# THE OTHER DOUBLE STANDARD: COMMUNITARIANISM, FEDERALISM, AND AMERICAN CONSTITUTIONAL LAW

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## I. INTRODUCTION

This is a tale of two doctrines. One subsists in the realm of contemporary political theory, attracting scant notice compared to its more influential intellectual cousin. The other haunts the annals of American jurisprudence, garnering more attention for its absence than its impact. Through a process of conceptual alchemy, this article will attempt to wed these two soulmates and to demonstrate how such a marriage can produce a sound and significant single doctrine that makes a unique contribution to each of these respective disciplines.

In its contemporary formulation, communitarianism was first conceived in the 1980s.[1] The doctrine arose in reaction to the revival of normative political theory that had occurred in the previous decade and which had been dominated by proponents of liberalism.[2] Communitarian thought thus attracted considerable attention when it appeared, due to its stark contrast with prevailing liberal ideas. Following the publication of the first few seminal works,[3] however, communitarianism's most noted advocates

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[1]Several commentators have noted that contemporary communitarianism echoes many themes found in earlier critiques of liberalism. *See* Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHILOSOPHY AND PUBLIC AFFAIRS 308, 308-09 (1985); Stephen Holmes, *The Permanent Structure of Antiliberal Thought*, *in* LIBERALISM AND THE MORAL LIFE 227, 228 (Nancy L. Rosenblum ed., 1989); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POLITICAL THEORY 6, 6-7 (1990).

[2]*See* JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, A THEORY OF JUSTICE]; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[3]MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) [hereinafter SANDEL, LIMITS OF JUSTICE]; ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1984); 2 CHARLES TAYLOR, *Atomism*, *in* PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES 187 (1985).

gradually stopped developing and defending the theory. It is likely that this occurred, in part, because these theorists simply lost interest in the concept and turned their critical attentions elsewhere.[4] Just as important, however, was the fact that liberal commentators raised significant objections to communitarian theory, which advocates of the theory seemed unable adequately to address.

The importance of federalism as a legal doctrine has steadily diminished throughout the course of American history. Although numerous cases in the early years of the Republic granted it an important place,[5] events such as the Civil War, the emergence of a national economy, and the vast expansion of the powers of the federal government combined to nearly eliminate federalism as a significant doctrine of judicial review by the middle of the twentieth century. Recent attempts to revive the doctrine have been sharply criticized,[6] and even those who favor its use often qualify their support considerably.[7] The consensus thus seems to be that federalism is an antiquated concept whose risks outweigh its rewards in modern constitutional interpretation.

The aim of this article is to show how communitarianism and federalism can atone for each other's sins. Although both doctrines have encountered numerous formidable objections in recent years, the combination of the two concepts helps to provide answers to these various criticisms. Indeed, this article will argue that the lack of success experienced by the two doctrines in realizing their full intellectual potential is due to the failure of their proponents to recognize the affinity between the two and to tap the resources of each for use by the other. The conception of communitarian federalism which emerges in the ensuing discussion not only offers important insights for the disciplines of political and legal theory, but also provides a

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[4]*See, e.g.*, ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988); CHARLES TAYLOR, SOURCES OF THE SELF (1989). Neither of these works addresses the communitarian themes prominent in the author's earlier writings.

[5]*See, e.g.*, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the Fifth Amendment is solely a limitation on the federal government and is not applicable to the states).

[6]*See, e.g.*, Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985) (urging that state sovereignty be entirely abandoned as a constraint on Congress's use of its delegated powers).

[7]*See, e.g.*, James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251 (1994) (arguing that judicial federalism should be enforced, but only on matters other than civil rights).

practical prescription for the formulation of public policy.

Part II of the article canvasses the debate between liberals and communitarians in political theory and shows how the concept of federalism can help communitarianism answer some of the major objections advanced by its opponents. Part III offers both a historical and a contemporary account of American federalism as a vehicle of communitarian practice. Part IV recounts how American constitutional law came to reject federalism as a legal doctrine, identifies the potential dangers of this anti-communitarian trend, and prescribes a framework for reconstructing federalism as a principle of judicial review.

## II. THE ROLE OF FEDERALISM IN COMMUNITARIAN THEORY AND PRACTICE

### A. THE LIBERAL-COMMUNITARIAN DEBATE IN POLITICAL THEORY

For more than a decade, commentators known as "communitarians" have been engaged in criticizing liberal political theory.[8] Originally conceived as a critique of John Rawls' seminal statement of contemporary liberalism,[9] communitarianism has since evolved into a more general indictment of liberal doctrines and institutions.

Communitarian criticisms of liberalism are of two basic types. First, communitarians make *ontological*[10] claims concerning liberalism's account of self-identity and self-perception. Second, communitarians advance *political*[11] claims critical of particular policies and practices espoused by liberalism. The existence of and relationship between these two types of arguments is often inadequately addressed by commentators on both sides of

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[8]Liberal political theory asserts the primacy of the individual and the instrumental nature of government. It is distinct from, and not necessarily related to, contemporary liberal politics, which tends to focus more on the modern welfare state.

[9]RAWLS, A THEORY OF JUSTICE, *supra* note 2. The central thesis of Rawls' book, arguably the most important work of political theory published this century, is that fairness requires that all individuals within a state be guaranteed the greatest possible amount of freedom and material wealth. *See id.*

[10]Ontological questions concern the status and nature of being.

[11]The political arguments of communitarians consist of specific prescriptions for altering public policy. They are distinct from, but often build on, communitarian ontological claims. *See* discussion *infra* Sec. II.A.2.

the liberal-communitarian debate.[12]

### 1. THE ONTOLOGICAL DEBATE: THE NATURE OF THE SELF

A central claim advanced by communitarians is that liberal political theory is excessively individualistic. The communitarian critics claim that this individualism is manifested most clearly in liberalism's conception of the self. For example, noted political philosopher Michael Sandel[13] charges that liberalism is based on the ontological premise that individual identity exists prior to and independent of any social context.[14] According to this conception, which Sandel calls the "unencumbered" self, an individual is capable of revising his or her defining characteristics and commitments merely by choosing to do so. Communitarians argue that this notion of a "pre-social" self is inherent in concepts such as John Locke's "state of nature"[15] and Rawls' "original position."[16]

Communitarians contend that the idea of an unencumbered self is unrealistic. They argue that it is impossible for people to conceive of themselves as bearing no particular identity; such selves do not exist.[17] Furthermore, communitarians assert that these indispensable particular identities are the products of a social environment and depend for their

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[12]*See* Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 688 (1992) (contending that conceptual confusion regarding different types of communitarian claims has obscured the distinct nature of the arguments advanced by each).

[13]Sandel is still considered to have formulated the most significant critique of John Rawls' work. SANDEL, LIMITS OF JUSTICE, *supra* note 3.

[14]MICHAEL J. SANDEL, INTRODUCTION TO LIBERALISM AND ITS CRITICS 1 (Michael J. Sandel ed., 1984) [hereinafter SANDEL, LIBERALISM AND ITS CRITICS].

[15]Locke's phrase, "state of nature," describes the situation in which humans live before the institution of government. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 309-18 (Peter Laslett ed., 1965).

[16]*See, e.g.*, TAYLOR, *supra* note 3, at 187-90; MACINTYRE, *supra* note 3, at 250-51. The original position is a hypothetical situation posited by Rawls in which individuals are deprived of knowledge of their particular interests and desires and then asked to choose principles of justice applicable to all. RAWLS, THEORY OF JUSTICE, *supra* note 2, at 18.

[17]SANDEL, LIBERLISM AND ITS CRITICS, *supra* note 14, at 5; *see* SANDEL, LIMITS OF JUSTICE, *supra* note 3, at 62.

existence on a community of other human beings.[18] Thus, according to communitarians, the atomistic account of self-identity advanced by liberalism is implausible.

Contemporary liberal theorists have typically responded to these communitarian criticisms by conceding the incoherence of the notion of an unencumbered self.[19] Liberals explain that concepts such as the pre-social self who enters civil society with a fully-formed identity were never meant to be metaphysical or ontological descriptions of psychological reality, but were instead mere rhetorical devices developed to demonstrate the injustice of certain political arrangements.[20] Rawls, for example, has explicitly denied that his theory implies any metaphysical view of human identity.[21] The consensus of liberal writers responding to this particular communitarian criticism has been that liberalism can safely, and even productively, concede this ontological point.[22]

### 2. THE POLITICAL DEBATE: DEFINING THE RELEVANT COMMUNITY

The second criticism advanced by communitarian theorists charges that liberalism advocates unsound principles of public policy. This substantive

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[18]*See* TAYLOR, *supra* note 3, at 205.

[19]*See, e.g.*, Gardbaum, *supra* note 12, at 705 (urging liberal theorists to abandon much of what has traditionally been ascribed to their theory and to embrace large elements of communitarian theory).

[20]Holmes, *supra* note 1, at 237.

[21]John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. AND PUB. AFF. 223, 223 (1985) [hereinafter Rawls, *Justice as Fairness*].

[22]While it may be true that certain versions of contemporary liberal theory can survive the jettisoning of the atomistic elements of earlier accounts of the doctrine, such a move has the potential to significantly weaken the case for liberalism. Traditional liberal theory grounded its normative claims in the ontological primacy of the individual. It was precisely because the individual was the theoretical primitive of liberal thought that the doctrine was able to generate such robust protection of individual freedom. *See* TAYLOR, *supra* note 3, at 188-89. When the individual was viewed as having an existence independent of civil society, it was easy to argue that state encroachments on personal liberty were justified only to protect the liberty of other people. If, however, the individual is seen as primarily a social construct, dependent on the community for its identity, its claim to immunity from state authority is much weaker. Thus, although contemporary liberals assert that plausible grounds other than atomism exist to justify liberal principles, it is possible that, by abandoning the ontological individualism of traditional liberal thought, liberal theorists deprive themselves of their most persuasive grounds of argument.

argument, while conceptually distinct from the ontological critique of liberalism, assumes the validity of that critique and then attempts to show its political implications.

Communitarians argue that if individual identity is a product of a person's social environment, public policy should reflect and accommodate this fact. By ignoring the social construction of human character, liberal theory has misdirected liberal politics.[23] Communitarians note that, in an effort to preserve the independence of ontologically autonomous individuals, liberalism prescribes governmental policies that minimize state control over citizens' conduct. Sandel describes this political aspect of liberalism as the "politics of rights."[24] Thus, in contrast to the communitarian position, liberalism's conception of politics presumes invalid all state coercion of citizens and requires that each instance of coercion be justified by showing that coercion is necessary for the preservation of other, more weighty individual rights. Under liberalism, the only valid criterion for political decisionmaking is the safeguarding of individual autonomy.[25]

Communitarians contend that if, as many liberals concede, the ontological notion of an entirely autonomous, unencumbered self is unrealistic, public policies based on this theoretical notion must also be problematic. In place of a politics of rights, communitarians advocate a "politics of the common good," in which individual freedom would not be given exclusive priority in the establishment of public policy.[26] Rather, the formulation of public policy would serve as a vehicle to express and reinforce the characteristics and views held in common by the members of a community. On this conception, no longer would the mere curtailment of an individual's freedom be presumptive grounds for the invalidation of a particular public policy. Instead, even coercive measures would be permitted if they expressed the community's view of the public good.

In response to this communitarian proposal, defenders of liberalism have advanced two major objections to a "politics of the common good."

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[23]*See* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993) (arguing that excessively individualistic policies and programs of recent years have undermined the cohesion necessary for social stability).

[24]SANDEL, LIBERALISM AND ITS CRITICS, *supra* note 14, at 6.

[25]The classic statement of this conception is JOHN STUART MILL, ON LIBERTY (1859). Mill contends that individuals should be granted absolute freedom to act as they please, no matter how foolish their conduct may seem, provided their actions do not infringe on the freedom of others.

[26]SANDEL, LIBERALISM AND ITS CRITICS, *supra* note 14, at 6.

First, liberals argue that it is impossible to identify the common good, both because people disagree on matters of public policy, and because it is difficult to define the relevant community that shares this elusive good.[27] Second, liberals assert that even if a common good could be identified, enforcing it in society would constrain individual freedom to an unacceptable extent.[28] Because these two objections to communitarian politics have been largely responsible for the failure of communitarian theory to be translated into practice, the next two sections will outline each objection in greater detail and attempt to show how the concept of federalism can help communitarians respond to them.

### B. WHOSE COMMON GOOD?

In response to the communitarian criticism that liberal public policy unduly privileges individual rights over communal authority, liberal theorists have countered that such deference to individuals is necessitated by the diversity of modern society. As political theorist Will Kymlicka argues, the problem with the communitarian attempts to base public policy on ends shared by all members of society is that "there are no such shared ends."[29] On any given question of public policy, people's various religious, moral, and political beliefs produce a host of conflicting views over the most appropriate course to pursue. Enforcing anyone's particular conception of the best policy necessarily excludes conceptions held by others, thus demonstrating that there is no societal consensus on the nature of "the common good."[30]

A related version of this objection to communitarian politics emphasizes the difficulty of identifying the relevant community which purportedly shares this common good. Critics of communitarian politics point out that most individuals are members of multiple "communities," including churches and synagogues, civic organizations, labor unions, trade

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[27]*See infra* notes 29-32.

[28]*See infra* notes 40-43.

[29]WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 86 (1989).

[30]Rawls has based his most recent work on this lack of societal consensus regarding morality, which he calls the "fact of reasonable pluralism." JOHN RAWLS, POLITICAL LIBERALISM xix (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. *Cf.* Holmes, *supra* note 1, at 240 ("In a pluralistic society, willingness to subordinate private interest to what one considers 'the' common good, does not, by itself, solve our most urgent political controversies and problems.").

associations, as well as various political subdivisions.[31] Liberal theorists argue that while some of these communities do embrace unified moral and political views, the communities least likely to exhibit such ideological unity are those defined by jurisdictional units of government. The processes of political decisionmaking, it is argued, are thus particularly ill-suited to establishing consensus regarding the common good. As theorist Stephen Macedo has noted, "one could apply the most sophisticated arts of the gerrymanderer and still be hard pressed to discern contiguous territories, of any substantial size, which are not checkerboards inhabited by persons with different cultural and religious identities."[32]

To see how this objection concerning communal identity can be answered, it is useful to consider an analogy drawn from the work of John Rawls. As discussed previously, a major criticism of Rawls' original formulation of liberalism was that it contained an implausible view of the human self. As we saw, Rawls' response to this criticism was that his writings expressed no view at all on the nature of the self.[33] Rawls has since developed this point at great length, stressing the limited scope of his theory by characterizing it as merely "political liberalism," as opposed to a comprehensive conception of liberalism.[34]

In much the same manner, advocates of communitarian politics can respond to the communal identity objection by emphasizing that it is merely political, and not comprehensive, communitarianism that they seek. While it is true that there is great ideological divergence among various cultural, religious, and other groups in society, these disparate views frequently converge in support of a particular measure of public policy.[35] The mere

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[31]STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 28 (1990).

[32]*Id.* at 29. Liberals who make observations such as this rarely discuss the possibility that the cosmopolitanism of American political jurisdictions may to a great extent be caused by the very enforcement of liberal policies and a corresponding failure to pursue communitarian politics, trends which deter people from congregating in meaningful communities. The purported obstacles to realizing communitarianism thus may be of liberalism's own making.

[33]Rawls, *Justice as Fairness*, *supra* note 21.

[34]RAWLS, POLITICAL LIBERALISM, *supra* note 30, at xvi.

[35]For example, while the opposition of many feminists to pornography is based on a perception that it subordinates women and encourages violence against them, others oppose it primarily on religious grounds as indecent behavior that promotes sexual promiscuity. Similarly, while Christians, Jews, and Muslims differ dramatically in their conceptions of

fact that a policy is able to achieve enactment through the democratic process is evidence that it enjoys considerable support in the community. Thus, although the political process may be unsuitable for forging consensus on matters such as a comprehensive conception of morality, it can be quite effective at identifying limited areas of agreement regarding sound public policy. So long as the political process is functioning fairly, democratic expression is an eminently reasonable and legitimate method of identifying the common good.[36]

This notion of political communitarianism is particularly appropriate for a federalist political system such as that of the United States. Within the nation's various governmental subdivisions, the political norms of the community are reflected in the public policies that are adopted. Given the pluralism of modern society, it is unreasonable to expect widespread agreement on comprehensive philosophical ideals in any purely political subdivision. Communal generation and affirmation of strong moral conceptions thus will generally be consigned to non-political communities. Political communitarianism will operate only to implement particular policies supported by an array of more comprehensive views in a particular jurisdiction.[37] Contrary to the charges of liberal critics,[38] political communitarianism is thus a weak rather than a strong form of communitarianism. Accordingly, it can be analogized to Rawls' idea of an "overlapping consensus:"[39] political decisionmaking is accomplished by identifying specific concepts supported by various groups within a given jurisdiction, often on differing grounds.

Political communitarianism thus answers the communal identity objection by locating the common good in specific measures of public policy possessing sufficient support to achieve democratic enactment within a

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theology and morality, they often unite to protect and promote the place of religion in society. JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 57 (1991).

[36]*See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[37]For instance, a ban on gambling might be supported by some on economic grounds, by others for religious reasons, and by still others to protect citizens' mental and emotional health.

[38]Gardbaum, *supra* note 12, at 714 (arguing that political communitarianism represents the strongest form of the doctrine).

[39]RAWLS, POLITICAL LIBERALISM, *supra* note 30, at 150. Rawls uses this phrase to describe the situation in which individuals' comprehensive moral conceptions differ widely, yet coincide on certain matters.

particular jurisdiction. On this conception of communitarian politics, the common good is no more and no less than the expressed consensus of a political community.

### C. BALANCING INDIVIDUALISM AND COMMUNITARIANISM THROUGH FEDERALISM

The second objection frequently raised in opposition to political communitarianism is that granting democratic majorities broad authority to dictate public policy will result in excessive constraints on individual freedom. Liberal theorists argue that even if the possibility of identifying the political norms espoused by a particular community is conceded, enforcing those norms through the use of state power is often unduly repressive.[40]

In developing this objection, liberals frequently employ an argument drawn from the debate over ontological communitarianism. Recall that many liberals readily concede the communitarian claim that it is implausible to view the self as independent of any socially-constituted identity. After making this concession, however, defenders of liberalism point out that the fact that it is impossible for an individual to have *no* contingent characteristics whatsoever does not mean that he or she is permanently bound to any particular *set* of traits. On the contrary, say liberal theorists, one of the most central features of individual identity is the capacity to revise one's commitments.[41] Without this capacity, the distinction between the individual and her community is lost, and self-perception becomes impossible.[42]

Liberal theorists charge that political communitarianism ignores these realities of individual identity. By forcing people to adopt commitments defined for them by the political majority, communitarian politics prevents them from engaging in constructive self-definition and self-expression.[43] When state coercion enforces one particular conception of the good, individuals are deprived of the option of revising their personal moral conceptions and acting in accordance therewith. For liberals who view human autonomy as the highest value and the central means of individual growth, such a result is unacceptable.

What liberals and communitarians fail to recognize is that their

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[40]KYMLICKA, *supra* note 29, at 12; Holmes, *supra* note 1, at 223.

[41]Gutmann, *supra* note 1, at 315-16.

[42]KYMLICKA, *supra* note 29, at 52.

[43]*Id.* at 12.

seemingly inconsistent positions are compatible within the context of federalist doctrine. Communitarians stress the importance of affirming one's socially-constructed identity through the political process; in contrast, liberals emphasize the need for freedom to revise one's identity.[44] One solution to this impasse that has not been widely explored by communitarians is the multiplicity of political subdivisions present in a federal system such as that of the United States. A political communitarianism based on jurisdictional variation of public policy permits the pursuit of both communitarian and liberal ends. Members of a particular political subdivision are allowed to express their views of the common good by establishing public policy through the democratic process. At the same time, the multiplicity of jurisdictions in the larger polity allows individuals who wish to pursue alternative conceptions of the common good to identify and migrate to other communities more hospitable to their preferred conceptions.

Liberals may object to this proposed solution by arguing that requiring dissenters from communal norms to relocate to other jurisdictions imposes an excessive burden upon such individuals.[45] Indeed, Rawls has written in his most recent work that it is illegitimate to ask people to either submit to policies they consider objectionable or else leave the jurisdiction, since exercising such an exit option often entails forsaking one's language and culture.[46] Within a nationalized federal polity such as the United States, however, leaving one political subdivision for another rarely requires such sacrifices. Furthermore, the costs of migration that do exist within contemporary America, such as leaving one's family or job, have been significantly minimized by advances in transportation and communications technology, as well as by the nationalization of the economy. It is not uncommon today for people almost effortlessly to move to another part of the country merely to experience a different climate or unfamiliar scenery.

Migration is also not the only option for those living in a community whose public policy they oppose. Such individuals can seek to change that policy by persuading their fellow citizens of its error or even by attracting to the jurisdiction other voters who share their views. Yet another option is for dissenters to simply live with the objectionable policy, possibly after determining that the benefits of remaining in the jurisdiction still outweigh the costs. The human capacity to revise one's commitments so strongly

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[44]*See* Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, *in* LIBERALISM AND THE MORAL LIFE 159, *supra* note 1, at 159-63. Taylor contends that the philosophical misfires of this debate are the result of a failure to distinguish between ontological and political arguments. *See supra* notes 10-11.

[45]Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 923 (1987).

[46]RAWLS, POLITICAL LIBERALISM, *supra* note 30, at 136 n.4, 222.

championed by liberals may even lead such dissenters to eventually change their minds about the policies in question after living with them for a period of time. Finally, in a country with a strong national government such as the United States, those individual freedoms supported by a broad and deep nationwide consensus will likely receive protection through the national political process, i.e., through the mechanism of amending the United States Constitution. The passage of such an amendment serves to indicate the existence of a national community on the specific issue in question, thereby warranting the imposition of a uniform national policy.

A conception of communitarian politics founded on the jurisdictional variation allowed by a federal system of government can thus meet the most salient objections to communitarianism advanced by the doctrine's liberal critics. Communitarian federalism not only facilitates the identification of a community's political norms; it also affords individuals ample opportunities to revise their commitments and conduct if they so wish.

## III. COMMUNITARIAN FEDERALISM: THEN AND NOW

Federalism is a concept that has come under attack on a variety of fronts in the United States in recent years. For example, its numerous critics charge that profound economic and social changes in the nation over the past two centuries have greatly reduced the utility of the doctrine in contemporary American life.[47] Additionally, these critics argue that the notion of federalism poses a threat to the achievement of important national policy goals for which nationwide uniformity is crucial.[48] Furthermore, federalism's opponents frequently accuse its proponents of ideological opportunism, noting that the latter often invoke the concept merely as a means of opposing a particular national policy, thereby demonstrating that their advocacy of federalism is contingent on its producing a desired

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[47]Sotirios A. Barber, National League of Cities v. Usery: *New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 181; Archibald Cox, *Federalism and Individual Rights Under the Burger Court*, 73 N.W. U. L. REV. 1, 22 (1979); *see* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1488 (1987). These critics typically cite factors such as the emergence of a national economy, the pervasiveness of the national media, and the rise of a national consciousness as forces obviating the need for federalism today.

[48]*See* CLINT BOLICK, GRASS ROOTS TYRANNY: THE LIMITS OF FEDERALISM (1993); Blumstein, *supra* note 7, at 1271; Barber, *supra* note 47, at 179.

substantive outcome.[49]

Based on these and other alleged faults of federalism, many commentators over the past few decades have called for the abandonment of judicial application of the doctrine.[50] This recommendation is often based on the claim that judicial enforcement of federalism requires the interpretation of hopelessly vague provisions of the Constitution and, thus, runs the risk of judges undemocratically imposing upon society their merely personal policy preferences.[51] Other writers contend that the purposes of federalism are adequately protected by the structure of the national political process,[52] or even that federalism serves no important normative purpose at all, and hence is not deserving of protection.[53]

These indictments of federalism as a legal doctrine have not fallen on deaf ears. For over half a century, the concept has played no significant role in federal constitutional law.[54] With the exception of a single 1995 decision,[55] the Supreme Court has not held an act of Congress invalid as exceeding a constitutional grant of national power since 1937.[56] Furthermore, the Court's civil liberties jurisprudence during this same period dramatically curtailed the authority of sub-national governments to pursue a

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[49]Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 935 (1994); BOLICK, *supra* note 48, at 74.

[50]*See, e.g.*, Rubin and Feeley, *supra* note 49, at 909; Charles L. Black, Jr., *On Worrying About the Constitution*, 55 U. COLO. L. REV. 469 (1984).

[51]This was one of Justice Blackmun's primary arguments in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1984). *See* Blumstein, *supra* note 7, at 1287.

[52]The classic statement of this view is HERBERT WECHSLER, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, *in* PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 49 (1961). More recently, Jesse Choper has provided an extensive restatement of the view. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

[53]Rubin and Feeley, *supra* note 49, at 909.

[54]*See* Bruce LaPierre, *Political Accountability in the National Political Process — The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 585 (1985).

[55]Lopez v. United States, 115 S. Ct. 1624 (1995); *see infra* note 115 and accompanying text.

[56]This statement excludes the Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

variety of democratically-enacted public policies.[57]

This article contends that the demise of federalism as a legal doctrine is a result of the failure of both academic and judicial commentators to appreciate a number of important insights contained in a political account of communitarian theory. The neglect of these communitarian themes in contemporary constitutional discourse is somewhat ironic, since many of the themes figured prominently in the discussions surrounding the adoption of the Constitution and its earliest amendments. In fact, much of the structure of the American federal system can be traced to various concerns, held by many in the founding era, that mirror central aspects of modern communitarian thought. Reviewing these original arguments for American federalism illustrates why political communitarianism was and is particularly well-suited to our governmental system.

For those unconvinced (or simply unsatisfied) by such an originalist argument, however, an even stronger case for federalist community can be constructed based on certain social and political realities of contemporary American life. This argument emphasizes the need to accommodate the great diversity of normative views present in the nation and contends that communitarian federalism best accomplishes this objective. The next two sections outline each of these arguments.

### A. THE ORIGINAL PURPOSES OF FEDERALISM

Since the United States Constitution was written for a federal republic, its animating purpose is the allocation of power between national and state governments. In accomplishing this allocation, the document's framers recognized the need to permit jurisdictional variation on issues of public policy that lack a strong national consensus. At the same time, they were convinced that national uniformity of policy on other matters was crucial to the nation's success. They therefore constructed a system of government incorporating both of these principles.

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[57]*See, e.g.*, Engel v. Vitale, 370 U.S. 42 (1962) (prohibiting recital in public school of forty-two word non-denominational prayer); Roe v. Wade, 410 U.S. 113 (1973) (striking down bans on abortion in effect in most states); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (invalidating local ordinance prohibiting nude dancers in places of adult-only entertainment). *See generally* HENRY J. ABRAHAM, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES (5th ed. 1988).

### 1. POWERS OF THE NATIONAL GOVERNMENT

The delegates to the Philadelphia convention of 1787 gathered in order to fashion remedies to the serious weaknesses of government under the Articles of Confederation. They recognized that the primary defect of that system was a lack of centralized power to enact uniform national policy on issues which demanded such uniformity. Before the creation of a federal form of government, each state pursued those policies it believed to be in its interest, but the absence of coordination among the various governments often frustrated even the pursuit of ends shared by all. For example, during the Revolutionary War, the absence of an effective national taxing power seriously impaired the ability of the new nation to successfully conduct its military affairs.[58]

By 1787, however, it was not the issue of national defense which most concerned the delegates, but instead that of the national economy. The rapidly-growing nation was suffering from the chaos engendered by the widespread enactment of narrowly self-interested trade policies by the various state legislatures. Protective tariffs and retaliatory trade regulations were common.[59] The delegates recognized that in pursuing such policies, the states were actually harming their own interests by hindering the development of the national economy. The situation thus represented what today might be called a "collective action" problem:[60] legislatures in all of the states agreed on the importance of advancing economic prosperity, but due to the absence of any mechanism to enforce necessary constraints on self-interested behavior by individual states, the realization of that common end was frustrated.

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[58]*See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 262-64 (1985).

[59]Perhaps the most extreme illustration of the animosity between the states during this period was the reaction to the paper-money scheme adopted by Rhode Island in 1786. Faced with an overwhelming public debt, the state legislature issued a large amount of unsecured currency. When the value of the money fell to seven cents on the dollar, creditors in other states vociferously condemned the legislators of "Rogue's Island." *See* McDonald, *supra* note 58, at 175-76; *see also* GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th ed. 1991).

[60]In simplified terms, a collective action problem is a situation in which numerous actors each desire a benefit, but engage in strategic behavior in order to contribute as little as possible to the expense of producing that benefit. Because each actor knows that it will be able to fully enjoy the benefit when produced, regardless of the level of its contribution, there is little incentive to participate in the production. The provision of national defense is a classic example. *See* RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 49-80 (2d ed. 1980).

A great portion of the substantive authority granted by the Constitution to the national government is directed to this purpose of fostering commercial development. The powers to lay taxes and duties, to coin money, to grant patents, to regulate interstate and foreign commerce, and even to establish bankruptcy laws, are all intended to facilitate the centralized coordination necessary to maximize economic prosperity throughout a national polity. Those who drafted and ratified the Constitution thus clearly agreed that national uniformity in matters of economic regulation should be permitted.

A number of delegates to the convention believed that national uniformity of policy was desirable on other subjects as well. To this end, supporters of the "Virginia Plan" proposed that Congress be granted a general authority to legislate on any matter it deemed to be in the national interest and, further, that it be empowered to veto state legislation it viewed as contrary to that interest.[61] Delegates representing small states vigorously objected to these two proposals, fearing that such provisions would allow a majority of the national legislature to impose uniform policies on an objecting minority, especially since the plan also called for congressional representation to be based strictly on population. These opponents of plenary national power felt that under the two provisions of the Virginia Plan, uniform policies justified as ostensibly serving the "national interest" would in fact represent merely the particular interests of those able to muster a legislative majority in Congress. Due to these strong objections, the two proposals stood almost no chance of adoption and, therefore, did not receive further consideration.[62]

The fear of uniformity held by many Americans during the founding era was also exhibited in the debate over the need for a bill of rights. A major objection to the draft of the Constitution which was presented to the states for ratification was its failure to include affirmative limitations on the powers of the proposed government in order to safeguard individual rights. Ultimately, ratification by the requisite number of states was achieved only through the promise that the new Congress would immediately propose such a bill of rights.[63]

It may seem odd to speak of sentiment in favor of a bill of rights as *opposition* to uniformity, since the new amendments were designed to protect the rights of all individuals equally throughout the nation. It is, however, universally acknowledged that the Bill of Rights was originally intended to

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[61]MCDONALD, *supra* note 58, at 206.

[62]*Id.*

[63]Herbert J. Storing, *The Constitution and the Bill of Rights*, *in* TAKING THE CONSTITUTION SERIOUSLY 110 (Gary L. McDowell ed., 1981).

apply only to actions of the national government and not to the states.[64] Clearly, then, the real evil feared was the tyranny of national uniformity of policy, rather than simply broad governmental power over individuals, since the states still wielded such power even after the adoption of the Bill of Rights.

Indeed, as affirmative limitations on the powers of the national government, the provisions of the Bill of Rights are of a distinct conceptual character from the mass of provisions found in the body of the Constitution. Whereas provisions granting such powers as the regulation of commerce or the coining of money represent decisions against diversity of policy in these specific areas and in favor of national uniformity, the Bill of Rights provisions as applied to the national government embody precisely the opposite preference. Uniform national restrictions on freedom of speech or of the press, for example, were barred, but such regulations remained permissible when operative strictly within individual political subdivisions.

### 2. CONSTRAINTS ON SUB-NATIONAL LEVELS OF GOVERNMENT

In contrast to the provisions of the Bill of Rights, those amendments that by their own terms do apply to the states, such as the Thirteenth, Fourteenth, and Fifteenth, represent decisions against diversity and in favor of national uniformity of policy. Because these types of provisions concern actions that no level of government is allowed to pursue,[65] such as denying the right to vote because of a person's race, they require uniform national application.

The process by which such constitutional amendments are adopted in the United States corresponds perfectly with the theory of political communitarianism that this article contends is embodied in the American federal system. To restate the fundamental premise, communitarian federalism operates to allow jurisdictional variation in matters of public policy on which no clear national consensus exists. By contrast, for an amendment to be adopted, there must be significant national consensus on an issue: two-thirds of the members of both houses of Congress must approve it, after which a majority of the members in three-fourths of the nation's state legislatures must consent. The process thus works to insure that the objectives of a federal system are met; those issues on which uniformity of opinion is high are allowed to be resolved on a nationwide basis, while those issues exhibiting significant divergence of opinion are reserved for

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[64]*See* ABRAHAM, *supra* note 57, at 38-41.

[65]Although by their own terms these provisions do not explicitly apply to the national government, their limitations exist implicitly in the enumerated powers doctrine, effectively constraining national authority as well.

jurisdictional variation.

Although the amendment process generally reinforces communitarian federalism in this manner, one prominent exception to this rule has been the Fourteenth Amendment. Because that amendment is phrased in such broad and ambiguous terms, determining the precise issues on which it requires nationwide uniformity has been a difficult and controversial task. The "privileges or immunities of citizens" that no state is allowed to abridge could be interpreted to mean almost anything,[66] and, through the notion of substantive due process, the word "liberty" has been applied to the pursuit of activities ranging from contraceptive use to flag-burning.[67]

Such ambiguous phraseology and the expansive judicial interpretations it produces undermine the purposes of both the constitutional amendment process and the federal structure of American government. Since federalism operates to permit jurisdictional diversity of public policy on matters lacking a strong national consensus, the adoption of a constitutional amendment imposing uniform nationwide policy should serve to identify specific issues on which such a consensus exists. Application of the Fourteenth Amendment by the federal courts to an unspecified and seemingly unlimited range of governmental policies instead threatens to completely eviscerate the presumption in favor of jurisdictional diversity embodied in our federal system.[68]

Perhaps this is, in fact, what the Fourteenth Amendment was intended to do. Having just emerged from the most traumatic and destructive period in the nation's history, the Amendment's framers may have so strongly desired to dramatically curtail the powers of the states that they were willing to abandon the fundamental project of American federalism. Or perhaps the framers may not have considered fully the potential implications of their choice of words, knowing only that they wanted to move away from the notion of state sovereignty; the framers may merely have assumed that people would know what they meant, even if they themselves were unable to specify it more precisely. Or they may simply have intended to declare, in the strongest possible language, that states were forbidden from denying

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[66]*See* Slaughterhouse Cases, 83 U.S (16 Wall.) 36 (1873).

[67]Griswold v. Connecticut, 381 U.S. 479 (1965) (holding the use of contraceptives to be a constitutionally guaranteed right); Texas v. Johnson, 491 U.S. 397 (1989) (holding flag-burning to be a form of expression protected by the First Amendment).

[68]*See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

rights, privileges, or protection to anyone on the basis of racial identity.[69]

It is impossible in the late twentieth-century to definitively resolve these questions surrounding the adoption of the Fourteenth Amendment. Many interpretations of the provision are plausible, each supported by strong arguments.[70] Since we are stuck with the language of the Amendment, we must learn to live with it, and to interpret it as effectively as possible, just as we have struggled to apply the congressional commerce power to modern needs. The crucial question for modern constitutional law with regard to the Fourteenth Amendment is thus the following: which interpretation of the Amendment best accords with the realities of contemporary political and social life in America, and with the processes through which our federal constitutional system is governed? The argument of the next section attempts to demonstrate that the principles of communitarian federalism that motivated the original design of the American system of government are even more crucial for modern constitutional interpretation than they were in earlier eras.

### B. COMMUNITARIANISM AND FEDERALISM TODAY

The idea of communitarian federalism is an essential principle of political and institutional organization in modern constitutional law due to the ineliminable diversity of ideological perspectives held by American citizens. Because many of these normative conceptions are fundamentally incompatible, not only as moral doctrines, but also as political prescriptions, the best, and possibly the only, way to accommodate this diversity is through the operation of federalism.

Commentators in many disciplines have noted the wide range of moral views present in contemporary American society. For example, John Rawls has indicated that his most recent work was motivated by the fact that American citizens are "profoundly divided by reasonable religious, philosophical, and moral doctrines."[71] Sociologist James Davison Hunter has extensively documented the intractable ideological differences Americans have on such issues as abortion, pornography, homosexuality, and religious instruction in public schools.[72]

Americans are not only diverse, they are also at odds. Many people's moral conceptions are incompatible with those held by others. For example,

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[69]*Id.* at 18.

[70]*See* ELY, *supra* note 36, at 25 (concluding that "this is an argument no one can win").

[71]RAWLS, POLITICAL LIBERALSIM, *supra* note 30, at xix.

[72]HUNTER, *supra* note 35.

some view gambling or prostitution as moral evils, while others see these activities as entirely appropriate. Conceptions of political morality also exhibit this irreconcilability: some citizens are of the view that the state should remain as neutral as possible with regard to moral ideals, while others believe that the state may legitimately shape character and promote the moral ends of its citizens.[73]

These numerous philosophical differences are manifested in a variety of ways in contemporary American society. One primary method is through public discourse. Statements expounding an enormous variety of moral perspectives can be encountered daily through the print or electronic media. Citizens also express their ideological diversity by joining associations, in which they can enjoy the advantages of pursuing their particular moral conceptions in concert with other like-minded individuals.[74]

For most of American history this variety of moral perspectives has also been exhibited through governmental policy. Different jurisdictions have employed state power to varying degrees and for various reasons, based on the content of their citizens' normative views.[75] Only in recent decades has the judiciary undertaken to significantly curtail this practice, as the federal courts have increasingly interpreted the United States Constitution to impose requirements of national uniformity in many areas of substantive policy. At the same time, the legislative and executive branches of the national government have greatly expanded the scope of issues on which they attempt to set policy for the nation as a whole.[76] These shifts toward uniformity have often been effected despite the persistence of fundamental and widespread disagreement within the nation on the specific issues addressed. As a result, large numbers of citizens have been asked to submit to what they view as objectionable governmental policies, regardless of the

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[73]This dichotomy captures a central difference between liberal and communitarian politics. Liberals typically place paramount importance on individual self-determination, while communitarians are generally more concerned with the coherence of certain social or political relations. *See* JEREMY WALDRON, *Legislation and Moral Neutrality*, *in* LIBERAL RIGHTS: COLLECTED PAPERS, 1981-1991 at 143, 164-67 (1993).

[74]*See* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

[75]*See supra* note 64 and accompanying text.

[76]H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 681 (1993).

jurisdiction in which they live.[77]

Such uniform national policies, whether embodied in legislation or judicial interpretation, are often criticized by their opponents as lacking a constitutional justification. For example, opponents may argue that a certain law exceeds Congress's power or that a restriction imposed on the states by a Supreme Court ruling is not mandated by a certain constitutional provision. Frequently, however, these professed critics of uniformity have no objections to the establishment of national policy when it better serves their particular ideological ends.[78] Thus, the importance of federalism often seems to "depend on whose ox is being gored."[79]

Given America's ideological diversity, a more principled approach to questions of national power must be adopted. As this article argues, that approach is found in communitarian federalism. Allowing political subdivisions within the nation to pursue a variety of public policies according to the moral conceptions held by their citizens offers at least two distinct advantages over currently prevailing modes of constitutional interpretation: 1) it more fully accommodates the diversity of ideological views in American society by sanctioning jurisdictional variation in the democratic expression of such views; and 2) it discourages the use of national political processes and institutions to impose particular ideological views on those who do not subscribe to them.

The employment of this jurisprudence of federalism would foster the crucial modern values of tolerance, diversity, and pluralism. Such a jurisprudence would allow a variety of resolutions to controversial issues over which reasonable Americans can and do disagree. A federalist conception of judicial review would also strengthen the democratic foundations of the American constitutional system by affording citizens greater influence over the establishment of local governmental policy, while still allowing the adoption and enforcement of uniform national norms upon which there is significant ideological harmony.

To illustrate how these objectives could be accomplished, consider the example of Fourteenth Amendment interpretation raised in the previous section. The ideological diversity of the American citizenry makes it impossible to achieve any significant consensus on the application of the Fourteenth Amendment to a broad range of governmental policies. Attempts to identify the "true meaning" of the amendment as applied to specific acts

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[77]*See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (striking down laws in effect in 48 states prohibiting desecration of the American flag).

[78]*See* BOLICK, *supra* note 48, at 79-91 (labeling this phenomenon "situational federalism"); *see also infra* text accompanying notes 120-24.

[79]Al Smith, *quoted in* ABRAHAM, *supra* note 57, at 9.

of government are therefore bound to be viewed as the expression of mere preferences for certain ideological positions, whether conservative or liberal. If instead Fourteenth Amendment jurisprudence were confined to those government policies that all agree the Amendment was intended to address, such as racial discrimination, the partisan nature of constitutional litigation could be reduced. In turn, the rapidly-disintegrating public perception of federal judges as impartial decisionmakers could be significantly enhanced. Such a neutral conception of federalism would also contribute to social and political stability in the nation, as those subscribing to distinct normative values and ideological preferences would be able to join with other like-minded citizens. Instead of having their goals frustrated by a federal court's declaration that their ideas of sound public policy are constitutionally impermissible, these citizens would be able to embody their distinct views in the laws of a particular jurisdiction.

Far from having been rendered obsolete by changed circumstances, then, federalism, because of the great transformations the country has experienced, is in many respects more important in the modern era than ever before. While most criticisms of federalism focus on the extensive economic and commercial evolution that has occurred since the birth of the Republic,[80] it is clear that the nation has also undergone profound social changes that have significantly affected people's views on a variety of political questions, such as the appropriate objects of governmental authority. In contrast to the evolution in the economic realm, this social transformation has increased diversity in American life, multiplying rather than removing our differences, rendering us in many ways a less (rather than a more) homogeneous people. We are, therefore, in a way that our nation's founders anticipated but to an extent they probably could not have imagined, vitally in need of federalism to both sanction and confine the expression of our ideological diversity.

Furthermore, a properly-conceived legal doctrine of federalism need pose no obstacles to the realization of important national policy objectives through the use of congressional and administrative authority. For example, the American economy is unalterably national in scope, and maximizing its efficiency frequently requires uniform, centralized regulation. As recounted in the previous section, this modern need for economic centralization was becoming apparent even in the late eighteenth-century, as the drafters of the Constitution sought to remedy a fatal weakness of the Articles of Confederation by granting to the proposed Congress the power to regulate

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[80] *See supra* note 47 and accompanying text.

interstate and international trade.[81] Although contemporary national economic regulation is undoubtedly more expansive than that originally contemplated by those who ratified the Constitution, such regulation rarely impinges on normative values of federalism, since, for all our philosophical differences, material prosperity is an end almost all segments of society share.

Finally, an added virtue of a communitarian account of legal federalism in contemporary constitutional law is that it prevents the notion of federalism from being employed in an instrumental or opportunistic manner. Communitarian federalism is a second-order principle of political and social organization, which is necessarily neutral as to any particular first-order, or substantive, policy prescriptions. The doctrine stands only for the proposition that jurisdictional subdivisions of a polity be allowed to pursue certain ends shared in common by their members when those ends differ from the ends held by members of other jurisdictions. Indeed, consistent enforcement of such a neutral conception of federalism would eliminate opportunistic invocations of the doctrine by those on all sides of controversial policy debates.

Ultimately, the application of communitarian federalism in contemporary American judicial review requires that policies of the national government and those of its political subdivisions be held to different standards of constitutional scrutiny. Uniform national policies should be permitted when authorized by a power granted in the Constitution to the national government. The rationale for permitting national policy in such areas is that the presence of a constitutionally authorized power indicates a high level of consensus in the nation as a whole on the ends for which the power has been granted. The establishment of national policy on matters not explicitly assigned to the national government, however, should be precluded, in order that separate jurisdictions may pursue divergent ends according to the normative values shared by their citizens, subject only to the constraints imposed by the Constitution on sub-national levels of government.

## IV. THE JUDICIAL NEGLECT OF FEDERALISM

Federalism is a concept that has been neither seriously nor consistently applied by the federal courts at any time during this century.[82] This may seem odd in light of this article's contention that a conception of communitarian federalism offers significant advantages for American public

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[81] *See supra* note 59 and accompanying text.

[82] *See infra* notes 96-100; LaPierre, *supra* note 54, at 585.

policy. This final section will review the process by which the American judiciary came to neglect federalism as a legal doctrine and attempt to catalog the deleterious effects of this occurrence. Specifically, it will be argued that the disappearance of federalism from constitutional interpretation is directly attributable to two particular developments in United States Supreme Court jurisprudence over the past century. These developments, discussed respectively in parts A and B below, not only led the courts to neglect federalism, but also obscured the costs of their doing so. As the nation grows ever more ideologically diverse, these costs are becoming more and more evident.

Modern constitutional law has been widely viewed as operating under a "double standard," affording great deference to governmental economic regulation, but imposing much more stringent constraints on policies that restrict civil rights and liberties.[83] The doctrinal development of each prong of this double standard holds important keys to understanding the judicial abandonment of federalism. In fact, over the past century, constitutional jurisprudence has emphasized this distinction between economic regulation and restrictions on civil liberties at the cost of ignoring another double standard built into the structure of the Constitution; that is, the requirement that different degrees of judicial deference be afforded to policies of national and sub-national levels of government.

### A. GOVERNMENT REGULATION OF THE ECONOMY

As noted in Section III, the most important task facing the delegates to the Philadelphia convention of 1787 was to take measures to improve the poor condition of interstate and international commerce occasioned by the Articles of Confederation. Discriminatory trade policies enacted by the states against each other, as well as the absence of a uniform foreign trade policy, threatened to throttle the economic development of the new nation in its infancy.[84]

The earliest judicial interpretations of the Constitution's delegation to Congress of power to regulate commerce reflected an acknowledgement of

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[83]For example, economic regulations will usually be upheld upon a simple finding that they are "reasonable." By contrast, restrictions on individual liberty are subject to "strict" or "heightened" scrutiny and must, therefore, be supported by a "compelling" or "substantial" state interest. *See* GUNTHER, *supra* note 59, at 462; ABRAHAM, *supra* note 57, at 11-37.

[84]*See supra* text accompanying note 59.

this fundamental motivation for the establishment of a national government.[85] In fact, for approximately one full century following the ratification of the Constitution, the Supreme Court consistently deferred to congressional action regulating the national economy, rejecting claims that such action invaded areas of sovereignty reserved to the states.

During this same period, the Court also allowed virtually unlimited regulation by states and localities of their own internal economies. The only notable exception to this pattern was the restraint occasionally imposed under the authority of the Constitution's Contracts Clause.[86] Except for this specific provision barring certain forms of contractual impairment, the Court found no constitutional impediments to the exercise of the plenary legislative authority possessed by states and their political subdivisions.

After approximately a century of such deference to economic regulation by all levels of government, however, the Court reversed course and began to impose significant constraints on both national and local commercial legislation.[87] The occasion for this dramatic shift was the embrace by many justices of a certain laissez-faire economic philosophy, which viewed commercial regulation by government as an unnecessary obstacle to the efficiency of markets and an unwarranted infringement on individual liberty. Due to the nature of the Constitution, this ideological vision was implemented through two separate modes of judicial analysis. With respect to national power, the Court invalidated numerous attempts at economic regulation as exceeding Congress's constitutional authority to regulate interstate commerce.[88] As to state and local economic measures, the justices had to look elsewhere for a justification of their activism, and so they turned to the recently-adopted Fourteenth Amendment, holding numerous

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[85]*See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[86]*See, e.g.*, Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (holding that effort by New Hampshire legislature to modify the college charter violated the Contracts Clause).

[87]*See* Allgeyer v. Louisiana, 105 U.S. 578 (1897) (holding that state law prohibiting the obtaining of insurance from an out-of-state corporation violates the "liberty of contract"); Lochner v. New York, 198 U.S. 45 (1905) (invalidating New York law prohibiting the employment of bakery employees for more than 10 hours a day or 60 hours a week); Adair v. United States, 208 U.S. 161 (1908) (striking down federal law against "yellow dog" contracts on interstate railroads); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating state law similar to that in *Adair*).

[88]*See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down federal law regulating the poultry industry in New York City).

acts of commercial regulation to be unconstitutional deprivations of "liberty."[89]

Although the judicial activism of this "*Lochner* era"[90] jurisprudence was couched in two separate modes of legal analysis, it was motivated by the single ideological doctrine of laissez-faire economic philosophy.[91] This fact had tremendous implications for the evolution of constitutional law once the folly of the Court's ways was finally recognized in the 1930s. Since the Court had been engaged for nearly fifty years in invalidating a variety of economic regulations enacted by both national and sub-national levels of government, the abandonment of the discredited economic philosophy now dictated deference to such measures on both levels as well. While this doctrinal result was entirely appropriate, given the broad powers of economic regulation possessed by both Congress and the states, it contributed to a perception that constraints on governmental action are unitary in nature, implying that what is prohibited of one government is necessarily prohibited of all. Thus, rather than reinforcing the two separate conclusions that 1) Congress has broad authority under the commerce power to regulate the national economy, and 2) the states have similar authority due to their plenary legislative powers, post-1937 review of commercial legislation instead merely gave the impression that government in general was permitted to regulate broadly on economic matters.[92]

Such a unitary conception of governmental power, and the constraints on that power, was of little consequence when applied to economic regulation, since the authority of both levels of government in the economic realm is so similar. Nonetheless, the impression created by this economic half of the double standard was reflected inversely in the jurisprudence of its civil libertarian counterpart, effecting an enormous revolution in the system of American federalism.

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[89]*See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (holding that "liberty of contract" precludes government regulation of employees' wages and hours).

[90]The name originates from *Lochner*, 198 U.S. 45, which typified the Supreme Court's hostility to commercial regulation during this period.

[91]As enunciated in *Lochner*, this philosophy was grounded in "the general right [of an individual] to make a contract in relation to his business," which right was "part of the liberty of the individual protected by the Fourteenth Amendment." *Id.* at 49.

[92]*See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (holding that legislation affecting ordinary commercial transactions is presumed to be constitutional).

### B. GOVERNMENT REGULATION OF CIVIL LIBERTIES

The Bill of Rights originally operated to restrict action by the national government only. For approximately the first century of the nation's existence, the only federal constitutional constraints on the authority of state and local governments were found in the body of the Constitution, in such provisions as the Contracts Clause.[93]

Even for an extended period following the adoption of the Fourteenth Amendment, the Federal Constitution continued to impose few restraints on state action in the non-economic or "civil liberties" realm, due to narrow interpretations of that Amendment by the Supreme Court.[94] During this period, then, the Court in effect operated under the opposite of its modern double standard, invalidating many economic measures but sustaining legislation of other types.[95]

It was not until the third decade of the twentieth century that the Court began to read any significant limitations on state action into the Constitution in the interests of protecting civil liberties. The vehicle by which the Court began to effect this change was the doctrine of "incorporation," by which individual provisions of the Bill of Rights were applied to prohibit state as well as federal action.[96]

It is significant that the first case to explicitly sanction the direct application of the Bill of Rights to the states, Gitlow v. New York,[97] involved a prosecution for allegedly subversive speech. Espionage and syndicalism laws similar to the one at issue in *Gitlow* had also been enacted on numerous occasions by Congress, and such congressional measures had recently received extensive Supreme Court review under the First Amendment.[98] The Court in *Gitlow* stated in dicta that "freedom of speech and of the press — which are protected by the First Amendment from

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[93]These types of provisions are located primarily in Article I, Section 10 of the Federal Constitution.

[94]*See, e.g.*, Slaughterhouse Cases, 83 U.S (16 Wall.) 36 (1873).

[95]*See supra* notes 87-91.

[96]Through a process that has come to be known as "selective incorporation" the Court between 1925 and 1970 applied nearly all of the major provisions of the Bill of Rights to state action. *See* ABRAHAM, *supra* note 57, at 38-60.

[97]268 U.S. 652 (1925).

[98]Schenck v. United States, 249 U.S. 47 (1919) (upholding the Federal Espionage Act of 1917); Abrams v. United States, 250 U.S. 616 (1919) (sustaining the Sedition Act of 1918).

abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment from impairment by the States."[99] The Court then proceeded to apply the same sort of First Amendment analysis it had employed in earlier cases involving acts of Congress to this case involving a New York criminal anarchy statute and, by so doing, reached the same disposition it had reached in those cases.[100] *Gitlow* thus marked the birth of the unitary conception of governmental power embodied in the modern double standard of constitutional interpretation: whatever is allowed or prohibited of Congress is also allowed or prohibited of the states.

The modern jurisprudence of the double standard fosters this unitary conception of political power because it embraces a topical rather than a jurisdictional categorization of governmental activity. At any level of government, the regulation of economic matters is presumed to be constitutionally legitimate, while public policy that concerns civil rights and liberties is presumed to be constitutionally suspect. This failure to consider at the outset of any alleged constitutional controversy the institutional origin of the governmental policy at issue has two potentially damaging effects upon the American system of government.

First, holding the actions of national and sub-national levels of government to the same standard of constitutional review threatens to dangerously enlarge national powers. When civil libertarian concepts such as "strict scrutiny"[101] and "fundamental rights"[102] completely supplant doctrines of federalism in constitutional analysis, as they largely have for more than half a century, important constitutional constraints on Congress and the national executive are forgotten. A rule against judicially enforcing constraints of federalism, advocated by many contemporary commentators,[103] would allow Congress to legislate on any matter that the currently-prevailing civil liberties jurisprudence allows states to address. Thus, for example, Congress might attempt to prohibit nude dancing,[104] or

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[99]268 U.S. at 666.

[100]*Id.* at 669.

[101]*See supra* note 83.

[102]*See supra* note 83.

[103]Rubin and Feeley, *supra* note 49, at 909; Black, *supra* note 50, at 469.

[104]Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (upholding state ban on nude dancing).

require clear evidence of a patient's consent in order to terminate artificial life-support,[105] or establish permissible alcohol-content levels for beverages,[106] or mandate parental notification for minors seeking abortions,[107] or ban acts of sodomy.[108] Each of these governmental policies has been upheld by the Supreme Court when enacted by state and local governments, and only principles of federalism prevent Congress from enacting similar legislation. The popular argument that issues of federalism should be addressed through the national political process, rather than through judicial review,[109] would allow any of these policies to be implemented on a national basis by merely obtaining the support of a majority of Congress and a politically sympathetic president.[110]

Such concerns should not be dismissed as unrealistic. Congress has a long and distinguished history of attempting to exercise general police powers. It has, at various times, prohibited interstate traffic in lottery tickets, slot machines, prostitution, pornography, and products of child labor.[111] Due to perceived constraints of federalism, Congress has historically limited the application of such laws to the pursuit of these various activities through the channels of interstate commerce, but it is clear that the goal of such legislation is the prohibition of the activities themselves. Refusing to judicially enforce federalism "as a constraint on national policy,"[112] as many commentators have urged, would finally provide

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[105]Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) (upholding state right-to-die regulation).

[106]Craig v. Boren, 429 U.S. 190 (1976) (invalidating alcohol-content regulation only because it applied solely to men).

[107]Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (upholding state parental notification requirement).

[108]Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding state ban on homosexual sodomy).

[109]*See* Wechsler, *supra* note 52; CHOPER, *supra* note 52.

[110]*See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*, 88 COLUM. L. REV. 1, 17-19 (1988).

[111]*See* Champion v. Ames, 188 U.S. 321 (1903) (lottery tickets); United States v. Five Gambling Devices, 346 U.S. 441 (1953) (slot machines); Hoke v. United States, 227 U.S. 308 (1913) (prostitution); Hammer v. Dagenhart, 247 U.S. 251 (1918) (products of child labor); United States v. Popper, 98 F. 423 (N.D. Cal. 1899) (pornography).

[112]Rubin and Feeley, *supra* note 49, at 951.

Congress with a prime opportunity to embody the moral views of a majority of its members in uniform national regulations, operative directly on individuals. In light of recent electoral changes in the composition of Congress, such concerns may be even more realistic.[113] Thus, although a prominent authority on constitutional law[114] predicts that "liberals [will] find dismaying" the "structural limits" on congressional power imposed recently in *Lopez v. United States*,[115] such limits may instead provide an important security against paternalistic national legislation.

Second, basing constitutional interpretation on the unitary conception of government characteristic of modern civil liberties jurisprudence unduly restricts the powers of sub-national political jurisdictions. Given the broad ideological diversity of American citizens, there are bound to be many reasonable disagreements over the appropriate scope of government regulation of individual conduct. Seizing on any one particular ideological conception, whether conservative or liberal, and attempting to enforce it as a uniform nationwide constraint on governmental action in all jurisdictions is both unwise and unfair. Allowing separate jurisdictions to enact a variety of policies on topics that have not been the subject of a specific federal constitutional mandate indicating broad popular consensus would better promote social and political stability and foster respect for values of tolerance, diversity, and pluralism.

### C. FEDERALISM AS A LEGAL DOCTRINE

A legal doctrine of federalism should enforce the presumptions embodied in the United States Constitution that the national government possesses only those powers specifically granted to it, while the states enjoy plenary legislative power, subject only to specifically enumerated constraints. As a general principle, then, in reviewing acts of Congress, the Supreme Court should maintain a presumption against their constitutionality and require the government to prove that particular measures are within a

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[113]*See, e.g.*, Jerry Gray, *House Acts to Ban Abortion Method, Making It a Crime*, N.Y. TIMES, Nov. 2, 1995, at A1, B13 (describing unprecedented congressional vote in favor of a national prohibition on a particular late-term abortion procedure and noting that members of Congress justified the measure on Commerce Clause grounds).

[114]Laurence H. Tribe, *quoted in* Joan Biskupic, *Ban on Guns Near Schools Is Rejected*, WASH. POST, Apr. 27, 1995, at A3, A6.

[115]115 S. Ct. 1624 (1995) (striking down federal law prohibiting the possession of a firearm within 1000 feet of a school, on grounds that the law exceeded Congress's power under the Commerce Clause).

constitutionally delegated power. Conversely, in considering state and local policies, the Court should presume their constitutionality and require litigants challenging them to demonstrate that they fall within a specific constitutional prohibition.

To illustrate how these principles would operate in practice, consider the laws against flag-burning recently invalidated by the Supreme Court. Employing federalism as a legal doctrine, the Court would have maintained presumptions against the constitutionality of the congressional measure in *United States v. Eichman*,[116] and in favor of the validity of the state statute in *Texas v. Johnson*.[117] As a result, rather than discussing as it did the intricacies of First Amendment doctrine, such as whether flag-burning is "expressive conduct" or has "communicative impact,"[118] the *Eichman* Court would have instead focused on whether the law was within a constitutionally delegated power of Congress. By contrast, in *Johnson*, the Court would have presumed power on the part of the Texas legislature to enact the law and then proceeded to inquire whether the Fourteenth Amendment prohibited this particular use of that power. In making these determinations, the Court would have given due consideration to the Constitution's fundamental preference for jurisdictional diversity and hostility to nationwide uniformity and, thus, would have likely sustained the Texas law and invalidated the congressional measure.

While this conception of conducting judicial review according to two different jurisdictional standards may seem odd to those versed in contemporary constitutional doctrine, it was viewed as quite natural and logical prior to the revolution effected in Supreme Court jurisprudence by the modern economic/non-economic double standard. For example, Justice Holmes commented in *Gitlow* that the principle of free speech, as applied to state and local laws, should be given "a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."[119] The source of many politically-charged controversies of modern constitutional law can be traced to an ill-founded attempt to subject state and local governments to the same stringent constraints originally developed to guard against uniform national legislation.

Furthermore, the application of communitarian federalism would allow

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[116]496 U.S. 310 (1990) (striking down federal ban on flag-burning as an attempt to suppress expression).

[117]491 U.S. 397 (1989) (invalidating state ban on flag-burning).

[118]*Eichman*, 496 U.S. at 317, 320.

[119]Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

judicial review to be conducted in a more principled, consistent manner. As a neutral conception for ordering social and political life, communitarian federalism neither advances nor inhibits any particular ideological views or policies.[120] Most of the opposition to federalism voiced by contemporary commentators is a result of the doctrine having been employed in an inconsistent, opportunistic fashion for partisan purposes. Judges, as well as citizens, of all ideological persuasions must respect the right of their philosophical opponents to embody their views in the public policy of their particular jurisdictions. For example, in *Dolan v. City of Tigard*[121] Chief Justice Rehnquist refused to allow a municipality to condition its approval of a building permit on the landowner's conveyance of a portion of the land to the city for construction of a sidewalk and greenway.[122] Chief Justice Rehnquist should have been willing to afford the city the same latitude to establish land-use policy that he granted the state of Indiana to prohibit nude dancing[123] and the state of Texas to ban flag burning.[124]

The neglect of federalism as a legal doctrine thus not only threatens to dangerously enlarge national powers, it also stifles the ability of sub-national jurisdictions to express the political norms of their citizens in their respective public policies. The acknowledgement and application of the principles of communitarian federalism in contemporary judicial review offers a mechanism to significantly alleviate these detrimental effects.

## V. CONCLUSION

Although both communitarianism and federalism have attracted much criticism in recent years, few of their defenders have explored the connections between the two doctrines. The liberal philosophies and policies criticized by communitarians have played a major role in the demise of federalism as a legal doctrine in the United States. The insights offered by

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[120]Admittedly, the doctrine is not neutral toward any ideology that refuses to tolerate the existence elsewhere of communities holding views opposed to its own.

[121]114 S. Ct. 2309 (1994).

[122]*Id.* at 2322.

[123]Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (upholding state ban on nude dancing).

[124]Texas v. Johnson, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting) (arguing that flag-burning is not expression protected by the First Amendment).

communitarianism promise to bolster the case for a robust application of federalism in American law.

Similarly, doctrines of federalism can help communitarian theorists respond to their liberal critics. The concept of political communitarianism provides a mechanism by which the policy norms of a governmental subdivision can be identified, expressed, and developed. Furthermore, the jurisdictional variation encouraged by traditional American federalism adds much to communitarian thought, making possible a dynamic conception of community with numerous focal points of democratic activity.