

Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition

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Contemporary analyses of federalism neglect to consider adequately the contents and consequences of intrastate structures and institutions. This neglect of the intrastate aspects of federalism and interstate regulatory competition leaves impoverished our understanding of contemporary American federalism and the issue of interstate regulatory competition and competence. My burden in this paper is to demonstrate that these two related claims are accurate. The burden of future work in this vein is to explain more theoretically and empirically the role of state institutional and constitutional structures on the efficacy of interstate regulatory competition. The larger ambition is to connect analyses and models of intrastate regulatory decisionmaking with contemporary theories of federalism.

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I. WHAT IS MISSING IN MODERN DEBATES ABOUT FEDERALISM?

The topic of federalism in contemporary scholarly discourse is really a pair of topics: one part is so-called constitutional federalism, that is, the relationship between the national and state governments as structured by the U.S. Constitution and interpreted by the courts over two centuries; the other part is the ubiquitous debate over the proper relationship, as a political, social, economic—perhaps even moral—matter, between the nation and the fifty states. While these twin topics represent variations on the same basic theme, that is, the appropriate relationship in the United States between the national and state governments, the ways in which we speak about the principles of federalism when we discuss either constitutional federalism or the federalism “policy” are very distinct.

Consider just one example. American constitutional federalism presupposes the states are more or less the same for constitutional purposes. The relationship that is constitutionally crucial is that between one unit of government—the national government—and the units of state government in the aggregate. The Tenth Amendment, for example, reserves rights to the states; the nature and scope of this reservation does not turn on the characteristics of any particular state. Fundamentally, states are treated equally by the Constitution’s structure and its interpretation; the establishment of equal suffrage in the United States Senate is merely the most conspicuous manifestation of this equality. This deep equality is reflected as well in the federal courts’ treatment of state regulation in the dormant commerce clause area.¹ However much sense it would make as a matter of interstate regulatory policy, no court would permit one state to discriminate against interstate commerce while limiting another state’s ability to so act. It is a central, if unstated, premise of commerce clause jurisprudence that all states are equally restricted in their abilities to regulate commerce.

By contrast, an economist writing on a blank slate may well make a case for the view that certain states in certain circumstances should be entitled to doctrinal flexibility in the application of the general rule that states may not “balkanize” the national market through patterns of state regulation.² Likewise, someone preoccupied with the distributive inequalities among states at a given point in time may well counsel some constitutional-doctrinal tailoring as well. However, such a state-specific approach would be anathema to our constitutional law; the reason is essentially that American federalism is, perhaps ironically, about breaking down lines of distinction among the states.

1. See generally Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

2. See, e.g., *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511 (1935).

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When we shift our analytical focus to the “policy” of federalism and, more particularly, to the prospects and perils of interstate regulatory competition, the necessity of considering states as distinct, heterogeneous spheres of public power becomes clear. Begin with Justice Brandeis’s famous paean to “laboratories of experimentation,” in *New State Ice, Co. v. Liebmann*.³ The “experimentation” motif stresses that one of the essential values of federalism is that states may act differently.⁴ American law and politics understand that states will (and should) deal with different social and economic problems in different ways.⁵ To put the point even a bit more strongly than is probably fair, the insistence in many modern debates about federalism that states be treated as a monolith confounds efforts to speak sensibly about the policies of federalism and about the benefits and costs of interjurisdictional regulatory competition. Prescriptive scholarship about American federalism has not offered a coherent set of rules and principles to create the incentives and opportunities for optimal regulatory decisionmaking in the interstate system because American federalism has had little to say about “states.” Instead, American federalism is persistently about the relationship between the national government and the “states.”⁶ Prudence counsels, I would argue, greater attention to the relationship between the national government (which is, itself, made up of many different parts) and the range of other units of government. These other units include states of very different shapes, sizes, cultures, histories, and—as the following discussion will emphasize, institutions and political/legal decisionmaking structures.

But why speak of states qua states at all? A claim which has gained some recent momentum as a result of a provocative essay by my colleagues Malcolm Feeley and Edward Rubin is that it has become anachronistic to speak about federalism because of the increasing irrelevance of states and state boundaries to debates about social, political, and economic policy.⁷ We might, they argue, sensibly speak about decentralization and devolution of power to appropriate public and private authorities; but we should not continue to pedigree federalism as a constitutional or prescriptive principle or set of conditions and constraints. Debates about (de)centralization and the devolution of power to units below the national government implicate the sorts of concerns that are central to the topics considered at this conference:⁸ What is the level of

3. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

4. See generally DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

5. See *id.*; DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 14-25 (3d ed. 1984).

6. See, e.g., Richard Briffault, *What About the “Ism?” Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1355 (1994) [hereinafter Briffault, *What About the “Ism?”*].

7. See generally Edward Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

8. I put (de) in parentheses because I want to refer to the term “decentralization” to include not only that particular normative concept but also “centralization;” in other words, it is the *debate* about

government most appropriate to the provision of certain goods and services? What are the structures that best ensure that goods are provided, and are provided efficiently, to members of a given community? Which responsibilities are best assigned exclusively to one unit and which are best shared?

The collection of arguments organized around this claim that federalism is anachronistic frame an important insight: If the common element which brings together scholars and policymakers to conferences such as this one is an interest in the potential of a reconstructed federalism to address fundamental issues of policy in the modern technological age,⁹ we ought to attend more carefully to the question of how facilitating the sort of interstate regulatory competition and cooperation that will enable American society to proceed more efficiently and more justly entails constructing a so-called "new federalism."¹⁰ What are the precise links, though, between the economic and social values of a reconstructed relationship among spheres of power in American society and the so-called new federalism? This question is an important one for the modern scholarly debate about regulatory competition and competence. After all, what goes on within states is hardly relevant in the long run if we regard state borders as accidental, as anachronistic and unstable; if we, on the other hand, take more seriously the regulatory activities of states as states, then we can see the structure of American federalism as much more fundamental to understanding how best to partition power among individuals and units of government within the nation.

Those who insist that federalism is anachronistic have neglected their American political and constitutional history. Federalism was not, after all, an analytic construct cooked up by the likes of Charles Tiebout or Daniel Elazar; it is a central element of American constitutional ideology, perhaps the most central element. Professor Briffault overstates the point only a little when he notes that "[f]ederalism, or, more accurately, the federal structure, just is. It does not need an argument. The structure exists and defines our government."¹¹

Let me suggest, though, there are several critical reasons for attending not merely to decentralization/devolution but to federalism in considering issues of regulatory competition and competence.

The federalist structure that we have inherited from our Constitution and our constitutional tradition is critical in shaping debates about (de)centrali-

decentralization of power, rather than decentralization per se, that I want to capture.

9. For evidence that this interest is growing in volume, and perhaps in amplitude as well, see generally SHAPIRO, *supra* note 4, and the sources cited therein.

10. Sources that capture the nature of these essential questions are legion. Particularly interesting recent discussions include PAUL E. PETERSON, *THE PRICE OF FEDERALISM* (1995), especially Chapters 2 and 8; VINCENT OSTROM, *THE MEANING OF AMERICAN FEDERALISM* (1991); THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990).

11. Briffault, *What About the "Ism"?*, *supra* note 6, at 1348 n.161.

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zation. There are three essential reasons for this. First, the fact of fifty states (leaving entirely aside, for the moment, debates about the “sovereignty” of these states) creates a specific, constructed universe in which interstate regulatory competition takes place; this is a particular geographic and demographic market that can, no matter how sophisticated becomes our technological capacity for travel and communication, be located and described rather precisely.¹² Second, the diversity of the fifty states and its impact on this regulatory universe make debates about federalism, and not merely (de)centralization, relevant. Third, there is institutional structure found in these fifty states. Some of this structure exists because of federal constitutional command,¹³ some exists because of the constraints imposed by national legislative command; but the vast range of intrastate structure is a product of individual state choice. This choice is manifested in state constitutional design, state political structure, and in other institutional arrangements that shape the policymaking process within the state. The bulk of my essay is taken up with considering this third feature; let me make a few sketchy remarks, however, about the first two features as well.

As far as the fact of the fifty states is concerned, the nexus between federalism and arguments about (de)centralization is fundamentally a part of the very structure of the American constitutional order. Critics of this nexus are asking the wrong question. The proper question is not: If we were starting from scratch and designing a system of government, would we construct the national government and the states and distribute power to them as the Constitution of 1787 does? Rather, it is: How does the existence of the fifty states construct the argument about the allocation of power?¹⁴ As Larry Kramer puts the point: “The simple existence of independent states within the larger nation affects the dynamic of American politics . . . by encouraging

12. I am eliding here three fundamental questions that implicate this description of the fifty states as a circumscribed universe in which competition takes place: (1) immigration/emigration and the corresponding malleability of this “market”; (2) expansion of the United States through the addition of new states or, at least, new quasi-state territories (it should be remembered, of course, how rare are “new” states of this Union); and (3) the globalization of regulatory competition which may make the interstate regulatory competition correspondingly less exclusive.

13. For example, the requirement of strict electoral equality, the so-called “one man, one vote” requirement first established in *Reynolds v. Sims*, 377 U.S. 533 (1964).

14. Describing the state’s existence as the “fact” that is intrinsically relevant is an oversimplification, to be sure. It is not the geographical fact that states exist, of course, but rather the ascription by the Constitution’s design of a status. Some of this status is instantiated by clear Constitutional power: For example, the role of the states in the amendment process is prescribed in Article V. U.S. CONST., art. V. See Henry Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996). Some of this status is, while constitutionally enshrined, considerably less clear: for example, the Tenth Amendment, see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993), and the Guarantee Clause, see Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). For my purposes, it is sufficient to observe as the “fact of the fifty states” the constitutionally structured status of the states.

political movements to develop along state lines and to utilize the machinery of state government to achieve their goals."¹⁵

The size and shape of the union and its fifty states are also central, if undervalued, aspects of the intrinsic importance of states qua states in understanding federalism. Notwithstanding the incessant march toward technological sophistication and the borders that are forever falling, we should keep firmly in mind that as of 1996 the sheer breadth of the nation, over two hundred and forty million people strong, confounds attempts to consolidate all political and economic power in a small space and in few hands. Consider, for example, the recent battle for the Republican presidential nomination. The candidates are reminded that the primary system, however compact and however affected by the modern media age, is still a very labor-intensive, and redundant process.

The diversity of states must also be kept in mind if we are trying to reconcile debates about federalism and debates about (de)centralization. States are, needless to say, different in population, in geography, and in location; they have different cultures, identities, and aims. The essential insight of classic economic arguments for state variation, captured in one part of Charles Tiebout's hypothesis about the optimal size of local governments¹⁶ and in Albert Hirschman's analysis of the role of exit, voice, and loyalty in constructing local politics and decisionmaking processes,¹⁷ is that communities are different, and these differences are essential and reasonably impervious to efforts at homogenization.¹⁸ Moreover, we need not dismantle the elegant argument in favor of the Union as a national community—as "We the People" not "we the states"—to insist that interstate diversity is a persistent fact of American political and social life.¹⁹ The diversity of states represents more than merely the banal fact that there are lots of different people and different communities in this country; rather, interstate diversity is significant because much of this diversity—and the variation and heterogeneity that results—is captured within state borders. And the resilience of these borders to change is striking. The citizens of my state—California—have been debating whether to split into two for decades; nothing has, nor likely will, happen, though. Nor do states in the New England region, notwithstanding issues and personalities

15. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1547 (1994); see also COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM 9 (Daniel J. Elazar et al. eds., 1969).

16. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

17. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

18. For an extended analysis of the political economy of interjurisdictional competition on its bears on the relationship between states and localities, see the discussion in Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 508-28 (1991) [hereinafter Been, *Land Use Exactions*].

19. See, e.g., OSTROM, *supra* note 10, at 5-68; WILLIAM RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE (1964); Daniel J. Elazar & John Kincaid, *Covenant, Policy and Constitutionalism*, 10 PUBLIUS 3 (1980).

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in common, and notwithstanding the presumed synergies that would accompany collaboration, seem to be anxious to consolidate into one "super state." A truism of American political life is that citizens appear to be reasonably patriotic about their state and its borders.²⁰

More remains to be said about these two broad features of federalism described above. On the one hand, I may have overestimated the degree to which these two features are immutable and therefore resist reconstruction in a way that would maintain the divergence between debates about federalism and debates about (de)centralization. On the other hand, it may be that one or both of these features (or others not described) may so overwhelm the issues that preoccupy lawyers and social scientists that scholarly debates about old and new federalism and about interstate regulatory competition, are marginally relevant at best and profoundly Pollyannish at worst. I am content to leave these two features alone for now. I want to concentrate on the third described feature of the federal/state relationship, one that is undervalued in contemporary debates about federalism: the role of intrastate political institutions.

II. INSTITUTIONAL DIMENSIONS OF STATE REGULATORY PROCESSES

Metaphors about American national and state governments that stress its monolithic, hegemonic character—Hobbes's "Leviathan" comes to mind—are misleading. American government is a nexus of institutions; it is a plurality of cross-cutting, but often distinct, loci of function and power.²¹ Moreover, the institutions are not machines; they are made up of humans, each with their identities, agendas, cultures, and conceptions of roles.²² While these observations are elementary, they are important to keep in mind when we are trying to deconstruct and reconstruct abstract ideas like "federalism" and "(de)centralization."

If we are to say something meaningful, positively and normatively, about federalism, we must have at least a rough sense of the nature and function of the various political institutions that form American government. Better yet,

20. For an intriguing analysis of the "covenantal basis of American federalism," suggesting some reasons, beyond rational self-interest, why Americans cling to the idea of federalism (and not merely decentralization), see OSTROM, *supra* note 10, at 53-68. Daniel Elazar's work is relevant in this regard, as well. See generally ELAZAR, *supra* note 5.

21. See the discussions—from very different starting points—of the nature of institutions, institutional behavior, and American government in A NEW CONSTITUTIONALISM: DESIGNING POLITICAL INSTITUTIONS FOR A GOOD SOCIETY (Steven L. Erwin & Karol Edward Soltan eds., 1993); James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AMER. POL. SCI. REV. 734 (1984); Terry Moe, *Politics and the Theory of Organizations*, 7 J.L. ECON. & ORG. 106 (1991); Oliver E. Williamson, *Chester Barnard and the Incipient Science of Organization, in ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 173-78* (Oliver E. Williamson ed., 1990).

22. See, e.g., PHILIP SELZNICK, *THE MORAL COMMONWEALTH* 231-64 (1992); JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS* (1989) [hereinafter MARCH & OLSEN, INSTITUTIONS].

with a more complete set of institutional theories we can make informed judgments concerning the appropriate distribution of power and the construction of the proper set of incentives among units of government—national, state, and local. This is not necessarily a plea for more abstraction. Institutional theories can be grand or modest.²³ We may aim toward the sort of institutional theory that explains everything and thus sweeps all issues of federalism and regulatory competition within its scope, or we may merely aim to understand particular elements of institutional design and behavior. My only point is that sensitivity to the structure of institutions and institutional interrelationships is required to inform a sophisticated analysis of federalism.

A. *The Relevance of Intrastate Institutional Capacity on Public Policy*

Although the notion that the design and performance of political institutions influence regulatory outcomes seems unassailable, it has proven difficult to measure whether, and how, this influence takes place.²⁴ There are several studies which indicate that certain aspects of legislative structure, such as the increased professionalism of legislatures and the expansion of legislative staff have influenced legislative outcomes.²⁵ Specifically, states with a greater institutional capacity are likely to innovate and, to the extent that innovation has an impact on the state's competitive position vis-a-vis its competitors, such innovation will facilitate interstate regulatory competition.²⁶

Beyond institutional capacity that can be measured by studying particular legislative reforms, we have fewer empirically demonstrable reasons for confidence that political institutions affect regulatory outcomes.²⁷ Yet there

23. See generally MARCH & OLSEN, *INSTITUTIONS*, *supra* note 22.

24. See R. Kent Weaver & Bert A. Rockman, *When and How Do Institutions Matter?*, in DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD 445 (R. Kent Weaver & Bert A. Rockman eds., 1993) [hereinafter WEAVER & ROCKMAN, DO INSTITUTIONS MATTER?]. For a classic, empirically-rich examination of the role of, *inter alia*, institutions in regulatory policymaking, see essays in THE POLITICS OF REGULATION (James Q. Wilson ed., 1980).

25. See, e.g., Keon S. Chi & Dennis O. Grady, *Innovations in State Governments: Their Organizational and Professional Environment*, in THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES: 1990-91 (1991) [hereinafter THE BOOK OF THE STATES 1990-91]; Virginia Gray, *State Legislatures and Policy Innovations*, in ENCYCLOPEDIA OF THE AMERICAN LEGISLATIVE SYSTEM (Joel H. Silbey ed., 1994); Virginia Gray & David Lowery, *The Corporatist Foundations of State Industrial Policy*, 71 SOC. SCI. Q. 3 (1990); Paul Sabatier & David Whiteman, *Legislative Decisionmaking and Substantive Policy Information: Models of Information Flow*, 10 LEGIS. STUD. Q. 395 (1985).

26. See Gray, *supra* note 25, at 1347-49. This connection between intrastate institutional capacity and policy outcomes is likely to be especially strong where states have an exclusive or nearly exclusive role in promulgating and implementing policy in the area. Land use or education might be examples here. By contrast, in the welfare or environmental area, where responsibilities are shared or where the dominant paradigm of regulatory decisionmaking is national, then modulating intrastate capacity, without changing the incentives of national policymakers, is likely to be substantially less important. See generally John P. Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183 (1995) (discussing federalism in environmental area).

27. The dearth of political science on the connection between intrastate political processes and policy outcomes is noted by Virginia Gray. See Gray, *supra* note 25.

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would seem to be quite plausible theoretical reasons why they should. First, to the extent that regulatory innovation is partly a product of institutional capacity, then there is a variety of elements that make up this capacity—not only within the structure of the legislature,²⁸ but in other “branches” and in other decisionmaking locations, such as the bureaucracy and the courts.²⁹ The issue, of course, is not merely about “quantity,” but “quality.” Second, diffusion of power throughout the state governmental system cuts both in the direction of limiting the ability of states to take regulatory initiatives centrally, quickly, and durably;³⁰ on the other hand, it may promote experimentation through risk-taking,³¹ allocation of appropriate expertise through the logic of comparative advantage, and in facilitating more appropriate policy through redundant spheres of power. To the extent that intrastate institutional mechanisms promote this diffusion of power, there is an impact—whether positive or negative—on policy outcomes. Third, and perhaps most importantly, policymaking processes (and the outcomes they generate) take place within, and in the shadow of, political institutions. The framework of institutions within the state political system is inescapable. Hence, one would be hard-pressed to separate out policy outcomes from institutions on the grounds that influences on the policymaking process are wholly “externally” formed, or that, by contrast, decisions take place in a vacuum, springing up fully formed from the well-intentioned views of policymakers rather than through a more complicated, bounded, and institutionally constructed process. Institutions surely influence policy outcomes, and the institutions that are formed within the structure of state government are influential.³² The key question is *how* do these influences manifest themselves? How, in particular, do institutions shape and influence competitive federalism?

We ought to think about intrastate institutional mechanisms as pushing and pulling in two separate directions. In one sense, these mechanisms are designed to, and have the function of, *facilitating* interstate regulatory competition. For example, the ability of a state to act *centrally*, *quickly*, and *durably* represents an enormous positive capability in the interstate regulatory marketplace. Let us

28. See, e.g., JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989).

29. See, e.g., R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* (1994).

30. See, e.g., Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AMER. POL. SCI. REV. 1174 (1973).

31. See T. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990). For different perspectives on this risk-taking and innovation element of federalism, see Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race-to-the-Bottom' Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Ed Kitch, *Regulation, the American Common Market and Public Choice*, 6 HARV. J.L. & PUB. POL'Y 119 (1982); Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980).

32. See generally R. Kent Weaver & Bert A. Rockman, *Assessing the Effects of Institutions*, in WEAVER & ROCKMAN, *DO INSTITUTIONS MATTER?*, *supra* note 23; R. Kent Weaver & Bert A. Rockman, *When and How Do Institutions Matter?*, in *id.* at 445-61.

consider these three elements in turn. The ability to act centrally—i.e., without disabling conflict among the state government and local governments—is important. Truly heterogeneous states such as New York, Illinois, and California, face relentless issues of intrastate governmental variety and conflict; state/local conflict limits the capacity of the state to move forward with a unified voice. In certain contexts, this fragmentation can impede effective state competition; it can also impede salutary collaboration, where such collaboration requires a uniform state response. On the other hand, this fragmentation need not be an unadulterated evil for competitive or collaborative regulatory purposes. Surely Justice Brandeis had in mind, in his vision of states as experimental laboratories, that these laboratories would have separate parts: these parts, in mediating interlocal, intrastate interests, may reflect an asset, rather than a liability. Moreover, the reality of late twentieth century regulatory competition reveals many compacts struck among localities and states, localities and other localities, and localities and the federal government. The notion that interstate regulatory competition involves solely the states qua states is naive.

Related to the point about centralization versus fragmentation is the point about quick, determined initiative. Mediating competing intrastate demands—including not only local governments but demands of other interested groups such as the state bureaucracy, lobbyists, third parties, and the like—is a time and resource-intensive process for state decisionmakers. Surely the more homogeneous state is, at the very least, better able to bring their statewide interest more quickly to the economic table. Moreover, where states sharing common interests can collaborate on a regional basis, their capacity to secure economic benefit, often at the expense of the more fragmented, internally contentious states, expands.

Durability is a final, yet very important, element in the mix as well.³³ A key dilemma in the process of interstate regulatory collaboration is the reliability of interstate agreements. Deals struck among states, after all, are intrinsically precarious; they rely on continuing support from the political principals within a state. To be sure, there are various legal constraints on the capacity of states to violate their agreements. The Contract Clause of the U.S. Constitution is, while often obscure, one such constraint. However, the political constraints on the ability of states to enter into binding, durable agreements make the processes of interstate regulatory collaboration problematic. Resolving these complex problems and developing governance structures to improve the legal policies and economic capacities of states to strike deals and to rely upon such interstate agreements is key in the modern prescriptive

33. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. ECON. 875 (1975); Barry R. Weingast & William Marshall, *The Industrial Organization of Congress; or Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

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analysis of regulation and of federalism.

This discussion has focused on the role of intrastate institutional mechanisms to *facilitate* interstate regulatory competition. The other direction, however, toward which these mechanisms pull is to *constrain* such competition. Although conventional theories of federalism teach us that states have an interest in expanding their power and thereby competing more effectively in the regulatory marketplace, many intrastate institutional mechanisms constrict the state's ability to so compete. There are a number of reasons to believe these strictures have not arisen accidentally. Take, for example, the common prohibitions in state constitutions against special legislation. There are good economic reasons for permitting a state to target certain localities through special legislation.³⁴

Perhaps the best way to consider how certain intrastate mechanisms can facilitate interstate regulatory competition is by example. Suppose a municipality we will call Xanadu, located in a state we will call Oceana, fears a decline in its capacity to raise revenues for the financing of important public goods. This decline is, let us say, the product of two distinct, but significant, factors. Factor number one: a shrinking tax base has left the city with an inadequate source of tax revenue. Of course, expanding the rate will encourage just the sort of emigration that Xanadu seeks to avoid. Factor number two: the phenomenon of unfunded mandates imposed by the state has increased the demands on municipalities without a corresponding allocation of resources to finance these greater demands. Xanadu imposes a business license tax of \$x per annum on all financial institutions doing business within its borders. It also imposes a hotel tax of \$y on customers who stay in hotels in the municipality (suppose Xanadu is located near a spectacular waterfall that makes its location especially attractive to visitors).

Let us put to one side the standard economic arguments in the public finance literature that explain why and in what circumstances such local financial decisions would be: (a) inefficient; and/or (b) unlikely for various economic reasons (Tiebout hypothesis, etc.).³⁵ The connection I want to explore here is between local regulatory goals and the goals of the state. From the state's standpoint, these local regulations are problematic. They may be appropriate, given the state's interests in protecting the fiscal durability of localities and also its interest in enabling the locality to meet its (unfunded) obligations. After all, these taxes would hardly represent the first time that the costs of the state's regulatory requirements on localities would be passed through private businesses to consumers. Yet the state faces a hard fiscal decision, one that does not concern merely its choice with respect to Xanadu

34. See CLAYTON GILLETTE, LOCAL GOVERNMENT LAW 239-63 (1994).

35. See *supra* note 16.

and its predicament but also its choices across a range of real or putative policy issues that may arise. We could conjure up a number of different scenarios in which Xanadu's tax decisions will run afoul of state concerns and, in particular, will hamper the state's ability to compete in the interstate regulatory marketplace. So, in light of this, what is the state going to do?

It is tempting to observe that a state would have plenary authority over such local taxing decisions and that if the state fears exploitative local policy, it would just sweep these municipal decisions to one side through appropriate legislation. However, it is not clear that any state—including my fictional state of Oceana—would be empowered to do so. The architecture of state and local power in modern state constitutionalism is more complicated than the maxim that “local governments are mere administrative arms of the state government” indicates.³⁶ Moreover, it is not clear that Oceana would, in any event, have the political incentives to diminish local authority through legislative fiat, even if it would serve the state's general economic interest to do so. The key to unlocking both of these difficult issues is intrastate political and legal institutions.

Consider, first, the issue of “authority.” Most state constitutions have home rule guarantees.³⁷ In those states that have such provisions and in which the courts develop their own definition of what constitutes local or municipal affairs, many of the hardest fought legal disputes between local governments and the state involve local taxing decisions.³⁸ Sometimes the issue is whether the municipality should enjoy taxing authority alongside the state; other times the issue is whether the good or activity should be taxed at all.³⁹ In any event, the constitutional structure of home rule presents a difficult range of issues for decisionmakers who seek to protect state regulatory flexibility.

Next, consider the issue of “political incentives” and how institutional structure intersects with these incentives. Legislators are elected from single-member districts in which presumably the interests of local citizens (as well as whatever interest groups clamor for attention) are represented. Moreover, the legislature is a marketplace in which trades are struck, deals are made, and legislation is shaped through a process of mutually reinforcing, structure-induced quid pro quo. What both of these institutional principles mean for the relationship between state and local relations are critical. On one hand, the multiplicity of local interests in the legislative marketplace makes interlocal, intrastate deals essential. Local interests in taxing businesses and individuals

36. See *infra* Subsection II.B.5.

37. *Id.*

38. *Id.*

39. See generally Daniel B. Rodriguez, *State Supremacy, Local Sovereignty: Reconstructing State/Local Relations Under the California Constitution*, in CONSTITUTIONAL REFORM IN CALIFORNIA 401 (R. Noll & B. Cain eds., 1995) [hereinafter CONSTITUTIONAL REFORM].

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are represented in important respects in the legislative process through locally elected representatives; and Xanadu, like other municipalities, has its representatives. However, the state legislative process is institutionally structured to take account of statewide interests as well. One of these structures is the office of the governor; another is the requirement of a balanced budget; a third is statewide political parties. These, and other structures, work to ameliorate the impact of local capture of the state legislative process. Yet the structure of representation limits how successful the state legislative process can be in limiting local interests.

To bring another significant intrastate institutional structure into the mix, consider the impact of initiative-form lawmaking on the decisions of Oceana and Xanadu. Suppose citizens of Oceana fear the impact that Xanadu's tax squeeze on vacationers and businesses will have on the economic vitality of their own communities. They may propose initiative legislation to restrict the domain of local decisionmaking, not necessarily in the name of promoting the state's public interest, but merely in order to safeguard their own local self interest. The story of that part of Proposition 13 in the state of California that deals with local taxing power reveals the distrust that voters have in other communities, wholly apart from whatever larger, statewide interests they may have.

The incentives faced by voters in statewide elections also favor the contraction of local power. State voters cast their ballot on a statewide basis in an initiative election. This phenomenon alone represents a stark distinction in the structure of incentives that exist in direct versus representative democracy. There is no legislative/local nexus where voters cast their ballots statewide. To be sure, we know what the voters of Xanadu will have to say if they vote on a statewide initiative. But the influence of the voters of Xanadu will turn on the extent to which they command a majority in the state electorate—and less on the extent to which they can sway voters from other local communities over to their side.

Surely the initiative system is, from a regulatory competition standpoint, a double-edged sword. On the one hand, it enables voters to make choices on behalf of statewide interests and thereby limits the ability of parochial interest groups to further their aims through, for example, capture of the legislative process.⁴⁰ On the other hand, the voters have notoriously limited time horizons. They will often thwart the legislative process—and thus representative democracy—by what in retrospect seem to be rather instinctive, and uninformed decisions. The vast majority of those who carefully study the American policymaking process regard the decision to impose legislative term limits to be of this variety. In any event, the point is that the opportunity for voters to

40. See *infra* Subsection II.B.2.

short-circuit the legislative process by engaging in alternative forms of lawmaking may inhibit the capacity of state policymakers, charged with the responsibility to safeguard the public interest, from taking sensible steps.

Other institutional mechanisms also have this sort of double-edged sword characteristic. Take the example of bicameralism. Most of the literature on bicameralism in modern legislatures either assumes or explains why assigning lawmaking roles to two legislative bodies, rather than one, increases the costs of legislative success and therefore impedes the legislature's ability to move quickly. On the other hand, of course, the requirement of bicameralism makes legislation harder to repeal and therefore increases the durability of legislative bargains once struck.⁴¹ Whether the equilibrium ends up facilitating or hampering the state's ability to regulate efficiently is an empirical question. Hence, bicameralism (which is the norm in all but one American state)⁴² may simultaneously facilitate and constrain the state's ability to compete effectively in the interstate regulatory marketplace.

B. *Features of State Institutions and Regulatory Processes*

In order to generalize about intrastate aspects of interstate regulatory competition and about the role of intrastate institutions, we need to keep in mind some basic features that are found in each state. These institutions are structured differently and have different regulatory impacts depending on circumstances unique to each state; indeed, that is precisely the point of this exercise: to consider how states differ from one another with respect to institutional design and function. Of course, states do share a number of institutional features which bear on their capacity to compete with other states for people, resources, and economic goods. The aim of this section, however, is to consider both state variation and state similarity; each is relevant to understanding the intrastate aspects of interstate regulatory competition.

A caveat: The following discussion of the various features of intrastate decisionmaking touches lightly on a number of complex issues that deserve more extensive treatment in their own individual right. The purpose of this discussion is suggestive; I wish to point to a variety of institutional arrangements and features which, as I think more careful study will bear out, influence and structure interstate regulatory competition in ways that contemporary debates do not yet adequately consider.

41. See generally Weingast & Marshall, *supra* note 33.

42. See NEB. CONST. art. I.

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1. *Legislatures and Lawmaking*

All states, with the exception of Nebraska, have a bicameral legislature.⁴³ In all states, bills must be passed by majorities in each legislative chamber and presented to the governor for his signature.⁴⁴ All states provide for some system of override in the event that the governor vetoes proposed legislation.⁴⁵ This bicameral structure of the lawmaking process ensures that in nearly every state the process for the consideration and enactment of legislation is organized around a similar set of incentives and interchamber checks and balances.⁴⁶

Beyond the basic structural uniformity, though, lie a number of important differences. These differences make it impossible to assimilate the legislative structure of state governments into a general theory of "how legislation is made in the fifty states." One difference is size: States differ dramatically in the numbers of lawmakers in their legislative chambers. A sample of this difference is indicated here:

TABLE 1⁴⁷

	Upper house	Lower house	Total
Alabama	35	105	140
California	40	80	120
Connecticut	36	151	187
Delaware	21	41	62
Massachusetts	40	160	200
Nebraska	unicameral		49
Nevada	21	42	63
New Hampshire	24	400	424

Variations in size of the upper chamber range from 20 (Alaska) to 67 (Minnesota), while variations in the size of the lower chamber range from 40 (Alaska) to 400 (New Hampshire).

While the strict requirement of electoral equality ensures that the

43. See THE COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES: 1993-94*, at 50-52 (1994) [hereinafter *THE BOOK OF THE STATES, 1993-94*].

44. *Id.* (describing differences in state procedures).

45. *Id.*

46. There is a rich literature, much of it growing out of social choice theory, on the functions and impact of bicameralism on the legislative process. See, e.g., KENNETH I. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1971); Geoffrey Brennan & Alan Hamlin, *Bicameralism and Majoritarian Equilibrium*, 74 *PUB. CHOICE* 169 (1992); Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 *INT'L REV. L. & ECON.* 145 (1992); William H. Riker, *The Justification of Bicameralism*, 13 *INT'L POL. SCI. REV.* 101 (1992).

47. *THE BOOK OF THE STATES, 1993-1994*, *supra* note 43, at 113-14.

constituencies represented by each member is roughly the same,⁴⁸ states are free to construct the membership of their legislative chambers however they wish.⁴⁹ To the extent that we believe that the number of legislators matters for the business of lawmaking, we should consider further the significance of variation in the size of their respective legislative assemblies.

Another difference among state legislatures is the limitation on terms of office. A rash of state "term limits" initiatives over the past few years has left states in very different positions with respect to the longevity of state lawmakers. It is only very recently that these state term limits have started to kick in; hence, we can only speculate as to the impact that intrastate term limits will have on state policymaking. Informed critics suggest that the effects will be severe.⁵⁰ It is argued that the executive branch will enjoy more power, and that powerful organized interest groups—including entrenched semi-permanent staff—will maintain and expand their influence over the legislative process as neophyte legislators scramble for information and for campaign funds.⁵¹ The net result, these critics suggest, is the weakening of the legislative process and the replacement of expert lawmakers with inexperienced, ineffective newcomers. Defenders of term limits, of course, offer answers to these critiques.⁵² More interesting for my purposes is not the arguments for or against term limits, but rather the consequence of interstate variation with respect to state legislative terms. For the moment, nineteen states have term limits on state legislators.⁵³ Although it has not been a preoccupation in the literature on term limits, we should consider with care the impact of legislative term limits on the ability of states to compete and collaborate in the interstate regulatory marketplace.

A third difference is the structure of intralegislative lawmaking. Just from what we can observe by looking at the rules and practices "on the books," we see substantial differences in how state legislators make laws. One key

48. See *Reynolds v. Sims*, 377 U.S. 533, 561-68 (1964).

49. It should also be noted that states are free to expand or contract the number of legislative chambers. Although only one state presently acts unicamerally, there have been a number of proposals in other states to replace bicameral lawmaking with a unicameral legislature. For a history of the unicameral legislature movement in California, see David Brady & Brian Gaines, *A House Discarded? Evaluating the Case for a Unicameral California Legislature*, in CONSTITUTIONAL REFORM, *supra* note 39. While I am not aware of proposals to expand the number of legislative assemblies, there is nothing constitutionally sacrosanct about the bicameral system in the states.

50. See, e.g., Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477 (1992); Nelson W. Polsby, *Restoration Comedy*, 102 YALE L.J. 1515 (1993) (reviewing GEORGE WILL, *RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* (1992)).

51. For an especially sophisticated theoretical analysis of the impact of term limits, see Linda R. Cohen, *Terms of Office, Legislative Structure, and Collective Incentives*, in CONSTITUTIONAL REFORM IN CALIFORNIA, *supra* note 39, at 239-65.

52. See, e.g., WILL, *supra* note 50.

53. THE BOOK OF THE STATES, 1993-94, *supra* note 43, at 59-60. The only state whose voters have rejected term limits for state legislators when it has been placed on the ballot is the state of Washington. *Id.*

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difference is the length of legislative sessions. Only fifteen states have unlimited sessions; the remainder have sessions which last anywhere from 45 days (Utah and New Hampshire) to six months.⁵⁴ That session length has been seen as an important component of legislative capacity to make, implement, and oversee public policy is evidenced by the substantial legislative reforms in the 1960s and 1970s which resulted in significant increases in session length in many states.⁵⁵

Another key difference concerns state legislatures' reliance on committees and subcommittees for the conduct of legislative business. Some state legislatures rely substantially on legislative committees and subcommittees; others consider legislative proposals in a much more centralized way, relying on semi-permanent staff and offices such as the legislative analyst or on party leadership. One measure of committee influence is the number of standing committees in a state legislature. The following table describes a measure of standing committee representation in state legislatures (using the same sample from Table 1). The number in the right-hand column is the ratio of committees to chamber size.⁵⁶

TABLE 2⁵⁷

	Number of standing committees	Ratio
Alabama	51	0.36
California	56	0.46
Connecticut	17	0.09
Delaware	46	0.74
Massachusetts	35	0.17
Nebraska (unicameral)	14	0.28
Nevada	20	0.32
New Hampshire	48	0.11

While the variation is rather substantial in this unscientific sample, evaluation of standing committee number as a measure of committee influence is imperfect. However, there are a number of studies which indicate that state legislatures rely significantly on committees to carry out significant lawmaking functions and vary substantially in the extent of this influence. Keith Hamm and Ronald Hedlund have analyzed a wealth of survey data concerning

54. THE BOOK OF THE STATES, 1993-94, *supra* note 43, at 109-10.

55. See Alan Rosenthal, *Reform in State Legislatures*, in ENCYCLOPEDIA OF AMERICAN LEGISLATURES 837-52 (J. Silbey ed., 1994); see also ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, THE QUESTION OF STATE GOVERNMENT CAPACITY (Wash. D.C. 1985).

56. I have included standing committees in both chambers, as well as joint standing committees. In one of the states listed, Connecticut, all committees are joint.

57. See THE BOOK OF THE STATES, 1993-94, *supra* note 43, at 157-58.

legislator opinions on the subject of committee influence.⁵⁸ They note a substantial difference, some attributable to the numbers of committees in the state legislatures and some simply not explained by structural factors. Other studies confirm the basic hypothesis that committees matter greatly in the state legislative process even, interestingly, after the wave of state legislative reform in the 1960s and 1970s.⁵⁹ As Hamm and Hedlund note, "[C]ommittees are the primary means used by legislative bodies to respond in a measured and reasonable way to the increasing number and range of emerging policy needs and demands in states."⁶⁰ We lack, however, a sophisticated theory that explains how and why committee influence on the legislative process varies from state to state.

In addition to the organizational form of state legislatures, there are important statutory or constitutional constraints on state lawmaking.⁶¹ Two stand out. One is the requirement in many state constitutions or state statutes of a balanced budget. Thirty-nine states include in their constitutions a balanced budget requirement. Thirteen states require a balanced budget by statute. Vermont is the one state that has no balanced budget requirement.⁶² The balanced budget requirement constrains the pattern of legislative expenditures in important ways. The most conspicuous way is in curtailing the ability of states to pursue competitive regulatory strategies in the interstate regulatory marketplace by piling up debt.⁶³ A second structural device is the power of the governor, in forty-two states, to exercise a line item veto, a device which

58. Keith E. Hamm & Ronald D. Hedlund, *Committees in State Legislatures*, in *ENCYCLOPEDIA OF AMERICAN LEGISLATURES* 669-99, 671 at tbl. 1; see also Wayne L. Francis & James W. Riddlesperger, *U.S. State Legislative Committees: Structure, Procedural Efficiency, and Party Control*, 7 *LEGIS. STUD. Q.* 453 (1982).

59. In addition to the studies cited in Hamm & Hedlund, *supra* note 58, see WAYNE L. FRANCIS, *THE LEGISLATIVE COMMITTEE GAME: A COMPARATIVE ANALYSIS OF FIFTY STATES* (1989).

60. Hamm & Hedlund, *supra* note 58, at 672.

61. In focusing on the structural components of lawmaking processes, I have not considered two important features of democracy within states which are probably pertinent to the consideration of interstate regulatory competition. The first concerns patterns of participation within the states. For example, who votes in state elections? How often and on what basis? These questions, along with the related questions regarding the nature and degree of direct political participation by individuals and organizations within a state are significant elements of the intrastate aspects of interstate regulatory competition. For a recent, thorough analysis of contemporary political participation within states, see KIM QUAILE HILL, *DEMOCRACY IN THE FIFTY STATES* 72-89 (1994).

The second feature of democracy that is no doubt pertinent to a complete theory of intrastate decisionmaking is the role of political parties. *Id.* at 53-71; Kramer, *supra* note 15, at 1522-42; see also Keith E. Hamm, Ronald D. Hedlund & R. Bruce Anderson, *Political Parties in State Legislatures*, in *ENCYCLOPEDIA OF AMERICAN LEGISLATURES* 947 (1994).

62. Tony Hutchison & Kathy Jaines, *Legislative Budget Procedures in the 50 States: A Guide to Appropriations and Budget Processes* 6-14, *Fiscal Affairs Program*, Nat'l Council of State Legislatures (1988), in *THE BOOK OF THE STATES*, *supra* note 43.

63. This is not to say, as the literature on unfunded mandates indicates, that states do not have the ability to "overspend" in ways that get around the balanced budget constraint. See the discussion of the political economy of unfunded mandates in David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 *S. CAL. L. REV.* 1, 11-18 (1995).

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leaves the governor (and the political party that he or she represents) in a better position to bargain with legislators from the other party.⁶⁴ These and other structural constraints, combined with significant aspects of organizational form, represent important elements of state legislative processes.⁶⁵ And to the extent that these elements differ from state to state, we find another reason to look closely at the role of these differences on the capacity of states to engage profitably in interstate regulatory competition and collaboration.

A final difference in the state legislative process which bears consideration as we evaluate the intrainstitutional context of regulatory decisionmaking is the role of the state bureaucracy. Most analyses of regulatory performance that draw connections among structures of decisionmaking and federalism concentrate on the role of the federal bureaucracy on state policymaking processes.⁶⁶ However, each of the fifty states has its own bureaucracies and its own administrative agencies. They differ significantly in their architecture, influence, and attachment to the basic elements of legislative and executive processes within a given state. As with the other structural elements of legislative decisionmaking described above, we need to consider the role of state administrative and regulatory decisionmakers—the so-called “fourth branch” of government—in order to complete the picture of intrastate legislative mechanisms.

2. *Alternative Forms of Lawmaking*

The system of direct democracy represented by the initiative lawmaking process that exists in certain states is a powerful element in the structure of regulatory decisionmaking in states.⁶⁷ Currently, sixteen states permit voters to amend the state constitution through initiative. Eighteen states permit amendment of statutes by initiatives.⁶⁸ As political scientists have repeatedly reminded us, direct democracy changes legislative incentives; it empowers a different spectrum of interest groups while disempowering others; and it recreates intrastate political alliances by, among other things, shifting the emphasis

64. See, e.g., J. Gregory Sidak, *The Line-Item Veto Amendment*, 80 CORNELL L. REV. 1498, 1499 & n.7 (1995) (citing effects of line-item veto on behavior of other political actors); see also PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION AND MANAGEMENT* 130-31 (1992); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 22-28 (1960); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 167 (1985)).

65. Gregory Sidak describes these twin structural devices even more ambitiously: “[C]onstitutional reforms like the balanced-budget amendment and the line-item veto are not merely structural modifications of the operation of the . . . government. Rather, these reforms protect the liberty and property of future generations of American citizens.” Sidak, *supra* note 64, at 1499.

66. See, e.g., *THE POLITICS OF REGULATION* (James Q. Wilson ed., 1980).

67. On the role of direct democracy in state lawmaking, see generally THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989); DAVID MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984).

68. *THE BOOK OF THE STATES, 1993-94*, *supra* note 43, at 294, tbl. 5.15.

away from intralegislative deal-making to statewide, retail politics.⁶⁹ The entire enterprise is deeply controversial.⁷⁰ Yet, Americans seem wedded to their initiative lawmaking system. In California, for example, the initiative system is a fundamental part of the lawmaking process, having an impact upon some of the most important and controversial issues of political, economic, and social life.⁷¹ The system is fundamental in other states as well.

To the extent that lawmaking by initiative takes decisions out of the peculiar processes of legislative decisionmaking and puts it into the hands of the voters at large, those with a stake in regulatory outcomes must appeal not only to a different lawmaking constituency, but to a fundamentally different type of constituency. There is no clear opportunity for voters in an initiative system to engage in logrolling: the monitoring costs would be extraordinary.⁷² If we think that the opportunity for cross-issue vote trading is a significant element in regulatory policymaking,⁷³ then lawmaking through the initiative system represents, for better or worse, a very different sort of environment for considering and making regulatory decisions. Moreover, the initiative system allows issues to be considered by the populace and not by elected officials with their own, particular self-interests. Term limits and campaign financing reform are two familiar examples of issues that could not, given legislator self-interest, be seriously considered within a legislature. The political viability of term limits and campaign finance reform largely exist only through direct democracy mechanisms. Regardless of the public policy implications, the key point is that initiative lawmaking empowers a type of constituency that is represented very differently in a more republican form of government.

Second, the phenomenon of initiative lawmaking may be expected to have effects on the decisions made within legislatures. Surely, legislators appreciate the extent to which they have two different constituencies. They represent the voters of their district, and they represent the interests of the voters of the state writ large, who have the capacity to, for instance, use term limits to force them

69. See John Ferejohn, *Reforming the Initiative Process*, in CONSTITUTIONAL REFORM, *supra* note 39, at 313-25.

70. See, e.g., David Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 44 (1995); Hans A. Linde, *When Initiative Lawmaking is Not 'Republican Government': The Campaign Against Homosexuality*, 72 OR. L. REV. 10 (1993).

71. See WILLIAM DEVERELL & TOM SITTON, *CALIFORNIA PROGRESSIVISM REVISITED* (1994); Elisabeth R. Gerber, *Reforming the California Initiative Process: A Proposal to Increase Flexibility and Legislative Accountability*, in CONSTITUTIONAL REFORM, *supra* note 39.

72. Consider some of the differences between a legislature and the populace: (1) Votes are cast by secret ballots in direct democracy, not so in legislatures. So, votes can hardly be bought and sold since there is no chance of adequate policing; (2) voters are not "repeat players" in the sense that they interact with one another on a statewide level such that their allegiances and behavior can be watched by others; (3) voters have no continuing oversight mechanisms to enable them to secure influence over interest groups, regulated industries or others; their only redress is an initiative that is considered at the next appropriate election.

73. See, e.g., David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 AMER. POL. SCI. REV. 1181 (1989); Weingast & Marshall, *supra* note 33.

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out of office, reduce their compensation, constrict their jurisdiction, and reallocate power to other units of government (e.g., the governor, courts, local governments). The fact that legislators carry out their functions in the shadow of this initiative system may well translate into different patterns of legislative lawmaking. The phenomenon is measurable to some degree. Do we observe different patterns of lawmaking over a similar range of issues in states than we do in the U.S. Congress? Are some of these differences attributable to the absence of a national initiative system? These are among the questions pertinent to the project of considering to what extent initiative lawmaking matters to the conduct of interstate regulatory competition.⁷⁴

Another aspect of alternative forms of lawmaking to note at least in passing is this: Most states permit some form of initiative lawmaking at the local level. With respect to certain issues such as zoning, this technique can be a vital part of the state's regulatory arsenal. Local governments' power to conduct such initiative lawmaking is for the most part, however, subject to state constraint. Still, local governments in modern America truly rely upon this form of lawmaking to assert a variety of public policy agendas, ranging from zoning out "disfavored" uses of property to enacting local campaign financing and election laws.

3. *Distribution of Powers in the State Government*

All states have some form of separation of powers incorporated in their constitutions. Massachusetts is perhaps the most deliberate in its formulation. It provides as follows:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.⁷⁵

74. With respect to those states which have initiative lawmaking, there are substantial variations in the mechanics of the process. There are different signature requirements to put an initiative on the ballot. In Arizona, for example, the initiative proposal must be signed by a number equal to 15% of the votes cast for the governor in the last election; in Oklahoma, the number is 15% of the highest vote total for an office in the last election; in North Dakota, the requirement is 4% of the resident population; in Colorado, the rather obscure measure is 5% of all votes cast for the office of Secretary of State in the last election. Perhaps the most interesting variation is Missouri's: 8% of the votes cast for governor, with the requirement of 8% each from 2/3 of Congressional districts in the state. With respect to the time period within which signatures can be gathered, there is substantial variation as well. Arizona, for example, permits 2 years, while Oklahoma allows only 90 days. *THE BOOK OF THE STATES, 1993-94*, *supra* note 43, at 296-97, tbl. 5.17.

75. MASS. CONST. art. XXX, 1 MASS. GEN. LAWS ANN. 670 (1978).

The basic principle underlying this particular version of the separation of powers is shared in each state. The governmental institutions within the state reflect this principle. Hence, each state has three branches of government; each state provides that the governor is elected directly by the people. No state follows an alternative, more parliamentary system of interbranch relationships, whether or not it would be permitted to do so consistent with the U.S. Constitution. Therefore, the characteristics that we identify with the so-called separation of powers are widely shared and, in their basic form, should not detain us in thinking about varieties of intrastate regulatory processes.

There is considerable variation behind these rather standard formulations. However, part of these differences stem, no doubt, from continuing controversy over the efficacy of separation of powers as a description of American government and politics at the end of the twentieth century. At a descriptive level, our policymaking process does not respect clear lines of division among branches of government nor does it indicate that there are hermetically sealed branches of government each with their distinctive powers and roles.⁷⁶ At the federal level, we live, as Richard Neustadt observed, in a system of "separated branches sharing powers." This corresponds pretty well to state decision-making. Still relevant, though, is how states treat their system of separation of powers differently.

Consider, for example, how states select their judges. All states but Rhode Island provide for some limitation on the terms of judges of the state's highest court;⁷⁷ state rules frequently limit the number of years a supreme court justice can sit;⁷⁸ in other states, there is a "70 and out" rule.⁷⁹ With respect to the selection and retention process for lower state court judges, most judges are elected in some fashion. However, the methods of removal for state judges at all levels differs substantially from state to state.⁸⁰ A standard intuition is that this electoral check affects judicial performance. A related intuition is that this diminishes the checking function of the judiciary on nonmajoritarian policy outcomes and political processes. Whether this surrender of a certain amount of checks and balances is considered deleterious depends upon one's conception of the judicial role within a state constitutional order. Moreover, the empirical question of whether judicial performance is systematically different in states that tie judges to the electorate more solidly than in those that do not is controversial. I mean only to underscore the basic point, that the role of the

76. Compare Peter Straus, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (proposing functional conception of distribution of powers) with Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1989) (defending stronger, more formalistic conception of separation of powers).

77. THE BOOK OF THE STATES, 1993-94, *supra* note 43, at 190-92, tbl. 4.4.

78. *Id.*

79. *Id.*

80. *Id.*

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judiciary, and the selection of members of the judiciary, affects the distribution of powers in different ways throughout the fifty states.

4. *Individual Rights and Liberties*

It is a commonplace to observe that regulatory policy reflects not merely economic choices made in the name of economic efficiency, the maximization of social wealth, and/or distributive justice, but also represents fundamental choices about the nature and scope of individual liberty. In the strongest version of this claim, it is said that individuals enjoy, or should enjoy, some sort of a right to a particular distribution of goods and services; naturally, the establishment and maintenance of such rights would then connect regulatory policymaking (including interstate regulatory competition) with the constraining features of enforceable rights and liberties.⁸¹ But even the weaker version of this claim, one that remains agnostic about the proper role of government in securing a particular mix of regulatory outcomes, believes that regulatory policies and processes take place in the shadow of persistent claims about rights.⁸²

These claims are particularly persistent within states and within the structures of intrastate decisionmaking. The rights embodied in state constitutions often represent an expansion of certain types of claims against government conduct (and claims for certain governmentally provided goods and services) in ways that affect substantially the structure of regulatory policymaking. One of the points made repeatedly by those who study interstate regulatory competition is that people and businesses exercise voice and exit options in order to secure a particular provision of goods by the governments of the state and local areas in which they are inclined to locate.⁸³ These goods include rights. And, therefore, it should come as no surprise that states differ in important respects in the nature and scope of the rights enjoyed by their citizens. What is more surprising, from the standpoint of standard political economy theory, is why states share so many rights in common.

For example, consider states that restrict state and local regulation through, say, requirements of just compensation or protections against the impairment of contracts. In this regard, the state creates a scheme of limitations on state regulatory initiatives, limitations that may restrict, in important ways, the

81. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 90-91 (1990) (critiquing "misleading rhetoric of rights" in connection with regulatory policy).

82. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

83. See generally Been, *Land Use Exactions*, *supra* note 18; Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983).

capacity of states to compete in the interstate regulatory arena.⁸⁴ To be sure, the federal Constitution establishes various property and contractual rights not unlike relevant state protections;⁸⁵ but the key difference is that national rights apply to either, in the case of the Takings Clause, the federal government or, in the case of the Contract Clause, the states equally; they, in one respect at least, level the playing field.⁸⁶ By contrast, the embodiment of restrictive rights in state constitutions limits state regulatory power vis-a-vis other states that do not have these applicable provisions. While the standard "race to the bottom" rationale would explain why states would eschew these constraints in order to maximize their competitive position, it is notable that all state constitutions have some form of both just compensation and protection against impairment of contracts, although both of these provisions seem to restrict rather than to facilitate the state's regulatory position. Surely we must look beyond "race to the bottom" theories to explain the durability of these constitutional rights.

5. *The Relationship Between State and Local Governments*

Richard Briffault uses the helpful term "localism" to describe the constitutional relationship between state and local governments in American law.⁸⁷ Although localism is pertinent to the vast range of issues that state governments consider in day-to-day policymaking and is especially pertinent to the pattern of regulatory decisions made, it is virtually ignored in contemporary debates about federalism. The omission is critical, for it is only in understanding the way in which the relationships between state and local governments are, first, constructed by state constitutions and, second, work in practice, that we can sensibly evaluate arguments about the efficacy of interstate regulatory competition.⁸⁸ To put the matter simply at the outset: States are not unitary actors, but are made up of a variety of influential, heterogeneous local units of government; these units construct state regulatory decisionmaking; they also constrain it in important ways. Therefore, the interrelationship between state and local governments is what defines the notion of the "state." Correlatively, this interrelationship is what helps define the scope of state power and state policymaking processes.

A standard maxim in the literature on state and local government is that

84. Some form of protection of so-called economic rights, through eminent domain and contractual protections, exist in every state, although the form of such rights vary.

85. See U.S. CONST. amend. V.

86. See, e.g., *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

87. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault, *Our Localism*]; Richard Briffault, *Localism in State Constitutional Law*, 496 ANNALS AMER. ACAD. POL. & SOC. SCI. 117 (1988).

88. See Briffault, *What About the "Ism"?*, *supra* note 6, at 1303, 1307-09.

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local governments are creatures of state governments, depending upon them for their existence and for their authority.⁸⁹ We have long rejected, it is said, the notion that there is inherent local power.⁹⁰ True enough; however, this description of the formal relationship between state and local power is vastly underinclusive as an analysis of the realities of state/local relationships.⁹¹ To begin with, many states have ceded to local governments a modicum of sovereign power through the provision of home rule.⁹² But even with respect to the range of power that is not subject to local sovereignty—which, after all, is most of the relevant regulatory power within a state—local governments form constituencies that seek, and occasionally enjoy, influence on state policymaking. Local governments have two separate, but vital, qualities that ensure their persistent influence over fundamental policy choices within state government. One quality is that they constitute a relevant interest group in the state political process;⁹³ they clamor for resources and also for a certain level of freedom from imposition of state commands. For example, the conspicuous debate over unfunded state mandates reflects at its core debates about how—and whether—local interests are to be adequately represented in state decisionmaking.⁹⁴ As a general rule, local governments seem to fare rather well (compared with the state government vis-a-vis the national government until just recently) in securing constitutional or legislative protection against unfunded mandates.⁹⁵ With respect to other issues, especially where there is a zero-sum choice between the burden borne by statewide constituencies and the constituencies represented by several local governments, localities fare considerably less well. That local governments form important, ubiquitous interest groups, though, is the essential point here.

Another way in which local governments are critical in structuring intrastate regulatory decisionmaking and thus implicate interstate competition is with respect to the continuing burdens they bear in collecting local revenues and in distributing public goods in the manner demanded by local constituen-

89. See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

90. See, e.g., Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1114-15 (1980); Howard L. McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 216 (1916).

91. See generally CLAYTON GILLETTE, *LOCAL GOVERNMENT LAW*, Ch. 3 ("The Community's Relationship with the State") (1994); Briffault, *Our Localism*, *supra* note 87.

92. See GILLETTE, *supra* note 34, at 301-47; Terrance Sandalow, *The Limits of Municipal Power under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

93. Cf. Clayton Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991) (considering questions of interest group and capture in context of local decisionmaking contexts).

94. See, e.g., Jerry Mashaw & Susan Rose-Ackerman, *Federalism and Regulation*, in *THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT* 111 (G. Eads & M. Fix eds., 1984); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Services*, 46 VAND. L. REV. 1355 (1993).

95. See generally GILLETTE, *supra* note 34, at 507-11.

cies—in other words, in the way local units of government manage their local fiscal affairs.⁹⁶ Under one plausible model of state/local relations, local governments are mere administrative arms of the central, state government. When they are useful in implementing state goals, states will rely on them; when they cease to be useful, that is, when it is more efficient to manage the collection and distribution functions of public goods provision through a more centralized mechanism, local governments will be replaced. This model contemplates an entirely functional and hierarchical view of the proper distribution of powers, one that builds from the essential premise that the state may do what it wishes with its “agents.” Other models, though, contemplate a more independent, and more complex, relationship between the state and local governments. One strand emphasizes the value of local governments as fora for participatory democracy and “communitarian” values,⁹⁷ values that are not easily realized at the statewide level. Another strand emphasizes that even if we believe that form should follow function, we might want to establish and maintain solid spheres of local decisionmaking units, resistant to reincorporation by the states into more centralized structures.

These are not merely different normative models of how we may want to see localism constructed in the abstract; they also jibe with the structures of localism in particular states. While scholars of localism insist, partly because it is precisely the nature of the enterprise, that we might develop general principles and premises for state/local relationships in all fifty states, it is more credible to believe that some states require structural and institutional relationships among units of government that are distinct from those required in other states. Simply put, different states have different economic, political, and social requirements; they also have distinct cultures and histories which make a general theory of localism unlikely.

Nonetheless, it is important to the project outlined at the beginning and at the end of this paper to consider more systematically the nature and structure of localism as it is constructed in different states. After all, we may discover that the principles of localism are properly generalizable; perhaps localism shares in common with federalism, as described by the framers of the U.S. Constitution, the idea that there is an appropriate distribution between layers of government that can be spelled out in an ideal constitutional form. What we are more likely to find, I predict, is that states have quite distinct views about the proper relationships among different units of government in their respective states. There is some evidence of this on the surface of the matter, after all: The variation, for example, in the number of special districts in different states

96. See WALLACE E. OATES, *FISCAL FEDERALISM* (1972).

97. See, e.g., Frug, *supra* note 90, at 1153-54.

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is tremendous;⁹⁸ and, although less variable, there are substantial differences in the sorts of revenue-raising devices employed in different states.⁹⁹ To be sure, some of these differences reflect mere differences of technique; but others represent more basic variations embodied in contrasting constitutional structures and in state constitutional law.¹⁰⁰

The hard normative questions raised by this tour through state institutional regulatory processes are two-fold. First, what follows, for our law of federalism, from the fact of meaningful state variation? Perhaps nothing; there are, after all, a number of powerful reasons for the equalization of state regulatory decisionmaking through a uniform set of constitutional rules (most of these reasons start from a baseline of three words: "Articles of Confederation"). But perhaps much follows, in terms of how we might structure legal rules to encourage states to develop tools to carry out the regulatory goals that we as simultaneous citizens of local, state, and national communities aim to accomplish. Second, what follows for our politics of federalism? In other words, what should we expect from the national legislature in creating and implementing regulatory policy, in light of the impact of these national decisions on the processes of decisionmaking in state and local governments?

CONCLUSION

This Article has raised a number of different issues for further thought.

98. The following table gives a sense of the range among states:

<u>States With Greatest Number of Special Districts</u>	<u>Number</u>
Illinois	2920
California	2797
Texas	2266
Pennsylvania	2006
Kansas	1482

<u>States With Least Number of Special Districts</u>	<u>Number</u>
Alaska	14
Hawaii	16
Louisiana	30
Rhode Island	83
Vermont	104

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1992 CENSUS OF GOVERNMENTS VOL. 1, NO. 1, GOVERNMENT ORGANIZATION at 3 (1994).

99. See GILLETTE, *supra* note 34, at 423-696.

100. One is the requirement, expressed in every state Constitution, of equal treatment and, relatedly, of the prohibition against "special legislation." Both of these requirements are designed to ensure that the state may not single out particular localities for disfavored treatment; legislation which deals with the architecture and powers of local governments must apply to such governments on an equal basis. To be sure, general law will have differential impacts; but the state laws must be designed, at least, to apply equally to localities within the state. This mechanism limits the capacity of Oceana, the hypothetical state of the preceding Section of this Article, to single out Xanadu for special treatment, either by specifically proscribing local taxes or by exempting the local government from the general strictures of state law.

Some may lead to dead ends. After all, intrastate institutional mechanisms may, in some contexts and for some reasons, be far less conspicuous and far less significant for the state's competitive posture than other elements, such as its size, its population, and its economic condition. Other lines of analysis, though, may bear more fruit. There are number of hypotheses one might formulate whose consideration may yield richer predictions about the role of intrastate mechanisms on regulatory competition:

- The larger the size of legislative chambers in a state, the fewer the number of legislative rules, statutes, etc., there will be to facilitate the ability of states to compete in the regulatory marketplace. The reason is that larger chambers mean smaller legislative constituencies and, therefore, a greater chance that localities (and locally organized interest groups) will be able to thwart initiatives that benefit the state as a whole.

- In states that have, and frequently rely upon, initiatives, referenda, and other alternative forms of lawmaking (e.g., local initiatives), there are a greater number of state regulatory laws that deal with statewide, non-parochial, interests.

- In states that enable the state legislature to decide whether a certain policy issue involves a matter of statewide, as opposed to purely local, concern, we see a greater quantity and "quality" of state laws that respond to the statewide interests in facilitating regulatory competition. Correspondingly, we see less maneuvering room for local governments to collaborate with one another, with other states, with other localities, and with the federal government.

- In states with a more attenuated electoral constraint on judges (e.g., longer terms of office), we see a greater independence and, correspondingly, a decreased willingness to decide regulatory matters in a way that promotes state regulatory interests vis-a-vis other states. (This hypothesis, of course, presupposes something as well about the incentives faced by the so-called "independent" judiciary).

The message of this Article is not especially tied to the plausibility of these hypotheses. Its ambition, as stated at the outset, is more limited: to suggest that our conversations about interstate regulatory competition/collaboration and about federalism would be greatly enriched by paying more careful attention to the relationship between interstate regulatory policymaking and intrastate institutional mechanisms and structures.