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FEDERAL DEFERENCE TO LOCAL REGULATORS AND THE ECONOMIC THEORY OF REGULATION: TOWARD A PUBLIC-CHOICE EXPLANATION OF FEDERALISM

*Jonathan R. Macey**

THE concept of federalism, which describes the complex relationship between the states and the federal government, is one of the most revered sacred cows on the American political scene. Conservatives and liberals alike extol the virtues of state autonomy whenever deference to the states happens to serve their political needs at a particular moment. Yet both groups are also quick to wield the power of the supremacy clause,[1] while citing vague platitudes about the need for uniformity among the states, whenever a single national rule in a particular area furthers their political interests.

The relationship between the ideal of federalism and the reality of the supremacy clause thus emerges as one of the most convenient of political expedients.[2] This Article seeks to place this relationship within the context of the economic theory of public choice.

Building on the earlier work of Professor George Stigler,[3] Professors Sam Peltzman[4] and Gary Becker[5] have specified the core characteristics of public-choice theory by developing what has come to be known as the "political-support-maximization" model, which has replaced the older cartel model as a tool for predicting political

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* Professor of Law, Cornell University. I received helpful comments on earlier drafts of this Article that were presented at law school faculty workshops at the University of Chicago, Cornell University, New York Law School, and the University of Virginia. I received extremely useful advice and comments from Peter H. Aranson, Henry N. Butler, Lloyd R. Cohen, Richard A. Epstein, Clayton P. Gillette, Fred S. McChesney, Michael W. McConnell, Henry G. Manne, Roberta Romano, Robert E. Scott, Steven H. Shiffrin, Cass R. Sunstein, and Robert D. Tollison.

[1] U.S. Const. art. VI, § 2.

[2] See McConnell, Federalism: Evaluating the Founders' Design (Book Review), 54 U. Chi. L. Rev. 1484, 1488 (1987) ("[F]or most people . . . issues of federalism take second seat to particular substantive outcomes.").

[3] Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

[4] Peltzman, Toward a More General Theory of Regulation, 19 J.L. & Econ. 211 (1976).

[5] Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. 371 (1983).

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behavior. The political-support-maximization model has been employed successfully to define regulatory action,[6] reversal of regulatory action,[7] and regulatory forbearance.[8]

As yet, however, the model provides no explanation of why federal lawmakers ever would *defer* to state regulators by allowing such local lawmakers to regulate in their stead. Given the federal government's broad authority under the supremacy clause to preempt local rules,[9] the political-support-maximization model would seem to predict that the federal government will always exercise its power to preempt local law—either to regulate or to forbear from regulating—in order to obtain for itself the political support associated with providing laws to interested political coalitions. But contrary to this prediction, we observe that the federal government willingly defers to local governments over a wide range of issues by allowing them to continue to supply laws.

Nor has Congress simply ceded regulatory authority over local issues to local governments and retained for itself exclusive authority to intervene in national affairs, as a public-interest defense of federalism would predict.[10] The federal government has, at times, taken a lively interest in regulating purely local matters, such as the responsibility of the states to provide funds for the education of handicapped children or the issuance of charters to banks that are unable to do business beyond the borders of the state in which their main office is located. Conversely, Congress has ceded to individual states the power to dictate what is, in effect, national policy in certain important areas. For example, Delaware's corporate law and South Dakota's law of usury both have truly national effects yet are promulgated at the state level.[11]

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[6] See, e.g., Haddock & Macey, Regulation on Demand: A Private Interest Model with an Application to Insider Trading Regulation, 30 J.L. & Econ. 311 (1987).

[7] See, e.g., Jarrell, Change at the Exchange: The Causes and Effects of Deregulation, 27 J.L. & Econ. 273 (1984).

[8] See, e.g., McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101 (1987).

[9] See Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985); Nine for the Seesaw, The Economist, Mar. 2, 1985, at 21.

[10] McConnell, supra note 2, at 1494-96.

[11] Delaware's corporate laws have a national effect because they control the internal affairs of many major corporations whose principal business activities are located elsewhere. South Dakota's law of usury has a national effect because loans originated in South Dakota,

This Article seeks to show that deference to local regulators is in fact consistent with the political-support-maximization model that provides the theoretical underpinning of the economic theory of regulation. As will be seen, just as the political-support-maximizing solution for a particular issue may be for Congress to regulate in a specific area (or to prevent regulations from being implemented), for other issues Congress and administrative agencies will find that they can maximize political support by refraining from regulating—even when they *know* that regulators at the state level will step in and regulate in their stead.

While at first blush it may appear that this sort of regulatory deference permits local lawmakers to capture all of the gains associated with a particular regulatory enactment, this is not the case. The supremacy clause allows federal lawmakers to obtain political support in exchange simply for agreeing to permit local lawmakers to retain regulatory authority over certain issues. Current interpretations of the supremacy clause permit federal law to override state law not only in cases of actual conflict, such as when federal and state law provide different standards, but also where Congress is thought by the courts to have prohibited parallel state legislation by implication.[12] Thus, the supremacy clause is a considerable source of political rents for Congress because it allows Congress to obtain political support by permitting independent or concomitant state regulation at little or no political cost to itself.

This Article attempts to specify the conditions under which Congress will choose to delegate the responsibility for regulating to state governments. According to the theory presented here—and consistent with the political-support-maximization model of public-choice theory—Congress will delegate to local regulators only when the political support it obtains from deferring to the states is greater than the political support it obtains from regulating itself. Deference to local regulators is sometimes the strategy by which federal regulators maximize political support from interest groups. Deference to local regulators will also occur when legislating will cause Congress to *lose*

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particularly purchases made with credit cards issued by South Dakota banks, are subject to South Dakota law.

[12] See J. Nowak, R. Rotunda & J. Young, Constitutional Law § 9.1 (3d ed. 1986). The supremacy clause also allows Congress expressly to prohibit state action. Id.

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political support.[13]

The important point here is that deferring to state lawmakers does not deprive federal lawmakers of political support. But instead of receiving political support for regulating, they will receive political support for agreeing to allow local regulators to make local laws. Political support to members of Congress for deferring to state regulators may come from the relevant interest groups directly, or it may be channeled through a conduit such as the Conference of State Bank Supervisors or the National Governors Conference. In either case, the result will be the same: Congress receives political support in exchange for deferring to state lawmakers on a particular regulatory issue.

The theory here might be described as a "franchise theory of federalism." In an ordinary business franchise, the owner of a product, service, or technology, rather than market its own goods, often will choose to sell another firm the rights to market them under a franchise arrangement. Under certain circumstances firms find it in their interests to employ this sort of contractual arrangement.[14] This Article identifies three general situations in which Congress will "franchise" the right to regulate in a particular area to the states: (1) when a particular state has developed a body of regulation that comprises a valuable capital asset and federal regulation would dissipate the value of that asset; (2) when the political-support-maximizing outcome varies markedly from area to area due to the existence of spatial monopolies, variegated local political optima, and variations in voter preferences across regions; and (3) where Congress can avoid potentially damaging political opposition from special-interest groups by

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[13] See infra notes 68-87 and accompanying text.

[14] See Brickley & Dark, The Choice of Organizational Form: The Case of Franchising, 18 J. Fin. Econ. 401 (1987); Caves & Murphy, Franchising: Firms, Markets, and Intangible Assets, 42 S. Econ. J. 572 (1976); Klein & Saft, The Law and Economics of Franchise Tying Contracts, 28 J.L. & Econ. 345, 349-54 (1985); Rubin, The Theory of the Firm and the Structure of the Franchise Contract, 21 J.L. & Econ. 223 (1987).

The use of the franchise metaphor is not to suggest that the concerns involved in Congress's decision whether to regulate exactly mimic those of a firm considering whether to become a franchisor. One important difference is that in the case of Congress, franchise fees (political support) are normally paid by the customer (interest groups) rather than by the franchisees (state regulators), although state legislators may in some circumstances pay for the right to regulate. The development of a comprehensive franchise theory of federalism is beyond the scope of this Article.

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putting the responsibility for a particularly controversial issue on state and local governments.

Part I of this Article places the model presented here within the context of the general economic theory of regulation and explains why interest groups often find that federal law is superior to state law in providing them with wealth transfers. Part II elaborates the circumstances in which Congress maximizes its own political support by deferring regulation to local lawmakers.

I. Legislative Deference and the Economic Theory of Regulation

Under the economic theory of regulation, politicians can obtain payments (which may come in the form of honoraria, campaigu contributions, indirect political support, and, of course, outright bribes) from interest groups in exchange for regulation.[15] The model posits that politicians maximize the aggregate political support that they receive from interest groups by supplying the legal rules that result in the highest net receipt of support.[16]

The first sort of interest-group activity observed by public-choice theorists was rent seeking. Politicians would supply rent-creating regulation to the groups best able to pay for it, sometimes by establishing cartels in particular industries,[17] but often in more subtle ways.[18] Later it was seen that exogenous shocks could alter an existing polit-

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[15] See Berke, How Cash Is Given to Politicians' Interests, N.Y. Times, Dec. 10, 1989, § E, at 4; Easterbrook, What's Wrong With Congress?, The Atlantic, Dec. 1984, at 57, 70-72.

[16] More specifically, the model posits that legal rules are supplied to those groups that bid the most for them and that compensation is provided in the form of political support. Because particular aspects of much legislation, especially complicated legislation, affect some groups more than others, some groups will be more interested than others in specific aspects of a particular legislative package. The precise contours of the resulting law will reflect a political equilibrium representing the preferences of a variety of groups. See Peltzman, supra note 4, at 222-24.

In addition, the economic theory of regulation predicts that laws will tend to benefit small, cohesive special-interest groups at the expense of the general public. This result is due to two factors: (1) individuals lack sufficient incentives to promote laws that directly benefit the general public because of free-rider problems; and (2) interest groups have strong incentives to press for laws that transfer wealth from the general public to themselves. See Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 230-32 (1986).

[17] Stigler, supra note 3, at 5, 11-13.

[18] See Macey, Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall, 33 Emory L.J. 1 (1984).

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ical equilibrium, rendering a preexisting arrangement undesirable from the perspective of the regulated groups. In such instances, deregulation might become the political-support-maximizing strategy for a subsequent set of politicians. Where, for example, exogenous technical factors or general economic forces erode the rents associated with a particular activity, the demand for the regulatory regime supporting that activity may decline.[19] This diminution in demand ultimately may result in deregulation.[20]

In addition to extracting payments for regulating or for deregulating, politicians can obtain payments for agreeing not to regulate in a particular area. As Professor Fred McChesney has explained in an illuminating article, where private parties have created quasi-rents through capital investments that can be used only for particularized purposes, politicians can extract payments in exchange for promises to refrain from imposing regulations that would expropriate those investments.[21]

In a world of high information and transaction costs, the political-support-maximizing strategy is not always obvious to the politicians making the relevant decisions. Consequently, the period prior to legislative decisionmaking, which is often characterized by a series of hearings, fact findings, and related investigations, resembles a form of auction at which interest groups can express their preferences for particular regulatory configurations and signal their legislators about the intensity of these preferences. During this "bidding" process legislators discover which legislative strategy will allow them to obtain the most political support.

As presently understood, however, the economic theory of legislation does not explain why Congress would confer regulatory authority on state legislatures when it could easily legislate directly. Instead, the theory appears to imply that the federal government should supply all law, as deference to state regulators simply allows local lawmakers to capture for themselves the political support available for supplying regulation to rent-seeking constituents. It is not surpris-

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[19] For an insightful discussion of the problem of durability of interest-group bargains, see Landes & Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875 (1975).

[20] Jarrell, supra note 7; Macey & Haddock, Shirking at the SEC: The Failure of the National Market System, 1985 U. Ill. L. Rev. 315.

[21] McChesney, supra note 8, at 110-11.

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ing that the economic theory of regulation does not specify a role for state law: For at least four reasons, obtaining a federal law will be the strategy of choice for most interest groups seeking to obtain wealth transfers.

The first factor that suggests that interest groups generally will prefer to obtain rents by invoking federal rather than state law involves transaction costs. It is simply less expensive to obtain passage of one federal statute than to obtain passage of fifty state statutes because a different state legislature must be lobbied in each state.[22] Even if interest groups would benefit marginally by having a myriad of local statutes, the benefits may not outweigh the transaction costs associated with obtaining passage of all of those statutes. Only when the benefits to interest groups of having a series of different local statutes are higher that the costs of obtaining such statutes would we expect to observe local statutes.

A related factor is that when statutes are passed at the state level, political support must still be provided to federal regulators to induce them to forbear from later preempting the field by enacting a subsequent law. In other words, the supremacy clause generally requires interest groups to pay twice to obtain a state law—once at the state level and once at the national level.[23] By contrast, where interest

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[22] Butler & Macey, The Myth of Competition in the Dual Banking System, 73 Cornell L. Rev. 677, 709 (1988). Of course, interest groups are not forced to select between obtaining a single federal law on the one hand and 50 state laws on the other. An interest-group coalition can opt for "half a loaf" by obtaining the legislation it prefers in only a few states. At some point in the process, however, the cost of obtaining a single federal rule becomes lower than the cost of obtaining a multitude of state-law rules.

Furthermore, as Professor Saul Levmore has pointed out, at times interest groups that operate at the national level will press for a single nationwide rule in order to avoid problems of exploitation at the state level. Levmore, Interstate Exploitation and Judicial Intervention, 69 Va. L. Rev. 563 (1983). This situation will occur when the benefits of a particular rule are concentrated in one jurisdiction, but the costs are concentrated in other jurisdictions. For example, a given state may choose to impose an unusually harsh liability rule on manufacturers of a particular product if none of the manufacturers of that product are located in that state. In such a situation, the consumers will be more powerful politically than the producers at the state level. Nationally, however, the producers may dominate the political process.

[23] Even under the most expansive interpretations of the commerce clause, some aspects of state lawmaking authority are probably immune from federal preemption. For example, in Penry v. Lynaugh, 57 U.S.L.W. 4958 (U.S. June 26, 1989), the Court held that states possess the constitutional authority to permit the execution of retarded persons under certain circumstances. Congress has considered passing legislation to prohibit such executions, but it is not clear that Congress has such power over the states. It is clear, however, that Congress

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groups are able to obtain federal legislation that preempts the field, they can avoid the necessity of making payoffs to local politicians.

A third reason interest groups may prefer national law to local law is that, from an interest group's perspective, federal law is often considered a higher quality product than state law. One reason for this belief is that federal bureaucrats and judges are perceived as more sophisticated than their state rivals and, consequentially, more able to develop innovative, responsive solutions to interest-group needs. Similarly, the fact that greater resources are available to federal regulators naturally implies that they will have more wealth to extend to interest-group supplicants than will local regulators. Finally, the deals made at the federal level are likely to be more durable than the deals made at the state level. This is because the full-time, professional politicians that dominate at the federal level have considerable reputational capital invested in the stability of the deals they make.[24] Moreover, because of its political independence, the federal judiciary represents a more reliable enforcement agency for interest-group bargains than generally exists at the local level.[25]

Finally, and perhaps most importantly, federal law is harder for adversely affected parties to avoid than is state law. Regulated entities often can shift assets or personnel to one state to avoid regulatory transfers imposed by another state. If, for example, one state imposes an onerous tax on firms or citizens within its borders, it would be relatively easy for parties who are adversely affected simply to relocate to another state. The wealth transfers effectuated at the national level, however, are likely to be harder to avoid than the wealth transfers effectuated at the local level. While exit can be used as a strategy for avoiding federal law, the costs of exiting to avoid federal law are generally much higher than the costs of exiting to avoid state law. For example, when individual states attempted to enact plant-closing laws, they found existing firms threatening to exit and new firms refusing to establish plants in such states. For this reason, plant-clos-

has the constitutional authority to intercede in an incredibly broad range of issues traditionally considered the province of state decisionmaking. The discussion in this Article pertains to these issues.

[24] Macey, Public Choice: The Theory of the Firm and the Theory of Market Exchange, 74 Cornell L. Rev. 43, 52-53 (1989).

[25] Landes & Posner, supra note 19, at 885-87.

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ing laws proved almost wholly ineffective at the state level.[26] By contrast, the federal government was able to enact such laws far more successfully because the burden of relocating outside of the United States made the avoidance of the federal plant-closing laws inframarginal for most firms.[27] Thus, interest groups will favor federal law over state law because states face stiffer competition from one another than the federal government faces from other sovereign nations.[28] This stiffer competition is a manifestation of the fact that the groups or individuals harmed by interest-group wealth transfers can easily relocate to avoid the effects of such wealth transfer activity. As recent events in Eastern Europe have illustrated, the ability to exit poses severe constraints on the ability of interest groups to achieve their goals.

For all of these reasons, we observe interest groups exhibiting a strong preference for federal as opposed to state law in most areas. This preference enables federal regulators to reap political support by providing appropriate legislation. Yet we also observe federal regulators voluntarily deferring to local regulators in a variety of contexts. The economic theory of regulation is in need of some refinement in order to take account of this fact.

I wish to emphasize that such deference occurs despite the fact that federal legislators can obtain political support by providing favors directly to local constituents in certain situations. All members of Congress have sophisticated, well-staffed offices for the express purpose of delivering favors to local constituents. And, as the recent controversy over the closing of obsolete military bases has made clear, members of Congress do not view the provision of localized favors as outside the range of services they profitably can offer their constituents.[29] In addition, Professors Barry Weingast and William Marshall

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[26] Macey, Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes, 1989 Duke L.J. 173, 195-96.

[27] Id. at 196-97.

[28] See R. McKenzie & G. Tullock, Modern Political Economy: An Introduction to Economics 398-400 (1978) (comparing the benefits of competition among governments with the advantages and disadvantages of centralization).

[29] Indeed, the need for legislators to deliver favors for their constituents back home, a commonplace observation in political science, explains the fact that logrolling is an effective political practice. See D. Mayhew, Congress: The Electoral Connection 31-33 (1974); Weingast & 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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recently have shown how the structure of the committee system within Congress can resolve certain contracting problems that exist among members of Congress, thereby enhancing the ability of legislators to provide discrete benefits to local constituencies.[30] Consistent with this analysis, a variety of empirical studies have demonstrated that members of particular congressional committees enjoy disproportionate success at obtaining local pork-barrel projects from legislation originating in their committees.[31]

The riddle here is that despite the fact that Congress possesses the power to preempt state law and the ability to use its lawmaking power to provide highly localized benefits to interested groups, it often chooses not to do so. The following Part explores the situations in which Congress will maximize political support by granting a regulatory "franchise" to local regulators.[32]

II. State Law as the Political-Support-Maximizing Solution

The above discussion of public-choice theory implies that when the political support that can be obtained from deference to local lawmakers is greater than the political support to be derived from direct federal regulation, we can expect federal regulators to defer to the states. At least three sets of conditions can be identified in which such deference will be the political-support-maximizing solution. The first is where interest groups have made an expropriable investment in

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[30] Weingast & Marshall, supra note 29, at 144.

[31] See Macey, supra note 24, at 55 (summarizing the evidence).

[32] The above discussion also suggests the need for a minor modification of McChesney's powerful point about rent extraction. See text accompanying note 21. McChesney's model hypothesizes a world in which economic activities will not be regulated if Congress declines to regulate them. But if Congress simply declines to regulate without doing more, state governments can capture any available rents from regulating (or from declining to regulate) that otherwise would have gone to members of Congress. In other words, where the political-support-maximizing solution for federal regulators is to forbear from regulating, they must act affirmatively to prevent local governments from regulating. Congress can do this by passing specific enactments that do not change the state of the law, but that clearly supersede specific state laws. Congress also can act by expressing a desire to supersede local regulations or by passing a regulatory scheme under which local laws are invalid because they impermissibly interfere with the effectuation of congressional objectives. In addition, courts on occasion will invoke the so-called "dormant commerce clause" to invalidate state legislation that does not conflict with any federal statute, but that infringes upon interstate commerce. See J. Nowak, R. Rotunda & J. Young, supra note 12, § 9.3.

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a particular set of local regulations. For example, over time local regulators may have developed particularized expertise in a specific subject area, or they may have developed a long-term contractual relationship with one or more interest groups through a pattern of repeat dealings. Where these conditions obtain, existing local regulation takes the form of an income-producing capital asset. Federal preemption in these areas would dissipate the value of this asset. Interest groups and local politicians therefore have an incentive to provide political support to Congress in exchange for Congress's agreement not to preempt these local regulations.

The second set of circumstances under which we are likely to observe federal deference to local regulators is where the political-support-maximizing solution for a particular regulatory issue differs markedly from jurisdiction to jurisdiction. Federal law is an unwieldy device for maximizing aggregate political support where there is a complex set of differing local political optima caused by local or spatial monopolies. In such circumstances, local regulators will be the best source for the complex matrix of differing regulatory schemes necessary to provide the diverse set of arrangements necessary to benefit the relevant groups.

A third set of conditions under which we will observe deference to state regulators is derived directly from Professor Morris Fiorina's earlier work on the delegation of legislative authority to administrative agencies.[33] As Fiorina pointed out, if Congress regulates in the form of a specific—that is, judicially enforceable—statute, members of Congress "engender[] the unalloyed approval of those benefited and the disapproval of those harmed."[34] Fiorina observed that delegating a decision to a regulatory agency has the advantage of permitting Congress to remove the blame for particularly controversial legislation from its own shoulders onto those of the relevant agency.

Fiorina's analysis can be extended from administrative agencies to include explicit or implicit delegations of legislative power to state governments. Indeed, Congress often can shift the blame for controversial enactments even more effectively by deferring to state legislators than by deferring to administrative agencies because Congress

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33 Fiorina, Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?, 39 Pub. Choice 33 (1982).

34 Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 56 (1983) (describing Fiorina's conclusions).

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often is considered at least partially accountable for the actions of the latter. By contrast, actions by state legislatures may bring excoriation on state legislators and cries for federal preemption, but will only rarely bring condemnation by Congress itself.[35]

The discussion that follows will elaborate on the conditions that will permit local law to dominate national law under an economic theory of regulation.

A. *The Protection of Asset-Specific Investments*

When an individual state creates a regulatory regime that accumulates particularized expertise, reputational value, or human capital in a specific subject area, that regulatory scheme represents a capital asset of that state. The beneficiaries of the state-law regulatory regime will be willing to pay to retain the current regulatory structure in the face of threatened federal intervention. Whenever existing, state-created rents on such assets are greater than the rents that can be created by federal regulation, the price the beneficiaries of the state regulation will pay Congress in return for retention of state control will be greater than the political support Congress could obtain by intervening directly. This situation represents a variation on McChesney's model of regulatory forbearance. Under McChesney's model, interest groups provide political support in return for an agreement to refrain from regulating. In this model, interest groups provide political support to retain an existing, alternative regulatory regime.

An example of this phenomenon involves the provision of corporate law by state legislatures. For years there has been a fierce debate about the efficacy of the jurisdictional competition for corporate charters that continues to rage among the states. One group contends that state law is preferable because competition among the states produces efficient corporate laws that maximize firm value and shareholder

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[35] Congress will be particularly inclined to defer legislative authority to state legislatures rather than to administrative agencies whenever the relevant issues can be resolved by a discrete declaration of law, rather than by the ongoing series of interpretations that are the standard fare of administrative agencies. While ongoing regulation may present Congress with later opportunities to gain political support, simple, discrete matters do not. The abortion controversy thus presents a paradigmatic example of an issue that Congress will relegate to the states. See infra notes 72-87 and accompanying text.

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wealth.[36] A competing group argues that federal law ought to preempt state law because competition among the states for corporate chartering revenues has led to an undesirable "race to the bottom" in which various states compete to provide the set of laws that best facilitate the transfer of wealth from shareholders to managers.[37]

But all states are not equal in the jurisdictional competition for corporate charters. One state, Delaware, has consistently led the field for the past fifty years.[38] Over forty percent of all companies listed on the New York Stock Exchange are chartered in Delaware,[39] and, even more significantly, eighty-two percent of all firms move to Delaware when they elect to reincorporate from the state in which they originally obtained their charter.[40]

Delaware's dominance in the market for corporate charters is not a consequence of a unique willingness to provide corporate laws that chartering firms find attractive. Many states have manifested an eagerness to do this in order to obtain a greater share of the significant revenues associated with granting state charters. Nor is Delaware's dominance a consequence of its greater technical expertise in promulgating a sophisticated and useful body of doctrine. Other states could easily replicate, or even improve upon, Delaware's body of doctrine.[41] Indeed, one cannot explain Delaware's dominance in the jurisdictional competition for corporate charters solely with reference to its distinctive corporate code because its corporate code is, in fact, not particularly remarkable or even distinguishable from that of other states.

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[36] See, e.g., Easterbrook & Fischel, Voting in Corporate Law, 26 J.L. & Econ. 395 (1983); Winter, State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251 (1977).

[37] See, e.g., Louis K. Liggett Co. v. Lee, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting) (describing the competition among the states for corporate chartering revenues as a race "not of diligence but of laxity"); R. Nader, M. Green & J. Seligman, Taming the Giant Corporation (1976); Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663, 666 (1974) (describing this competition as a "race for the bottom"); Jennings, Federalization of Corporation Law: Part Way or All the Way?, 31 Bus. Law. 991 (1976).

[38] Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J.L. Econ. & Org. 225 (1985).

[39] See 1 N.Y. Stock Exchange Guide (CCH) 725-99 (1989).

[40] Romano, supra note 38, at 244.

[41] Nevada has attempted to duplicate Delaware's doctrine. See Macey & Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Tex. L. Rev. 469, 488 (1987). Recently, Pennsylvania also promulgated laws that appear to offer management a mcre attractive package.

Rather, Delaware dominates the jurisdictional competition for corporate charters because of the nature of that competitive process. Delaware is a small state. It obtains an extremely high proportion of its budget (sixteen percent) from franchise taxes on corporate chartering.[42] Delaware relies on these revenues more than other states because for other states, revenues from corporate chartering represent only a small portion of their total budget. In other words, the high percentage of Delaware's budget that is derived from chartering revenues represents a credible (bonded) promise that the state will not renege on its earlier promise to respond in consistent ways to new phenomena.[43] Delaware has been able to retain its dominance because it is able to offer a reliable promise that its corporation law will remain highly attractive to managers in the future.[44] Competing states are unable to match Delaware's promise of future performance because they cannot offer the same credible bond.

In exchange for the high percentage of state revenues derived from corporate chartering, Delaware also offers current and prospective charterers a highly specialized bar and a judiciary with particularized experience and expertise in corporate law.[45] Numerous attorneys, investment bankers, and corporate officers and directors both in and out of Delaware have made large investments of human capital that are specific to Delaware; hence, they have come to share Delaware's large stake in the preservation of its dominant position in the competition for corporate charters. These groups have learned the rules, practices, and traditions of the Delaware legislature and the philosophies of its judges, and they have familiarized themselves with the way the Delaware corporate code is likely to be interpreted.

In other words, the jurisdictional competition for corporate charters "is characterized by bilateral investment in assets that are specific to the chartering transaction, involving human capital on the firm side and the corporate legal system on the state side."[46] In sum, Delaware

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[42] Romano, supra note 38, at 240-41.

[43] This theory of Delaware's dominance was first propounded by Professor Roberta Romano. See id. at 226.

[44] Id. at 226-27.

[45] See, e.g., Macey & Miller, supra note 41, at 488 (observing that "Delaware judges, corporate attorneys, and legislators are more knowledgeable about and have a greater interest in corporate law than do people with similar positions in other states"); Meyers, Showdown in Delaware: The Battle to Shape Takeover Law, Institutional Investor, Feb. 1989, at 64.

[46] Romano, supra note 38, at 226.

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is committed to having a reliable and responsive system of corporate laws.

But the benefits of Delaware's dominant position in the competition for corporate charters are not randomly distributed. Rather, numerous interest groups, but particularly the Delaware corporate bar, benefit from Delaware's current dominant position.[47] Indeed, building on the earlier work of Professor Roberta Romano, Professor Geoffrey Miller and I have elsewhere shown that the precise contours of much of Delaware's corporate law can be explained by the fact that it effectively channels litigation into the state's courts.[48]

Thus, Delaware's dominant position in the market for corporate charters represents a valuable capital asset that generates revenues for Delaware corporations, corporate lawyers, investment bankers, and for the state itself. All of these groups have a large stake in seeing that Delaware retains its dominant position so that their specific capital investments will not be dissipated. These capital assets would be destroyed if the federal government enacted a pervasive system of federal corporate law that preempted the field. All of these groups, whatever their political disposition on issues of federalism generally or corporate governance in particular, have an incentive to work to avoid federal preemption. Thus, Congress can amass significant political support by refraining from preempting state law in this area. The fact that Congress has not enacted a national corporate law indicates that deference to the states is in fact its political-support-maximizing solution.

While public-choice theory thus offers an explanation for the persistence of state chartering, the phenomenon is wholly inconsistent with a public-interest view of federalism. Even the most ardent supporters of federalism recognize that national solutions are desirable in situations in which externalities exist, such as when a particular state can capture most of the benefits from regulating while bearing few of the costs associated with its regulatory regime.[49] But continued state regulation of corporate chartering permits one small state, Delaware, to enact laws that are truly national in focus. The consequences of these laws are felt nationally, while the benefits of the regulatory regime

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[47] Macey & Miller, supra note 41, at 501-02.

[48] Id.

[49] See McConnell, supra note 2, at 1495.

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accrue disproportionately to interest groups within Delaware.[50]

While other areas have not been studied in the same detail as Delaware's corporate law, it appears that the Delaware phenomenon is not unique. For example, Connecticut is well known for having developed specialized expertise in the provision of regulation for the insurance industry. To protect this asset, interest groups successfully have persuaded Congress not to displace state insurance regulation, despite the fact that there has been significant federal intervention in all other aspects of the financial services industry, particularly banking and securities.

Thus, when the Supreme Court reversed an 1868 decision[51] and held that states no longer had exclusive control of the insurance industry,[52] Congress responded by passing the McCarran-Ferguson Act less than a year later.[53] The McCarran-Ferguson Act specifically deferred regulatory authority over insurance to the states in order to "secure more adequate regulation" over the industry.[54] The McCarran-Ferguson Act, which has been described as a "sweeping" authorization by Congress of state regulation,[55] declared that the power to regulate the insurance industry would remain with the states and that no act of Congress should be interpreted as implicitly invalidating any state insurance regulation unless the congressional act specifically related to the business of insurance.[56]

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[50] See Macey & Miller, supra note 41, at 490-98.

[51] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

[52] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

[53] McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (1988)).

[54] H.R. Rep. No. 143, 79th Cong., 1st Sess. 4, *reprinted in* 1945 U.S. Code Cong. Serv. 670, 673.

[55] L. Tribe, American Constitutional Law § 6-33, at 526 (2d ed. 1988).

[56] 15 U.S.C. § 1011 (1988):

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Exempting the insurance companies from the operation of the commerce clause turned out to be something of a mixed blessing for the insurance industry. As a consequence of the Act, states were able to impose taxes that discriminated against out-of-state insurance companies without fear that the taxes would be struck down as violative of the commerce clause. See Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (upholding a South Carolina tax that charged a three percent premium on out-of-state insurance firms). The Supreme Court came to the rescue of the insurance industry almost 40 years later. See Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (holding that an Alabama law imposing higher gross premiums on

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The McCarran-Ferguson Act was paraded to the public as a bill to protect states' rights.[57] In fact, the bill was the product of the Association of Insurance Commissioners, which drafted a statute and presented it to Congress.[58] The bill proposed by the state insurance commissioners ultimately was accepted by Congress, although various proposals to exclude the insurance industry from the antitrust laws were rejected.[59]

Interestingly, the first significant incursion on the states' franchise to regulate the insurance industry has come in the area of products liability. Manufacturers persuaded Congress to pass the Product Liability Risk Retention Act of 1981[60] in order to "reduce the problem of the rising cost of product liability insurance by permitting product manufacturers to purchase insurance on a group basis."[61]

B. State Law as a Customized Response to Local Interest Groups

The fifty states that comprise the union differ dramatically in history, demography, economic orientation, and natural endowment. Consequently, it is not surprising that patterns of interest-group behavior differ significantly from state to state, and even from locality to locality. The political-support-maximizing equilibrium may require favoring a certain interest group in one state and a different interest group in another. The issue of gun control is a good example of this phenomenon. In general, states with largely urban populations tend to favor gun control while states with rural populations often prefer to provide citizens with broad rights to own and carry guns.

The implication of such variety is that the political-support-maximizing outcome for politicians in one state may not be the political-support-maximizing solution for politicians in another. And when interest-group preferences are aggregated, the political-support-maximizing solution at the national level may differ from many, perhaps most, of the local solutions. Inevitably, a national rule will impose

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non-Alabama insurance companies would violate the equal protection clause if it were not related to a legitimate state interest).

57 See 90 Cong. Rec. A4403 (1944) (statement of Sen. Hatch).

58 Id. at A4403-07.

59 See id. at A4405 (setting forth the proposals to exclude insurance industry from the antitrust laws, which proposals were not incorporated into the legislation as passed).

60 Pub. L. No. 97-45, 95 Stat. 949 (codified as amended at 15 U.S.C. §§ 3901-3904 (1988)).

61 H.R. Rep. No. 190, 97th Cong., 1st Sess. 4, *reprinted in* 1981 U.S. Code Cong. & Admin. News 1432, 1432.

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high costs on some interest groups that have benefited from a conflicting local rule.[62] Interest groups that are likely to be disappointed by or indifferent to a national solution will pay to have matters resolved at the local level.

Of course, the transaction costs of obtaining individualized local rules likely will exceed the transaction costs associated with obtaining a single national rule. Only when the increase in political support that Congress can gain from deferring to the states outweighs, at the margin, the increase in transaction costs associated with promulgating a multitude of local rules will we expect to observe local instead of national rules.

Spatial monopolies such as those conferred by zoning laws represent the classic situation in which interest groups and politicians will prefer a myriad of local laws to a single federal rule.[63] A uniform zoning law passed at the national level would deprive innumerable local lawmakers of the ability to capture the rents associated with passing zoning laws and variances that favor local interest groups by providing them with spatial monopolies. Federal regulators can capture rents as well by agreeing to defer to such local lawmakers.

Furthermore, some of the factors that usually cause interest groups to favor federal laws over state laws are absent where the interest groups are seeking to protect spatial monopolies. First, while obtaining a single federal statute generally will be cheaper than obtaining *fifty* local laws, the costs of obtaining a single federal law generally will be greater than the costs of obtaining *one* local law. And one local law is all that is necessary to protect a spatial monopoly. Second, the cost of compensating federal lawmakers for declining to regulate spatial monopolies will probably be low because the cost of replicating this vast regulatory regime at the federal level is likely to be prohibitive, thus making it an unattractive prospect for federal

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[62] See also Butler & Macey, supra note 22 (applying the theory presented here to the state and federal regulation of branch banking).

[63] A spatial monopoly is a monopoly that arises because one producer is able to locate at a sufficient distance from its competitors such that consumers must incur transaction costs to obtain goods produced by rivals. The producer can tack onto the competitive price of its goods an amount up to the amount of the transaction cost that the consumer would have to pay to do business elsewhere. Because different businesses are likely to dominate in different locales, the zoning law that provides the most political support for lawmakers in one jurisdiction is likely to differ markedly from that which provides the most political support for the lawmakers in another jurisdiction.

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intervention. Finally, competition among states will not deter local lawmakers from exploiting spatial monopolies because, by definition, such locational advantages cannot be transported.

State laws regarding branch banking represent a particular type of "zoning" restriction and provide an instructive example of federal deference to state regulators to protect a variety of localized spatial monopolies.[64] States, with the aid of the federal government, have adopted a diverse panoply of laws designed to protect local banking cartels in order to maximize the political support received from banks. In some states these cartels are best protected by eliminating branch banking altogether. In other states, the political-support-maximizing solution has been to adopt home office protection statutes, which prohibit branching into the town or city where another bank maintains its home office. Other states prohibit banks from branching into counties that are not contiguous to the county in which the bank maintains its main office. Still others prohibit banks from branching into unincorporated areas of noncontiguous counties or into communities with less than a fixed number of residents. This farrago of laws is necessary to serve the needs of the variegated web of banking interests that exist within the states.

The predominant effect of these banking laws is local in nature. A single, uniform federal rule would be optimal from the perspective of some, but not all, local interest groups. By allowing local law to prevail, political-support-maximizing federal regulators can maximize the total sum of rents in the system.[65] Thus, state regulators survive to implement these sorts of laws, and federal regulators obtain payoffs for agreeing to defer to them.

At first blush, the analysis presented here appears to conform to the analysis contained in a public-interest model of federalism. A public-interest model would prescribe that local law should dominate whenever regulations have a purely local effect, while national law should dominate whenever regulations have a predominately national

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[64] Butler & Macey, supra note 22, at 708.

[65] Obviously, payment problems and other contracting problems will hamper the ability of interest groups and politicians to forge agreements. See Macey, supra note 24, at 52-56 (discussing structural solutions to the contracting problem). In addition, as an empirical matter, it is very hard to link individual political payments by interest groups to specific promises by politicians. Clearly, however, the fact that such payments are made is strong evidence that interest groups believe they are receiving something in return.

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effect.[66] The public-interest model, however, assumes that the full costs and benefits of a particular legal regime to the *public* is what motivates the local decisionmaker, while the model presented here focuses on the fact that interest groups have a strong incentive to press for local solutions to their regulatory problems.

Of course, over a wide range of issues, the outcomes predicted by the public-interest model will be identical to those predicted by the interest-group model when the political-support-maximizing solution varies widely from jurisdiction to jurisdiction. The crucial distinction lies in the *process* that leads to the predicted outcomes. The zoning hypothetical invoked above provides a useful illustration. A public-interest model would predict that zoning rules will be locally produced because virtually all of the costs and benefits of zoning ordinances are local. Local politicians, according to the public-interest model, enact the zoning ordinances that respond to "local conditions and tastes."[67] The public-choice model, on the other hand, predicts that zoning laws are passed because such laws benefit local special-interest groups by facilitating the creation of spatial monopolies. A striking example of this phenomenon are local zoning rules that prohibit liquor stores from locating too close together. Such rules, which are quite common, benefit existing liquor stores at the expense of newcomers. Similarly, zoning laws prescribing housing densities and imposing acreage restrictions on residential property also benefit local interests at the expense of outsiders.

C. *Federal Deference as Risk Avoidance*

In the spatial monopoly scenario illustrated above, federal legislators are able to reap political support by allowing interest groups to obtain customized local regulations from state regulators. Congress might also defer to the states in order to avoid the *loss* of political support on issues for which there is no clear national consensus. Just as passing the right kinds of laws can benefit lawmakers by enabling them to obtain political support, passing the wrong kinds of laws can result in a diminution of political support.[68] And, in a world of

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[66] See McConnell, supra note 2, at 1492-1511.

[67] Id. at 1493.

[68] The same, of course, is true in the private sector. Just as good business decisions increase the wealth of decisionmakers in the private sector, bad business decisions are costly.

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imperfect information, lawmakers will not always be certain of whether the political costs to them of passing a particular statute outweigh the benefits. As Professors Peter Aranson, Ernest Gellhorn, and Glen Robinson have observed, a politician "may not know what his constituents want, how regulation will affect them, and which affected [interest] group is stronger."[69]

Professor Fiorina and Kenneth Shepsle have observed that one strategy for maximizing political support under conditions of uncertainty is to delegate the matter to an administrative agency.[70] Another strategy will be to turn the matter to be regulated over to the states. Indeed, deferring a controversial regulatory matter to the states may insulate Congress from political fallout even more effectively than turning the matter over to an administrative agency. Congress is perceived as having more control over the actions of administrative agencies than of state legislatures; consequently, Congress is more likely to be held accountable for regulatory action taken by administrative agencies than it is for similar actions taken by states. In addition, Congress can justify virtually any decision to delegate a controversial policy matter to the states simply by uttering vague tributes to the virtues of federalism.

On the other hand, delegation to federal administrative agencies has certain advantages over delegations to the states. Specifically, in a complex area, such as establishing a comprehensive environmental policy, Congress can garner political support by passing a generalized statute containing vague platitudes about the virtues of a sound environment and then setting up a complex administrative agency that will respond to the interests of the regulated. The general public, which strongly favored the enactment of environmental safeguards, will find it too costly to monitor the agency's actions. Organized groups, by contrast, "will be unrelenting in their efforts to influence the day-to-day details of legislation's implementation."[71] Congress can thus engender political support (or at least avoid the loss of sup-

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69 Aranson, Gellhorn & Robinson, supra note 34, at 60.

70 Professor Fiorina draws the connection between the formation of administrative agencies and legislative ambiguity most explicitly. See Fiorina, supra note 33, at 55-57; see also Shepsle, The Strategy of Ambiguity: Uncertainty and Electoral Competition, 66 Am. Pol. Sci. Rev. 555 (1972) (observing that the optimal political strategy for politicians often involves ambiguity); Aranson, Gellhorn & Robinson, supra note 34, at 33 (observing that Shepsle's strategy of ambiguity often involves the delegation of authority to an administrative agency).

71 Lee, Politics, Ideology, and the Power of Public Choice, 74 Va. L. Rev. 191, 197 (1988).

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port) from the general public through the initial delegation, while its subsequent administration provides opportunities to extract political support from interest groups disappointed with the original enactment. On the other hand, simple, discrete matters that can be easily understood and monitored by the public do not provide opportunities for interest groups to attempt to alter the legislation ex post by influencing the way the administrative agency interprets it. Thus, when a national political-support-maximizing course is not apparent, the issue will be delegated to the states.

Moreover, as with delegations to administrative agencies, Congress always can decide to regulate when and if interest-group political support galvanizes around a particular regulatory solution, thereby signaling Congress that it can intervene safely. Similarly, individual members of Congress also can obtain political support on matters traditionally settled by state law by acting as agents for powerful constituencies in their dealings with state legislators. In an era in which the federal government provides considerable funding of state-sponsored projects through direct grants and matching funds, state representatives have much to gain by appeasing Congress. Another strategy for garnering political support on matters traditionally relegated to state law is for federal regulators occasionally to threaten to regulate in these areas. Finally, individual members of Congress can obtain political support by acting entrepreneurially, identifying issues currently being regulated nationally and offering to sponsor legislation that would benefit interest groups by turning the issues over to local control.

The responsibility-shifting model described above appears to apply with great force to the abortion controversy. Unlike desegregation, which grudgingly was accepted as a way of life after the Supreme Court's decision in *Brown v. Board of Education*,[72] the issue of abortion has become increasingly controversial since the Supreme Court's decision in *Roe v. Wade*,[73] which invalidated state laws banning abortion. Emotions about the legality of abortion run extremely high, with groups on both sides of the debate expressing a willingness to confer or withdraw political support to particular candidates on the

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72 347 U.S. 483 (1954).

73 410 U.S. 113 (1973).

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basis of this single issue.[74]

Now, in the wake of *Webster v. Reproductive Health Services*,[75] Congress conceivably could preempt state action on the issue of abortion, either by making abortion legal or by preempting the field in some other way, perhaps by establishing an administrative agency with exclusive authority to promulgate rules and guidelines governing abortion.[76] Yet there is little doubt that Congress will refrain from stepping in and preempting the field. It is clear that *Webster v. Reproductive Health Services* leaves the abortion issue in the hands of the states, which now have almost exclusive responsibility for regulating in this area, despite the fact that Congress often regulates issues of far less notoriety or national significance.[77]

States are not being given the responsibility for regulating abortion because there is anything about the issue that suggests that states are a more appropriate or logical regulatory forum than the federal government. Clearly, a fetus in New York cannot be philosophically distinguished from a fetus in Alabama, any more than a New York woman can be said to possess a right to privacy or individual autonomy that differs from that of a woman in Alabama. Indeed, in an issue of similarly local concern, access to schooling for the handicapped, the federal government has taken an extremely active role, compelling states to provide appropriate educational opportunities for all students, including those in need of special education due to mental defects or retardation.

Rather, states are given the responsibility for regulating abortions because they provide a far safer forum from the perspective of

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[74] See Apple, Limits on Abortion Seem Less Likely, N.Y. Times, Sept. 29, 1989, at A1, col. 1 (describing poll showing that "abortion remains one of the most divisive subjects in American life").

[75] 109 S. Ct. 3040 (1989). In *Webster*, the Supreme Court upheld a provision of a Missouri law that requires doctors to ascertain whether a fetus is viable by performing "such medical examinations and tests as are necessary to make a finding of the unborn child's gestational age, weight, and lung maturity" before performing an abortion on any woman believed to be 20 or more weeks pregnant. Id. at 3043.

[76] In 1983, for example, the so-called Hatch-Eagleton amendment to the Constitution, S.J. Res. 3, 98th Cong., 1st Sess., 129 Cong. Rec. S95 (daily ed. Jan. 26, 1983), which would have overturned *Roe v. Wade* and allowed Congress and the states to pass new laws restricting or prohibiting abortion, was defeated after vigorous debate. 129 Cong. Rec. S9310 (daily ed. June 28, 1983).

[77] Medoff, Constituencies, Ideology, and the Demand for Abortion Legislation, 60 Pub. Choice 185, 185 (1989).

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national politicians than does the federal government. Unlike a complicated issue such as the environment, Congress cannot avoid the political fallout associated with abortion by delegating the matter to an administrative agency. The issue is too straightforward. As one political commentator has observed, "[a]bortion is . . . a question of conscience with two clear, opposing positions, there's hardly a hedge to hide behind. Basically, you're on one side or the other."[78]

Opinions on the abortion issue vary widely among groups.[79] Groups taking a strong position in favor of a woman's right to choose to have an abortion include women of childbearing age in white collar occupations, for whom the cost of having children is higher than for other women,[80] and nonwhite women, who are "much more likely to use abortion . . . than whites."[81] The group most vociferously opposed to abortion, of course, is fundamentalist Christians, a group that is "unified and adamant in its opposition to abortion."[82] In addition, a group that has been identified as the "passive poor,"[83] who are older, Southern, and Democratic, are strongly opposed to abortion. Forty-seven percent of this group "favor changing laws to make it

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78 Weisberg, Abortion Olympics, New Republic, Feb. 12, 1990, at 12.

79 Netter, An Empirical Investigation of the Determinants of Congressional Voting on Federal Financing of Abortions and the ERA, 14 J. Legal Stud. 245, 253 (1985).

80 Kristin Luker cites the following argument as a "theme" among women who support the right to abortion on demand:

> For women to achieve any kind of equality in the employment market requires acceptance by society that they are in control of their reproductive lives. . . . Legalized abortion . . . is certainly a factor in freeing women from the blanket accusation that they're going to be divided in their loyalty to their career because they're going to have children.

K. Luker, Abortion and the Politics of Motherhood 119 (1984); see also Mincer, Market Prices, Opportunity Costs, and Income Effects, *in* Measurement in Economics: Studies in Mathematical Economics and Econometrics in Memory of Yehuda Grunfeld 67, 75-79 (1963) (finding an inverse relationship between earnings of women in white-collar occupations and their "fertility rate").

81 Medoff, supra note 77, at 187. Between 1973 and 1980, the abortion rate increased by 162% for nonwhite women but only by 106% for white women: By 1980 the abortion rate of nonwhite women (56.8 per thousand) was more than double that of white women (24.3 per thousand). Id. Thus, it is not surprising that "while abortion tends to be viewed as a women's liberation issue, the civil rights movement (both black and Latin) has tended to support legal abortion on the grounds that it is a social and civil rights issue." Id.

82 Id. Although the Roman Catholic church officially opposes abortion, American Catholics as individuals are split on the issue, thus nullifying the group's political impact with respect to this issue. Id.

83 See N. Ornstein, A. Kohut & L. McCarthy, The People, the Press, and Politics: The Times Mirror Study of the American Electorate 17 (1988).

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more difficult for a woman to get an abortion," and forty percent strongly identify themselves as "supporter[s] of the anti-abortion movement."[84]

It is important to distinguish an important, albeit subtle, difference between the political climate surrounding the abortion debate, which involves responsibility shifting, and that which surrounds an issue such as gun control, which involves differing local optima among various political subdivisions. The gun control issue is delegated to local governments because the political-support-maximizing solution varies dramatically across localities. It is not surprising that rural counties in Georgia support citizens' rights to bear arms, while Massachusetts's citizens support strict gun control measures.

But, as the recent gubernatorial elections in Florida, Virginia, and New Jersey illustrated, the political climate surrounding the abortion issue is clouded with uncertainty. Even at local levels there was uncertainty both about how prominent abortion would be as a political issue and about what the political-support-maximizing solution would be for particular politicians.[85] Perhaps the strongest indication of the ambiguity of the abortion issue was the extent to which candidates to elected office modified the tone or substance of their stance on the issue.[86] These modifications show that the politicians made erroneous predictions about the political-support-maximizing outcome and had to alter their positions to survive.

Many politicians predicted that the Court's departure from the principles espoused in *Roe v. Wade* would benefit the Republican Party, particularly in the South, where there appeared to be strong support for legal curbs on the right to obtain an abortion. Others, however, noted that interest groups supporting women's reproductive choice had not had any incentive to galvanize into an effective political coalition while *Roe* was still good law, but that such groups might

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[84] Id. at 36.

[85] Apple, supra note 74, at A13, col. 1 (noting that "[a] less polarized, more ambiguous political situation has resulted, in which abortion sometimes counts a lot and sometimes does not, and in which it is sometimes hard to tell who is benefiting from the issue and who is not"); Pressman, Abortion Politics: U.S. Court Ruling Changes the Political Landscape, Cal. J., Oct. 1989, at 395, 396 (quoting a consultant to the California Assembly's Republican Caucus as saying that "both sides [of the abortion issue] would agree that we don't really know which side has the upper hand . . . . [I]t's fairly tight.").

[86] See Weisberg, supra note 78, at 14-15 (describing changes in stance on the abortion issue of various politicians).

emerge as an effective counter to the so-called right-to-life movement if significant changes were to occur in the legal landscape.[87]

Thus, unlike the situation with gun control, the abortion issue is clouded with uncertainty. Congress is able to avoid much of the political cost associated with this uncertainty by hiding behind the shield of "federalism." Local politicians are not. Gun control involves a situation in which the political-support-maximizing solution is far more clear to politicians in the individual states than it is at the national level. Abortion involves an issue in which uncertainty and risk exist at all levels of political life. Very few politicians can afford to take a stand on this issue without risking serious political repercussions. Thus, for Congress, the political-support-maximizing solution to the abortion issue is to shift the risk of error to the states.

III. CONCLUSION

This Article has identified three situations in which federal lawmakers will maximize political support for themselves by relegating regulatory authority to state officials. The first is where existing state law has created expropriable quasi-rents through the development of asset-specific investments whose continued value depends on the perpetuation of such laws. The second is when a single national rule, by permitting new entry, would deprive local interest groups of the advantage of an existing spatial monopoly. Finally, we have seen that federal lawmakers, who often must act under conditions of uncertainty, sometimes will wish to avoid the political fallout that accompanies particularly controversial decisions. Under these conditions, federal politicians will find that the best solution will be to relegate matters to state legislators. Thus, this Article has extended the economic theory of regulation to include an explanation of the gains available to federal officials from delegating regulatory matters to state and local officials. The ability to confer or withhold regulatory authority from state officials under the supremacy clause is a considerable source of rents at the national level.

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[87] Apple, supra note 74, at A13, col. 1 (observing that "[i]n the last few years, the anti-abortion advocates tended to dominate the national debate, and their opponents were somewhat quiescent. But . . . [*Webster*] has awakened the defenders of abortion, and their voices have reached politicians.").

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Many who have recognized the costs of public-sector activities in the United States have extolled the virtues of delegating such activities to state governments. I wish to emphasize in closing that nothing in the foregoing discussion is inconsistent with the traditional defense of a strong federalist system as a device for achieving a more efficient legal system by encouraging competition among the states. Rather, the point is that the supremacy clause, which permits Congress to trump the states whenever it sees fit, undermines much of the effect of jurisdictional competition among states in the provision of law.

From a public-choice perspective, the federalist system can only be viewed as a mechanism that provides a complement rather than a substitute for federal law as a mechanism by which interest groups can exchange political support for wealth transfers. Deferring regulatory matters to the state legislatures must take its place alongside the other strategies by which federal politicians can offer wealth transfers to interest groups in exchange for political support.

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