

Not Old or Borrowed: The Truly New Blue Federalism

*Robert A. Schapiro**

Progressives once feared federalism as a mechanism for allowing deviant, pernicious practices to persist. Federalism, it seemed, might constitute a polite, historically grounded justification for blocking the federal government from guaranteeing basic human rights to people throughout the United States.¹ After all, “states’ rights” provided a rallying cry for opposition to the civil rights movement of the 1950s and 1960s. Thus, in 1964, a leading political scientist wrote, “[I]f in the United States one disapproves of racism, one should disapprove of federalism.”²

Times have changed. In an era when the federal government has seemed unable or unwilling to address a variety of pressing societal problems, states have taken the lead in providing their own solutions. This trend of state-level reform represents a kind of return to the early Progressive movement of the late nineteenth and early twentieth centuries, when state-sponsored programs constituted the core of the Progressive agenda. It was the great progressive Justice Louis Brandeis who extolled the virtues of states as “laboratories” for experimenting with novel social policies.³ The main concern for Brandeis, along with other Progressives, was for the federal government to get out of the way and allow state policies to flourish. Before 1938, the federal government served as a potential roadblock to reform. In cases such as *Lochner v. New York* in 1905, the United States

* Professor of Law and Director, Center for Federalism and Intersystemic Governance, Emory University School of Law. Email: robert.schapiro@emory.edu. I am grateful for the skilled research assistance of Myles Levelle and Cullen Stafford. Terry Gordon and Will Haines of the Emory University School of Law Library also offered valuable aid.

¹ Throughout this Article, I use the term “human rights” to refer to the range of rights that state and federal governments might guarantee. Current civil rights laws protect many human rights, such as rights against racial discrimination or arbitrary deprivation of property. However, I use the term “human rights,” rather than “civil rights,” for two related reasons. First, some human rights, such as rights against environmental degradation or rights to adequate education, do not fit comfortably into contemporary understandings of “civil rights.” Second, the term “human rights” connects discussions of rights in the United States to global debates about the protection of human dignity and to international documents elaborating such protections, such as the Universal Declaration of Human Rights. One of the themes that this Article emphasizes is the importance of considering the overlap of multiple legal regimes, including state, national, and international systems. For an analysis of “civil rights” and “human rights,” see, e.g., Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207 (1992). For a discussion of the place of “human rights” in legal discourse in the United States, see, e.g., Michael J. Perry, *The Idea of Human Rights and the Matter of Rights-Talk*, 28 SUFFOLK U. L. REV. 587 (1994).

² WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 155 (1964).

³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

Supreme Court invoked the doctrine of substantive due process to strike down state legislation regulating the working conditions of employees.⁴ Similarly, before the landmark case of *Erie Railroad Co. v. Tompkins*⁵ in 1938, the federal courts exercised a broad prerogative to define a general common law in cases within their diversity jurisdiction.⁶ The federal courts used this authority to create an alternative legal regime that interfered with states' abilities to regulate commercial entities.⁷ In the wake of the Supreme Court's acquiescence in the New Deal policies of President Franklin D. Roosevelt,⁸ the Court abandoned both economic substantive due process and general common law in the late 1930s, thus freeing state economic regulation from federal fetters.⁹

While federalism provided a rallying cry for progressives in the early twentieth century, by the 1950s and 1960s federalism had new champions. Federalism—understood as constitutional protection for states from national meddling—offered a convenient shield for local obstruction of federal efforts to guarantee civil rights. Thus federalism became associated with state-sponsored racism. Only after the successes of the civil rights movement and the legislative achievements of the Civil Rights Act of 1964¹⁰ and the Voting Rights Act of 1965¹¹ could federalism begin to free itself from this taint.

The recent “blue state” federalism hearkens back to the early Progressive era, and its accomplishments have been impressive.¹² In areas ranging from student loans to climate change, from gay marriage to international law, states have been leaders in advancing significant policy objectives that

⁴ 198 U.S. 45, 53 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁵ 304 U.S. 64 (1938).

⁶ *See, e.g., Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19–22 (1842), *overruled by Erie*, 304 U.S. at 79–80.

⁷ *See* EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* 62 (1992) (“The federal common law and substantive due process were obverse sides of the same coin of federal judicial activism and centralization, and they both seemed to make the federal courts the protectors of corporate interests.”); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 701 (1999) (characterizing general common law under *Swift* as the “sibling” of economic due process under *Lochner*).

⁸ For a discussion of the transformation of the Supreme Court during the New Deal period, see generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995).

⁹ *See Erie*, 304 U.S. at 79–80 (rejecting *Swift*'s conception of federal common law); *W. Coast Hotel*, 300 U.S. at 392–97 (abrogating *Lochner*'s prior protection of economic due process).

¹⁰ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

¹¹ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

¹² In this Essay, I use “blue state” federalism colloquially to refer to a federalism that advances policy goals generally associated with “blue” (Democratic-leaning) states. These goals include health care, safety, environmental protection, and financial regulation, along with a broad conception of the kinds of civil and social rights deserving of protection. I am not concerned with whether a particular policy emanates from a traditionally “red” or “blue” state.

have been stymied at the national level. Albany, Sacramento, and other state capitals, rather than Washington, D.C., have become the incubators for innovative regulatory schemes. It is tempting for progressives to celebrate this kind of political reversal of fortune, to turn the federalism table, and to reappropriate a concept that once served as an obstacle to progressive policies.

Amid the progressive glee, however, it is important to recognize that for federalism to maintain its progressive potential, it will need to be reconceptualized. The early twenty-first century is not the same as the early twentieth century. Society and social ills have become more complex. Further, the civil rights era demonstrated the dangerous potential of unchecked local power, and this threat must not be ignored.

Federalism is both a conception of governance and a principle of constitutional law in the United States. The reconceptualization of federalism relates to both of these aspects. As officials formulate optimal policies, they must take account of the transformed character of federalism. Blue state federalism needs to be more than the bad old federalism with new policies inserted. It will not do to take the theories of Strom Thurmond or Ross Barnett and deploy them in support of programs that progressives endorse. What is needed is a new conception of federalism that provides a realistic assessment of the position and promise of states in the twenty-first century.

Specifically, I will argue that, from a policy perspective, officials should conceptualize federalism as a relationship between the states and the federal government, rather than as a means of building walls to divide them. To achieve its full potential, blue state federalism must draw on the problem solving competence of states, without attempting to create enclaves of exclusive state jurisdiction, sealed off from the influence of the federal government. As blue state federalism has demonstrated, states retain a vital role in addressing pressing problems of all sorts. However, as an examination of history and current practice also illuminates, the federal government remains an essential force in confronting contemporary challenges.

The failure to appreciate these characteristics of the new federalism leads to harmful consequences. For a variety of reasons, federalism received relatively little attention from judges and national policy makers from the 1940s through the 1980s. When federalism returned with force to the national stage in the 1980s, some courts and politicians attempted to apply the outworn dual federalist concepts that judges, regulators, and administrators had discarded during the New Deal period. These officials viewed the new federalism through the lens of the old. They thus attempted to place the innovative developments of the new federalism within the outmoded, constricting framework of the old, dual federalism.

From a constitutional perspective, the recent jurisprudence of the United States Supreme Court illustrates the perils of clinging to this former conception of federalism. While the new blue federalism represents a creative partnership between states and the national government, the old dual federalism advanced by the current Court blocks such cooperation. In the Court's conception, federalism requires judicially constructed barriers be-

tween states and the national government. The Court thus hearkens back to the jurisprudence of the pre-New Deal period, improperly constitutionalizing the old dualist understanding of federalism. In this way, the Court may appear to be a friend of blue state federalism, while it actually stands as a serious foe. Like policymakers all across the nation, the Court has shown an increasing interest in federalism. However, in invoking the old federalism of the pre-New Deal era, the Court blocks the flowering of the new federalism.

As I will explain, the wall-building understanding of federalism advanced by the Rehnquist and Roberts Courts actually threatens the accomplishments of the new blue federalism. Properly understood, the federalist system of the United States facilitates an important role for states in addressing social concerns. Confusing the creative potential of the new federalism with the outmoded dual federalism of the Court undermines that potential. It is crucial that policymakers do not reproduce the conceptual confusion at the heart of the current Court's vision of federalism. To understand and celebrate the federalism that we have, state and federal officials must recognize its differences from past notions of federalism.

The old, dual federalism thus presents a two-fold trap. First, under the influence of dualist notions, state and federal regulators may attempt to reconstruct separate enclaves of state and federal prerogative. This wall-building approach will impede the beneficial potential of the new federalism. Second, enchanted by the siren song of the old federalism, the Supreme Court may continue to invoke constitutional principles to ban or disrupt valuable instances of state-federal interaction.

Part I outlines different conceptions of federalism. This Part contrasts a traditional notion of dual federalism with an emerging "polyphonic" approach, which emphasizes the interaction of the states and the federal government. Part II reviews some of the signal achievements of blue state federalism, including regulatory efforts addressed at climate change, lending regulation, gay and lesbian equality, health care, and international human rights. In each instance, I note the important role that states have served. At the same time, these areas illustrate a need for a productive relationship between states and the national government. Blue state federalism is not an argument for federal abandonment of these topics. Drawing on the examples from Part II, Part III analyzes the importance of a continuing role for the national government in the evolution of blue state federalism. This Part further argues that far from assisting the development of progressive federalism, the recent federalism decisions of the United States Supreme Court have hindered state policy initiatives. By seeking to draw boundaries between state and federal enclaves, the Court has blocked the kind of dynamic interaction between the states and the federal government that lies at the heart of blue state federalism. Part IV reviews some of the potential pitfalls of this interactive understanding of federalism and how they might be addressed.

I. THE OLD FEDERALISM AND THE NEW

Before the New Deal, the Supreme Court interpreted the Constitution to require a strong division of authority between the federal government and the states, with some functions allocated to the central authority and others placed with the states. In this “dual federalism” conception, the spheres of state and national authority were exclusive and non-overlapping. The federal government enjoyed plenary authority over some issues, and the states exercised complete control over others. Clear borders divided these state and federal regions, and the job of the courts was to enforce that boundary. When the federal government tried to control local matters, the courts nullified the action. Similarly, if states presumed to regulate national matters, the courts invalidated the state measures.¹³

As a practical matter, state and federal authority inevitably overlapped to some degree. Congress had the constitutional power to regulate interstate commerce, but some state laws inevitably had an impact on interstate commerce. As far as back as *Gibbons v. Ogden* in 1824, the Court noted the potential overlap of state and federal law.¹⁴ In midcentury, the Court crafted a doctrine to address that concurrence. *Cooley v. Board of Wardens* concerned a Pennsylvania law that required vessels using the Port of Philadelphia to employ a local pilot to guide them through the harbor.¹⁵ In *Cooley*, the Court distinguished between subjects requiring uniform treatment and those susceptible to local variation.¹⁶ Finding the regulation of pilotage to be a local topic, the Court upheld the law.¹⁷ The theory of dual federalism, though, understood such overlap to be an exception to the general rule that states and the federal government each controlled enclaves of exclusive jurisdiction. Writing in 1858, Chief Justice Roger Taney described the system as follows: “[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.”¹⁸

This framework proved overly constraining for both the states and the national government. The Great Depression and the prospect of another Great War placed unbearable strain upon dual federalism. In the oft-told story of the Revolution of 1937, dual federalism broke under these pressures.

¹³ See Robert A. Schapiro, *Monophonic Preemption*, 102 Nw. U. L. REV. 811, 815–17 (2008) [hereinafter Schapiro, *Monophonic Preemption*].

¹⁴ 22 U.S. (9 Wheat.) 1, 238 (1824).

¹⁵ 53 U.S. (12 How.) 299 (1851).

¹⁶ See *id.* at 320–21.

¹⁷ *Id.* at 320 (“It is the opinion of the majority of the Court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States.”).

¹⁸ *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1859).

Buoyed by massive popular support, President Franklin D. Roosevelt advanced a series of national programs aimed at economic relief and recovery. After initial resistance, the United States Supreme Court ratified a broader notion of the scope of federal power.¹⁹

This enlarged realm for federal authority also required a new understanding of the relationship between the states and the national government. The postulate of exclusive realms of jurisdiction could not survive this expansion of federal power. As applied to the new understanding of national jurisdiction, exclusiveness would have effectively eliminated any role for the states. Accordingly, the Supreme Court accepted a broad realm of concurrent state and federal regulation. The recognition of state or federal authority no longer entailed the prohibition of the other. More generally, the Court retreated from an active role in supervising the allocation of state and federal power. The Court recognized that no clear boundary existed between local and national matters and that any competing claims of the states and the federal government could best be resolved in the political process.²⁰ The Court ceased its efforts to block the perceived need for broad federal action. Thus, with the changed understanding of federalism came a transformation in the conception of the judicial role. The wall between the state and the federal fell; hence, the need for a judicial border patrol ended.

In the 1980s, state and federal policymakers and courts began to focus anew on federalism. With this attention to federalism came a renewed debate about the proper role of states and the national government. Some developments were clear. As discussed in the next Part, states became more assertive in promoting their distinctive policies in a number of areas. With regard to doctrinal notions of constitutional federalism, however, questions remained. Would a reinvigorated federalism lead the Court to turn back the clock to the federalism doctrines of the early twentieth century? The answer turned out to be a qualified yes.

When a newly ascendant conservative majority on the United States Supreme Court has confronted federalism, it has generally spoken in the accents of dual federalism. To be sure, the conception of exclusive and non-overlapping spheres of state and federal action has passed irrevocably into history. Given the reality of the modern, integrated economy and the existing interlocking web of state and federal regulations, true dual federalism cannot be revived. The Rehnquist Court, however, did reinstitute some key features of the old dual approach, and the Roberts Court has continued on this path. The Court has insisted on the existence of a “truly local” sphere and a “truly national” sphere and defined an important role for the courts in

¹⁹ See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 130–33 (1942) (upholding the Agricultural Adjustment Act); *United States v. Darby*, 312 U.S. 100, 125–26 (1941) (upholding the Fair Labor Standards Act).

²⁰ See CUSHMAN, *supra* note 8, at 169–70, 214–22.

demarcating the boundaries of each.²¹ When the Court has perceived those borders to be violated, it has not hesitated to strike down the offending law. Thus, the Court has resuscitated limits on federal power through new interpretations of the Interstate Commerce Clause,²² state sovereign immunity,²³ and the prohibition of “commandeering” the state governmental apparatus.²⁴ At the same time, the Court has been even more active in invoking preemption²⁵ and dormant commerce clause²⁶ doctrines to invalidate state regulations that the Court concludes trench on federal prerogatives.

In other work, I have suggested an alternative conception of federalism that would acknowledge a broad role for the interaction of the states and the federal government and would not license a return to pre-1937 judicial activism in the federalism arena.²⁷ I have termed this approach a “polyphonic” conception of federalism. The polyphonic approach notes the broad overlap of federal and state policy initiatives and emphasizes the benefits of this concurrence, which advances the values of plurality, dialogue, and redundancy. When federal and state regulators both approach a problem, they can provide valuable alternative methods and learn from each others’ experiences. The existence of multiple regulatory schemes also affords a failsafe mechanism should federal or state regulators neglect an important problem. The key point is that federalism need not be understood as a return to the dual federalism ideal of a strict division between state and federal activities. Instead, federalism can provide a network of decentralized problem solvers all addressing similar concerns. Polyphonic federalism finds inspiration in the market, Wikipedia, and other approaches that rely on dispersed yet coordinated nodes of power. In this conception, federalism need not entail reinvigorated judicial activism in defining appropriate federal and state realms.

²¹ *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”); *see also* *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

²² *See Lopez*, 514 U.S. at 567–68.

²³ *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

²⁴ *See New York v. United States*, 505 U.S. 144, 161 (1992).

²⁵ *See, e.g., Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1006–11 (2008) (holding a state tort suit preempted by federal approval of medical device); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–29 (2003) (holding a state statute requiring disclosure of information about Holocaust-era insurance policies preempted by United States foreign policy); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540–51 (2001) (holding a state statute regulating advertising of tobacco products preempted by federal law).

²⁶ *See, e.g., Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572–75 (1997) (holding that tax exemption for charitable institutions serving state residents violates the dormant commerce clause); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192–97 (1994) (holding that tax subsidy scheme for local dairy farmers violates the dormant commerce clause); *C&A Carbone, Inc. v. City of Clarkstown*, 511 U.S. 383, 389–95 (1994) (invoking dormant commerce clause to invalidate local waste transfer plan).

²⁷ ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (forthcoming 2009) [hereinafter SCHAPIRO, POLYPHONIC FEDERALISM]; *see also* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) [hereinafter Schapiro, *Interactive Federalism*].

No longer would courts be obligated to defend Maginot lines protecting some supposedly local area of authority.

As the next Part argues, the achievements of blue state federalism accord with this polyphonic conception. In particular, the progressive policies advanced by states do not presuppose exclusive state authority. To the contrary, the state programs generally assume an important, complementary role for the federal government. As blue state federalism advances, then, it will be important to keep in mind that the federal government continues to play a vital role in governance. A truly progressive federalism does not rely on judicially crafted visions of appropriate local and national regions. Rather, progressive federalism empowers democratically accountable governments to meet the needs of the people while ensuring human rights for all.

II. BLUE STATE FEDERALISM IN ACTION

In almost every conceivable area, states recently have taken the lead in promoting important policies. This Part reviews a few of these efforts. Without in any way deprecating the significance of these state initiatives, this Part also contends that in each instance, the state measures are intended to complement, rather than substitute for, federal policies. The success of the state programs in no way depends on the federal government's abandonment of the relevant areas, much less on a court's invocation of the United States Constitution to divide state and federal authority. These instances of blue state federalism thus align with the polyphonic conception of federalism outlined in Part I. The state policy initiatives do not presuppose or support a return to the old principles of dual federalism.

A. *Environmental Policy*

While the federal government traditionally has been the leader in environmental policy, states recently have implemented their own approaches, especially when federal regulators have been slow to act. These state initiatives often have spurred federal activity. The result has been a complementary mixture of state and federal policies.

California adopted its own emission standards for motor vehicles in the 1960s.²⁸ Congress later enacted the Clean Air Act,²⁹ establishing nationwide rules for emissions. That legislation generally seeks uniformity by prohibiting states from setting their own limits. The Act, however, specifically allows California to mandate its own tougher regulations, subject to the approval of the Environmental Protection Agency.³⁰ In addition, the Act

²⁸ See Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 170 (2006) [hereinafter Engel, *Dynamic Federalism*].

²⁹ 42 U.S.C. §§ 7401–7671q (1990).

³⁰ See 42 U.S.C. § 7543. For discussion of exceptions for California, see Engel, *Dynamic Federalism*, *supra* note 28, at 170–71.

permits other states to adopt the stricter California rules in lieu of the federal standard.

The regulation of low emission vehicles illustrates the operation of this interactive process.³¹ In the 1990s, using its authority under the Clean Air Act, California implemented standards requiring the sale of low emission vehicles. When other states proposed adopting California's rules, the auto industry urged the EPA to adopt new national standards that would be more lenient than the California rules. The EPA ended up brokering a compromise under which states could adopt the national standards or the California standards. California's action thus prompted a nationwide approach. Federalism promoted a federal response, which incorporated state efforts.

With regard to the regulation of greenhouse gases, the states have played an even more significant role in the face of inaction from the federal government. The Bush Administration has come under criticism for failing to address issues of global climate change, including the role of greenhouse gases in raising the Earth's temperature.³² States have stepped into that breach, with California in the vanguard. In 2006, the California legislature approved an ambitious bill to reduce the emission of greenhouse gases generated in California by twenty-five percent by the year 2020.³³

Other states have also adopted global warming initiatives. Thirty-eight states have climate action plans completed or in development.³⁴ Of these states, eighteen have set statewide emission targets.³⁵ Twenty-eight states and Puerto Rico have completed or are developing strategies for limiting greenhouse gas emissions.³⁶ Twenty-one states plus Washington, D.C. have adopted renewable portfolio standards, requiring that a certain proportion of energy sales come from renewable technology.³⁷

Regional initiatives have spread across the nation, generally committing the member states to reductions in greenhouse gases and setting the stage for regional "cap and trade" programs, under which emission allowances can be exchanged using a market-based system. The Regional Greenhouse Gas Initiative, which includes ten northeastern and mid-atlantic states, is one example.³⁸ The Western Climate Initiative³⁹ and the Midwestern Greenhouse Gas

³¹ For discussion of California's regulation of low emission vehicles, see Engel, *Dynamic Federalism*, *supra* note 28, at 171.

³² See, e.g., Elisabeth Bumiller, *Stumping On Climate, McCain Faults Bush*, N.Y. TIMES, May 14, 2008, at A16.

³³ See Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does this Say about Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1016 (2006) [hereinafter Engel, *Climate Change Initiatives*].

³⁴ PEW CTR. ON GLOBAL CLIMATE CHANGE, LEARNING FROM STATE ACTION ON CLIMATE CHANGE 12 (2008), available at [http://www.pewclimate.org/docUploads/States%20Brief%20\(May%202008\).pdf](http://www.pewclimate.org/docUploads/States%20Brief%20(May%202008).pdf) (on file with the Harvard Law School Library).

³⁵ *Id.*

³⁶ Engel, *Climate Change Initiatives*, *supra* note 33, at 1018–19.

³⁷ *Id.* at 1019.

³⁸ Regional Greenhouse Gas Initiative Home Page, <http://www.rggi.org/home> (last visited Nov. 10, 2008) (on file with the Harvard Law School Library).

Reduction Accord⁴⁰ are others. As of May 2008, thirty-nine states had joined a registry program that will measure and track greenhouse gas emissions, providing a foundation for broader greenhouse gas reduction plans.⁴¹

In this area, the federal government has been positively hostile to some state efforts. California enacted legislation setting tough rules for the greenhouse gas emissions by cars and light trucks. Nine other states adopted the California standards. However, reflecting the strong anti-regulatory perspective of the Bush Administration, the Environmental Protection Agency refused to allow the California regulations to take effect. California has filed suit, joined by fifteen other states, seeking to overturn the EPA decision.⁴²

Global warming is, well, a global problem. Individual states can have little impact on the overall situation. However, the states are committed to trying. In the face of inaction and outright opposition from the Bush Administration, including the EPA's recent refusal to adopt regulatory plans,⁴³ the states are doing the best they can. It is almost certain that the state activity will eventually prod the federal government into action. In the meantime, states can begin the process of incremental change.

It is clear that the national government must be part of any solution. In the face of obstruction by the EPA, it might be tempting to disavow any federal role in this area. But that is impossible. No one believes that global warming is best addressed by the states rather than the national government. Some kind of national policy is essential. However, state-level action, including regional initiatives, is all that has been possible in the face of recent federal inaction. Moreover, as in the case of auto emission standards, the eventual national policy may incorporate regional variations in approach.

B. Banking Regulation

A variety of federal agencies monitor the lending industry. Like many other transactions, loans may extend across the nation, with lenders and borrowers widely dispersed and participating in a national lending market. But in the face of recent lending scandals, state officials have vigorously responded to allegations of wrongdoing.

New York's Attorney General, Andrew Cuomo, for example, pursued his own inquiries into misconduct in the student loan and subprime mortgage markets. With regard to student loans, Cuomo identified potential conflicts of interest and other abuses. He conducted aggressive investigations and

³⁹ Western Climate Initiative Home Page, <http://westernclimateinitiative.org> (last visited Nov. 10, 2008) (on file with the Harvard Law School Library).

⁴⁰ Midwestern Greenhouse Gas Reduction Accord Home Page, <http://midwesternaccord.org> (last visited Nov. 10, 2008) (on file with the Harvard Law School Library).

⁴¹ See PEW CTR., *supra* note 34, at 5.

⁴² See Felicity Barringer, *California Sues E.P.A. over Denial of Waiver*, N.Y. TIMES, Jan. 3, 2008, at A14.

⁴³ See Felicity Barringer, *2 Decisions Shut Door on Bush Clean-Air Steps*, N.Y. TIMES, July 12, 2008, at A1.

secured settlements requiring lenders to pay restitution.⁴⁴ Cuomo acknowledged that federal regulators also had jurisdiction, but he was not satisfied with the federal response. According to Cuomo, federal agencies with oversight responsibilities, including the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Trade Commission, had not been doing their jobs.⁴⁵ Cuomo remarked, “I will use the state consumer protection laws to protect consumers at a time . . . when the federal government isn’t acting.”⁴⁶

As in the environmental area, this state-level activism served to prod federal efforts. Cuomo spearheaded a group of state attorneys general who pressed Congress to enact new laws in the area. The attorneys general envisioned a concurrent state-federal effort. A group of thirty-two attorneys general wrote to congressional leaders promoting this kind of partnership: “This problem cries out for a federal solution that supplements the work of state-attorney-general offices across the country.”⁴⁷

In reaction to similar concerns about lack of federal action, Cuomo’s office also has investigated subprime home loans and the market for “auction-rate securities,” complex financial instruments marketed to investors.⁴⁸ In these endeavors, Cuomo is following in the footsteps of his predecessor, Eliot Spitzer, who targeted corporate and securities fraud. Commentators have argued that the regulatory competition between state attorneys general and federal agencies has benefited consumers by pressuring companies into more generous restitution payments.⁴⁹

C. *Gay and Lesbian Rights*

The federal government has done little to safeguard the rights of gays and lesbians. No federal statutes prohibit discrimination based on sexual orientation. National legislation affording such protection has been long de-

⁴⁴ See Jonathan D. Glater, *Lender Agrees to Contribution of \$2 Million to a Student Fund*, N.Y. TIMES, Aug. 1, 2007, at A13.

⁴⁵ See Diana Jean Schemo, *Cuomo Plans to Broaden Student-Lending Inquiry*, N.Y. TIMES, June 7, 2007, at A20.

⁴⁶ *All Things Considered: Job Not Finished in Student Loans Inquiry* (NPR broadcast June 9, 2007) (interview with Andrew Cuomo), available at <http://www.npr.org/templates/story/story.php?storyId=10876290> (on file with the Harvard Law School Library).

⁴⁷ Paul Basken, *Attorneys General and Senate Panel Cite More Evidence of Lender Corruption*, CHRON. HIGHER EDUC., June 29, 2007, at A18 (quoting letter of attorneys general).

⁴⁸ See Jenny Anderson, *Another New York Attorney General Starts a Wall Street Crusade*, N.Y. TIMES, Dec. 7, 2007, at C6; Louise Story, *New York Accuses UBS of Misleading Investors*, N.Y. TIMES, July 25, 2008, at C7.

⁴⁹ See John C. Coffee, Jr., *Corporate Securities: The Spitzer Legacy and the Cuomo Future*, N.Y.L.J., Mar. 20, 2008, at 5 (discussing Eric Zitzewitz, *An Eliot Effect? Prosecutorial Discretion in Mutual Fund Settlement Negotiations, 2003–7* (Jan. 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091035 (unpublished manuscript, on file with the Harvard Law School Library)).

bated, but no law has been enacted.⁵⁰ The major bill that was adopted in the area of gay and lesbian rights was the Defense of Marriage Act,⁵¹ which purports to authorize states and the federal government to refuse to recognize same-sex marriages, even if performed in accordance with the laws of a particular state. The United States Supreme Court has not recognized sexual orientation as a suspect class deserving strict scrutiny under the equal protection clause.

Here again states have taken the lead. Laws in twenty states and the District of Columbia now prohibit employment discrimination based on sexual orientation.⁵² Twelve of these states extend protection to gender identity. Of course, developments in same-sex marriage and partnerships also have occurred at the state level. Through interpretations of state constitutions, Massachusetts and Connecticut now guarantee same-sex couples the right to marry.⁵³ The California Supreme Court also interpreted the state constitution to protect same-sex marriage,⁵⁴ although a subsequent amendment undercut that holding.⁵⁵ Other states offer domestic partnerships.

While states, rather than the federal government, have taken the initiative in extending rights to gays and lesbians, in many ways the state and federal developments have been mutually reinforcing. In *Bowers v. Hardwick* in 1986, the United States Supreme Court refused to recognize a right to engage in same-sex sexual activity.⁵⁶ In the wake of *Bowers*, some state courts relied on state constitutions to strike down state sodomy laws.⁵⁷ Indeed, in 1998, the Georgia Supreme Court invoked the Georgia Constitution to strike down the very sodomy statute that the United States Supreme Court had upheld in *Bowers*.⁵⁸ When the United States Supreme Court revisited

⁵⁰ For a description of recent efforts to enact federal legislation prohibiting employment discrimination against gays and lesbians, see David M. Herszenhorn, *House Backs Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 7, 2007, at A1.

⁵¹ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)).

⁵² HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES, (Aug. 21, 2008), http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (on file with the Harvard Law School Library).

⁵³ See *Kerrigan v. Comm'r of Public Health*, No. 17716, 2008 WL 4530885, at *53 (Conn. Oct. 28, 2008); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).

⁵⁴ *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

⁵⁵ On November 4, 2008, California voters approved a statewide ballot provision that amended the state constitution to restrict marriage to heterosexual couples. See California Secretary of State, Proposition 8: Eliminates the Right of Same-Sex Couples to Marry. Initiative Constitutional Amendment (Nov. 4, 2008), available at <http://www.voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf> (on file with the Harvard Law School Library); Jesse McKinley, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1. When this Article went to press, legal challenges to the implementation of Proposition 8 were still pending. See California Courts, Proposition 8 Cases, <http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm> (last visited Dec. 2, 2008) (on file with the Harvard Law School Library).

⁵⁶ 478 U.S. 186, 194–97 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁵⁷ See, e.g., *Powell v. State*, 510 S.E.2d 18, 22–26 (Ga. 1998); *Commonwealth v. Wasson*, 842 S.W.2d 487, 501–02 (Ky. 1992).

⁵⁸ See *Powell*, 510 S.E.2d at 22–26.

the issue in *Lawrence v. Texas* in 2003 and decided to overrule *Bowers*, the Court noted the intervening state court decisions as reflections of shifting social attitudes.⁵⁹

Although the Massachusetts, California, and Connecticut court decisions declaring a right to same-sex marriage rested on state constitutional grounds rather than federal constitutional law, these decisions did cite and draw support from the United States Supreme Court's ruling in *Lawrence*.⁶⁰ Thus, state developments served to undermine *Bowers* and to create the foundation for *Lawrence*. Then *Lawrence* helped to set the stage for the state court marriage rulings in Massachusetts, California, and Connecticut. State and federal developments intertwined and reinforced each other. The state and federal laws are independent of each other, but they exercise an important mutual influence.

D. Health Care Policy

Since the failure of national health care reform in the Clinton Administration, the federal government has done little to promote universal access to health care. The United States Census Bureau estimates that forty-seven million Americans do not have health insurance, and the number who lack coverage at some point during a given year is much higher.⁶¹ The principal response to the problem of the uninsured has come from the states.

Massachusetts has instituted the most far-reaching plan.⁶² Under legislation enacted in 2006, the state is moving toward full coverage. The Massachusetts law mandates that most individuals obtain health insurance. To ensure the availability of affordable policies, the plan includes an expansion of Medicaid benefits, enhanced public subsidies, and reforms of the insurance market. As of April 2008, the plan had resulted in insurance coverage for 355,000 people who were formerly uninsured.⁶³

Other states are exploring options for expanding coverage.⁶⁴ Several, including Kansas, Louisiana, Mississippi, New Mexico, and Utah, are contemplating market-based reforms, such as the implementation of insurance exchanges to facilitate consumer access to a broad range of policies. Some states are relying on private insurance to increase coverage; others are investigating public subsidies. States are learning from each other and experimenting with novel approaches.

⁵⁹ See *Lawrence*, 539 U.S. at 570–73 (citing state cases).

⁶⁰ See *In re Marriage Cases*, 183 P.3d at 421; *Kerrigan*, 2008 WL 4530885, at *35–36; *Goodridge*, 798 N.E.2d at 959.

⁶¹ See Arthur Birmingham LaFrance, *Healthcare Reform in the United States*, 6 SEATTLE J. FOR SOC. JUST. 199, 199 & n.6 (2007).

⁶² For an overview of the plan, see generally John E. McDonough et al., *Massachusetts Health Reform Implementation: Major Progress and Future Challenges*, 27 HEALTH AFF. w285 (2008).

⁶³ *Id.* at w294.

⁶⁴ See Henry J. Aaron & Stuart M. Butler, *A Federalist Approach to Health Reform: The Worst Way, Except for All the Others*, 27 HEALTH AFF. 725, 727–28 (2008).

Most analysts expect some national plan for health care reform to emerge. During his campaign, President Obama made proposals to expand health care coverage. State-by-state initiatives are useful, but a federal role also is important. As patients and employers move across state lines, some kind of coordination is necessary. Federal funds will be part of any solution as well.⁶⁵ Federal spending on Medicaid and Medicare is an important component of state plans, and the federal share may have to increase to subsidize access to affordable care. In this way, federal involvement would assist states in meeting interstate challenges and in overcoming budgetary hurdles. In addition, some studies suggest that closer federal supervision of joint federal-state programs, such as Medicaid, yields better coverage for poorer citizens.⁶⁶ A larger federal presence need not override state plans. Federal legislation does not equate to a rigid national uniformity. Any federal program may well provide for some regional variation, allowing the states to build on their experience and to meet the needs of their residents.

States currently provide important leadership in health care policy. Federal programs, however, provide a significant component of health care funding, and some kind of enhanced federal role is very likely in the near future. Conceived along these lines, the involvement of the federal government will assist states in their goal of promoting coverage for all.

In addition to expanding the number of people with health insurance, states also regulate existing private insurance plans so as to promote increased coverage and accountability.⁶⁷ With respect to employer-provided health care coverage, though, the Supreme Court has generally taken a broad view of the preemptive scope of the Employee Retirement Income Security Act (ERISA),⁶⁸ the comprehensive federal statute regulating employee benefits. In cases such as *Aetna Health Inc. v. Davila*⁶⁹ and *Pegram v. Herdrich*,⁷⁰ the Court held that ERISA preempted state-law claims against health maintenance organizations. ERISA preemption generally does not substitute a federal remedy for state relief, but rather eliminates any meaningful remedy for the plaintiff.⁷¹ These preemption decisions represent another example of the Supreme Court's recent dualist mindset, in which it rejects overlapping state and federal efforts. The Court has thus hindered state efforts to fill the gaps left by federal regulatory inaction. The various state initiatives had spurred discussions at the national level about the proper mix

⁶⁵ See Alan Weil, *How Far Can States Take Health Reform?*, 27 HEALTH AFF. 736, 744-46 (2008).

⁶⁶ See Dayna Bowen Matthew, *The "New Federalism" Approach to Medicaid: Empirical Evidence that Ceding Inherently Federal Authority to the States Harms Public Health*, 90 KY. L.J. 973, 989-98 (2002).

⁶⁷ See James E. Holloway, *Revisiting Cooperative Federalism in Mandated Employer-Sponsored Health Care Programs Under the ERISA Preemption Provision*, 8 QUINNIPIAC HEALTH L.J. 239, 250-52 (2005).

⁶⁸ Pub. L. 93-406, 88 Stat. 829 (1974).

⁶⁹ 542 U.S. 200, 214 (2004).

⁷⁰ 530 U.S. 211, 237 (2000).

⁷¹ See Nan D. Hunter, *Risk Governance and Deliberative Democracy in Health Care*, 97 GEO. L.J. 1, 24 n.120, 27 n.142 (2008).

of federal and state regulation. However, the Supreme Court's restriction of state health policy reforms removed the impetus for federal action, and the result has been a diminution of state protections without any compensating federal safeguards for patients.⁷² Any eventual national solution will require some balance of federal and state regulatory efforts.

E. *International Law*

An emerging area of progressive state activity concerns international law. The United States Supreme Court has been cautious in giving domestic legal effect to rules derived from international law. In some instances, states and their courts have been more receptive to such claims.

The Vienna Convention on Consular Relations⁷³ has been a recurring source of controversy.⁷⁴ The Vienna Convention requires that when foreign nationals are arrested, the detaining country must inform the detainees of their right to speak to consular officials from their own countries. The United States ratified the Convention in 1969 and also ratified the "Optional Protocol," submitting to the jurisdiction of the International Court of Justice (ICJ) for disputes arising out of the Convention. The Convention, however, was widely ignored in the United States.⁷⁵ Local police often were unaware of the Convention's requirements.

As discussed below, the Convention gave rise to a series of judicial decisions, relating specifically to the right of a criminal defendant to raise Vienna Convention claims in collateral proceedings when the issues were not presented at trial. Claims not submitted to the trial court generally are forfeited and cannot be raised in later proceedings. The question that motivated extensive litigation was whether defendants could forfeit Vienna Convention claims of which they were not aware.

In 1998, the United States Supreme Court held that state courts could apply the usual rules of procedural default.⁷⁶ The Court decided that the states could treat Vienna Convention claims as waived if not made during the initial trial. The ICJ, however, subsequently held in *Avena* that such rights could not be forfeited.⁷⁷ The matter then returned to the United States Supreme Court. After giving "respectful consideration" to the ICJ's interpretation of the Convention, the United States Supreme Court rejected it and reaffirmed its own prior interpretation.⁷⁸ The question that then remained

⁷² See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 51–54 (2007).

⁷³ Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

⁷⁴ For a description of this treaty's background, see *Medellin v. Texas*, 128 S. Ct. 1346, 1353–54 (2008).

⁷⁵ See *Medellin v. Dretke*, 544 U.S. 660, 674–75 (O'Connor, J., dissenting from the dismissal of certiorari) (noting the states' failure to comply with the Convention).

⁷⁶ See *Breard v. Greene*, 523 U.S. 371, 378–79 (1998) (per curiam).

⁷⁷ See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 57 (Mar. 31)

⁷⁸ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–56 (2006).

concerned the defendants who were actual parties to the ICJ proceeding. Would the state courts be obligated to honor the ICJ decision with regard to the specific defendants involved in *Avena* before the ICJ? After all, the United States had agreed to be bound by the decisions of the ICJ.

In *Medellin*, the Supreme Court refused to require Texas to adhere to the ICJ ruling, even with regard to defendants who were parties to the ICJ proceeding.⁷⁹ The Court held that the ICJ judgment was not “self-executing.”⁸⁰ According to the Court, the obligation of the United States extends only to “undertake” to comply with the ruling.⁸¹ In this instance, the Texas courts refused to abide by the ICJ interpretation, and the Supreme Court had no authority to overrule that decision. Thus, at least without an implementing statute, the federal government could not force Texas to obey the ICJ.

For present purposes, the concurrence of Justice Stevens is most interesting. He agreed that the Court could not force Texas to comply. However, he emphasized that Texas should take it upon itself to abide by the obligations of the Convention. Justice Stevens wrote:

One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas’ duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another.⁸²

Justice Stevens cited the example of Oklahoma. The Oklahoma Court of Criminal Appeals decided on its own to defer to the decision of the ICJ and to allow the defaulted claim to proceed.⁸³ In effect, Justice Stevens urged Texas to be more like Oklahoma. More generally, at a time when the United States Supreme Court has been reluctant to give domestic effect to international law, states and state courts may take the lead in so doing.

The United States Supreme Court also has been hesitant to incorporate customary international law into the domestic legal system. Customary international law reflects the consistent practice of nations undertaken out of a sense of obligation.⁸⁴ It includes a broad array of rules, including immunity of foreign diplomats and human rights principles.⁸⁵ Unlike treaty law, customary international law need not be embodied in a treaty or convention. In

⁷⁹ *Medellin*, 128 S. Ct. at 1360.

⁸⁰ *Id.*

⁸¹ *Id.* at 1349.

⁸² *Id.* at 1374 (Stevens, J., concurring).

⁸³ *See id.* at 1375 n.4 (citing *Torres v. Oklahoma*, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004)).

⁸⁴ *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987).

⁸⁵ *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 753–54 (5th ed. 2003).

Sosa v. Alvarez-Machain, the United States Supreme Court adopted a cautious approach to the incorporation of customary international law.⁸⁶ Though the opinion is not entirely clear on the issue, the Court appears unwilling to view all customary international law as automatically a part of the law of the United States.⁸⁷ States, however, generally remain free to draw on customary international law principles in developing their own law. The future of customary international law may well take place in state tribunals.

State and local initiatives regarding global human rights issues also have progressed in non-judicial forums. The movement to endorse the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW)⁸⁸ provides a prime example of such sub-national efforts. The United States has not ratified CEDAW. States and localities, however, have pledged support for its terms. Professor Judith Resnik found that “[a]s of 2004, forty-four cities, eighteen counties, and sixteen states have passed or considered legislation relating to CEDAW.”⁸⁹ San Francisco has sought actually to implement some of the provisions of CEDAW, in particular by investigating and issuing reports relating to systematic discrimination against women.⁹⁰ Los Angeles adopted an ordinance noting the “continuing need . . . to protect the human rights of women and girls by addressing discrimination, including violence, against them and to implement, locally, the principles of CEDAW.”⁹¹ State and local legislative bodies have refused to cede international human rights initiatives to organs of the federal government.

F. Summary

In each of the areas surveyed in this Part, activities by states demonstrate the power of federalism. Driven by the perception that the federal government has neglected important policy areas, state officials have developed their own programs. They have provided the protection for their inhabitants that the federal government has failed to afford. These topics demonstrate the potential of federalism to advance significant progressive goals.

These areas also illustrate the ways in which blue state federalism fits into the newer polyphonic conception of federalism, rather than into the

⁸⁶ 542 U.S. 692, 727 (2004).

⁸⁷ For analyses of the *Sosa* decision from a variety of perspectives, compare Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007), with William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653 (2007), and Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1 (2004).

⁸⁸ Dec. 18, 1979, 1249 U.N.T.S. 13.

⁸⁹ Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1640 (2006).

⁹⁰ See *id.* at 1641–42.

⁹¹ *Id.* at 1642–43 (quoting L.A., CAL., ORDINANCE 175735 (2003), available at http://clkrep.lacity.org/councilfiles/00-0398-S2_ORD_175735_02-08-2004.pdf) (internal quotation marks omitted).

older framework of dual federalism. None of the subjects discussed above lies within the exclusive jurisdiction of the states. In each area, the states and the federal government exercise overlapping authority. Many other policy fields demonstrate a similarly promising interaction of state and federal initiatives. Local control of education has a long history in the United States. However, the national government has come to play an increasingly important role in providing educational funding.⁹² These federal dollars supplement state and local tax bases and help to offset disparities in resources among states. The federal No Child Left Behind Act of 2001 (NCLB),⁹³ which passed with broad bipartisan support,⁹⁴ provides a framework for a state-federal partnership in education. NCLB's particular focus on high-stakes testing, with potentially draconian penalties for inadequate performance, has led to widespread criticism.⁹⁵ Nonetheless, the concept of a joint federal-state effort to advance education remains popular. In their recent campaigns for the presidency, both Barack Obama and John McCain criticized some aspects of the No Child Left Behind Act, but they supported continued federal funding for education.⁹⁶

By contrast to education, immigration has traditionally come within the exclusive jurisdiction of the federal government. Recently, however, local governments have added their own voices to immigration debates. Some localities have declared themselves to be "sanctuary cities," refusing to cooperate in federal enforcement of immigration measures against undocumented aliens.⁹⁷ Other cities have enacted ordinances targeting undocumented aliens, supplementing what they see as inadequate federal efforts.⁹⁸ Although the federal government will remain the primary authority in immigration and a guarantor of the rights of immigrants, states and localities will remain participants in the debate, ensuring that diverse viewpoints are represented.⁹⁹

⁹² See GAIL L. SUNDERMAN ET AL., *NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD* 11 (2005); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937-39 (2004).

⁹³ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended primarily in scattered sections of 20 U.S.C.).

⁹⁴ The vote on the final bill in the House of Representatives was 381-41. Adam Clymer, *National Briefing Washington: House Passes Education Bill*, N.Y. TIMES, Dec. 14, 2001, at A36. The vote in the Senate was 87-10. Diana Jean Schemo, *Senate Approves a Bill to Expand the Federal Role in Public Education*, N.Y. TIMES, Dec. 19, 2001, at A32.

⁹⁵ See SUNDERMAN ET AL., *supra* note 89, at xxix, 36-38.

⁹⁶ See Maria Glod, *In Rush to White House, 'No Child' Is Left Behind; Obama, McCain Reveal Little on Updates for Plan*, WASH. POST, Sept. 15, 2008, at A4.

⁹⁷ See Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 377-78 & n.43 (2008).

⁹⁸ See *id.* at 376-77.

⁹⁹ See Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1070-73 (2007) (discussing potential benefits of local participation in immigration law); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1681-84 (2008) (noting the important role of local legal structures in debates about immigration).

Blue state federalism consists in the states becoming actively engaged in these areas and generally prodding the federal government into action. The state measures are designed to complement federal efforts and generally require action by the federal government to achieve fully the desired ends. Blue state federalism empowers the states; it does not diminish the authority of the federal government. Along these lines, blue state federalism does not require a boundary between state and federal enclaves. Hence, courts need not provide a border patrol, striking down state and federal actions that transgress an imagined frontier. The primary driver of blue state federalism is the democratic activity of the states or the initiatives of state courts. The federalism doctrines of the United States Supreme Court do not facilitate blue state federalism. Rather, as discussed in the next Part, the Court's decisions have hindered the development of a progressive federalism.

III. PERILS OF OLD FEDERALISM

Part II surveyed some of the recent state-level initiatives that advance progressive policies. I also argued that these plans generally reflect an ongoing, interactive relationship between state and federal measures. This blue state federalism does not entail the older, dual federalism notion of enclaves of state and federal power, protected from each other by an active judiciary. This Part expands that argument to demonstrate why the dual federalism principles embodied in the recent decisions of the United States Supreme Court do not align with blue state goals. Accordingly, recognition of the benefits of blue state federalism does not require a commitment to the Court's federalism jurisprudence. Indeed, as I will explain, the case law traveling under the banner of the "federalism revolution" runs counter to the goals of progressive federalism. The new, blue federalism should not be confused with the old, dual federalism.

A. *Need for Federal Action*

The Supreme Court's federalism jurisprudence insists on an effort to separate the "truly local" from the "truly national." Through these formal categories, the Court attempts to limit the authority of the federal government. For the Court, federalism requires a judicially enforced limitation on national authority. I have discussed the shortcomings of the Court's federalism jurisprudence at length elsewhere.¹⁰⁰ The more limited point of relevance here is that none of the progressive achievements of blue state federalism requires a judicial limitation of the federal government. To the contrary, the progressive policy initiatives generally presuppose active, concurrent federal regulation.

¹⁰⁰ See SCHAPIRO, POLYPHONIC FEDERALISM, *supra* note 27; Schapiro, *Interactive Federalism*, *supra* note 27.

As evidenced by the areas canvassed in Part II, the ills addressed by blue state federalism are not distinctively local in nature. The solutions may be local in scope, but the problems are not. Issues of loan fraud, global warming, gay and lesbian rights, health care, and international law transcend state and even national boundaries. One of the weaknesses in the Court's approach is its insistence on defending a "truly local" sphere at a time when the social integration wrought by enhanced technology, communications, and travel renders such a concept elusive at best. State-based solutions may provide a second-best solution when federal regulators refuse to act. More positively, state regulations may provide a laboratory for testing different regulatory approaches, and diversity may persist. The dual scheme of vehicle emission standards illustrates the promise of this track. An optimal system of regulation may emerge from the interaction of California standards and national standards.

On any account, though, a federal role is important. The environment is a national issue that has an impact on all citizens. Greenhouse gases present an obvious case for broad regulation. Even given instances of species or landscapes that exist in only one state, the environment is something that has an impact stretching far beyond any state's borders. Some federal participation is necessary. In light of the integrated national economy in which lenders and borrowers may enjoy no geographic proximity, loan regulation also requires some national supervision, as the state attorneys general recognized in petitioning Congress for a federal response.

Gay and lesbian rights, health care, and international law present additional justifications for a national approach. One responsibility of the federal government is to ensure the rights of all people throughout the United States. Implementation of human rights should not depend on the discretion of individual states. *Lawrence* stands for the principle that same-sex couples should be able to exercise their right to intimate relationships wherever they travel in the United States. In this way, *Lawrence* follows in the tradition of *Brown v. Board of Education*¹⁰¹ and the Civil Rights Act of 1964. The realization of human rights should not depend on accidents of geography. Issues of same-sex marriage and partnerships currently are playing out state-by-state. As complex issues of interstate recognition arise, further federal responses may be necessary.

Another reason for federal involvement follows from the fiscal realities of the United States. Given its authority to collect income taxes, borrow money, and print currency, the federal government enjoys access to vast financial resources. Most problems require money, and the federal government is generally in the best position to provide it. Whether the issue is education or health care, the sums of money involved require federal participation. Federal funding need not translate into wholly federal programs. Many models of federal-state fiscal cooperation are possible, including national financing of state and local initiatives. Some federal role, however, is

¹⁰¹ 347 U.S. 483 (1954).

essential.¹⁰² State treasuries cannot bear the full weight of all desirable programs.

B. *Perils of the Court's Federalism Jurisprudence*

The federalism jurisprudence of the Rehnquist and Roberts Courts has done nothing to promote the dynamic interchange of state and federal programs. Indeed, progressive federalism has flourished in the states largely in spite of the efforts of the Court. Driven by a dualist vision of federalism, the Court has attempted to separate state and federal realms in a manner detrimental to blue state federalism. So far, the Court's efforts to limit the power of the national government have had little impact, but the Court's restrictions on states have interfered with significant state policy prerogatives.

1. *Limiting the Federal Government*

Because of the important federal role in progressive initiatives, limiting the authority of the federal government has the effect of obstructing state policies. The actual restrictions on federal power have been modest to date. Environmental regulation is the area in which the Court has shown the greatest inclination to impose significant barriers to federal action.

While the United States Supreme Court has not yet struck down major environmental legislation as beyond the authority of Congress, it has adopted limiting interpretations of the Clean Water Act, driven in part by concern over the extent of Congress's Commerce Clause powers. The *SWANCC*¹⁰³ and *Rapanos*¹⁰⁴ cases adopted narrow constructions of the power of the federal government to regulate wetlands, thus complicating federal efforts to protect water systems. It is notable that in *Rapanos*, thirty-three states joined an amicus brief urging a broad construction of federal authority.¹⁰⁵ Only Alaska and Utah expressly argued in support of limiting federal power.¹⁰⁶ Most states welcomed the national government's assistance in protecting their wetlands. The federal regulations advanced state environmental goals. In restricting federal power, the Supreme Court rulings thwarted state aims. Additional action by the Supreme Court to limit federal authority would further frustrate state policies.

¹⁰² For a discussion of the implications of the federal government's superior capacity to raise money, see David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2574–77 (2005).

¹⁰³ *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

¹⁰⁴ *Rapanos v. United States*, 547 U.S. 715, 757 (2006).

¹⁰⁵ Stephen L. Kass & Jean M. McCarroll, *Environmental Law: The Supreme Court Addresses the Clean Water Act*, N.Y.L.J., June 23, 2006, at 3.

¹⁰⁶ See Felicity Barringer, *Reach of Clean Water Act Is at Issue in 2 Supreme Court Cases This Week*, N.Y. TIMES, Feb. 20, 2006, at A8.

2. *Limiting the States*

The Supreme Court's invocation of federalism to limit the authority of the national government constitutes one threat to blue state federalism. The Court's concomitant use of preemption doctrines and the dormant Commerce Clause to strike down state regulatory efforts pose a more serious danger.

In a series of cases, the Court has invalidated state laws and even state-law jury verdicts based on their supposed conflict with federal statutes or regulations. To give just a few instances, the Court has rejected state tort suits concerning automobile safety¹⁰⁷ and medical devices¹⁰⁸ and nullified state regulations concerning tobacco advertising,¹⁰⁹ oil spills,¹¹⁰ and banking.¹¹¹ In a related development, the Court also has aggressively invoked the dormant Commerce Clause to invalidate state laws that have an impact on interstate commerce.¹¹² In addition to blocking state policies, the Court's application of the dormant Commerce Clause to state tax policies has threatened the financial resources of states.¹¹³ State programs depend on the state treasury. By restricting the taxing policies of the states, the Court has limited the states' abilities to promote their initiatives.

The Court's aggressive use of preemption and the dormant Commerce Clause has garnered much scholarly and popular attention.¹¹⁴ Some have insisted on a tension between the Court's preemption and dormant Commerce Clause doctrines and other aspects of its federalism framework.¹¹⁵ The Court is limiting federal authority in the name of preserving realms of state prerogative while at the same time relying on preemption and dormant Commerce Clause principles to curtail state prerogatives. From this perspective, some tension is undeniable. However, the overall framework of dual federalism focuses on maintaining boundaries between state and federal enclaves. When the Supreme Court last relied on dual federalism, in the first third of the twentieth century, the Court both narrowly construed the Com-

¹⁰⁷ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864–65 (2000).

¹⁰⁸ *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008).

¹⁰⁹ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551, 571 (2001).

¹¹⁰ *United States v. Locke*, 529 U.S. 89, 115–17 (2000).

¹¹¹ *Watters v. Wachovia Bank*, 127 S. Ct. 1559, 1564–65 (2007).

¹¹² *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 595 (1997); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205–07 (1994); *C&A Carbone, Inc. v. City of Clarkstown*, 511 U.S. 383, 393–95 (1994).

¹¹³ *See Super, supra* note 102, at 2598–603.

¹¹⁴ *See generally Symposium on Ordering State-Federal Relations Through Federal Preemption Doctrine*, 102 *Nw. U. L. Rev.* 503 (2008); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 *U. Chi. L. Rev.* 429, 460–63 (2002); Edward A. Zelinsky & Brannon P. Denning, *Debate—The Future of the Dormant Commerce Clause: Abolishing the Prohibition on Discriminatory Taxation*, 155 *U. Pa. L. Rev. Pennumbra* 196 (2007); Adam Cohen, Editorial, *Whatever Happened to (the Good Kind of) States' Rights?*, *N.Y. Times*, May 23, 2008, at A24; Jeffrey Rosen, *Supreme Court Inc.*, *N.Y. Times*, Mar. 16, 2008, §6 (Magazine), at 38.

¹¹⁵ *See, e.g., Erwin Chemerinsky, Empowering States When It Matters: A Different Approach to Preemption*, 69 *Brook. L. Rev.* 1313, 1324 (2004); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 *Sup. Ct. Rev.* 343, 343.

merce Clause to check federal power and broadly interpreted preemption and the dormant Commerce Clause to limit state authority. That combination has now returned.

In sum, the Supreme Court's recent line of federalism cases is not supportive of progressive federalism and indeed hinders it. State initiatives generally require and presuppose some federal assistance, and the Court's decisions may block these federal efforts. Further, the preemption and dormant Commerce Clause components of the Court's federalism jurisprudence directly threaten important state policies. So far, the current Court's more restrictive understanding of the constitutional limitations on federal power has had limited impact on the new federalism. However, the Court's broad interpretation of the preemptive scope of federal legislation has erected a substantial obstacle to state regulatory efforts. Each Term of the Court brings more preemption decisions, and that trend seems likely to continue,¹¹⁶ given the dualist mindset of the current majority.

IV. THE PERILS OF POLYPHONY

As discussed in the preceding Parts, the interaction of state and federal law promotes many important benefits. The absence of clear boundaries between state and federal domains, however, also presents potential hazards. In particular, the lack of bright jurisdictional lines could undermine important principles of uniformity and accountability. While policymakers must remain vigilant about these concerns, I believe that they can be accommodated within the framework of the new blue state federalism.

The new federalism contemplates, indeed celebrates, the potential mixture of federal and state laws addressing any particular subject. Of course, such a plural legal regime may sometimes impose unacceptable costs. With regard to some issues, uniformity is preferable. If the United States does ever adopt a national plan to address greenhouse gases, the plan may require a uniform system of regulation. A *mélange* of overlapping state and federal rules might impose excessive expenses on businesses and might undermine the overall effectiveness of the program. Similarly, in some situations states may attempt to extract local benefits while imposing great costs on the interstate operations of an entity. For example, one of the most enduring cases in the canon of constitutional law arose from such an early attempt by a state to promote in-state benefits, while imposing large out-of-state costs.¹¹⁷ In such

¹¹⁶ See, e.g., *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008) (presenting the question whether the federal Food, Drug, and Cosmetic Act preempts state tort suits).

¹¹⁷ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

instances, some preemptive federal regulation might be necessary to safeguard the benefits of a truly interstate commercial system.¹¹⁸

This concern for uniformity is certainly legitimate. Preemptive federal regulation is sometimes required. To take the clearest case, the federal government must enforce human rights provisions throughout the nation. Freedom from state-sponsored discrimination cannot vary based on location within the United States. The absence of federal safeguards would undermine rights of national citizenship. Economic discrimination by states against other states also warrants a federal response. The only question is when such uniformity is required. Policymakers and courts should not assume that a single, national solution is necessary for every problem.¹¹⁹

The existence of multiple regulators also might undermine government accountability. When many agencies exercise authority over a particular area, regulators might shirk their responsibilities, secure in the knowledge that it may be difficult for citizens to assign the blame for regulatory failure. In its recent federalism cases, the Supreme Court has cited this kind of concern as a justification for enforcing principles of dual federalism. Justices have asserted that a blurring of local and national functions will prevent citizens from holding accountable their elected officials.¹²⁰

While one could imagine an accountability issue arising, the concern seems overstated. First, despite the claims of some Justices on the Supreme Court, it is not clear that overlapping levels of regulation do threaten accountability, and the proponents of this argument have little evidence to cite. Once citizens become aware of a problem, they should have little difficulty assigning blame properly.¹²¹ Indeed, concurrent authority may promote accountability. As part of the No Child Left Behind Act, for example, the federal government required states to publicize certain performance data so as to give parents the tools to evaluate their school systems.¹²² In presenting

¹¹⁸ For a more detailed discussion of the potential danger of states' "exporting" costs onto other states and the possible need for preemptive federal regulations, see Schapiro, *Monophonic Preemption*, *supra* note 13, at 824–29.

¹¹⁹ For a comprehensive and compelling review of the risks and benefits of multiple overlapping layers of regulation, see generally William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547 (2007).

¹²⁰ See *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) ("The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability . . ."); see also *United States v. Morrison*, 529 U.S. 598, 611 (2000) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur. . .") (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) (internal quotation marks omitted)).

¹²¹ Edward Rubin has provided a powerful critique of this accountability argument. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2083–91 (2005) (discussing the "implausibility" of assumptions underlying the concerns for accountability).

¹²² See James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1721–23 (2003).

the proposal, the Bush Administration characterized it as a “flexibility for accountability bargain.”¹²³ To be sure, accountability remains a critical component of governance, but a polyphonic conception of federalism can promote accountability, rather than undermine it.

CONCLUSION

This essay has emphasized the value of an interactive state and federal approach to a variety of issues. Other examples could be adduced that would highlight state initiatives that do not intersect with federal efforts. My point is not that no realm exists for independent state activity. Rather, I have sought to demonstrate that in many instances important state policies do connect with federal programs, that many state measures do presuppose a significant federal role. In these areas, state advances do not require a federal retreat; nor do state efforts depend on judicial action to divide state and federal realms. Indeed, various boundary maintenance decisions of the Supreme Court have impeded state goals. The attempt to impose older understandings of federalism on these newer developments has hampered the progressive federalism.

None of these arguments detracts from the significance of the innovative state policies that lie at the heart of blue state federalism. Instead, I argue only that contemporary federalism entails some genuinely new elements. This new, interactive federalism is not simply a return to an older notion of federalism. In the best traditions of federalism, states are experimenting with novel policy initiatives. However, the full realization of states’ goals may well involve a role for the federal government. A failure to recognize this feature of contemporary federalism will obstruct the development of important state policies. It is important to appreciate, and celebrate, what is truly new in blue state federalism.

¹²³ *Id.* at 1723 (quoting U.S. Dep’t of Educ., The No Child Left Behind Act of 2001: Executive Summary, (Jan. 7, 2002) <http://www.ed.gov/nclb/overview/intro/execsumm.pdf>) (internal citation and quotation marks omitted). For a collection of essays addressing the issue of the No Child Left Behind Act and accountability, see generally BROOKINGS INST., NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY (Paul E. Peterson & Martin R. West eds., 2003).

