South Carolina Law Review

Volume 72 | Issue 1 Article 6

Fall 2020

Faint-Hearted Federalism: The Role of State Autonomy in Conservative Constitutional Jurisprudence

Earl M. Maltz
Rutgers School of Law

FAINT-HEARTED FEDERALISM: THE ROLE OF STATE AUTONOMY IN CONSERVATIVE CONSTITUTIONAL JURISPRUDENCE

Earl M. Maltz

I. INTRODUCTION

In recent years, the Supreme Court has become increasingly aggressive in its efforts to protect the autonomy of state governments from what the conservative members of the Court have characterized as inappropriate intrusions by Congress. Under the leadership of Chief Justices William Rehnquist and John Roberts, the Court has developed a number of different doctrines that have been used both to protect the structural integrity of state governments and to preserve the ability of those governments to make important policy decisions without congressional interference.[1] The casualties of the Court's newfound assertiveness in this area include parts of federal

1. *See, e.g.*, *infra* note 22 and accompanying text; Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018).

statutes designed to deal with issues ranging from civil rights,[2] health care,[3] the regulation of sports gambling,[4] and the protection of the environment.[5]

However, the conservative justices[6] who have been the most vociferous in defending state autonomy against congressional intrusion have shown far less concern for preserving the structure of the federal system when reviewing state government action. Like Congress, the Supreme Court is an institution of the federal government. Thus, when the Court strikes down a state statute, it imposes a federal rule that by definition limits the policy options available to state governments in much the same way as statutes adopted by Congress constrain those options. Nonetheless, in cases dealing with constitutional claims that implicate other values conservatives hold dear, the same justices that frequently invoke the concept of federalism to invalidate congressional statutes have often dismissed the relevance of federalism-related concerns almost out of hand.[7]

This article will contrast the conservative justices' eagerness to limit the powers of Congress in the name of preserving state autonomy with their willingness to ignore or downplay the same concerns when considering the merits of arguments that state government actions are unconstitutional. The article begins by briefly discussing the reasons that state autonomy is valued within our federal system. The article then describes conservative justices' efforts to protect state governments from congressional action and juxtaposes those efforts with the conservative justices' decisions that impose significant constraints on state governments with little or no concern for the impact those decisions may have on state autonomy.

---

2. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013) (invalidating the preclearance requirement within the Voting Rights Act); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (determining that states are not subject to the Religious Freedom Restoration Act of 1993).

3. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (prohibiting the federal government from penalizing states that failed to comply with the Patient Protection and Affordable Care Act).

4. *See, e.g.*, *Murphy*, 138 U.S. at 1485–85 (determining the federal government cannot prohibit states from authorizing sports gambling).

5. *See, e.g.*, New York v. United States, 505 U.S. 144, 177 (1992) (invalidating the take title provision of the Low-Level Radioactive Waste Policy Act).

6. For purposes of this essay, the term "conservative justices" refers to Chief Justices Warren Burger, William Rehnquist, and John Roberts as well as Justices Lewis Powell, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh.

7. *See infra* notes 64–79 and accompanying text.

II. THE VIRTUES OF STATE AUTONOMY

The idea that state governments should enjoy a substantial degree of autonomy is a central tenet of the American constitutional system. For example, in *The Federalist Papers*, James Madison famously declared that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined[while] [t]hose which are to remain in the State governments are numerous and indefinite."[8] In addition, he noted that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[9]

Although the amendments adopted after the Civil War were designed to enhance the federal government's authority, those who drafted the Reconstruction amendments were also committed to the idea that the states should retain a substantial degree of autonomy.[10] For example, a precursor to Section One of the Fourteenth Amendment was defeated largely because a number of mainstream Republicans believed that the proposal would have unduly expanded the powers of the federal government and "utterly obliterate[d] State rights and State authority over their own internal affairs."[11] Additionally, a formulation of the Fifteenth Amendment that would have provided broader constitutional protection for voting rights was rejected in part because some Republicans complained that, if adopted the proposed language would have "overthrow[n] and uproot[ed] the very foundations of the State constitutions."[12] Against this background, Chief Justice Salmon P. Chase insisted in 1868 that "it may be not unreasonably said, that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the National government."[13]

While Chief Justice Chase may well have based his assumption on a formal conception of the nature of the Constitution's governmental structure, a number of commentators have argued that respect for state autonomy has a

8. THE FEDERALIST NO. 45 (James Madison).

9. *Id.*

10. *See* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 57 (1990).

11. *Debate in the Senate on the Concurrent Resolutions*, N.Y. TIMES, Feb. 28, 1866, at 1; *see* MALTZ, *supra* note 10, at 56–57.

12. CONG. GLOBE, 40th Cong., 3d Sess. 1037 (1869); *see also* CONG. GLOBE, 40th Cong., 3d Sess. 1034 (1869) (statement of Sen. Roscoe Conkling) ("Had the Senator considered how far this may revolutionize and undo the constitutions, the enactments, and the customs of the States?").

13. Texas v. White, 74 U.S. 700, 725 (1868).

variety of practical virtues as well.[14] For example, Michael W. McConnell has observed that:

> The first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes, while a national government must take a uniform—and hence less desirable—approach. So long as preferences for government policies are unevenly distributed among the various localities, more people can be satisfied by decentralized decision making than by a single national authority.[15]

McConnell also noted that "federalism has been thought to advance the public good [so] that state and local governmental units will have greater opportunity and incentive to pioneer useful changes. A consolidated national government has all the drawbacks of a monopoly: it stifles choice and lacks the goad of competition."[16] Sounding a similar note in his dissent in *New State Ice Co. v. Liebmann*, Justice Louis Brandeis invoked what has become known as the concept of "experimental federalism," famously asserting that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[17] Arguments like these provided the backdrop for disputes that arose over the significance of state autonomy in the evolution of constitutional law during the late twentieth and early twenty-first centuries.[18]

III. THE FALL AND RISE OF STATE AUTONOMY AS A CONSTITUTIONAL VALUE

The Supreme Court's treatment of federalism-related issues has undergone a dramatic transformation in recent years. During the final years of the Warren era, commentators might have been forgiven if they assumed constitutional protection for state autonomy was a relic of a bygone era. For example, cases such as *United States v. Darby*, *Wickard v. Filburn*, *Katzenbach v. McClung*, and *Maryland v. Wirtz* seemed to have established the principle that Congress possessed sweeping authority to regulate both private activity generally and working conditions for state and local

14. *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Framers Design*, 54 U. CHI. L. REV. 1484, 1493 (1987).

15. *Id.*

16. *Id.* at 1498.

17. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* J. Harvie Wilkinson, *Justice John M. Harlan and the Value of Federalism*, 57 VA. L. REV. 1185, 1193 (1971) (invoking the term "experimental federalism" as a theory of Brandeis).

18. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 581 (1995).

employees in particular.[19] Similarly, in a group of decisions including *South Carolina v. Katzenbach* and *Katzenbach v. Morgan*, the Court held that Congress also had broad power to control the electoral process by which voters chose both federal and state government officials.[20]

However, as conservative justices joined the Court in increasing numbers during the post-Warren era, they brought with them a vastly different attitude regarding the scope of the powers that the Constitution grants to the federal government. As early as 1970, the influence of newly-appointed conservatives was felt in *Oregon v. Mitchell*, where, for the first time in decades, the Court relied on the doctrine of enumerated powers to hold that Congress lacked the authority to set a minimum age for voters in state and local elections.[21] Six years later, the defenders of state autonomy won another important victory in *National League of Cities v. Usery*, wherein the Court overruled *Maryland v. Wirtz* and held that Congress could not prescribe minimum wages and maximum hours for state and local government employees who were engaged in "traditional governmental functions."[22]

Considered in isolation, neither *Mitchell* nor *Usery* had great long-term practical significance. The passage of the Twenty-Sixth Amendment effectively overturned the holding in *Mitchell*,[23] while the 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority* formally overruled *Usery*.[24] Nonetheless, *Mitchell* and *Usery* proved to be portents of things to come.

Beginning in the early 1990s, as the ideological balance of the Supreme Court shifted even further to the right, the conservative members of the Court showed an increased willingness to impose limits on congressional authority in order to protect what they characterized as constitutionally-mandated principles of federalism.[25] In some cases, conservatives have taken actions designed to ensure that the "integrity, dignity, and residual sovereignty of the States" is not undermined by federal statutes.[26] In others, the same justices

19. United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); Katzenbach v. McClung, 379 U.S. 294 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968).

20. South Carolina v. Katzenbach 383 U.S. 301, 337 (1966) (upholding the constitutionality of the Voting Rights Act of 1965); Katzenbach v. McClung, 384 U.S. 641, 650 (1966) (noting that Congress has power to expand scope of Fourteenth Amendment protections).

21. 400 U.S. 112, 128 (1970).

22. 426 U.S. 833, 852, 855–65 (1976).

23. U.S. CONST. amend. XXVI, § 1.

24. 469 U.S. 528, 557 (1985).

25. *See, e.g.*, Bond v. United States, 564 U.S. 211, 225 (2011).

26. *Id.* at 221 ("The federal balance is, in part, an end in itself, designed to ensure that States function as political entities in their own right.").

have sought to limit the nature of the substantive issues over which Congress may assert its authority.[27]

The defenders of state autonomy have deployed a variety of doctrinal arguments in their efforts to prevent Congress from undermining the independence of state governments. For example, in decisions such as *Seminole Tribe of Florida v. Florida* and *Alden v. Maine*, conservative majorities concluded that the Eleventh Amendment bars Congress from subjecting state governments to damage actions for violating federal statutes.[28] Additionally, in *New York v. United States* and its progeny, the conservative justices formed the core of the majorities holding that the so-called "anti-commandeering doctrine" prevents Congress from requiring state officials to participate in implementing federal policies.[29] However, the 2013 decision in *Shelby County v. Holder* is perhaps the most well-known and controversial case that established constitutional protections for the formal independence of state governments.[30]

In *Shelby County*, the justices revisited an issue that the Court had first confronted nearly fifty years earlier in *South Carolina v. Katzenbach*.[31] In *Katzenbach*, the Court was faced with a challenge to multiple provisions of the recently-adopted Voting Rights Act of 1965.[32] One of the most controversial sections of the statute prohibited a designated group of states from implementing changes in state electoral processes without first obtaining

27. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating the Violence Against Women Act); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (invalidating the Gun-Free School Zones Act).

28. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996); Alden v. Maine, 527 U.S. 706, 759 (1999); *see also* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that the Eleventh Amendment bars state employees from recovering "money damages by reason of the State's failure to comply with the . . . Americans with Disabilities Act"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66–67 (2000) (finding that a "clear statement of Congress' [s] intent to abrogate the States' immunity" exceeds Congress's authority under the Fourteenth Amendment); Fla. Prepaid Secondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647–48 (1999) (using the Fourteenth Amendment to bar Congress from enacting legislation that "expressly abrogated the States' sovereign immunity from claims of patent infringement"). *Compare* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (rejecting a constitutional challenge to Title II of the Americans with Disabilities Act), *with* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 740 (2003) (rejecting a constitutional challenge to the Family and Medical Leave Act).

29. 505 U.S. 144, 188 (1992) (holding that the federal government cannot require states to take title to low-level nuclear waste); *see also* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018) (holding that the federal government cannot prohibit states from repealing prohibitions on sports gambling); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (striking down a portion of Affordable Care Act); Printz v. United States, 521 U.S. 898, 934–35 (1997) (holding that the federal government cannot require local officials to perform background checks).

30. *See* 570 U.S. 529, 556–57 (2013).

31. 383 U.S. 301, 307 (1966).

32. *Id.*

approval from the federal government.[33] This requirement was, by any standard, an extraordinary federal intrusion into the power of a state government to structure its own political processes.[34] Nonetheless, in *Katzenbach*, a majority of the justices concluded that all provisions of the statute were constitutional.[35]

Speaking for the Court, Chief Justice Earl Warren conceded that the imposition of the preclearance requirement was "an uncommon exercise of congressional power"[36] At the same time, however, he observed that "exceptional conditions can justify legislative measures not otherwise appropriate."[37] Thus, noting that "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of [the] country through unremitting and ingenious defiance of the Constitution" and that less dramatic measures had failed to solve the problem, Chief Justice Warren concluded that Section Two of the Fifteenth Amendment provided Congress with the necessary authority to enact all provisions of the Voting Rights Act.[38]

Chief Justice Warren also rejected the contention that Congress had run afoul of the Constitution in this context by subjecting a small group of states to particularly stringent federal regulations.[39] He observed:

> Congress . . . learned that substantial voting discrimination presently occur[ed] in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future. In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary.[40]

Turning to the specifics of the coverage formula, which relied on voting rates to determine which states would be subjected to the preclearance requirement, Chief Justice Warren also asserted that "a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters" and concluded that "the coverage formula is [therefore] rational in both practice and theory."[41]

---

33. *See id.* at 357–58 (Black, J., concurring and dissenting).
34. *See id.* at 358–60.
35. *Id.* at 337 (majority opinion).
36. *Id.* at 334.
37. *Id.*
38. *Id.* at 309, 337.
39. *Id.* at 328.
40. *Id.* (footnote omitted) (citation omitted).
41. *Id.* at 330.

At the time that the Voting Rights Act was enacted, the preclearance requirement was set to expire in five years.[42] However, Congress repeatedly extended the duration of this provision and ultimately adopted a twenty-five year extension of the mandate in 2006.[43] While the coverage formula had undergone minor revisions in the interim, the determination of whether the preclearance requirement applied to a particular jurisdiction was still based on the conditions that existed in the late 1960s and early 1970s.[44]

Against this background, the concept of preclearance faced constitutional challenges on a number of occasions during the late twentieth century.[45] However, it was not until 2009 that a majority of the justices first indicated they had serious doubts about the constitutionality of the 2006 extension.[46] Four years later, in *Shelby County*, the five conservative members of the Court explicitly concluded that the extension was unconstitutional.[47]

Speaking for the *Shelby County* majority, Chief Justice Roberts reiterated the characterization of the preclearance requirement as "extraordinary legislation otherwise unfamiliar to our federal system"[48] that constituted an "extraordinary departure from the traditional course of relations between the States and the Federal Government."[49] Additionally, Chief Justice Roberts contended that the decision to impose the requirement on some, but not all, state governments ran afoul of the principle that "all the States enjoy equal sovereignty"[50] and that any departure from this principle required a showing that "[the] statute's disparate geographic coverage [was] sufficiently related to the problem that it target[ed]."[51]

Chief Justice Roberts conceded that, in 1965, both the imposition of the preclearance requirement itself and the content of the formula used to determine which jurisdictions were subjected to the requirement were justified by the conditions existing at the time.[52] At the same time, however, Chief

42. Shelby Cnty. v. Holder, 570 U.S. 529, 538 (2013).

43. *Id.* at 538–39; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, § 7, 120 Stat. 577, 581 (2006).

44. *Shelby Cnty.*, 570 U.S. at 538–39.

45. *See, e.g.*, Lopez v. Monterey Cnty., 525 U.S. 266, 268–69 (1999); Georgia v. United States, 411 U.S. 526, 540 (1973); City of Rome v. United States, 446 U.S. 156, 180 (1980).

46. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 211 (2009) (expressing doubts about the constitutionality of the Voting Rights Act's preclearance requirement).

47. *Shelby Cnty.*, 570 U.S. at 556–57.

48. *Id.* at 545 (internal quotation marks omitted) (quoting *Nw. Austin*, 557 U.S. at 211).

49. *Id.* (internal quotation marks omitted) (quoting Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 500–01 (1992)).

50. *Id.* at 545 (internal quotation marks omitted) (quoting *Nw. Austin*, 557 U.S. at 211).

51. *Id.* at 552 (internal quotation marks omitted) (quoting *Nw. Austin*, 557 U.S. at 203).

52. *See id.* at 545.

Justice Roberts cited a variety of evidence that, in his view, demonstrated that African-Americans in the southern states had far greater opportunity to participate in the political process than statistics from the 1960s and 1970s suggested.[53] Thus, insisting that the 2006 extension "impose[d] current burdens and [needed to] be justified by current needs,"[54] Roberts concluded that the original coverage formula could no longer be used to identify states that would be required to preclear their changes in the electoral process.[55]

Despite its condemnation of the existing preclearance requirement, the *Shelby County* majority did not purport to question Congress's authority to take other measures designed to prevent state and local governments from discriminating on the basis of race in the political process.[56] By contrast, in decisions such as *City of Boerne v. Flores*, the conservative justices successfully prevented Congress from determining which substantive rules would apply in certain situations.[57]

Ironically, the sequence of events that ultimately led to the decision in *Boerne* began in 1990 with *Employment Division v. Smith*, a case in which the Court emphasized the need to defer to legislative judgments.[58] In *Smith*, a group of Native Americans using the drug peyote for sacramental purposes argued that, by virtue of the Free Exercise Clause of the First Amendment, they were entitled to an exemption from a state law prohibiting the possession of the drug in all circumstances.[59] In concluding that the Constitution does not require a state to grant such an exemption, the majority rejected the apparent implications of several earlier cases suggesting that the decision not to provide such an exemption should be subject to strict scrutiny.[60]

Speaking for the Court, Justice Antonin Scalia based this conclusion on a classic argument for judicial deference.[61] Justice Scalia conceded that "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[62] Nevertheless, asserting that "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process," Justice Scalia insisted that "that unavoidable consequence of democratic government must be preferred to a

53. *See id.* at 547–58.

54. *Id.* at 536 (internal quotation marks omitted) (quoting *Nw. Austin*, 557 U.S. at 203).

55. *See id.* at 551.

56. *See id.* at 557.

57. *See* 521 U.S. 507, 536 (1997); *see also* United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating a provision of the Violence Against Women Act); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (striking down the Gun-Free School Zones Act).

58. *See* 494 U.S. 872, 890 (1990).

59. *See id.* at 874.

60. *See id.* at 881–85.

61. *See id.* at 890.

62. *Id.*

system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[63]

The decision in *Smith* generated a political firestorm.[64] Responding to the demands of a broad-based coalition whose membership cut across political lines, Congress enacted the Religious Freedom Restoration Act (RFRA) in 1993.[65] RFRA provided that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the imposition of the burden is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering that interest.[66] The statute passed unanimously in the House of Representatives and with only three dissenting votes in the Senate.[67]

In *Boerne*, the justices evaluated the constitutionality of RFRA in the context of a zoning dispute between a local religious organization and the municipal government of Boerne, Texas.[68] After the city denied the church a permit to physically expand due to its location in a historic district, church officials filed suit in federal court claiming RFRA required the city to grant the permit.[69] The city responded by arguing that Congress lacked the constitutional authority necessary to force state and local governments to conform to the requirements of RFRA.[70] In their rejoinder, those defending the application of the statute contended that Congress could derive the necessary authority from section five of the Fourteenth Amendment.[71]

Given the Court's emphasis on the importance of deferring to the democratic process in *Smith*, one might have expected the justices in *Boerne* to defer to the judgment of Congress and reject the constitutional challenge. In fact, however, five justices joined an opinion by Justice Kennedy in which he concluded that RFRA could not constitutionally be applied to the rules adopted by states and their subdivisions.[72]

In his majority opinion, Justice Kennedy distinguished sharply between the power to determine the scope of constitutional rights, which he argued belonged only to the courts, and the power to create remedies for violations of those rights, which he conceded belonged to Congress.[73] While

63. *Id.*

64. *See, e.g.*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

65. *Id.*

66. *Id.* § 3(a)–(b).

67. 139 CONG. REC. 27239–41, 26416 (1993).

68. *Boerne*, 521 U.S. at 511.

69. *Id.* at 512.

70. *See id.* at 517.

71. *Id.*

72. *See id.* at 509–11.

73. *See id.* at 519–29.

acknowledging that Congress has broad discretion to devise remedies, he contended that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[74] Though the defenders of RFRA sought to analogize *Boerne* (decided more than a decade before *Shelby County*) to cases in which the Court had upheld the constitutionality of the Voting Rights Act of 1965, Justice Kennedy observed that, unlike the hearings that provided the predicate for the passage of the Voting Rights Act, none of the witnesses called to support the passage of RFRA alleged recent instances of widespread, intentional discrimination by a state or local government against either specific religious groups or religious organizations generally.[75] Against this background, Justice Kennedy insisted that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior" and that Congress's effort to regulate the activities of state governments could only be viewed as an unconstitutional attempt to change the substantive content of the Free Exercise Clause.[76]

Shelby County and *Boerne* exemplify the types of cases in which the conservative members of the Court have successfully attracted majority support for decisions limiting the power of Congress. Additionally, groups of conservative justices have, at times, dissented in cases where a majority of the Court refused to impose additional constitutional constraints on the scope of congressional authority.[77] But, whether in the majority or in dissent, conservatives have often stressed the need to preserve state autonomy in cases challenging the constitutionality of federal statutes.[78] By contrast, the same

74. *Id.* at 520.

75. *Id.* at 530.

76. *Id.* at 532, 534–36 (describing the intended effect of the Religious Freedom Restoration Act of 1993 and Congress's right and duty to interpret the Constitution "within its sphere of power and responsibilities").

77. *See, e.g.*, Gonzalez v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (asserting that criminalizing "grow[ing] small amounts of marijuana in one's own home for one's own medicinal use" is beyond the scope of Congress's power under the Commerce Clause); *id.* at 57–58 (Thomas, J., dissenting) (arguing that in the context of medical marijuana, the "federalist system, properly understood, allows California and a growing number of other states to decide for themselves how to safeguard the health and welfare of their citizens"); Nev. Dep't Hum. Res. v. Hibbs, 538 U.S. 721, 741–42 (Kennedy, J., dissenting) ("If we apply the teaching of these and related cases, the family leave provision of the Act, 29 U.S.C. § 2612(a)(1)(C), in my respectful view, is invalid to the extent it allows for private suits against the unconsenting States.").

78. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 217 (2009) (Thomas, J., concurring in part and dissenting in part) ("State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority."); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 579 (1985) (Powell, J., dissenting) ("Although the Court's

group of justices has been largely oblivious to the impact that other actions of the Court have on the ability of state and local governments to implement policy decisions tailored specifically to the needs and preferences of their constituents.[79]

IV. THE CONSERVATIVE ASSAULT ON STATE AUTONOMY

A. State Autonomy and Judicial Review of State Government Action

By its nature, the idea that the Supreme Court has power to reverse decisions made at the state or local level poses a significant threat to state autonomy. The Court is an institution of the federal government that, like Congress, makes decisions establishing uniform rules that all parts of the nation are compelled to respect.[80] Thus, when the justices invoke the Constitution to invalidate a policy judgment made by state or local authorities, the Court's action is no less significant than a federal statute in terms of its impact on a state's ability to either effectuate the distinctive policy preferences of its local populace or to act as a "laboratory of democracy."[81]

Indeed, in some situations, the potential threat to state autonomy that judicial review creates may be even more significant than that posed by the existence of a national legislature. As Herbert Wechsler has observed, the structure of Congress provides some protection against the passage of statutes that might unduly intrude on state autonomy.[82] Federal statutes only become law if passed by majorities in both the House of Representatives and the Senate. Because each of these bodies is comprised of members selected by the voters of individual states and their subdivisions, these members owe their primary allegiance to those specific voters, rather than to the population of the

---

opinion purports to recognize that the States retain some sovereign power, it does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation.").

79. *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (plurality opinion).

80. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 378–79 (1816).

81. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2484 (2019) (Gorsuch, J., dissenting) ("[T]he regulation of alcohol wasn't left to the imagination of [the Supreme Court] of nine sitting in Washington, D.C., but to the judgment of the people themselves and their local elected representatives. State governments were supposed to serve as 'laborator[ies]' of democracy." (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

82. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

nation at large.[83] As a result, when proposed federal legislation threatens the policy preferences of many states, one would expect the representatives of those states to vigorously oppose such legislation and do whatever is necessary to prevent its passage. Against this background, Wechsler asserts that, because of what he characterizes as "the intrinsic sensitivity to any insular opinion that is dominant in a substantial number of states,"[84] Congress often defers to such "insular opinion[s]" and declines to take action even where the action is "called for by the voice of the entire nation."[85]

By contrast, given the manner in which the makeup of the Supreme Court is currently determined, there is no reason to believe—in the abstract at least—that similar considerations would create incentives for members of the Court to respect state governments' autonomy. In recent years, geography does not appear to have played any discernible role in the selection of Supreme Court justices.[86] Instead, each sitting president selected nominees whom he believed would support the jurisprudential and ideological agenda of the national political coalition to which he owed his election.[87]

In theory, of course, such an agenda might include a truly robust commitment to the idea that the federal judiciary should generally refrain from invoking the Constitution to displace policy judgments made by state and local governments. Indeed, in recent years, Republican presidential candidates have insisted that they favored just such an agenda. For example, in 2004, Republican George W. Bush was elected on a platform which declared that "the self-proclaimed supremacy of . . . judicial activists is antithetical to the democratic ideals on which our nation was founded,"[88] while in 2016, Republican Donald Trump ran on a platform which asserted that an "activist judiciary" is a "critical threat to our country's constitutional order . . . that usurps powers properly reserved to the people through other branches of government" and called for the appointment of judges who "reverse the long line of activist decisions . . . that have usurped . . . states' lawmaking authority."[89]

---

83. *Id.* at 546–47.

84. *Id.* at 547.

85. *Id.*

86. Sharon E. Rush, *Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias*, 79 MO. L. REV. 119, 177 (2014).

87. *See* NEAL DEVINS & LAURENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 176 (2019) ("[P]residents . . . have increasingly taken ideology into account when appointing Supreme Court Justices.").

88. REPUBLICAN NAT'L COMM., 2004 REPUBLICAN PARTY PLATFORM (Aug. 26, 2004), https://www.cbsnews.com/htdocs/pdf/GOP2004platform.pdf [https://perma.cc/TYM7-R885].

89. REPUBLICAN NAT'L COMM., 2016 REPUBLICAN PARTY PLATFORM (July 18, 2016), https://www.presidency.ucsb.edu/documents/2016-republican-party-platform#rebirth [https://perma.cc/JP59-3LKS].

Based on statements such as these, one might have expected the justices chosen by both President Bush and President Trump to respect the autonomy of state governments by consistently deferring to the policy decisions made by those governments. However, this has not been the case.[90] In a variety of circumstances, the appointees of both Bush and Trump have demonstrated a willingness to actively intervene and limit state autonomy in order to advance other aspects of the conservative political and jurisprudential agenda.[91] In some cases, the conservative justices have simply ignored the issue of state autonomy. In others, they have argued that any constitutional interest in the preservation of state autonomy should be subordinated to other concerns.[92]

B. Ignoring the Issue of State Autonomy: National Institute of Family & Life Advocates v. Becerra

The recent decision in *National Institute of Family & Life Advocates v. Becerra* provides a clear illustration of a case in which the conservative justices ignored the impact of their position on the autonomy of state governments.[93] *Becerra* was a constitutional challenge to The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act), a California statute that required clinics to provide two categories of specific information when offering services to pregnant women.[94] First, the FACT Act mandated that clinics licensed by the state notify women that California offers free or low-cost services, including abortions.[95] In addition, the statute required licensed clinics to provide women with a phone number to call for such services, while unlicensed clinics were required to notify women that the clinics were not authorized by the state to provide medical services.[96]

90. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 727–28 (2011) (overturning public financing for elections on First Amendment political speech grounds).

91. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261–62 (2020) (invalidating a scholarship fund established by the Montana Legislature under the Free Exercise Clause); Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1916–20 (2019) (Roberts, C.J., dissenting) (arguing that a state cannot regulate one industry with the purpose of influencing another industry that is preempted by federal law).

92. *See, e.g.*, Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 475–476 (2013) (expanding federal preemption of state law to prevent higher burdens on drug manufacturers); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017) (applying "most rigorous" scrutiny to a Free Exercise claim and holding that it overrides a state's policy preference).

93. 138 S. Ct. 2361 (2018).

94. *Id.* at 2368.

95. CAL. HEALTH & SAFETY CODE § 123472(a)(1)–(b)(1) (West, Westlaw through ch. 372 of 2020 Reg. Sess.).

96. *Becerra*, 138 S. Ct. at 2369–70.

The attack on the FACT Act was, by its nature, an assault on the autonomy of the state government of California. The institutions comprising that government had determined that the interests of the people of California were best served by the disclosure requirements. The *Becerra* Court was in essence being asked to displace this decision by imposing a national standard that would by its nature limit the ability of state governments to adopt policies it believed reflected the distinct values of the populations that they represented.[97] Nonetheless, Bush appointees John Roberts and Samuel Alito joined Trump appointee Neil Gorsuch and holdovers Anthony Kennedy and Clarence Thomas to form a five-justice majority that held the California statute unconstitutional.[98]

Despite the impact of this conclusion on California's ability to effectuate the policy preferences of its citizens, the concept of state autonomy is never mentioned in the majority opinion in *Becerra*.[99] Instead, the opinion engages in a detailed discussion of the relationship between the FACT Act and the First Amendment without even considering the possibility that the analysis should be influenced by the impact that the decision might have on the ability of state governments to adopt policies that reflected local conditions and values.[100]

The failure of the *Becerra* majority to discuss the relationship between its decision and the structure of federalism is by no means unique. In several other cases dealing with a variety of different issues, the conservative members of the Court have concluded that actions taken by state and local governments were unconstitutional without considering state autonomy as a constitutional value.[101] Moreover, even in those cases where federalism-related issues have been explicitly addressed, the conservative justices have frequently determined that concerns related to state autonomy should be subordinated to other, more important values.[102]

97. *See id.* at 2388 (Breyer, J., dissenting) ("[Because] citizens strongly hold . . . different points of view [about abortion] . . . it is particularly important to interpret the First Amendment so that it applies evenhandedly as between those who disagree so strongly.").

98. *Id.* at 2378.

99. *See id.* at 2370–78.

100. *Id.* at 2371–78.

101. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019–21 (2017) (analyzing the scope of the Free Exercise Clause); Sorrell v. IMS Health, Inc., 564 U.S 552, 580 (2011) (evaluating the regulation of commercial speech); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283–84 (1986) (discussing affirmative action).

102. *See, e.g.*, *infra* notes 120–121 and accompanying text.

C. *Downplaying the Significance of State Autonomy*

In a number of cases decided by the Roberts Court, the conservative justices have frequently acknowledged that invoking the Constitution can significantly limit the autonomy of state governments.[103] Until recently, conservative members of the Court were often the most likely to argue that the Court should act less aggressively in order to preserve that autonomy.[104] However, more recently, the conservative justices have demonstrated a much greater willingness to downplay the significance of autonomy when determining the scope of constitutional limitations on state and local governments.[105]

The position taken by the conservative justices in *McDonald v. City of Chicago* provides a striking example of this phenomenon.[106] *McDonald* was a challenge to the constitutionality of two city ordinances that, read together, effectively banned the possession of handguns.[107] Two years earlier, over the objections of Justices Stevens, Souter, Ginsburg, and Breyer, the Court had concluded in *District of Columbia v. Heller* that a similar ordinance passed by a body subject to the federal government's control violated the Second Amendment.[108] Thus, *McDonald* featured a battle over the application of the so-called incorporation doctrine—the theory that the strictures of the Bill of Rights have been made applicable to the states by the Fourteenth Amendment.[109]

During the late twentieth century, Justices John Marshall Harlan and Lewis Powell, both of whom at that time were generally characterized as being members of the Court's conservative wing,[110] emphasized the importance of preserving state autonomy in resisting the notion that the Bill of Rights should apply to the states "jot-for-jot and case-for-case."[111] In *McDonald*, progressive Justices John Paul Stevens and Stephen Breyer made similar arguments in contending that the Second Amendment, by its terms,

103. *See, e.g.*, *infra* notes 120–121 and accompanying text.

104. *See, e.g.*, *infra* notes 125–128 and accompanying text.

105. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 741 (2010) (plurality opinion).

106. *Id.*

107. *Id.* at 750.

108. 554 U.S. 570, 636 (2008).

109. *McDonald*, 561 U.S. at 761–67.

110. *See, e.g.*, Nadine Strossen, *John Marshall Harlan's Enduring Importance for Current Civil Liberties Issues, from Marriage Equality to Dragnet NSA Surveillance*, 61 N.Y.L. SCH. L. REV. 331, 334–35 (2017); Russell W. Galloway Jr., *Justice Lewis F. Powell, Jr.*, 28 SANTA CLARA L. REV. 379, 380 (1988).

111. Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting); Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring in judgment) (quoting *Duncan*, 391 U.S. at 181).

should not be applicable to the states.[112] While both Justice Stevens and Justice Breyer focused specifically on the relationship between the Second Amendment and the power of state governments, Justice Stevens also took the opportunity to launch an assault on the concept of incorporation more generally.[113]

Justice Stevens conceded that "there can be significant practical, as well as esthetic, benefits from treating rights symmetrically with regard to the State and Federal Governments."[114] But at the same time, invoking the concept of experimental federalism, he asserted that "[i]n a federalist system such as ours . . . this approach can carry substantial costs."[115] Turning specifically to the Second Amendment, Justice Stevens observed that:

> The costs of federal courts' imposing a uniform national standard may be especially high when the relevant regulatory interests vary significantly across localities, and when the ruling implicates the States' core police powers [such as the authority to regulate access to firearms]. . . . [T]he ability to respond to the social ills associated with dangerous weapons goes to the very core of the States' police powers.[116]

Similarly, describing the regulation of gun ownership as "the quintessential exercise of a State's 'police power,'"[117] Justice Breyer complained that "the incorporation of the right recognized in *Heller* would amount to a significant incursion on a traditional and important area of state concern, altering the constitutional relationship between the States and the Federal Government."[118]

Speaking for himself, Chief Justice Roberts and Justices Scalia and Kennedy, Justice Alito insisted that such concerns did not undermine the case for the incorporation of the Second Amendment.[119] Justice Alito acknowledged that the incorporation of the Second Amendment would "to some extent limit" the autonomy of state governments and that "[i]ncorporation always restricts experimentation and local variations."[120]

---

112. *See McDonald*, 561 U.S. at 911 (Stevens, J., dissenting); *id.* at 921–22 (Breyer, J., dissenting).

113. *Id.* at 873–77 (Stevens, J., dissenting).

114. *Id.* at 869.

115. *Id.*

116. *Id.* at 869–70, 901.

117. *Id.* at 922 (Breyer, J., dissenting) (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1873)).

118. *Id.* at 921–22.

119. *Id.* at 783–85, 790 (plurality opinion).

120. *Id.* at 790.

Nonetheless, invoking the memory of progressive icon Justice William Brennan, Justice Alito disparaged what Justice Brennan had described as "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights."[121]

Considered in isolation, the position taken by the conservative justices in *McDonald* might have been seen as a byproduct of considerations that were unique to that case. Prior to its consideration of *McDonald*, the Court had handed down a series of decisions establishing the principle that state governments are subject to those aspects of the Bill of Rights that are "fundamental to *our* scheme of ordered liberty."[122] Against the backdrop of this principle and the decision in *Heller*, much of Justice Alito's opinion in *McDonald* was devoted to an examination of the historical evidence that, in his view, demonstrated that an individual's right to own handguns was "deeply rooted in this nation's history and tradition" and that, in particular, such a right was widely viewed as fundamental at the time that the Fourteenth Amendment was drafted and ratified.[123] Thus, in the absence of other evidence, Justice Alito's response to the arguments of Justices Stevens and Breyer could have been characterized as a byproduct of respect for established precedent, rather than a lack of respect for the concept of state autonomy more generally. However, the dispute over gun control is not the only context in which the conservative members of the Court demonstrated a willingness to subordinate state autonomy to other considerations.

The reaction of the conservative justices to issues of equality in public education provides another example of the inconsistent treatment of state autonomy in conservative constitutional jurisprudence.[124] In the 1973 decision in *San Antonio School District v. Rodriguez*, conservative justices relied heavily on this concept in rejecting the claim that Texas's system for financing public schools violated the Equal Protection Clause.[125] There, over the objections of the progressive members of the Burger Court,[126] Justice Lewis Powell spoke for the five most conservative justices on the Court who

121. *Id.* at 788 (internal quotation marks omitted) (quoting Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)). In a separate opinion, Justice Clarence Thomas also concluded "that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment [is] 'fully applicable to the States.'" *Id.* at 805 (Thomas, J., concurring in part and concurring in judgment) (quoting *id.* at 750 (plurality opinion)).

122. *See id.* at 763–67 (plurality opinion) (citing Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)) (discussing the initiation of selective incorporation and move toward "inquir[ing] whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice").

123. *Id.* at 767 (internal quotation marks omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *see id.* at 767–78.

124. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58–59 (1973).

125. *Id.* at 40–44, 58–59 (discussing state autonomy and the Equal Protection Clause).

126. *Id.* at 62–63 (Brennan, J., dissenting); *id.* at 70–137 (Marshall, J., dissenting).

concluded that the Texas system should be subjected only to the deferential rational basis test.[127] In his defense of this contention Justice Powell emphasized the need to preserve the autonomy of state and local governments, observing that:

> While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action," it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.[128]

At times, conservative justices also cited similar concerns in opposing sweeping remedies in school desegregation cases involving systems that had never been formally segregated by law.[129] For example, dissenting in *Columbus Board of Education v. Penick*, Justice William Rehnquist observed that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[130] While conceding that "[this fact] does not, of course, place the school system beyond the authority of federal courts as guardians of federal constitutional rights,"[131] Justice Rehnquist asserted:

> [T]he practical and historical importance of the tradition does require that the existence of violations of constitutional rights be carefully and clearly defined before a federal court invades the traditional ambit of local control, and that the subsequent displacement of local authority be limited to that necessary to correct the identified violations.[132]

In 1991, speaking for a majority comprised almost entirely of the conservative members of the Court, Chief Justice Rehnquist sounded a similar

---

127. *Id.* at 40–41 (majority opinion). Justice Byron White also advocated the use of the rational basis test in *Rodriguez* but concluded that the Texas system was unconstitutional even under that approach. *Id.* at 68–70 (White, J., dissenting).

128. *Id.* at 44 (majority opinion) (alteration in original) (footnote omitted) (quoting Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 532 (1959) (Brennan, J., concurring)).

129. *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 452–55 (1979).

130. *Id.* at 490 (Rehnquist, J., dissenting) (internal quotation marks omitted) (quoting Milliken v. Bradley, 418 U.S. 717, 741–42 (1974)).

131. *Id.*

132. *Id.*

note in *Board of Education of Oklahoma City v. Dowell*.[133] There, in emphasizing the need for the federal courts to return control of school districts to local authorities once vestiges of past de jure segregation had been eliminated to the extent practicable, he observed that "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."[134] Additionally, he declared that:

> Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."[135]

However, the subsequent decision in *Parents Involved in Community Schools v. Seattle School District No. 1* demonstrated that the conservative members' enthusiasm for maintaining local control of schools did not extend to the adoption of policies that the conservatives themselves deemed offensive for other reasons.[136] In *Parents Involved*, the Court confronted constitutional challenges to race-conscious measures that had been voluntarily adopted by the school boards in Seattle, Washington, and Louisville, Kentucky, in an effort to improve the racial balance of the public schools in those cities.[137] The context in which the Louisville plan had been adopted was, in some respects, particularly striking.[138]

Prior to the decision in *Brown v. Board of Education*,[139] the city of Louisville and nearby Jefferson County had operated separate school systems, both of which were segregated by law.[140] By 1959, the city had eliminated formal racial segregation in its public schools, and the county soon

133. *Compare* Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237, 250–51 (1991) (casting the deciding vote despite previously opposing efforts of the conservative justices to limit the scope of remedies in school desegregation cases), *with, e.g.*, *Penick*, 443 U.S. 449, 490 (rejecting the position taken by conservative justices and upholding the authority of a district judge to issue a sweeping desegregation order).

134. *Dowell*, 498 U.S. at 248 (citations omitted).

135. *Id.* (citations omitted) (quoting Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)).

136. 551 U.S. 701, 720–21 (2007).

137. *Id.*

138. *Id.* at 715–17.

139. 347 U.S. 483 (1954).

140. *See* Hampton v. Jefferson Cnty. Bd. of Educ., 72 F. Supp. 2d 753, 755–56 (W.D. Ky. 1999).

followed.[141] Nonetheless, the Sixth Circuit later determined that neither the city nor the county had adequately addressed the problem of segregation.[142] In 1975, the district court entered an order that, among other things, required the two systems to be consolidated, established guidelines for the racial composition of each school in the combined system, and directed the local authorities to take the steps necessary to ensure that those guidelines were met.[143]

Although the guidelines themselves were modified in 1996, the school district remained under the formal supervision of the federal district court until the year 2000.[144] In that year, finding that "the [School] Board has demonstrated extraordinary good faith and has accomplished all the purposes of the [Desegregation] Decree" and that "[t]o the greatest extent practicable, the Decree [has] eliminated the vestiges associated with the former policy of segregation and its pernicious effects," the district court dissolved the decree, thereby leaving the school board free to set its own attendance policies.[145]

At that point, the school board could have reverted to a policy of assigning all students to the schools nearest their homes.[146] However, cognizant of the fact that adopting a pure neighborhood school plan would exacerbate the racial imbalance in many schools within the system, in 2001, the board adopted a method for assigning students that was designed to avoid this result.[147] While both geography and individual choice played an important role in the assignment plan, the plan also provided that African-Americans should comprise between fifteen and fifty percent of the student body in each school—the same parameters that had been established by the 1996 school desegregation order.[148] As a result, some students who would otherwise have been allowed to attend a specific school were unable to do so because of their race.[149] This reality provided the backdrop for the constitutional challenge to the Louisville plan in *Parents Involved*.[150]

In some important respects, the issues presented in *Parents Involved* bore a striking similarity to those that had been before the Court in the *Penick*

141. *See id.*

142. Newberg Area Council, Inc. v. Bd. of Educ. of Jefferson Cnty., 489 F.2d 925, 931–32 (6th Cir. 1973).

143. *Id.* at 762.

144. *Parents Involved*, 551 U.S. at 715.

145. Hampton v. Jefferson Cnty. Bd. of Educ., 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000).

146. *See Parents Involved*, 551 U.S. at 715–17.

147. *See id.*

148. *Id.* at 716; Hampton v. Jefferson Cnty. Bd. of Educ., 72 F. Supp. 2d 753, 768 (W.D. Ky. 1999).

149. *See Parents Involved*, 551 U.S. at 716.

150. *Id.* at 717–18.

desegregation case nearly thirty years before.[151] Both cases involved challenges to student assignment systems that had been devised by local school boards with important educational or operational objectives in mind.[152] Moreover, in both cases, the justices were called upon to overturn those systems in the interest of advancing a particular vision of racial justice.[153]

Not surprisingly, the defenders of the Louisville plan relied in part on arguments similar to those that had been made by then-Justice Rehnquist in the *Penick* case.[154] Thus, in *Parents Involved*, Justice Breyer observed that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint" and that "[b]y and large, public education in our Nation is committed to the control of state and local authorities."[155] Justice Breyer also noted that in *Rodriguez* and a variety of other cases, "this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils."[156] Relying on these considerations, Justice Breyer insisted that, in cases like *Parents Involved*, the Court should defer to the "knowledge, expertise and concerns" of local school boards.[157]

However, these arguments left the conservative members of the *Parents Involved* Court unmoved. Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, concluded that the overt consideration of race by the school districts in Louisville and Seattle was unconstitutional.[158] Responding to Justice Breyer's plea to defer to the judgment of local authorities, Chief Justice Roberts simply observed: "Such deference 'is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.'"[159]

The conservative justices were equally dismissive of federalism-related concerns in *Janus v. American Federation of State, County, & Municipal State Employees, Council 31*[160] and *Arizona State Legislature v. Arizona*

151. *Id.*; Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 453 (1979).

152. *Parents Involved*, 551 U.S. at 715–17; *Penick.*, 443 U.S. at 452–53.

153. *Parents Involved*, 551 U.S. at 715–17; *Penick*, 443 U.S. at 452–53.

154. *See Parents Involved*, 551 U.S. at 717, 723; *Penick*, 443 U.S. at 490 (Rehnquist, J., dissenting).

155. 551 U.S. at 849 (Breyer, J., dissenting) (internal quotation marks omitted) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

156. *Id.* (citations omitted).

157. *Id.* at 848.

158. *Id.* at 721–25 (majority opinion).

159. *Id.* at 744 (plurality opinion) (quoting Johnson v. California, 543 U.S. 499, 506 n.1 (2005)).

160. 138 S. Ct. 2448 (2018).

Independent Redistricting Commission.[161] In *Janus*, with the Court divided once again along ideological lines, the five conservative justices voted to overrule the decision in *Abood v. Detroit Board of Education*[162] and held that a union representing government employees could not constitutionally require non-member employees to pay agency fees that were designed to cover the cost of activities that were germane to the process of collective bargaining.[163] In her dissent, Justice Elena Kagan noted that the rule established by the majority in *Janus* imposed significant limitations on the autonomy of state governments.[164] Implicitly invoking the concept of experimental federalism, Justice Kagan observed that, at the time the decision was handed down, the nation was engaged in "an energetic policy debate" over the question of whether government employee unions should be allowed to charge agency fees.[165] Although twenty-eight states prohibited the imposition of such fees, the fees were lawful in twenty-two states.[166] Justice Kagan complained that, by virtue of the Court's decision, the "debate [now] ends," and that, in the future, all states would be required to follow the rule established by the majority in *Janus*.[167]

Justice Alito's majority opinion made short shrift of this argument.[168] Justice Alito conceded that the Court should not "'pick the winning side [in policy debates]'—unless the Constitution commands that [it] do so."[169] He also acknowledged that the decision in *Janus* would deprive states of a policy option that had previously been available to them.[170] Nonetheless, noting that "when a . . . state law violates the Constitution, the American doctrine of judicial review requires [the Court] to enforce the Constitution," Justice Alito insisted that "[i]n holding that [the laws at issue in *Janus*] violate the Constitution, [the Court is] simply enforcing the First Amendment as properly understood."[171]

The willingness of most of the conservative justices to subordinate the concept of state autonomy to other norms was reflected even more clearly in their approach to the issues presented by *Arizona State Legislature*.[172] The dispute in that case centered on a recently-adopted provision of the Arizona state constitution, which had removed the authority to draw congressional

161. 576 U.S. 787 (2015).
162. 431 U.S. 209 (1977).
163. *Janus*, 138 S. Ct. at 2459–60.
164. *Id.* at 2501–02 (Kagan, J., dissenting).
165. *Id.* at 2501.
166. *Id.*
167. *Id.*
168. *Id.* at 2465–86 (majority opinion).
169. *Id.* at 2486 n.28.
170. *See id.* at 2485 n.27.
171. *Id.* at 2486 n.28.
172. 576 U.S. 787 (2015).

districts from the Arizona state legislature and vested that authority in an independent commission established solely for the purpose of creating districts for elections to the House of Representatives and state legislature.[173] Those challenging the constitutionality of this regime argued that, with respect to the creation of congressional districts, the Arizona constitutional provision ran afoul of the Elections Clause, which provides that, in the absence of congressional legislation, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[174]

Justice Kennedy joined his four progressive colleagues in rejecting this challenge. Speaking for the majority, Justice Ruth Bader Ginsburg asserted: "The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation."[175] However, the four most conservative justices on the Court—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—dissented,[176] with Chief Justice Roberts insisting:

> The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, "the Legislature" is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process.[177]

Whatever else one might say about the merits in *Arizona State Legislature*, one point is indisputable: The approach taken by the progressive majority left state governments with far greater autonomy than that embraced by the conservative dissenters. All of the justices were well-aware of this reality.[178] Thus, in her majority opinion, Justice Ginsburg noted: "It is characteristic of our federal system that States retain autonomy to establish their own governmental processes . . . ."[179] Additionally, she invoked the vision of the laboratories of democracy and observed that "[d]eference to state lawmaking allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government

173. ARIZ. CONST. art. IV, § 1 (West, Westlaw through 2d Reg. Sess. of 54th Leg.).

174. U.S. CONST. art. I, § 4, cl. 1.

175. *Ariz. State Legislature*, 576 U.S. at 814–15.

176. *Id.* at 824–50 (Roberts, C.J., dissenting); *id.* at 854–59 (Scalia, J., dissenting); *id.* at 859–62 (Thomas, J., dissenting).

177. *Id.* at 841 (Roberts, C.J., dissenting).

178. *See id.* at 816 (majority opinion) (citations omitted).

179. *Id.* (citation omitted).

more responsive by putting the States in competition for a mobile citizenry."[180]

By contrast, Chief Justice Roberts' dissent focused on a very different aspect of the concept of vertical federalism.[181] After observing that "[t]he Elections Clause both imposes a duty on States and assigns that duty to a particular state actor,"[182] Chief Justice Roberts noted that "[t]he States do not, in the majority's words, 'retain autonomy to establish their own governmental processes,' if those 'processes' violate the United States Constitution,"[183] and that "[i]n a conflict between the Arizona Constitution and the Elections Clause, the State Constitution must give way."[184]

This argument stands in stark contrast to the argument that Chief Justice Roberts himself had made only two years earlier in *Shelby County v. Holder*. Both *Shelby County* and *Arizona State Legislature* involved efforts to impose limits on the ability of state governments to control their own political processes.[185] In *Shelby County*, the limits were imposed by the preclearance requirements of the Voting Rights Act.[186] There, notwithstanding the lack of any clear textual limits on the power of Congress to enforce the Fifteenth Amendment, Chief Justice Roberts had relied heavily on what he characterized as "basic principles" of state autonomy to impose significant limitations on the powers of Congress.[187] By contrast, although Chief Justice Roberts had observed in *Shelby County* that "[d]rawing lines for congressional districts [remains] 'primarily the duty and responsibility of the State,'"[188] he gave no apparent consideration to the general principles of state autonomy in *Arizona State Legislature* in concluding that the relevant provision of the Arizona state constitution ran afoul of the federal Constitution.[189]

More generally, the arguments made by the conservative justices in *Parents Involved*, *Janus*, and *Arizona State Legislature* reflect a fundamental misconception regarding the nature of the federalism-related concerns raised by progressives in those cases. The progressive justices were not contending that state governments were entitled to enforce laws that were in conflict with

180. *Id.* (internal quotation marks omitted) (quoting Bond v. United States, 564 U.S. 211, 221 (2011)).

181. *See id.* at 824–50 (Roberts, C.J., dissenting).

182. *Id.* at 826 (citation omitted).

183. *Id.* at 827 (citation omitted).

184. *Id.* (citing Cook v. Gralicke, 531 U.S. 510, 523 (2001)).

185. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 534–35 (2013); *see supra* notes 172–184 and accompanying text.

186. *See Shelby Cnty.*, 570 U.S. at 534–45.

187. *See id.* at 544.

188. *Id.* at 543 (quoting Perry v. Perez, 565 U.S. 388, 392 (2012) (per curiam)).

189. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 827 (2015) (Roberts, C.J., dissenting).

the mandates of the Constitution.[190] Instead, Justices Breyer, Kagan, and Ginsburg were asserting that the bedrock principle of state autonomy is one of many factors the Court should take into account when determining how best to interpret the language of the Constitution.[191] By contrast, Chief Justice Roberts and Justice Alito at least implicitly suggested that the Court should consider the import of relevant constitutional provisions in the abstract, without considering the impact of that interpretation on the preexisting prerogatives of state governments.[192]

In short, the conservative justices have been far from consistent in their treatment of state autonomy in cases raising constitutional issues. Decisions like *Becerra*, *Parents Involved*, and *Janus* have had as great a negative impact on the autonomy of state government as at least some of the congressional enactments that the conservative justices have found offensive on federalism-related grounds. Conversely, in *Arizona State Legislature*, the autonomy of the Arizona state government emerged unscathed only because the progressive justices rejected the arguments made by Chief Justice Roberts and his conservative compatriots.[193] Of course, one might make analogous observations about decisions such as *Obergefell v. Hodges* and *Whole Woman's Health v. Hellerstedt*, where progressive justices invoked the Fourteenth Amendment to impose federal standards and displace the judgments of individual state governments.[194] Nonetheless, one point should be clear: If the conservative members of the Supreme Court are truly concerned with maintaining state autonomy, they should be far less willing to overturn state and local enactments on constitutional grounds in the future.

V. CONCLUSION

Recognizing that decisions such as *Becerra*, *Parents Involved*, and *Janus* significantly restrict state autonomy has important implications for our understanding of the nature of the issues that are at stake in constitutional litigation more generally. In the late twentieth and early twenty-first centuries, discussions of the role that the federal courts do and should play in the development of public policy focused in large measure on the relationship between the judiciary and the popularly-elected branches of government.[195]

190. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 814–15.

191. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803–04 (2007) (Breyer, J., dissenting); Janus v. Am. Fed'n of State, Cnty., & Mun. State Emps., 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting); *Ariz. State Legislature*, 576 U.S. at 816.

192. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 827 (Roberts, C.J., dissenting).

193. *See id.* at 807–22.

194. Obergefell v. Hodges, 576 U.S. 644, 681 (2015); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

195. *See infra* notes 196–198 and accompanying text.

Thus, as Richard H. Pildes has observed, recent scholarship regarding constitutional theory "has been uniquely dominated . . . by the struggle to rationalize judicial review with democracy,"[196] with some commentators arguing that the Supreme Court acts as a countermajoritarian force in American society while others insist the decisions of the Court typically reflect the views of the governing majority.[197]

However, in cases challenging the constitutionality of state laws, the first question to be asked is whether the Constitution demands that the relevant policy judgment be made at the federal level rather than the state level. In some cases, the Constitution does create nationally applicable rules of law that, by their nature, limit the options available to state governments. But in the absence of such a nationally applicable rule of law, state and local governments are free to take any action that they wish, and the federal courts must respect the decision of a state government even if the relevant decision was not made by a popularly elected branch of that government.[198]

Of course, in individual cases, reasonable minds may differ over whether the Constitution creates a binding national rule that states must respect. Nonetheless, the fundamental point remains. In reviewing the actions of state and local governments, all federal judges—whether progressive or conservative—should be aware of the impact their decisions have on the autonomy of state governments. Otherwise, they are simply ignoring the structure of the Constitution and the principles on which it is based.

196. Richard H. Pildes, *Is the Supreme Court a Majoritarian Institution?*, 2010 SUP. CT. REV. 103, 104.

197. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962) ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the people of the here and now . . . ."); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 185 (2006) ("[T]he Supreme Court has followed the public's views about constitutional questions throughout its history . . . ."). *Compare* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155–62 (2002) (discussing the evolution of the academic debate over the proper characterization of the relationship between judicial review and the concept of democracy), *with* Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 362 (2008) (discussing how academic debate has now evolved from concern over democratic deficits in the courts to electoral institutions).

198. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (rejecting a federal constitutional challenge after the California Supreme Court recognized an appellee's right to "exercise state-protected rights of expression and petition on appellant's property").