BUSINESS, THE STATES, AND FEDERALISM'S POLITICAL ECONOMY

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I. INTRODUCTION

The origin of this Conference and Article is a highly publicized conflict between business and, on the other side, state officials and conservative Congressmen and Senators over a legislative effort to limit federal preemptions of state and local laws.[1] The nasty spat caused consternation among parties who consider themselves political allies, inconvenience for conservative federal legislators who consider themselves friends of both business and states' rights, and gleeful, if uncomprehending, coverage by the *Washington Post*.[2] Occurring as it did under a liberal administration, the conflict between business and state and local interests seemed particularly gratuitous to participants and well-meaning observers. Businessmen and governors (at least, conservative, pro-business governors), the thinking goes, share anti-"Big Government" interests and values. Thus, they ought to be able to agree on a whole host of issues and, in particular, on federalism. Surely, their residual disagreements rest upon iron-outable misunderstandings.

Much more is at stake in the dispute than a temporarily entertaining K-Street squabble. Most obviously, mutual respect

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1. The controversial portion of the Federalism Accountability Act, S. 1214, 106th Cong. § 6 (1999), provided that:

> [n]o federal statute or federal rule enacted or promulgated after the effective date of the Act would be construed to preempt state or local law unless the statute or rule explicitly states that such preemption was intended or unless there is a direct conflict between such statute or rule and state or local law.

S. REP. NO. 106-159, at 2 (1999).

2. *See* Michael Grunwald, *In Legislative Tide, State Power Ebbs; Federalization Has Few Friends but Many Votes*, WASH. POST, Oct. 24, 1999, at A1.

and understanding are essential to a productive relationship between state governments and corporations.[3] From a broader, non-participant perspective, the state-business relation merits attention because on any given issue, a national coalition of States and business is very difficult to beat. Thus, the possibility that such a coalition might assemble regularly, on federalist ground and across a range of issues, raises the hope that federalism faces a very bright future.

On a wide range of issues that are chiefly a matter of state and local concern, governors and business executives are in fact accustomed to productive, mutually advantageous relations. State officials recognize that the creation of a favorable business climate—through favorable tax and regulatory regimes, an educated labor force, a workable infrastructure, and sensitivity to "quality of life issues" that are of great concern to employees and employers—is foremost *their* responsibility, not the national government's.[4] To be sure, not all forms of state competition for business and productive citizens are efficient.[5] Moreover, state officials are often constrained, and their decisions are often entangled with, federal regulatory and funding regimes. Even so, American federalism offers an amazing range of jurisdictional diversity, choice, and competition, and for all the friction created by multiple, overlapping jurisdictions, these federalist virtues have served us well. On the many issues where diversity and state competition are an asset rather than a hindrance to commerce, both business and the States have powerful incentives to

3. Throughout this Article, "state (government)" refers to state *and local* governments. The usage is simply a matter of brevity and convenience; it is not meant to suggest that local interests are either unimportant or necessarily congruent with those of state governments.

4. *See, e.g.*, NATIONAL GOVERNORS' ASSOCIATION, STATE STRATEGIES FOR THE NEW ECONOMY (2000), http://www.nga.org/cda/files/STRATEGY.pdf.

5. State competition through tariffs and protectionist measures, for instance, is clearly inefficient, which is why the Constitution prohibits it. The constitutional framework does permit some forms of inefficient competition—e.g., state attempts to attract business through selective tax breaks and exemptions, which most economists view as substantially less efficient than competition through the creation of a favorable macro-climate for business formation and investment. The case for tolerating inefficient state industrial policies rests on the proposition that the costs will generally be paid by each State's own citizens; thus, the process is subject to political discipline. Moreover, one cannot easily enjoin inefficient state favoritism without also enjoining highly efficient forms of competition. Thus, the competitive regime is bound to be less inefficient than the alternative of a wholly centralized system.

maintain state primacy and to arrange their mutual affairs in a decentralized fashion, one State and industry at a time.

At the *national* level, however and alas, the comforting picture of a natural, if temporarily confounded and distracted, anti-nationalist coalition between business and States is mistaken. If that coalition existed, the national administrative state as we know it would not: the anti-nationalist coalition would be strong enough to defeat any proposal not to its liking. In fact, such a coalition would quite probably be sufficiently strong to dismantle the national regulatory state. The fact that Leviathan is very much with us (and, quite probably, here to stay) should prompt us to contemplate an alternative, more accurate picture.

Such a picture emerges from a broad-brush application of public choice theory to federalism and the political demand for national legislation.[6] Under conditions of a national government that faces few, if any, meaningful constitutional constraints on its authority, the theory predicts, business and the States alike will often demand and lobby for centralized policy intervention. The issues on which the States will act nationalist are not always the same issues on which business will display that orientation. Conflicts between the two constituencies are thus pre-programmed, and their intensity will rise in proportion to the degree of unanimity on either side of the divide.

Pro-federalist coalitions between the States and business are not an outright impossibility. Neither, however, do they constitute a normal state of affairs. Rather, they depend on political circumstances and pre-existing institutional arrangements, and the task of forming state-business coalitions should be approached with a sense of realism and awareness for the other side's tolerance and interests. In that spirit, this Article attempts to sketch some of the conditions and political constellations that are conducive to state-business coalitions on federalist ground.

Before embarking on that program, two preliminary qualifications are in order. First, many of the national

6. Unfortunately, the public choice literature on federalism's political economy is quite thin. For a brief discussion, see Thomas S. Ulen, *Economic and Public-Choice Forces in Federalism*, 6 GEO. MASON L. REV. 921 (1998).

federalism issues and policy areas that most concern the States are of little immediate interest to business. (The reverse is not true: virtually every business issue and interest will be of concern to the States.) Education, welfare, and crime control fit this description. Still, business has every reason to be supportive of the States' devolutionary agenda on these issues, not simply because corporations should and do desire to be good corporate citizens, but also because federalist initiatives in those areas may well spill over into areas where the business community's interests *are* directly affected. Some of those interdependencies are economic, as when the sorry state of America's educational institutions constrains the supply of qualified labor. Others are political. For example, the devolution of welfare policy-making authority to the States long foundered on fears of a "Mississippi effect," meaning that the States could not be trusted to discharge their public obligation to the poor. Now that the States have proven their detractors wrong on welfare, we may be able to overcome "Mississippi" fears and devolve policy-making authority in areas with tangible, direct effects on business, such as certain environmental issues.[7]

Second, the picture of "the States" and "the business community" as homogeneous constituencies is an oversimplification. Most national policy issues with federalism implications divide both the States and business interests among themselves. Still, an explanatory model that starts with the generic interests of "the States" and "business" helps to explain when, where, and under what circumstances those constituencies can expect to agree, and when they must agree to disagree, on federalism issues.

II. BIG BUSINESS AND BIG GOVERNMENT

Once upon a time, big business was as adamantly opposed to the national regulatory state as its present-day reputation would lead one to suspect. The business community resolutely fought the national impositions of the New Deal—not unanimously, but with a remarkable measure of consistency and breadth of support. That era and political constellation,

7. *See infra* notes 81-85 and accompanying text.

however, ended six decades ago.

Constitutional Supreme Court decisions do not fully capture the richness and complexity of the changing relation between business and the national regulatory state, but they provide a useful prism. Resourceful private corporations launched most of the constitutional challenges to New Deal legislation; the case names—*Steward Machine Co.*,[8] *Panama Refining*,[9] *Carter Coal*,[10] *Jones & Laughlin Steel*[11]—tell the story. At other times, the corporate community showed its determination by bankrolling constitutional challenges to the New Deal, as when corporate interest prompted the whitest of white shoe law firms (Cravath, Swaine & Moore) to represent a kosher chicken business in the last great, successful Commerce Clause attack on a federal regulatory statute.[12]

That pattern ended with two devastating defeats in cases challenging, on Commerce Clause and other grounds, the Fair Labor Standards Act and the Agricultural Adjustment Act.[13] Since that time, federalism challenges to national legislation for the most part have been the business of state and local governments, criminal defense lawyers, and public interest law firms. Business-initiated federalism cases in the post-New Deal era have fallen into two broad categories: lawsuits in which business interests insist on federal preemption of state law under federal labor relations, environmental, and health and safety statutes,[14] and lawsuits aimed at curbing the exercise of

8. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (sustaining Social Security Act).

9. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (invalidating National Industrial Recovery Act as an unconstitutional delegation of legislative power).

10. Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that regulation of labor on a local level was beyond the purview of the Commerce Clause).

11. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (sustaining National Labor Relations Act).

12. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

13. United States v. Darby, 312 U.S. 100 (1941) (sustaining Fair Labor Standards Act against Tenth Amendment and Commerce Clause challenges); Wickard v. Filburn, 317 U.S. 111 (1942) (sustaining Agricultural Adjustment Act).

14. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (holding that District of Columbia negligence suit for failure of an auto manufacturer to equip a car with driver's side airbags is preempted by a Department of Transportation standard requiring such airbags in some cars); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (holding that a Massachusetts trade law concerning Burma undermined the intended purpose of, and was preempted by, the federal Foreign Operations, Export Financing, and Related Programs Appropriations Act); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (holding that only the

state taxing and regulatory authority under the dormant commerce clause.[15] Both types of cases usually serve nationalist rather than federalist objectives.

What happened? The conventional story of the collapse of the old constitutional order and of the business community's nationalist shift is that the economic world became more complex and interdependent.[16] The distinctions that had marked the limits of national power, such as the distinction between "commerce" and "manufacturing" and between in-state and interstate commerce, no longer worked. Business came to depend on uniform, harmonizing, national legislation.

This conventional account of the matter cannot be dismissed entirely. In particular, it is silly to deny that economic interdependence means that fewer matters of economic consequence are "completely internal" to one State, as Chief Justice Marshall famously defined the state governments' police powers.[17] Although the dilemma of sorting state police power regulation from interstate commerce regulation, in areas where those powers overlap, is at least as old as *Cooley v. Board of Wardens*,[18] increased economic interdependence means that the tension becomes more pronounced, in a much wider field of action. That alone explains much of the friction between state officials and business interests. State officials will understandably insist that matters affecting the State's citizens, inside the State's own territory, be regulated in accordance with the state electorate's wishes, even if those regulations happen to affect outside parties. Business representatives argue, for equally plausible reasons, that a like insistence by every state government compels corporations to comply with varying, conflicting regulatory standards in fifty jurisdictions, thus producing a thoroughly undesirable balkanization of the

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employment contracts of transportation workers are exempt from the Federal Arbitration Act).

15. *See, e.g.*, Barclays Bank, PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994) (sustaining state business income tax); W. Lynn Creamery v. Healy, 512 U.S. 186 (1994) (pricing order violated the dormant commerce clause).

16. This argument of changed conditions is a standard theme of the legal literature on federalism. *See, e.g.*, Lynn A. Baker, *Federalism: The Argument From Article V*, 13 GA. ST. U. L. REV. 923, 924 (1997) and sources cited therein. For a powerful critique, see *The Proper Scope of the Commerce Clause* by Richard A. Epstein. 73 VA. L. REV. 1387, 1452-54 (1987).

17. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

18. 53 U.S. (12 How.) 299 (1851).

American economy.

That said, though, the complexity-and-interdependence story cannot be the *whole* story. The American States were hardly unconnected autarkies, and American corporations operated across state lines, when corporate America fought the New Deal. (Jones & Laughlin Steel Corporation lost its Commerce Clause case over the National Labor Relations Act *because* it was a highly integrated multi-state corporation.) The initial interest group demand for national intervention did not come from business but rather from labor and other New Deal constituencies. To this day, we can observe expansive state regulation, and corporate resistance to national intervention, in areas where increased interdependence should long ago have eviscerated decentralized regulation; corporate chartering comes to mind.[19] Nor can "complexity" and economic integration explain why the allegedly untenable lines between in-state and interstate commerce survived, in dormant commerce clause cases, until 1960 and, in a slightly attenuated form, to this day.[20]

Far from being a mere response to *economic* changes, the corporate about-face in the wake of the New Deal has to do with the demise of what the economic historian Douglass North has called a "credible commitment" to limited government,[21] meaning a set of reliably enforced, consistently observed, constitutional and institutional arrangements that limit the scope of government. Before the New Deal, business had reason to hope that constitutional limitations on the

19. Corporate takeovers (for a related example) are highly complex transactions that affect shareholders, workers, and consumers in multiple jurisdictions. Even so, there is no national takeover statute, and little political pressure to create one. I do not mean to suggest that state competition in this area is necessarily efficient; it may or may not be. (For a review of the literature and an intriguing proposal for a national but pro-competitive statute, see Lucian Arye Bebchuck & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111 (2001)). The point is simply that a blanket incantation of "complexity" cannot explain the existing pockets of interstate competition.

20. *See, e.g.*, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) (discussing, without questioning, the distinction between intrastate and interstate commerce for purposes of state taxation); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (holding that the minimal state interest of forcing a farmer to ship his goods from within Arizona would constitute an unlawful burden on interstate commerce); *see generally* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988).

21. Douglass C. North, *Institutions and Credible Commitment*, 149 J. INSTITUTIONAL AND THEORETICAL ECON. 11 (1993).

national government's power would be observed. Business often preferred regulation at the state level, which offered the option of exiting inhospitable jurisdictions, to the prospect of harmonizing, hostile federal legislation that would effectively eliminate competition among the States.

The New Deal, however, wiped out reliable limits to national authority, and that changed the corporate calculus. Under conditions of national omnipotence and omnicompetence, rational business leaders can no longer exclude the possibility of federal legislation on anything. Some of them will therefore fight for national, uniform legislation that would rig the playing field in favor of their own industry or corporation (and against actual or potential competitors) and, moreover, would preclude even more extensive state regulation.

A contemporary, international comparison illustrates the force of these dynamics. At the 1997 global climate conference in Kyoto, the business community presented a united front against a global warming treaty.[22] Two short years later, at a follow-up conference in Buenos Aires, that front had crumbled. Some multinational corporations now lobbied *for* an international agreement.[23] What changed between Kyoto and Buenos Aires was not an increase in real-world complexity and interdependence but rather the political constellation: once-credible impediments to international cooperation no longer seemed reliable.

Once the first enterprise adopts a pro-intervention stance, corporate strategy turns into a collective action problem that will consistently, though not invariably, yield a pro-interventionist outcome. Let ninety-eight of a hundred firms oppose centralized intervention: each must fear that pro-intervention forces will peel off one opponent after another, either by threatening targeted regulation or by extending selective benefits, until they have amassed sufficient force to enact some version of the proposed measure. At that point, the remaining anti-interventionists are left holding the bag, the unenviable objects of a regulation that the defectors will have

22. For a discussion of American business objections, see John H. Cushman, Jr., *Intense Lobbying Against Global Warming Treaty*, N.Y. TIMES, Dec. 17, 1997, at A28.

23. *See* John J. Fialka, *An Environment-Business Global-Warming Link*, WALL ST. J., Nov. 22, 2000, at A2.

shaped to their own advantage. Thus, once the credible institutional commitment to non-intervention has collapsed, the dominant strategy for virtually every market participant is to defect from the anti-intervention coalition.[24] Trade associations may occasionally be able to discipline potential defectors, and broad-based industry groups may be able to provide political cover for firms or industries that are particularly vulnerable to interventionist entreaties or threats. Institutional obstacles—such as legislative supermajority requirements—may make pro-intervention coalition-building a cumbersome and expensive undertaking. None of these obstacles, however, changes the basic dynamics.

The business calculus dictates an insistence on federal preemption.[25] National intervention wipes out pro-business regulatory competition among the States by establishing a uniform "floor" of regulation. Unless that floor also provides a regulatory ceiling, it will simply serve as a basis for another round of state regulation. Put differently: business will view state regulation as tolerable and even advantageous so long as state experimentation, in a competitive environment, can run in a pro-regulatory and an anti-regulatory direction. Federalist "competition" becomes intolerable, however, when federal intervention renders non-regulatory state responses impermissible and suppresses the dynamics that might yield such responses—even while enhancing the more aggressive States' freedom to experiment with new regulation. Business will and must insist that federal intervention wipe out all state competition and experimentation.

III. STATES AND THE NATION

When business attacked national legislation at the dawn of the New Deal, where were the States? The answer, surprising

24. The holdout exceptions are industries and firms that must expect to be at the receiving end of whatever intervention might emerge. For instance, coal producers cannot defect from an industry coalition against initiatives to curb carbon dioxide emissions. Their strategy must be to prevent the defection of other, less "polluting" industries.

25. Business will also insist on uniform, preemptive national legislation when economies of scale or problems of arbitrage necessitate such a solution. Product labeling requirements are an example. The broader analysis in the text explains why businesses will insist on preemption even when uniformity is *not* a business necessity, for example, with respect to labor relations legislation.

at first sight, is that the States typically lined up *in defense* of the contested federal statutes. As Justice Robert H. Jackson observed, private corporations carried the "states' rights plea against the States themselves."[26]

The States' position in support of federal intervention is best understood as a response to interest group demands. States at the time were faced with urgent demands for social welfare legislation to ameliorate the harsh effects and dislocations attendant to the growth of corporate capitalism. They often responded competently to those demands; by 1918, for example, all States had adopted prohibitions against child labor, and progressive experiments with social insurance, unemployment insurance, and health and safety regulation became common during the 1920s and 1930s. Those experiments, however, were constrained by economic competition among the States: progressive States faced the threat that business might exit to more hospitable jurisdictions. That constraint—typically, though misleadingly, referred to as a "race to the bottom"[27]—induced progressive States to lobby for the enshrinement of their policy experiments into national legislation.

The historical experience just sketched illustrates the analysis of modern public choice theory, which interprets federal (unfunded) mandates, not as a sign of rampant federal overreach but rather as a response to the weakness of pro-regulatory, "distributional" coalitions in American politics.[28] Institutional and social obstacles—the separation of powers,

26. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 160 (1941).

27. Even the Progressive purveyors of the metaphor did not maintain that competitive pressures would produce a downward spiral; they merely argued that those pressures would impede and retard progressive reform. Even that more modest claim is remarkably bereft of theoretical and empirical support. *See* Richard L. Revesz, *Rehabilitating Interstate Commerce: Rethinking the "Race-to-the-Bottom" Rationale for Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). Revesz's path breaking article sparked a spirited academic debate. For the references and the author's rejoinder, see Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997).

28. The leading contribution is Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355 (1993). For a similar analysis from a more traditional perspective, see Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 219-20 (2001) ("*[F]ederal* oppression is not the problem. The problem, rather, lies in the ability of *some states* to harness the federal lawmaking power to oppress *other states.*") (citation omitted).

bicameralism, the sheer diversity of regional, social, ethnic, and economic interests in a vast country—make it difficult for distributional coalitions to obtain favorable legislation at the federal level. Precisely because the country is so diverse, however, such coalitions are often able to obtain such legislation in a few States. Having done so, they continue to press their case in the national arena. The service-providing States have an incentive to support the demand for national intervention—in part because the federal government may agree to defray a portion of the cost; in part because harmonizing national legislation will prevent a possible exodus of taxpayers and businesses who must pay for, but do not benefit from, the service provided by the State. Although still too weak to obtain a fully funded federal mandate, the pro-service coalition—now including the service-providing States—will often be able to obtain a mandate that hides a portion of the regulatory and tax costs in state and local budgets.

For several reasons, less regulation-minded States will often accede to demands for federal intervention, instead of insisting on their competitive advantage. For one thing, interest groups with sufficient influence to obtain progressive legislation in some States usually have some influence in the others, which proportionally weakens the holdout States' resolve in resisting new impositions. Second, many federal statutes contain some federal financing, thus dissipating pro-competition States' incentive to resist national legislation. (Taxpayers, after all, would have to pay a proportionate share of the federal program even if their State should fail to participate.) Third, States face the same "credible commitment" problem that confronts the business community. Pro-intervention forces know how to draw selected States to their side. Anti-regulation States have to assume that the interventionists will eventually prevail. They have to assume, moreover, that once the interventionists have assembled a sufficient majority, they will shape the law to their own advantage and to the remaining holdouts' detriment. For States as for business interests, defection to the pro-regulation camp becomes the dominant strategy.

The structure of state lobbying for federal intervention is analogous to that of private cartel arrangements. Cartel members seek to limit competition (on some margin, along

some dimension) without surrendering their independent existence and ability to serve customers. In the same way, States insist on retaining autonomy under federal, competition-restricting statutes. Originally pro-interventionist States will be reluctant to surrender control over a program that they would administer even without federal intervention; originally anti-interventionist States will insist on discretion in administering yet another federal mandate. Like the business community's insistence on preemptive federal legislation (or none at all), the States' insistence on a maximum degree of regulatory autonomy in implementing and administering federal statutes will tend to be unanimous.

States will also tend to oppose federal preemption. Let an intervention-minded state mandate a week of paid family leave per year for private employees, and let that be the extent to which the State can accommodate the political demand for paid leave time without losing industry to neighboring States. Once the one-week requirement has become a national (non-preemptive) rule, the State is in a position to open a new round of regulation and to mandate another week. Anti-interventionist States have little incentive to lobby *for* preemption: why rob a proto-socialist neighbor of the freedom to place itself at a competitive disadvantage (however temporary)?

The States' opposition to preemption, unlike their insistence on administrative autonomy, is not a matter of existential, institutional interest. For state governors, federal preemption is usually unpleasant but, as a rule, less intrusive and frustrating than federal micro-management and mandates that entail the expenditure of state funds. The primary forces against preemption are the distributional coalitions and private interests that demanded the state and, subsequently, federal intervention in the first instance: preemptive legislation would deprive those interests of their access points in state capitols and courthouses. (The coalition of trial lawyers and car safety advocates, for instance, holds a very dim view of preemption under national automobile safety laws and regulations.)[29] This constellation implies, though, that governors can take a pro-preemption stance only at the risk of alienating potent political

29. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

constituencies. Unlike the opposing, preemption-demanding business forces, those constituencies will be able to appeal to the governors' natural political instinct to preserve the States' autonomy and self-governance. Thus, the interest group dynamics that drive the state demand for federal intervention also generate a general state disposition against federal preemption.

IV. BUSINESS AND THE STATES

The preceding analysis suggests two preliminary conclusions. First, the much-publicized conflict over preemption is unavoidable, and irreconcilable. If the public choice analysis just sketched fails to persuade, the simple fact of unanimity on both sides of the preemption divide should do the job. An issue that has the States sing in unison is unlikely to reflect an accidental, changeable policy preference; it is bound to be an issue that affects their basic institutional operation, identity, and integrity as States. So, too, on the business side. Compromises on this or that individual preemption issue may be possible, but they are unlikely to be stable.[30] Business and the States may be able to find some general formula for agreement—say, to the effect that federal statutes should not "needlessly" preempt state law. But the universe of actual agreements encompassed by such a formula is an empty set.

That conclusion may sound distinctly unpleasant. The search for common ground among States and business, however, ought to start with the recognition that the "other side's" firm position on preemption reflects, not intransigence, bad faith, or cynicism about constitutional precepts, but rather a necessary institutional commitment. That being so, it is unrealistic to expect that the States will be swayed by learned disquisitions about the true scope of the Supremacy Clause, or business by impassioned appeals to "States' rights." The better part of wisdom is to agree to disagree—to expect fights over this contested constitutional territory, and to look for common

30. Preemption under federal statutes is typically implied rather than categorically established or excluded, and the scope of preemption is notoriously a subject of incessant litigation. These features of preemption illustrate the inordinate difficulty of reconciling conflicting business and state interests. Put differently, murky preemption provisions are a way of getting a statute passed by agreeing to postpone the preemption question for another day and forum.

ground elsewhere.

The second, more cheerful conclusion is that there would be substantially more room for agreement between business and state officials, on federalism grounds, if it were possible to re-establish a credible commitment to limited, national government in selected areas. By definition, such a commitment cannot be re-created in the legislative arena: congressional inaction, even for a long period, is mere forbearance, not a guarantee. The credibility must come from a constitutional rule that forbids federal interference.

The Supreme Court's decisions in *United States v. Lopez*[31] and *United States v. Morrison*[32] hold the promise of such a rule. The cases hold that congressional Commerce Clause legislation must be addressed to economic conduct (or conduct that is linked directly and substantially to economic transactions), "economic" meaning something like the voluntary exchange of (legal) goods and services across state lines.[33] This emerging Commerce Clause doctrine re-imposes only a limited constraint on the power of Congress. Even so, it opens up the possibility of state-business cooperation on challenges to federal programs and statutes that are perceived as impositions by business and States alike. Casual observation suggests that both sides have so far failed to explore the full potential for cooperation on this front.

The recent Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*[34] suggests the possibilities. The case, a successful challenge to the federal government's claimed authority to regulate isolated waters and wetlands, was initiated by a local government agency. Business groups filed briefs in support of the plaintiff-agency, as did some local governments.

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31. 514 U.S. 549 (1995).

32. 529 U.S. 598 (2000).

33. For a pre-*Morrison* defense of a Commerce Clause doctrine along these lines, see Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999). For a post-*Morrison* application of the test suggested in the text, see United States v. Faasse, 227 F.3d 660 (6th Cir. 2000) (setting aside a conviction under the federal Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1994), on the grounds that state-enforced child support payments across state lines, although monetary, do not constitute "commerce" in the constitutionally relevant sense), *rev'd en banc*, 265 F.3d 475 (6th Cir. 2001).

34. 531 U.S. 159 (2001).

SWANCC was decided on modest statutory grounds, rather than constitutional grounds, and the practical sweep of the decision is not entirely clear. To the extent that the decision exempts local waters and wetlands from federal regimentation, however, it represents a big step forward. Neither business nor state and local governments have a discernible interest in federal involvement in decisions affecting purely local water and land uses. There is no reason to believe that state and local wetlands decisions are less likely than federal agencies to strike an appropriate balance between environmental and economic concerns; in fact, a decentralized regime is more likely to reflect local values and interests.[35] Legal standards and administrative practices will differ from State to State, and perhaps from county to county; Minnesota and Virginia are bound to place a higher premium on bogs, marshes, and waterfowl than, say, Nevada. Such diversity, however, is an ecological and an economic virtue.[36]

Some of the business amicus briefs in *SWANCC* forcefully present these arguments, along with a coherent legal theory that built on the Supreme Court's Commerce Clause precedents.[37] Arguably, and by way of illustrating the value of such briefs, some business amici articulated a slightly more forceful and ambitious federalism theory than the petitioners' own brief, whose authors were duty-bound to their clients to limit their argument for the purpose of winning the case.

In other cases, however and alas, business has shown a more diffident posture. In *Gibbs v. Babbitt*,[38] a case with political dynamics and substantive issues strikingly similar to *SWANCC* (which was decided while the *Gibbs* petition was pending), two North Carolina counties and private land owners asked the United States Supreme Court to review a ruling by a divided

35. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 47-66 (1999) [hereinafter Adler, *Limits of Federal Wetland Regulation*] (arguing that state regulation of wetlands is unlikely to be environmentally inferior to federal regulation, and may prove superior); Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205 (2001).

36. *See* Adler, *Limits of Federal Wetland Regulation*, *supra* note 35, at 47-66.

37. *See, e.g.*, Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioners, Solid Waste Agency of N. County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (No. 99-1178).

38. 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

appellate court that sustained, against a Commerce Clause challenge, certain federal regulations under the Endangered Species Act. As in *SWANCC*, then, local government agencies attacked national environmental regulations that impose substantial costs on governments and business. No business interest, however, supported the petition for certiorari, and only a single State (Alabama) did so. The U.S. Supreme Court eventually denied certiorari.

It is an open question whether more extensive support from business (and for that matter the States) might have persuaded the Justices to hear the case. Considering the Supreme Court's close division in federalism cases, moreover, one can argue that *Gibbs* may have been a step too far, too fast, for both legal and esthetic reasons.[39] Still, the lack of a business amicus investment in a closely watched case suggests a reluctance to explore federalism-enhancing opportunities.

The States have shown a similar reluctance to occupy the common ground of enumerated powers. In *United States v. Morrison*, attorneys general representing thirty-five States plus Puerto Rico actually took the opposite position and argued that a federal tort remedy for "gender-based" sexual violence was a perfectly legitimate exercise of congressional power under the Commerce Clause and the Fourteenth Amendment. Alabama alone took the pro-federalist position.[40] Prudential reasons may

39. *SWANCC* turned on the statutory interpretation of "navigable waters" and its application to the particular piece of property at issue in the case, an inquiry that looks closely akin to the "as applied" analysis of jurisdictional predicates for federal intervention. *See* Jones v. United States, 529 U.S. 848 (2000). *Gibbs*, in contrast, involved a straightforward Commerce Clause challenge, which is and must be a *facial* challenge because the Supreme Court will not permit plaintiffs to question federal authority under the Commerce Clause by "excising" their individual conduct from the regulated universe. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); *see also* United States v. Morrison, 529 U.S. 598 (2000) (invalidating, with a facial analysis, a Commerce Clause statute that might be constitutional in some applications). As a matter of logic the difference should not matter: having effectively prohibited as-applied Commerce Clause challenges, it would be odd for the Justices to view facial challenges as somehow suspect. But then, logic is not the life of this particular branch of the law. As for the esthetics, *Gibbs* involved federal regulations concerning the "taking" of red wolves, a species with Discovery Channel appeal. Although neither an endangered species' popularity nor for that matter its propensity to cross state lines should make the slightest legal difference (so long as the species does not engage in economic transactions), an "ideal" case to test the constitutionality of the Endangered Species Act and implementing regulations should probably involve an ugly critter that stays put.

40. Brief for the State of Alabama as Amicus Curiae in Support of Respondents,

account for the state officials' position. But one is hard pressed to conceive of such reasons. Apparently, mere political correctness suffices to make States act against their broader, strategic interest in the general run of enumerated powers cases. That fact, though, has nothing to do with federalism's political economy—only with the individual official's poor judgment.

One might object that the enumerated powers territory where business and the States share common interests is pitifully small. I would quarrel with that description; federal interference with local land use decisions, for instance, strikes me as quite pervasive, and enumerated powers limitations on such interferences as potentially quite consequential. At any rate, it is important to recognize that the enumerated powers ground is common *because* it is limited. A Commerce Clause jurisprudence sufficiently robust to threaten, say, the Fair Labor Standards Act would again expose the States to competition that they have fought hard to suppress; it would also threaten federal preemptive statutes that are backed by enormous business investments. A judicial return to such a jurisprudence, however, is not even a remote possibility. That being so, business and the States can safely explore the more limited, but still sizeable, ground.

V. MORE COMMON GROUND: ENTITLEMENTS AND MANDATES

Many, perhaps most of the federal statutes that concern—and distress—States and local governments take the form of federal mandates—a handful funded in their entirety by the national government; others in part; still others, not at all. Resistance to these mandates provides fertile ground for cooperation among business and state and local officials.

This is not to suggest that business and the States will unanimously and jointly fight all or even most federal mandates. If that were true, few such mandates would have made it onto the statute books, and existing mandates would have a short shelf life. As noted,[41] most federal "mandates," including unfunded mandates, are a response to state and

United States. v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

41. *Supra* note 28 and accompanying text.

interest group demand. State officials will often find it politically difficult to demand the abolition of existing mandates. Because any such effort involves massive coordination problems with sister-States and local governments, the States' default position is to insist on more generous federal funding and more flexibility in administering the mandates.[42] Similarly, segments of the business community may embrace federal mandates that confer benefits on an industry (such as government contractors) or compel the States to regulate a competing industry, thus raising rivals' costs.[43]

Even so, the political economy of federal mandates is structurally hospitable, in litigation and, in some instances, in the legislative arena, to business-state coalitions on federalist ground. As a general rule, business has no reason to play the mandates game. While labor and other interest groups that demand economic redistribution must insist on federal intervention as a means of trumping state competition, States need not be encouraged, far less told, to compete for productive businesses. (There is no federal mandate for high-tech tax credits because the States will offer such incentives without federal prompting.) States, for their part and for reasons mentioned, will consistently, adamantly, and unanimously demand flexibility in administering federal mandates; the enthusiasm with which they have embraced the "devolution" agenda provides impressive evidence.

To be sure, the mere devolution of administrative responsibility falls short of a "real," competitive federalism that would permit States to determine the goals and objectives of regulation, not merely the means through which those goals are to be pursued.[44] Even so, devolution may constitute a step

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42. *See generally* Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557 (2000); Zelinsky, *supra* note 28.

43. *See, e.g.*, Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) (private health service providers insisting on expansive interpretation of federal mandates governing Medicaid reimbursements); Hazardous Waste Treatment Council v. U.S. Env't Prot. Agency, 910 F.2d 974 (D.C. Cir. 1990) (waste industry insisting on expansive interpretation of federal hazardous waste treatment requirements). For a general exposition of the anti-competitive practices at issue, see Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

44. Moreover, competitive federalism requires the "devolution" of administrative and policy-making authority to be accompanied by a full devolution of revenue responsibility. For the differences and the connections between devolution and competitive federalism, see Michael S. Greve, Real

toward federalism. It marks a territory where the States' interest in retaining quasi-sovereign authority and the business interest in efficiency are congruent.

Federal mandates can be enforced directly by the federal government through funding denials or the threat thereof; through conditional federal preemption, or the threat thereof; through lawsuits against state and local governments; and through intragovernmental bargaining. Mandates may also be enforced by private parties, however, typically under statutory entitlements, implied private rights of action, or § 1983.[45] Public and private enforcement devices are not mutually exclusive; in fact, most important federal statutes combine both mechanisms.

While the private enforcement of statutory entitlements is not normally thought of as a federal "mandate," state and local officials need no reminder that this is the true nature of such entitlements. When the average mayor or governor thinks of "commandeering," what comes to his mind is not the rare direct federal intervention of the sort at issue in *New York v. United States*[46] and *Printz v. United States*[47] but rather a private lawsuit under § 1983.[48] In that light, and since the reform of direct federal mandates is the subject of a separate article in this Issue,[49] I turn directly to the private enforcement of federal mandates. In this area, opportunities for state-business coalitions are particularly plentiful—and particularly underexplored. Two examples—one from the litigation context, one legislative—illustrate the point.

A. Litigation

In *Alexander v. Sandoval*,[50] the Supreme Court determined that Title VI of the Civil Rights Act does not create an implied right of action for private litigants to sue recipients of federal funds

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Federalism: Why It Matters, How It Could Happen (1999).

45. 42 U.S.C. § 1983 (1994).

46. 505 U.S. 144 (1992).

47. 521 U.S. 898 (1997).

48. Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. 297, 304 (1996).

49. *See* John C. Eastman, *Re-entering the Arena: Restoring a Judicial Role for Enforcing Limits on Federal Mandates*, 25 HARV. J. L. & PUB. POL'Y 931 (2002).

50. 532 U.S. 275 (2001).

for "disparate impact" violations. The case arose over Alabama's "English Only" requirements for driver's license tests. That issue seems far removed from business concerns. So, perhaps, does the broader issue over the scope of private rights of action under Title VI. It turns out, though, that the "federally funded" entities covered by the act include environmental permitting agencies at the state and local levels. As interpreted by an earlier administration, Title VI effectively requires affirmative action in industrial siting. *That* issue, for obvious reasons, is of acute interest to business constituencies.

As it happens, *Sandoval* and its aftermath illustrate both the potential of state-business coalitions in cases involving federal mandates and the business community's regrettable reluctance to explore that potential. After the Supreme Court's grant of certiorari in the case, the defendant-State's attorney general, William Pryor of Alabama, endeavored to solicit amicus support from business groups (among other constituencies), but found no takers. *After* the Supreme Court's decision, business groups naturally perceived its significance for "environmental racism" cases. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, a federal district court held that the same Title VI regulations that *Sandoval* had rendered unenforceable under an implied right of action theory could still be enforced under § 1983.[51] On appeal, business groups filed a persuasive amicus brief urging reversal. In overturning the district court's ruling, the Third Circuit Court of Appeals relied substantially on the amici's arguments.[52]

One must fear, alas, that the business community's commendable support for federalism in this case signals a response to immediate, tangible interests, rather than a learning process. As this Article goes to press, the *South Camden* plaintiffs have filed a petition for certiorari with the Supreme Court. Should that petition be granted, business constituencies will no doubt be heard from. The legal issue in the case, though—that is, the permissible scope of private enforcement of Spending Clause statutes (such as Title VI)—may very well

51. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp.2d 503 (D.N.J.), *rev'd*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001).

52. *S. Camden Citizens in Action*, 274 F.3d at 771.

be settled in a case that the Supreme Court has *already* agreed to hear. Like *Sandoval, Gonzaga University v. Doe*[53] involves a subject-matter (the Federal Education Records Protection Act) at some remove from immediate corporate concerns. As in *Sandoval,* business interests declined requests for amicus participation, notwithstanding the fact that the case may effectively decide a question in which the business community does have a demonstrable—and demonstrated—interest.

Even as a matter of simple litigation economy, business groups might do well to take a somewhat broader, more generous approach to supporting States in mandates cases. Cases like *Alexander v. Sandoval* and *Gonzaga v. Doe* are of a piece with the Supreme Court's long-standing effort to extend the States' sovereign immunity under the Eleventh Amendment[54] and to curtail private rights of action, principally against state and local governments, under federal statutes.[55] While the Supreme Court is rapidly running out of statutes that might lend themselves to a further extension of its Eleventh Amendment jurisprudence,[56] the statutory cases have by no means run their course.[57]

The curtailment of privately enforced entitlements has affected the day-to-day practice of federalism far more deeply and pervasively than the Court's "sexier," but necessarily rarer, constitutional interventions. To grossly oversimplify a rich and sophisticated literature: statutory entitlements are the

53. 24 P.3d 390 (Wash. 2001), *cert. granted,* 122 S.Ct. 865 (2002) (No. 01-679).

54. *See, e.g.,* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

55. *Alexander v. Sandoval* is the latest in a long line of decisions dating back over a decade. *See, e.g.,* Gregory v. Ashcroft, 501 U.S. 452 (1991); Dellmuth v. Muth, 491 U.S. 223 (1989); Suter v. Artist M., 503 U.S. 347 (1992); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

56. Just about the only statutes that can still be construed as abrogating sovereign immunity are federal statutes prohibiting discrimination on the basis of race and, most likely, sex, to the extent that those statutes constitute congruent and proportionate remedies for Fourteenth Amendment violations. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); City of Boerne v. Flores, 521 U.S. 507 (1997).

57. In *Gonzaga University v. Doe,* for example, the Supreme Court may overrule its erroneous 1980 decision in *Maine v. Thiboutot,* 448 U.S. 1 (1980), the *fons et origo* of its modern § 1983 jurisprudence. For suggestions that *Maine v. Thiboutot* should be overruled or at least sharply limited, see, e.g., Blessing v. Freestone, 520 U.S. 329, 350 (1997) (Scalia, J., concurring) (suggesting that the scope of enforceable rights under § 1983 should be determined "according to the understanding of § 1983 when it was enacted"); David Engdahl, *The Spending Power,* 44 DUKE L.J. 1, 101-08 (1994).

cornerstone of unholy nationalist coalitions of interest groups, bureaucrats, and congressional committees.[58] Put simply, an individual entitlement to, say, a "reasonable accommodation" for the disabled is Congress's way of satisfying a constituency demand without being held responsible for the costs. (It will be the National Council for the Blind and some federal district judge, rather than Congress, that forces Braille requirements on local libraries.) Federal agencies charged with implementing statutory mandates will welcome court-enforced mandates as a means of expanding their bureaucratic empires; local governments will complain about woefully underfunded federal mandates; advocacy groups, about the government's gross dereliction in enforcing the law. The constituencies' congressional patrons will then leverage the demands to obtain additional funds, thus setting off another round of shadow-boxing (at a higher level of spending).

The curtailment of statutory entitlements cracks those entrenched coalitions and changes the administration of federal programs from a rigid, litigation-driven regime to a more flexible bargaining process between state and federal officials. While advocacy groups still have a place at the table, they are no longer able to instrumentalize the federal judiciary as an agenda-setting institution.

For the States, this means that cooperative federal programs begin to look and feel much more like contracts with the federal government, rather than an imposition of federal mandates whose administration is micro-managed by federal judges and advocacy groups. For business, it means more cooperative relationships with state bureaucracies. State officials will still listen to groups that are antagonistic to business interests (as they should), but their agendas will no longer be driven by those groups and their legal demands. Many of the legal cases that would tend to advance this objective will involve programs and entitlements of no immediate concern to business. As *Sandoval* and its aftermath illustrate, however, the legal doctrines in this area tend to cut across a broad array of issues, including issues of direct

58. For thorough, nuanced empirical accounts of the phenomenon described in this paragraph, see R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983).

consequence to business interests. Entitlement reform through litigation provides a fertile field for cooperation between States and business.

B. Legislation

Prominent among private entitlement provisions that adversely affect state and business interests are the citizen suit provisions that are contained in every major federal environmental statute. Such suits purportedly enhance citizen participation and prod more aggressive agency enforcement. The lofty claim that these effects will improve the environment, however, is unsupported by a single systematic study. In fact, there are good reasons to suspect that private law enforcement will often harm the environment, and the empirical evidence, while inconclusive, tends to support that hypothesis.[59] Scholars with pronounced ecological sympathies have been compelled to conclude that citizen suit provisions are "part and parcel of a largely unsuccessful system of command-and-control regulation."[60] Former Secretary of the Interior Bruce Babbitt, an official unlikely to be suspected of shilling for corporate polluters, has bitterly complained about the flood of environmental citizen suits that has effectively eviscerated the enforcement of the Endangered Species Act.[61]

Opposition to citizen suits should unite business and the States—not only because such suits may be brought against both private and public entities alleged to be in violation of the law under which the suit is commenced, but also, and more importantly, because enforcement actions against public entities will affect private business, and vice versa. Citizen suits against government entities may prompt more aggressive government regulation and enforcement, with predictable consequences for business. Conversely, citizen suit campaigns against private industry by a horde of "self-appointed mini-EPAs"[62] effectively deprive the States of their enforcement

59. *See* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990).

60. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries', and Article III*, 91 MICH L. REV. 163, 221 (1992).

61. Janet Wilson, *Enforcement of Species Act Pits Babbitt vs. Activists*, L.A. TIMES, Oct. 3, 1999, at B1.

62. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 209

discretion and authority.[63]

Citizen suit provisions have for three decades remained immune from serious attacks in the legislative arena, and it may seem absurd that state officials or corporate lobbies should ask Congress to take an axe to so sacred a cow. Three considerations, however, render a state-business campaign against this exceedingly odd policy instrument a plausible prospect.

First, attempts to curb citizen suits by raising constitutional objections in individual cases—a plausible and partially successful strategy throughout the 1980s and 1990s—has been effectively foreclosed by the Supreme Court's 2000 decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*[64] Thus, reform must come, if it is to come at all, through congressional legislation.

Second, we are witnessing increased (and increasingly broad) disenchantment with centralized command-and-control regulation and, correspondingly, greater interest in devolving authority over environmental policy and enforcement to the States. Serious devolution, however, is fundamentally inconsistent with broad-based citizen suit enforcement. No State and no regulated business can have confidence in the State's policy and enforcement choices so long as those decisions can be second-guessed by any malcontent with access to the environmental lobbies' brief bank.

Third, at least one precedent suggests that state officials possess the courage and foresight to question supposedly sacrosanct entitlements. The central provision of the much-heralded 1996 Welfare Reform Act was the repeal of an

(2000) (Scalia, J., dissenting).

63. Citizen suit provisions typically require a sixty-day notice of intent to sue by private parties and, moreover, bar private suits where government agencies are "diligently" enforcing statutory mandates. The practical effectiveness of these safeguards is open to serious question. *See* Richard Pierce, *Issues Raised by Friends of the Earth v. Laidlaw Environmental Services: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENVTL. L & POL'Y F. 207 (2001). In any event, the purported safeguards do not ameliorate the underlying problem—that is, the authorization of private parties to superintend the exercise of executive discretion and state-federal relations. Notice and claim preclusion provisions still authorize private litigants to argue, in federal court, that the intergovernmental law enforcement system has broken down. That, in effect, amounts to an authority to run the system.

64. 528 U.S. 167 (2000).

individual entitlement to welfare.[65] That provision was enacted at the specific demand of state officials and in the face of shrill opposition by the welfare rights lobby. Individual welfare entitlements, state officials argued, would mean that the speed and direction of welfare reform would continue to be determined by the Children's Defense Fund, thus rendering any real devolution and reform illusory. That argument proved correct, and successful. If courageous governors are prepared to look Marion Wright Edelman in the eye, why should they not be willing to confront the environmental lobby, especially if that initiative were supported by a broad coalition of States and businesses?

From a public policy perspective, the enhanced state discretion attendant to the repeal of federal entitlements may entail a certain policy slippage. The 1996 welfare reform contained not only a welfare-to-work objective, where the States have made real progress, but also statutory goals for a reduction of out-of-wedlock births and the formation of stable families.[66] It would be too much to say that the States have failed at these tasks, for the fact is that they haven't tried.[67] Devolution, moreover, tends to be accompanied by a massive infusion of cash into service-providing constituencies. The welfare lobby was not squeezed out of welfare policy; it was bought out, as the decline of direct welfare assistance coincided with an enormous expansion of per-case expenditures on childcare, job training, substance abuse counseling, and other provider-intensive services.[68]

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65. *See* Personal Responsibility and Work Opportunity Act of 1996 § 103(a)(1), Pub. L. No. 104-193, 110 Stat. 2105, 2112-13 (codified as amended at 42 USC § 601(b) (Supp. III 1994)) (providing that pertinent provisions "shall not be interpreted to entitle any individual or family to assistance under any State program under [the Act]."). For an analysis of this provision as the core of the 1996 reform, see R. Shep Melnick, *Federalism and the New Rights*, 14 YALE L. & POL'Y REV. 325, 332-37 (1996).

66. Jack Tweedie, *From D.C. to Little Rock: Welfare Reform at Mid-term*, PUBLIUS: THE JOURNAL OF FEDERALISM, Winter/Spring 2000, at 69.

67. The best explanation for this pattern seems to be that welfare-to-work, but not family formation, is consistent with a broad popular consensus and, moreover, with the incentives and instincts of the implementing bureaucracies. *See* RICHARD P. NATHAN & THOMAS L. GAIS, IMPLEMENTING THE PERSONAL RESPONSIBILITY ACT OF 1996: A FIRST LOOK 48-49 (1999).

68. For a discussion of devolution, and how it and other forms of "cooperative federalism" satisfy interest group demands and stimulate local government growth, see Greve, *supra* note 42.

One would predict a comparable pattern in the wake of a repeal of environmental entitlements—a shift from litigation-driven implementation towards more discretionary enforcement and bargaining between state and federal officials, with a convoy of States moving towards consensual, balanced environmental objectives. Those trends would likely be coupled with state indifference to whatever esoteric objectives Congress may pile onto a serious environmental devolution (along with federally funded wind farms administered by the Natural Resources Defense Council). That price, however, is well worth paying for a more sensible, flexible environmental regime that is attuned to local needs and circumstances.

C. Litigation And Legislation

The preceding analysis suggests, and the record confirms, that litigation may provide a more promising field than legislation for collaborative anti-entitlement efforts. Legislative efforts involve coordination problems and high transaction costs. Litigation does not. In fact, a single courageous State may advance anti-entitlement arguments and strategies without the assistance of sister-States (or, for that matter, of business), as Alabama has done in advancing Eleventh Amendment immunity defenses against private suits for damages under federal statutes.[69] The dynamics of federal litigation may induce a single State to invoke constitutional and statutory defenses even when States, collectively, would be reluctant to invoke comparable arguments in a political debate over prospective legislation. For example, it is much easier to argue that federal law confers no private right of action to enforce mandates concerning the state collection of child support payments than to oppose such a mandate in the first instance. A State's failure to raise jurisdictional defenses (such as lack of standing or failure to state a cause of action) may induce, and by all rights should induce, federal judges to examine the availability of such defenses *sua sponte*, perhaps with the assistance of suitable *amici*. In a recent, particularly dramatic case, a defendant-State (Michigan) failed to raise jurisdictional defenses to a private claim for entitlements pursuant § 1983 and, subsequently, failed to respond adequately to the district

69. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

court's request for briefing on those issues. The district court "invited and accepted the participation of the Michigan Municipal League as *amicus curiae* to address the issues raised by the court."[70] Based on the League's briefs, the court proceeded to find that there is no private entitlement to, of all things, Medicaid benefits—a decision that should demonstrate the potential of a litigation-centered anti-entitlement strategy.

In most instances, favorable judicial entitlement decisions can be reversed by Congress. For example, a judicial decision to the effect that Congress failed to provide for a private right of action, with sufficient clarity and in the text of the statute, still leaves Congress with a means of redress. For that reason, litigation cannot be the *exclusive* focus of an anti-entitlement strategy for federalism. The "clear statement" rule and similar rules of construction, however, shift the legislative equilibrium to point in a federalism-friendly direction. Furthermore, they compel Congress to speak clearly on a question—the imposition of mandates on the States—on which it would much prefer to mumble, the better to procure a legislative compromise that allows lawmakers to avoid full responsibility for the adverse consequences of their action.[71] While these obstacles are not insurmountable, the prevention of legislative overrides—where legislative inertia facilitates the attainment of federalism objectives—provides perhaps the most fruitful and promising opportunities for advancing an anti-entitlement agenda. Business and the States have every incentive to unite behind that agenda.

VI. FEDERALISM AS A SECOND-BEST

By its very nature, federalism is a constitutional regime that generates, and in a sense celebrates, second-best solutions. Because federalism allows for diversity among the States, some States will invariably deviate from every interest group's ideal, uniform national rule or standard. Thus, the federalist

70. Westside Mothers v. Haveman, 133 F. Supp.2d 549 (E.D. Mich. 2001), *appeal docketed*, No. 01-1494 (6th Cir.).

71. *See* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (further discussing the equilibrium shift); William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 409-14 (1991).

approach will rarely be anyone's first-best solution; it will at most be an acceptable alternative to the worst scenario, which is a uniform national law imposed by a rival, competing interest.

In the national political process, federalism can often, for some period of time, "win" by default: a failure to reach an accommodation among national interest groups will leave a pre-existing federalist policy or legal regime in place. So, for example, business easily defeated Naderite initiatives for a national corporate chartering statute, which left the existing, highly efficient state-based chartering process in place. Only rarely, however, will federalist policies come about by design and explicit agreement.

Every economic interest group functions on the principle of rent collection. If an interest group is sufficiently strong to have its way in Washington, D.C., the rent-maximizing strategy usually is to enact a uniform, preemptive national statute to the group's liking. If two interest group coalitions are more evenly matched, each side will insist on "its" preferred uniform, national legislation. The likely compromise is a preemptive national statute that incorporates some of each side's demands. Even if *both* sides would benefit from a federalist compromise that committed the issue to the care of the States, a nationalist result may occur, either as a result of coordination problems (neither side wanting to make a federalist move that could be interpreted as weakness), or because of agency problems that separate the interests of national lobbying organizations from their members. For example, environmentalists and regulated industries alike may prefer the "certainty" of absurdly bureaucratic, spottily enforced federal permitting standards for stationary sources to the unpredictability of a federalist world, even when that world can be shown to benefit the environment and industry interests.

An analysis of the incentives faced by federal legislators yields substantially the same result. Legislators are more open to a nationalist compromise than to a federalist compromise. The latter disperses not only policy authority but also rent collection: if standards are set in Albany and Richmond rather than Washington, D.C., then that is where the campaign contributions will flow.

Nonetheless, certain circumstances may produce federalist

solutions. While some such solutions may emerge without the States' active support, most seem to require it.[72] To my knowledge, no general theory explains the (possible) emergence of federalist, second-best compromises.[73] That being so, I limit the analysis to a brief, highly speculative discussion of three examples.

A. All Pain, No Gain

In 1996, Congress enacted the Defense of Marriage Act ("DOMA"),[74] which provides in relevant part that States need not recognize same-sex marriages recognized in other States.[75] DOMA is a model of nationally re-enforced federalism: instead of scrambling for a national, uniform compromise on homosexual marriage, Congress effectively compartmentalized the policy debate along state lines. The statute was enacted over the opposition of religious conservatives and homosexual rights advocates, both of whom insisted on a national "solution" consonant with their respective objectives.

DOMA's federalist compromise came to pass because the majority of federal legislators were happy to wash their hands of the issue. Whatever rents might be had from an effort to fashion a national compromise would be dwarfed by the risk of being painted as a closet homophobe or an enemy of traditional family values (and quite possibly both).

For a variety of reasons, it is difficult to envision an economic DOMA equivalent that might yield a federalist outcome. Most obviously, economic issues are by definition "about" money, thus inviting lobbyists and legislators to split the difference instead of compartmentalizing irreconcilable differences.

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72. In rare instances, competitive federalist policies may emerge despite the States' active opposition. For example, § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54, *repealed by* ICC Termination Act of 1995 § 102(a), Pub. L. No. 104-88, 109 Stat. 803, 804, which provided in part that States may tax railroad property at a rate not exceeding the rates applicable to other property in the State, was enacted over the States' strenuous objections.

73. For an analysis of the unusual conditions that will induce federal legislators to leave federalist policies in place, see Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Theory of Federalism*, 76 VA. L. REV. 265 (1990).

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

75. *Id.*, §2, 110 Stat. at 2419 (codified at 28 U.S.C. § 1783C).

It is at least conceivable, however, that "economic" issues with profound moral implications might yield comparable outcomes.[76] Before the enactment of the Eighteenth Amendment, for example, Congress attempted to compartmentalize liquor regulations along state lines. (The Wilson Act[77] and the Webb-Kenyon Act[78] enabled States to pass liquor regulations without fear of violating Congress's commerce power.[79]) The regulation of consumer privacy on the Internet lends itself to a similar arrangement. Without minimizing the formidable obstacles to a sensible federalist compromise on that issue (that is, a compromise that would forestall federal substantive legislation without, at the same time, compelling service providers to comply with conflicting regulations in fifty state jurisdictions),[80] such a compromise might become acceptable if and when the alternatives of full federal preemption or unbounded state sovereignty were to appear altogether unpalatable to States and business.

B. Disaster Relief

Federal standards may inflict such exorbitant costs as to exceed the perceived benefits of uniformity (for business) and protection from competition (for the States). Under such circumstances, business may come to believe that state regulation will be more reasonable in most (though not all) States. Most States, for their part, may come to believe that they will be better off under a federalist regime, even if their own competitive position vis-à-vis sister States might deteriorate.

The clean-up of low-risk abandoned waste sites, or so-called "brownfields," provides an example of these dynamics. Most States concluded over a decade ago that the federal regulation

76. Macey, *supra* note 73, at 268, argues that Congress may defer to States when doing so enables lawmakers to escape an adverse political reaction. I am inclined to think that this response is most likely on issues with a non-negotiable "moral" dimension.

77. Ch. 728, 26 Stat. 313 (1890).

78. Pub. L. No. 62-398, 37 Stat. 699 (1913).

79. For a discussion of the purposes of the Wilson Act and the Webb-Kenyon Act, and the relationship between them, see Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 321-24 (1917).

80. For a proposal along these lines, see BRUCE H. KOBAYASHI & LARRY E. RIBSTEIN, A RECIPE FOR COOKIES: STATE REGULATION OF CONSUMER MARKETING INFORMATION (AEI Federalism Project Roundtable, Paper Series No. 1, 2001).

of "Superfund" sites[81] produces more harm than good. Superfund site remediation is measured in geological time, and the appearance of a site on the National Priorities List deters potential investors. Widespread failure to clean up and invest in old industrial brownfield sites, most of them located in urban areas, has driven business development to outlying "greenfield" sites, thus impeding urban re-development and exacerbating suburban sprawl.[82]

Confronted with that reality, state and local governments went ahead and cleaned up some 40,000 brownfields on their own, without federal intervention.[83] In contrast to the punitive, litigation-driven federal regime, state clean-up efforts have been based on liability protection for investors, flexible and risk-based clean-up standards, and tax incentives. Predictably, business (with the possible exception of the waste management industry) has been strongly supportive of the States' efforts.

Due to the horrendous failure of the federal statute and the States' remarkable progress in cleaning abandoned waste sites, the political debate shifted almost a decade ago from reforming a federal statute that is quite probably beyond repair to protecting an actual experiment with environmental federalism. State and local brownfields development did not "devolve" from Washington, D.C. Rather, it developed independently in the interstices of federal regulation. The federal government's principal ambition since 1994 has been to get a piece of the regulatory action and, more important, to claim credit for successful state and local experimentation that stands as an embarrassment to the federal authorities. The States' principal objective has been to protect their policies from federal second-guessing and interference. The potential for such interference is very real; for instance, state and local efforts to attract investors and developers may be thwarted so long as the U.S. Environmental Protection Agency reserves the right under federal law to re-open a cleaned-up site and to

81. Comprehensive Response, Compensation and Liability Act, Pub. L. No. 96-510, 94 Stat. 2627 (codified at 42 U.S.C. §§ 9601-9675); Superfund Amendment and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675).

82. Katherine X. Vasiliades, *Encouraging Industry In Order to Preserve Non-Commercial Property*, 9 VILL. ENVTL. L.J 29, 30 (1998).

83. Dana Joel Gattuso, *Revitalizing Urban America: Cleaning Up the Brownfields* (July 19, 200), *available at* http://www.cei.org/gencon/025,01782.cfm.

impose additional remediation requirements.[84] Thus, reform efforts at the federal level focus on enhancing the States' ability to provide private parties with finality and to de-link brownfield clean-up entirely from the federal Superfund regulation.[85] State and local governments' initiatives to that effect merit firm business support.

C. Logjam

Business-state cooperation on pro-federalism legislation may be possible on a set of issues that satisfy two conditions: (1) demonstrable inability of business to overcome interest group opposition to uniform, preemptive federal legislation; and (2) a demonstrable inability on the part of the States to overcome a prisoners' dilemma that pushes States to adopt more stringent regulation than any of them would adopt on their own volition. The inability to achieve the desired national outcome may induce business to settle for the second-best, decentralized solution. The States' support for that solution may break the national logjam.

Products liability law, for a conspicuous example, may satisfy these conditions. Under current choice-of-law rules, each State has an incentive to expropriate out-of-state corporations to benefit in-state plaintiffs. Restrictive liability doctrines would simply preclude domestic citizens from obtaining "their fair share," while still compelling them to pay, in the form of higher product prices, for damages and product changes that result from liability verdicts in other jurisdictions. Corporate lobbying to arrest this race towards escalating liability verdicts through a national products liability law has proven unavailing for over two decades. Many States have recognized that exorbitant liability verdicts deter productive investment, to no intelligible social purpose; even so, state-level reform efforts have been halting and often ineffectual, quite possibly because one State's unilateral declaration of a truce at the front of ever-escalating liability doctrines would simply enable other States to capture the rewards.

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84. Gabriel A. Espinosa, *Building on Brownfields: A Catalyst for Neighborhood Revitalization*, 11 VILL. ENVTL. L.J. 1, 11 (2000).

85. *See* Dana Joel Gattuso, *Senate Brownfields Bill Needs a Clean-Up* (Apr. 23, 2001), *available at* http://www.cei.org/gencon/004,02019.cfm.

Prominent jurists and economists have argued for federal choice-of-law rules on products liability matters that would enable States to choose liability rules in accordance with their own citizens' risk preferences, while enabling business to tailor product prices in accordance with liability risks incurred in various jurisdictions.[86] While the precise contours of such rules are open to some debate,[87] the decisive obstacle to their adoption lies in the difficulty of persuading States and business of settling for a second-best solution. Business groups are understandably reluctant to accept that two decades' worth of time, money, and effort spent on attaining national tort reform may be best viewed as sunk costs. The States, for their part, will be reluctant to embark on a venture that promises few discrete, tangible benefits for individual States and, moreover, a high risk of offending potent political constituencies, such as trial lawyers. Still, a federalist products liability reform that would enhance economic efficiency and the States' autonomy to fashion liability regimes in accordance with their own citizens' preferences would produce substantial benefits for manufacturers and for the vast majority of States. In that light, the idea merits exploration.[88]

VII. CONCLUSION

An attempt to develop a positive account of business-state coalitions on federalism—beyond an impressionistic survey of

86. *See* Michael McConnell, *A Choice-of-Law Approach to Products-Liability Reform, in* NEW DIRECTIONS IN LIABILITY LAW 90 (W. Olson ed., 1988) (arguing that products liability disputes should be governed by the law of the first retail sale); Michael I. Krauss, *Federalism and Product Liability Reform, at* http://www.federalismproject.org/masterpages/tort/krauss.html (last visited May 12, 2002) (same).

87. *Compare* sources cited *supra* note 86 *with, e.g.*, William Niskanen, *Do* Not *Federalize Tort Law*, 1 MICH. L. & POL'Y REV. 105 (arguing that products liability lawsuits should be governed by the law of the producer's domicile State); Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L.J. 503 (1987) (suggesting contractual choice of law approach).

88. That is so especially since the products liability regimes of several States may violate international treaty and free trade agreements. For example, a Canadian business has brought a claim in an international tribunal that Mississippi's liability regime violates the United States' obligations under the North American Free Trade Agreement. *See* Michael I. Krauss, *NAFTA Meets the American Torts Process:* O'Keefe v. Loewen, 9 GEO. MASON L. REV. 69 (2000). Business and the States will line up on opposing sides in such conflicts, and the conflicts may become quite bitter. Both sides have an incentive to search for common ground.

pending issues that might attract support from both sides—confronts the fact that federalism's political economy is poorly researched, and still more poorly understood. Political science treats federalism as little more than the study of intergovernmental relations. Economists and public finance theorists have developed sophisticated models of efficient federalist structures—without, alas, paying more than passing attention to the conditions that might sustain or, as the case may be, restore such structures.[89] Legal scholars have concentrated on federalism's technicalities or on its constitutional history, origins, values, and meaning. For all its erudition, most of that scholarship seems strangely disconnected from modern-day, real-life concerns. As one of the few pioneers on federalism's political economy has observed, we need a lot less meaning and a lot more models.[90]

The bare-bones model sketched in this Article captures only the most basic elements of the state-business relation and federalism. The model does not account for logrolling. It does not account for differences between state and local governments (which greatly complicate the picture). It does not account, except in passing, for agency problems that might induce national business and state lobbies to act at variance with individual members' interests. Most fatefully, the model treats "business" and "the States" as homogeneous actors, thus screening out the countless issues that divide both groups and, in the process, create opportunities for state-business coalitions that may foster, as well as impede, federalism.

It seems unlikely, however, that a more refined theory and a fuller account would invalidate the basic assessment that on many federalism-related issues the interests of business and the States are antagonistic. Business and the States represent different federalism values: the States, state sovereignty and autonomy; business, efficiency and competition. Both sets of values are at odds with the notion of an omnipotent national government, but they are also, much of the time, at odds with each other. It is possible, in principle, to sacrifice a bit of efficiency for more state sovereignty (or vice versa), without

89. *See, e.g.*, Jonathan Rodden & Susan Rose Ackerman, *Does Federalism Preserve Markets?*, 83 VA. L. REV. 1521, 1571-72 (1997).

90. *See* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 3 (2000).

making the system as a whole any more or less "federalist." Unlike an investment club, however, whose members are indifferent to portfolios with identical risk levels, state governments and corporations are acutely sensitive to the composition of the federalism portfolio, and they will fiercely contest an adverse move along the frontier.[91]

States and business are thus well advised to explore moves that push the federalism frontier outward by advancing *both* state sovereignty and the efficient operation of national markets and regulatory institutions. In attempting to show that some such moves are possible, I have undoubtedly failed to exhaust the full range of possibilities. That shortcoming provides a glimmer of hope for federalism.

91. I have borrowed the metaphor of federalism's frontier from Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1230 (1997).