The race-to-the bottom theory has attracted a range of critics who argue that its theoretical foundations are flawed and that empirical evidence cuts against it.⁴² I am one of the critics myself.⁴³ But to the extent that the theory is sound, this actually makes competitive federalism *more* attractive for libertarians, even though it might also make it less economically efficient and less attractive to left-liberals. Most race-to-the-bottom stories posit scenarios where the race results in less government intervention in the economy than would otherwise occur. Libertarians of nearly all stripes would, of course, welcome such a result.

Race-to-the-bottom theories are not entirely good news for libertarians. In some cases, state and local governments try to attract business interests by offering them special subsidies or regulatory barriers to entry that keep out competitors. For example, local governments try to attract professional sports teams by offering them inefficient stadium subsidies.⁴⁴ Overall, however, this oft-cited downside of interjurisdictional competition can turn into an upside when considered from a libertarian perspective.

Even if races to the bottom might lead to inefficiently low levels of government intervention relative to a baseline where the preexisting level was optimal, the race might actually make the system more efficient—no less—if the preexisting level of intervention was higher than optimal and the race to the bottom helped offset it. The idea that governments have a strong tendency to regulate and spend more than they optimally should is, of course, one shared by nearly all libertarians.

Limiting the Impact of Harmful Policies

In *Federalist* no. 10 James Madison famously

argued that the national government is less dangerous than state governments because it is harder for a faction to capture it and use it for its own benefit at the expense of minorities or the general public:

[T]he greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. . . .⁴⁵

This is correct so far as it goes. It probably really is easier for a faction to use a state government to “execute . . . plans of oppression” than the federal government. However, Madison ignored the fact that if the federal government does get captured by a faction, the consequences are a lot worse than with a state or locality. An oppressive federal policy will likely affect far more people than an oppressive state policy. Madison may have been right to believe that state governments might become tools of factional oppression more easily than the federal government. But he ignored the fact that the consequences of federal oppression, when it does happen, are potentially much worse.

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The more limited impact of subnational policies does make it more difficult to enact good policies, as well as bad ones. If a state or local government adopts a good policy—including one that increases liberty—its effects will be more limited than those of a comparable federal policy. But most libertarians believe that, at least on average, governments tend to enact far more harmful policies than beneficial ones. If they did not hold that view, they would have far less justification for being libertarians in the first place. If libertarian skepticism about government is correct, it implies that we often have good reason to worry more about the need to limit the scope of harmful legislation than the need to maximize the impact of good laws. From that perspective, federalism is often valuable as a strategy for reducing the risks of bad government.

Reducing Intergroup Conflict

In the United States, we traditionally think of federalism as inimical to the interests of ethnic minorities, a perception reinforced by the terrible history of state government oppression of African Americans. By contrast, many other nations adopted federalism precisely to protect the interests of vulnerable groups that are minorities at the national level, but majorities within a particular region. Granting those vulnerable groups autonomous regional governments in a federal framework can help protect them against majoritarian domination in a winner-take-all unitary system and reduce the danger of civil war and bloody secession movements. Federalism has helped diminish ethnic conflict in many countries around the world, including Canada, Switzerland, Belgium, and several Asian and African states.⁴⁶

Ethnic federalism does not always lead to results that are congenial to libertarians. In many cases, it enables regional governments dominated by national minorities to discriminate against other groups. In others, the central government heavily subsidizes minority-dominated regions, so that the latter will have less incentive to secede. The case of Quebec, a major recipient of Canadian federal subsidies, is a good example.⁴⁷

But in situations where ethnic federalism helps prevent violence, civil war, and centralized majoritarian oppression, libertarians should welcome it, or at least regard it as a lesser of two evils. Ethnic violence and war both often result in serious violations of the human rights valued by libertarians and tend to lead to increases in government spending.

Whether ethnically based federalism is actually necessary to address intergroup conflict varies from case to case. In some situations, conflict could potentially be reduced just as effectively by other means, such as power sharing in a unitary government, or peaceful secession.⁴⁸ But, at least in many situations, ethnic federalism offers a viable conflict-reduction strategy that libertarians and others concerned about reducing intergroup violence and repression have good reason to support.

Subnational Governments as a Check on the Power of the Central Government

Libertarians often argue that subnational governments will protect liberty against encroachments by the central government—an idea that has a long and venerable lineage. James Madison famously wrote in *Federalist* no. 51 that the Constitution’s system of federalism and separation of powers would provide a “double security” for liberty under which “the different governments will control each other, [and] at the same time each will be controlled by itself.”⁴⁹ In *Federalist* no. 46, he predicted that “ambitious encroachments of the Federal government on the authority of the state governments . . . would be signals of general alarm. Every [state] government would espouse the common cause.”⁵⁰

Unfortunately, it is far from clear that state governments are likely to do this under modern conditions. Very often, state officials have an interest in supporting the expansion of federal power rather than resisting it.⁵¹ The most obvious such situation is that state governments have an incentive to support policies that lead to greater federal subsidies for themselves, an incentive that has grown in recent years to the point where states get a quarter or more of their

revenue from federal sources.⁵² In addition, state governments often have incentives to support federal policies that serve to suppress competition among the states, thereby fostering a cartel. Unfortunately, from a libertarian perspective, much of the expansion of federal power since the 1930s involves precisely these kinds of initiatives.⁵³ States also have incentives to support expansions of federal power in cases where it enables them to engage in what legal scholars Lynn Baker and Ernest Young call “horizontal aggrandizement”: efforts to use federal power to impose their policy preferences on other state governments.⁵⁴

This does not mean that subnational governments *always* support the expansion of central government power. In ethnically divided societies, regional governments controlled by groups that are minorities at the national level often oppose the expansion of centralized power in order to protect their group interests. In the United States, state governments still often oppose expansions of federal power that they find inimical to their interests or ideologically abhorrent. A dramatic recent example has been the resistance of numerous Republican Party–controlled state governments to Democratic President Barack Obama’s “Obamacare” health care plan, enacted in 2010. Some 28 state governments sued to invalidate the plan under the federal Constitution, and many continued to resist it in various ways even after the Supreme Court narrowly upheld most of the plan in June 2012.⁵⁵

The point is not that subnational governments always support expansions of national power, but rather that they generally cannot be counted on to consistently oppose it, except perhaps in some ethnically divided societies. Subnational governments might be more consistent in resisting expansions of central government spending and taxation if they were prevented from seeking central government subsidies for themselves. In that scenario, any expansion of central government spending and taxation would necessarily diminish the pool of tax revenue available to the subnational authorities themselves.⁵⁶

FEDERALISM AS A THREAT TO LIBERTY

While federalism often helps promote libertarian values, it can also pose a threat to them. Libertarians must consider both sides of the equation.

State and local governments can and do often adopt nonlibertarian policies, just like central governments do. The crucial question, however, is whether there are scenarios where one level of government is likely to be systematically worse than the other. There are indeed cases where subnational governments pose a greater threat to libertarian values than the central government does. The most important such situations are persecution of local minorities, and the targeting of immobile assets, particularly property rights in land.

Persecution of Local Minorities

No phenomenon has tarnished the reputation of federalism in the United States as much as the long and sordid history of state government oppression of minority groups, most notably African Americans in the eras of segregation and slavery. The conventional wisdom holds that federalism was a disaster for African Americans and other minorities, while the growth of federal power greatly alleviated their plight, especially through the abolition of slavery and Jim Crow segregation.⁵⁷ As prominent libertarian-leaning political scientist William Riker put it in 1964, “[t]he main beneficiary [of federalism] throughout American history has been the Southern Whites, who have been given the freedom to oppress Negroes. . . . [I]f in the United States one approves of Southern white racists, then one should approve of American federalism.”⁵⁸

There is no doubt that state governments oppressed African Americans for decades, and to a lesser degree, Asian Americans and other minority groups. There is also no disputing the fact that it took federal intervention to abolish slavery in the 1860s and segregation a century later. The conventional wisdom about the relationship between fed-

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eralism and minority rights in America has a measure of validity.

But that conventional wisdom is also oversimplified and in need of revision.⁵⁹ It ignores or at least understates the reality that the federal government *also* has a long history of racial oppression. From the Founding to 1860, it did much more to preserve and extend slavery than to curb it. Federal policies such as the Fugitive Slave Act of 1850 helped slaveowners keep blacks in captivity, and inhibited their efforts to vote with their feet. Although Southern slaveowners are often seen as supporters of “states’ rights,” they prioritized the defense of slavery over state autonomy by favoring a strong Fugitive Slave Act that overrode Northern states’ efforts to protect African Americans against slavecatchers.⁶⁰

During much of the Jim Crow era, the federal government promoted perpetuated segregation in the armed forces, the federal civil service, and the District of Columbia,⁶¹ Throughout most of that period, the federal courts made only modest efforts to curb state oppression of African Americans,⁶² although failure to curb state-level discrimination is not as severe an indictment of the federal government’s record as its initiation of extensive discriminatory policies of its own. The 19th and early 20th century federal government also engaged in extensive oppression of other minority groups, including forcible displacement of Native Americans, persecution of the Mormons, and the internment of Japanese Americans during World War II.

Perhaps even more important, the conventional wisdom overlooks the fact that, during many periods in American history, persecuted minority groups would have been even worse off under a unitary government than they were under federalism. A unitary policy on slavery at the time of Founding would probably have resulted in universal slavery throughout the nation. A unitary policy on segregation in the early 20th century might well have been closer to that of the Southern states than that of the North.⁶³ Most of all, many minority groups benefited from the opportunities for foot

voting created by federalism, which enabled them to move to relatively less hostile jurisdictions.⁶⁴ African American migration to the North and West is the paradigmatic example, but not the only one.

In more recent times, as racism has gradually receded, minority groups have managed to accumulate greater political power at the local and state level, where they now often wield greater power than in Washington. This has begun to change the relationship between federalism and minority political power that persisted during much of American history.⁶⁵ Over time, as the power of minorities at the local and state level has grown, American federalism has become less distinct from federalism in most other ethnically diverse societies.

Gays and lesbians are a particularly dramatic example of a minority group that has recently benefited from federalism. Had there been a unitary national policy on marriage over the last 20 years, same-sex marriage would not have been adopted in 17 states, beginning with Massachusetts in 2003. The example of these more tolerant states has played a major role in boosting the cause of same-sex marriage with national public opinion.⁶⁶ A key factor in the rapid progress made by the same-sex marriage movement was the existence of states where public and elite opinion was more liberal on this issue than in the nation as a whole.

These considerations do not completely overturn the conventional wisdom on federalism and minority rights. Federalism does sometimes facilitate the oppression of minority groups. But it also often alleviates it, or at least reduces it relative to what would occur under unitary government.

History suggests that federalism benefits persecuted minority groups during periods where there is diversity in policy between states and the majority national opinion is either hostile to the minority in question or at least indifferent to it. In such a situation, a unitary policy would offer few benefits to the minority in question, while federalism at least gives minority members the opportunity to vote with their feet for more tolerant juris-

dictions. Such was the case for blacks during much of the 19th and early 20th centuries.

By contrast, centralization is most likely to benefit minorities when dominant national opinion becomes sympathetic to their plight, but majority opinion within the region where the group is concentrated continues to be hostile. That, of course, was the scenario confronting African Americans in the 1860s and again during Civil Rights Movement of the 1950s and 60s.

The implications of this for the relationship between libertarianism and federalism are not always easy to assess. Ideally, libertarians would want a federal system where the central government is able to prevent oppression of local minorities by subnational authorities, but lacks the authority to engage in such oppression itself. Arguably, the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution strike just such a balance. The three post-Civil War amendments ban slavery, involuntary servitude, various forms of discrimination, and denial of individual rights by state governments, but do not give the federal government a general power to legislate in all areas, instead merely permitting it to adopt “appropriate” enforcement legislation to prevent abuses by state governments.⁶⁷ But the extremely uneven enforcement of those amendments suggests that the appropriate balance is far easier to describe in theory than to implement in practice.

The problem extends beyond the context of violations of minority rights to the broader issue of countering subnational governments’ restrictions on liberty more generally. In principle, the central government could promote libertarianism by curbing other such state and local abuses as well. By forcing state and local governments to leave more decisions to the private sector, such an approach might lead to even greater decentralization and more effective foot voting than vesting power in the hands of subnational governments, as it is easier to vote with your feet in the private sector than the public.⁶⁸ But the more power a central government has to forestall local govern-

ment abuses, the more difficult it becomes to prevent it from using that authority to endanger liberty itself. Any durable libertarian federalism depends on effectively balancing these two objectives.

The Vulnerability of Immobile Assets

Foot voting is a powerful safeguard for individuals and owners of property that can be moved from one jurisdiction to another. Unfortunately, it is far less effective in protecting immobile assets, most notably property rights in land.⁶⁹ If local governments confiscate or severely restrict rights in immobile assets, foot voting is of little help. The owner can leave, but she can’t take her immobile assets with her. In part for this reason, state and local governments have a long history of targeting immobile assets for various forms of exploitation.

While a central government may also engage in such policies, it usually has less incentive to do so, because it can more easily tax mobile assets as well. The costs of exiting the nation entirely are much higher than those of leaving a region or locality. In this respect, one of federalism’s great benefits—the ability of mobile citizens to escape bad policies by foot voting—is sometimes actually a detriment to owners of immobile assets, since it leads to discriminatory targeting of their property.

Perhaps the most striking U.S. example of state and local governments targeting immobile assets is the forcible displacement of hundreds of thousands of people and numerous small businesses by means of eminent domain.⁷⁰ This issue came to national prominence as a result of the Supreme Court’s 2005 decision in *Kelo v. City of New London*,⁷¹ which ruled that the Constitution allows local governments to condemn property and transfer it to other private owners in order to promote “economic development” even if the government had little or no evidence proving that the promised economic development would actually be achieved. But similar takings had been occurring for decades, often on a much larger scale.⁷²

“A federal system where subnational governments must raise all or most of their own funds is conducive to interjurisdictional competition and to limiting government spending and regulation.”

“Federalism is often a valuable tool for protecting freedom, but can also be a menace. Libertarians have good reason to support this institution in many situations, but also to approach it with caution.”

Network industries that must be present in numerous states at once in order to function effectively are also vulnerable to exploitation. Because they often cannot leave a particular jurisdiction without undermining the effectiveness of their network, they are often unable to vote with their feet.⁷³ Telecommunications firms are a paradigmatic example of such an industry, since much of their value resides in being able to connect people in distant locations with each other.⁷⁴

The vulnerability of immobile assets is partially mitigated by the possibility that excessive exploitation will prevent financial institutions from investing in them in the first place. But this constraint often works too slowly to provide a strong deterrent to local and state governments with relatively short time horizons.⁷⁵

There is no simple solution to the problem of exploitation of immobile assets by subnational governments. Elsewhere, I have argued that this problem strengthens the case for establishing and enforcing strong constitutional protections for property rights and other immobile assets.⁷⁶ As in the case of constitutional protections for vulnerable minority groups, such restrictions are often easier to conceive than effectively implement. Regardless, the vulnerability of immobile assets significantly qualifies the advantages of federalism from a libertarian point of view.

CONCLUSION

Federalism has several major advantages for libertarians, but also poses some very real risks. Which predominate will often depend on the political situation in the nation in question, and even more so on the structure of the federal system itself.

A federal system where subnational governments must raise all or most of their own funds is conducive to interjurisdictional competition and to limiting government spending and regulation.⁷⁷ On the other hand, a system where states get most of their funding from the central government has very different tendencies.

Whether federalism mitigates the oppression of persecuted minorities or increases it depends in part on the distribution of the minority population. If national minorities are simultaneously regional majorities, ethnic federalism can protect them against repression by the central government. In addition, federalism may protect minorities in cases where the national majority is hostile or indifferent, but variation between regional governments gives minority group members the opportunity to vote with their feet for relatively more tolerant jurisdictions. By contrast, persecuted minorities can potentially benefit from centralization, in cases where national public opinion becomes supportive of their interests, while local majorities in the region where the minority group is concentrated remain hostile.

Federalism is often a valuable tool for protecting freedom, but can also be a menace. Libertarians have good reason to support this institution in many situations, but also to approach it with caution.

NOTES

1. See, for example, Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, rev. ed. (Princeton: Princeton University Press, 2013); Geoffrey Brennan and James M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Cambridge: Cambridge University Press, 1980); and F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), pp. 183–86.
2. For example, it is striking that Milton Friedman’s many works on libertarianism and political economy include only an extremely brief consideration of federalism. See Milton Friedman and Rose D. Friedman, *Free to Choose: A Personal Statement* (New York: Harcourt, Brace, Jovanovich, 1980), p. 157.
3. See, for example, Ayn Rand, “Racism,” *Objectivist Newsletter* 2 (September 1963): 33–36. Rand recognized that federalism has some value in pro-

protecting states against the federal government, but also condemned “states rights” advocates for using it to promote racism against blacks.

4. See, for example, Brennan and Buchanan, *The Power to Tax*; Arnold Kling, *Unchecked and Unbalanced: How the Discrepancy Between Knowledge and Power Caused the Financial Crisis* (Lanham, MD: Rowman & Littlefield, 2010), ch. 3; and Richard E. Wagner, “American Federalism: How Well Does it Support Liberty?” Mercatus Center Research Paper (May 6, 2014): 33–40, http://mercatus.org/sites/default/files/Wagner_Federalism_v2.pdf. Despite the title, this last paper mostly focuses on the impact on liberty of competition among state governments and its absence, rather than on the effects of federalism more generally.

5. Determining the value of federalism on these issues from a libertarian point of view would first require us to establish the “correct” libertarian position on the ultimate values at stake, which is a complex enough subject to deserve a policy analysis of its own.

6. I have defended the use of judicial review for this purpose elsewhere. See, for example, John McGinnis and Ilya Somin, “Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System,” *Northwestern University Law Review* 99 (2004): 89–130.

7. See, for example, David Friedman, *The Machinery of Freedom*, 2nd ed. (New Rochelle, NY: Arlington House, 1990); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (New York: LRF, 1978).

8. Robert Nozick, *Anarchy, the State, and Utopia* (New York: Basic Books, 1974).

9. See, for example, Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Cambridge: Harvard University Press, 2014).

10. For a definition of federalism similar to this, see for example, Jenna Bednar, *The Robust Fed-*

eration: Principles of Design (New York: Cambridge University Press, 2009), pp. 18–19. Bednar also argues that each level of government must be sovereign in “at least one policy realm.”

11. For various efforts at defining federalism that adopt approaches different from mine, see, for example, Malcolm Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: University of Michigan Press, 2008); Ronald L. Watts, “Federalism, Federal Political Systems, and Federations,” *Annual Review of Political Science* 1 (1998): 117–37, 120–21; and Giuseppe Eusepi and Richard E. Wagner, “Polycentric Polity: Genuine vs. Spurious Federalism,” *Review of Law and Economics* 6, no. 3 (2010): 329–45.

12. *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

13. See, for example, Florette Henri, *Black Migration: Movement North 1900–20* (New York: Doubleday, 1975); and Daniel M. Johnson and Rex R. Campbell, *Black Migration in America: A Social Demographic History* (Durham: Duke University Press, 1981). For a detailed discussion that relates this case to the theory of foot voting, see Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (Stanford: Stanford University Press, 2013), pp. 128–33; and Ilya Somin, “Foot Voting, Political Ignorance, and Constitutional Design,” *Social Philosophy and Policy* 28 (2011): 202–26.

14. See Stephen Clark, “Progressive Federalism? A Gay Liberationist Perspective,” *Albany Law Review* 66 (2003): 719–57.

15. Nathan Ashby, “Economic Freedom and Migration Flows Between US States,” *Southern Economic Journal* 73 (2007): 677–97; and Somin, *Democracy and Political Ignorance*, pp. 144–45.

16. For the classic work distinguishing exit and voice, see Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970).

17. This point is vividly driven home by Robert Nozick's "tale of the slave," in which it becomes clear that there is little difference between a slave who is owned by a single master, and one owned by a mass electorate in which he gets one of many millions of votes in referenda that determine labor policy. See Nozick, *Anarchy, State and Utopia*, pp. 290–92.
18. Adam Przeworski, *Democracy and the Limits of Self-Government* (Cambridge: Cambridge University Press, 2010), p. 101.
19. For a more detailed discussion of the link between foot voting and political freedom, see Ilya Somin, "Foot Voting, Federalism, and Political Freedom," *Nomos: Federalism and Subsidiarity*, ed. James Fleming and Jacob Levy (New York: NYU Press, forthcoming).
20. See, for example, Michael Huemer, *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey* (New York: Palgrave Macmillan, 2013), pp. 22–34; and Nozick, *Anarchy, State and Utopia*. For a particularly thorough critique of the idea that voting is an adequate indication of political consent, see A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1999), pp. 218–24.
21. See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957), ch. 13; and Somin, *Democracy and Political Ignorance*, ch. 3.
22. Somin, *Democracy and Political Ignorance*, pp. 78–84.
23. Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton: Princeton University Press, 2007); and Bryan Caplan, "Rational Ignorance Versus Rational Irrationality," *Kyklos* 54 (2001): 3–26.
24. For surveys of the evidence, see, for example, Michael X. Delli Carpini and Scott Keeter, *What Americans Know About Politics and Why it Matters* (New Haven: Yale University Press, 1996); Richard
- Shenkman, *Just How Stupid Are We? Facing the Truth about the American Voter* (New York: Basic Books, 2008); Scott Althaus, *Collective Preferences in Democratic Politics* (New York: Cambridge University Press, 2003); and Somin, *Democracy and Political Ignorance*, ch. 1.
25. For an extensive discussion of the available evidence, see Somin, *Democracy and Political Ignorance*, ch. 5.
26. Somin, *Democracy and Political Ignorance*, pp. 128–33.
27. For a more thorough discussion of the problem of moving costs as an obstacle to foot voting, see Somin, *Democracy and Political Ignorance*, pp. 144–45.
28. See, for example, *ibid.*, and Ashby, "Economic Freedom."
29. William P. Ruger and Jason Sorens, *Freedom in the Fifty States: An Index of Personal and Economic Freedom* (Arlington, VA: Mercatus Center, George Mason University, 2009), p. 34.
30. Kenneth Johnson, *The Changing Faces of New Hampshire: Recent Demographic Trends in the Granite State* (Durham, NH: Carsey Institute, University of New Hampshire, 2007).
31. For an overview of the Free State Project and its impact up to 2013, see Garrett Quinn, "The Free State Project Grows Up," *Reason*, July 2013, <http://reason.com/archives/2013/05/15/the-free-state-project-grows-up>.
32. See, for example, *Crandall v. Nevada*, 73 U.S. 35 (1867) (decision striking down a state exit tax as unconstitutional).
33. It is worth noting that competition is absent from the classic model of foot voting developed in Charles Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64, no. 5 (1956): 516–24, the foundational article for modern scholarship in the field.

34. For libertarian scholarship emphasizing the benefits of interstate competition for liberty, see, for example, Wagner, “American Federalism: How Well Does it Support Liberty?” 33–40; and Kling, *Unchecked and Unbalanced*, ch. 3.
35. See discussion of this point in the previous section.
36. See, for example, Jonathan Rodden, *Hamilton’s Paradox: The Promise and Peril of Fiscal Federalism* (Cambridge: Cambridge University Press, 2010); and Jonathan Rodden, “Reviving Leviathan: Fiscal Federalism and the Growth of Government,” *International Organization* 57, no. 4 (2003): 695–729.
37. See works by Jonathan Rodden cited in the previous note. For a thorough review of the relevant literature, see Barry Weingast, “Second Generation Fiscal Federalism: Implications for Decentralized Democratic Governance and Economic Development,” unpublished paper (2007).
38. For a survey, see Weingast, “Second Generation Fiscal Federalism.”
39. For the argument that competitive federalism played a key role in promoting U.S. economic development, see Michael S. Greve, *The Upside-Down Constitution* (Cambridge: Harvard University Press, 2012), chs. 4–7. For further evidence on the U.S., Britain, and China, see Barry Weingast, “The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development,” *Journal of Law, Economics, and Organization* 11, no. 1 (1995): 1–31. For additional extensive evidence from many countries, see Weingast, “Second Generation Fiscal Federalism.”
40. See, for example, Kirsten H. Engel, “State Environmental Standard-Setting: Is There a ‘Race’ and Is it ‘To the Bottom?’” *Hastings Law Journal* 48 (1997): 274–369; Kirsten Engel and Scott R. Saleska, “Facts are Stubborn Things: An Empirical Reality Check in the Theoretical Debate over State Environmental Rate-Setting,” *Cornell Journal of Law and Public Policy* 8 (1998): 55–88; and Joshua D. Sarnoff, “The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection,” *Duke Environmental Law and Policy Forum* 7 (1997): 225–54.
41. See, for example, Paul E. Peterson, *The Price of Federalism* (Washington, D.C.: Brookings Institution, 1995). For a critique of the conventional wisdom on this issue, see Frank H. Buckley and Margaret Brinig, “Welfare Magnets: The Race for the Top,” *Supreme Court Economic Review* 5 (1997): 141–77.
42. See, for example Richard Revesz, “Rehabilitating Interstate Competition: Rethinking the ‘Race to the Bottom’ Rationale for Federal Environmental Regulation,” *NYU Law Review* 67 (1992): 1210–54; Revesz, “The Race to the Bottom and Federal Environmental Regulation: A Response to Critics,” *Minnesota Law Review* 82 (1997): 535–64; and Greve, *Upside-Down Constitution*, pp. 186–88.
43. Somin, *Democracy and Political Ignorance*, pp. 145–47.
44. For a recent survey of the evidence, see David Schultz, *American Politics in the Age of Ignorance: Why Lawmakers Choose Belief over Research* (New York: Palgrave Macmillan, 2012), ch. 3.
45. James Madison, “Federalist no. 10,” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), p. 83.
46. For an overview covering many such cases, see Luis Moreno and César Colino, eds., *Diversity and Unity in Federal Countries* (Montreal & Kingston: McGill-Queen’s University Press, 2010); see also Dawn Brancati, *Peace by Design: Managing Intrastate Conflict through Decentralization* (New York: Oxford University Press, 2009).
47. For a recent summary, see Mark Milke, “Quebec’s Fiscal Independence Myth,” *National Post* (Toronto), March 24, 2014.
48. For a discussion of the viability and potential

advantages of peaceful secession as a conflict-reduction mechanism by a leading libertarian scholar, see Jason P. Sorens, *Secessionism: Identity, Interest and Strategy* (Montreal: McGill-Queens University Press, 2012).

49. James Madison, “Federalist no. 51,” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), p. 323.

50. Madison, “Federalist no. 46,” in *ibid.*, p. 298.

51. For an overview of their incentives in this regard, see John McGinnis and Ilya Somin, “Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System,” *Northwestern University Law Review* 99, no. 1 (2004): 89–130.

52. *Ibid.*

53. See Greve, *Upside-Down Constitution*, chs. 9–13.

54. See Lynn Baker and Ernest Young, “Federalism and the Double Standard of Judicial Review,” *Duke Law Journal* 51, no. 1 (2001): 75–164.

55. On the role of state governments in the Obamacare litigation, see Josh Blackman, *Unprecedented: The Constitutional Challenge to Obamacare* (New York: Public Affairs, 2013), chs. 3–4.

56. On this point, see Ilya Somin, “Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments,” *Georgetown Law Journal* 90 (2002): 461–502, 471–73.

57. For a good recent summary of this conventional wisdom, see Douglas Laycock, “Protecting Liberty in a Federal System: The US Experience,” in *Patterns of Regionalism and Federalism: Lessons for the UK*, ed. Jorg Fedtke and B.S. Markesisinis (London: Hart, 2006), pp. 121–45.

58. William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964), pp. 152–53, 55. Riker later developed a less negative view of

American federalism. See William H. Riker, *The Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987), pp. xii–xiii.

59. This critique of the conventional wisdom about federalism and minority rights is based on my more extensive treatment of the subject in Somin, *Democracy and Political Ignorance*, pp. 147–50, and Somin, “Foot Voting, Federalism, and Political Freedom.”

60. See Robert Kaczorowski, “The Tragic Irony of American Federalism: National Sovereignty versus State Sovereignty in Slavery and Freedom,” *University of Kansas Law Review* 45 (1997): 1015–61, 1034–40.

61. See Desmond King, *Separate and Unequal: African-Americans and the US Federal Government*, rev. ed. (New York: Oxford University Press, 2007).

62. For the conventional wisdom that the courts accomplished very little beyond what the other branches of government were willing to do, see Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004). For a somewhat more favorable evaluation of the judiciary’s record, see David E. Bernstein and Ilya Somin, “Judicial Power and Civil Rights Reconsidered,” *Yale Law Journal* 114 (2004): 591–657.

63. I discuss the reasoning behind these conjectures in Somin, *Democracy and Political Ignorance*, pp. 147–48.

64. See discussion above.

65. For an argument along these lines, see Heather K. Gerken, “A New Progressive Federalism,” *Democracy* (Spring 2012), <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=1>.

66. On the crucial role of the adoption of same-sex marriage in Massachusetts and other early-adopting states, see, for example, see Michael J. Klarman, *From the Closet to the Altar: Courts, Back-*

lash, and the Struggle for Same-Sex Marriage (New York: Oxford University Press, 2012).

67. See U.S. Const. Amend. XIII, Sect. 2; U.S. Const., Amend. XIV, Sect. 5; U.S. Const. Amend. XV, Sect. 2. The Thirteenth Amendment bans purely private slavery and involuntary servitude, as well as that enforced by state law. U.S. Const. Amend. XIII, Sect. 1.

68. See Somin, *Democracy and Political Ignorance*, pp. 137–39.

69. The argument in this section is based on a much more detailed analysis of the issue that I presented in Ilya Somin, “Federalism and Property Rights,” *University of Chicago Legal Forum* (2011): 53–88, 58–66.

70. Ibid., 63–64; see also Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain* (Chicago: University of Chicago Press, forthcoming), ch. 3.

71. 545 U.S. 469 (2005).

72. For an overview of the relevant history, see Somin, *Grasping Hand*, ch. 3.

73. For a discussion of this problem, see Richard A. Epstein, “Exit Rights under Federalism,” *Law and Contemporary Problems* 55, no. 1 (1992): 147–65.

74. For an overview of the special characteristics of network industries, including telecommunications, see Oz Shy, *The Economics of Network Industries* (Cambridge: Cambridge University Press, 2001).

75. Somin, “Federalism and Property Rights,” p. 61.

76. Ibid., 58–66; see also Somin, *Grasping Hand*, ch. 8.

77. See discussion in the section on interjurisdictional competition above.

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