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The Mobility Paradox

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THE MOBILITY PARADOX
TODD E. PETTYS*

I. INTRODUCTION: TIEBOUT'S REVOLUTION

Nearly half a century ago, in an article spanning a mere nine pages,¹ Charles Tiebout revolutionized the way many think about American federalism. Using the analytic tools Tiebout gave them, numerous scholars now contend that, in our mobile society, citizens' interests would best be served by dramatically shrinking the federal government and permitting state and local governments to regulate a far greater number of important matters.² If we stripped the federal government of a significant portion of its current power, these scholars contend, state and local governments would be better able to distinguish themselves from one another in a wide variety of meaningful ways, thereby giving mobile citizens many different regulatory regimes from which to choose when selecting a place to live. In similar fashion, the Rehnquist Court has enthusiastically proclaimed the benefits of decentralization in a society where citizens are highly mobile.³

Mobile citizens surely do sometimes benefit when they are permitted to choose from among a diverse array of state and local regulatory packages. I contend in this article, however, that citizens' mobility—the very mobility on which Tiebout's model relies—paradoxically also gives citizens powerful incentives to *oppose* decentralization and to seek federal legislation embodying their preferences. Indeed, as I shall point out,⁴ citizens of all political persuasions remain determined to achieve federal legislative victories on a host of issues they regard as important, notwithstanding many scholars' urgings to the contrary. I contend that these citizens are not irrational and that the ongoing debate about the ideal distribution of power between the state and federal governments will remain incomplete—and often irrelevant—until the incentives that frequently drive citizens to prefer federal regulation are taken fully into account.

Tiebout's contemporaries believed that government leaders were doomed to levy taxes and spend public funds in inefficient ways because they could not accurately ascertain citizens' preferences.⁵ In the private sector, of course, consumers reveal the

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¹ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

² See *infra* notes 5-37, 58-60 and accompanying text (providing an overview of these arguments).

³ See *infra* note 20 and accompanying text (quoting the Court's well-known recitation of some of federalism's benefits).

⁴ See *infra* notes 65-80 and accompanying text.

⁵ See Tiebout, *supra* note 1, at 416-17 (focusing on the work of Richard Musgrave and Paul Samuelson).

things they want and the prices they are willing to pay every time they make or forego a purchase, and sellers are able to tailor their products and prices accordingly. In the realm of “public goods” provided by governments,⁶ however, economists believed there was no comparable market-like mechanism by which citizens could reveal to politicians precisely what they wanted to get and what they were willing to pay to get it. Everyone acknowledged that voters could signal some of their preferences in elections, but many economists believed electoral mechanisms could not match the efficient preference-signaling power of the private marketplace.⁷

Tiebout agreed that, at the federal level, “no ‘market type’ solution exists to determine the [optimal] level of expenditures on public goods.”⁸ With respect to state and local governments,⁹ however, he believed his colleagues had overlooked a critical fact: citizens may “vote with their feet”¹⁰ by moving to the community that offers the combination of taxes and services they find most desirable. By choosing to reside in one community rather than another, Tiebout argued, citizens provide the preference-signaling counterpart to the consumer’s selection of goods and services in the private sector.¹¹

⁶ Tiebout defined “public goods” in two alternative ways: (1) goods “which all enjoy in common in the sense that each individual’s consumption of such a good leads to no subtraction from any other individual’s consumption of that good,” *id.* at 416, and (2) goods “which should be produced, but for which there is no feasible method of charging the consumers,” *id.* at 417. When he provided examples of the kinds of public goods he intended his argument to encompass, however, he occasionally reached beyond the confines of both definitions, citing government-provided goods (such as golf courses and parking facilities) for which consumers routinely are specially charged and with respect to which one person’s consumption does reduce other persons’ consumption opportunities. *See id.* at 418 (discussing “police and fire protection, education, hospitals, and courts,” as well as “golf course[s], . . . beaches, parks, . . . roads, and parking facilities”). Despite the narrow definitions with which he began, therefore, it appears Tiebout intended at least loosely to address a broad range of goods and services that governments routinely provide.

⁷ *See id.* at 417-18 (discussing the “unsatisfactory” aspects of elections); *see also* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 16-17 (1970) (stating that economists tend to believe “exit” is a more powerful means than “voice” for expressing dissatisfaction with a business’s or government’s performance).

⁸ Tiebout, *supra* note 1, at 416. Tiebout did not explain his concession, though the mobility-based argument he proceeded to make concerning local expenditures suggests he simply believed people do not move across national borders as readily as they move across subnational borders.

⁹ *See id.* at 418 n.9 (“The discussion that follows applies to local governments. It will be apparent as the argument proceeds that it also applies, with less force, to state governments.”).

¹⁰ Although it nicely captures the essence of Tiebout’s argument, the phrase “vote with their feet” does not appear in Tiebout’s article. The very familiarity of the concept, however, is evidence of just how influential Tiebout’s article has been.

¹¹ *See* Tiebout, *supra* note 1, at 420 (“Moving or failing to move replaces the usual market test of willingness to buy a good and reveals the consumer-voter’s demand for public goods.”); *see also id.* at 422 (“Spatial mobility provides the local public-goods counterpart to the private market’s shopping trip.”). Although he is widely credited for his pioneering work on the subject, Tiebout was not the first to perceive a relationship between people’s mobility and governments’ policies. *See, e.g.,* FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 258-59 (1948) (“The absence of tariff walls and the free

“The greater the number of communities and the greater the variance among them,” the more likely it is that a citizen can find a community that provides his or her ideal combination of taxes and services.¹² State and local politicians, therefore, need not attempt to discover the nuances of their current residents’ precise desires.¹³ Instead, those officials simply must adopt a regulatory package they believe citizens will find attractive, and then wait for those who find that package desirable to come to them.¹⁴

Tiebout readily conceded that he was making many assumptions. He assumed, for example, that citizens are fully informed regarding communities’ differing regulatory policies and that citizens are “fully mobile and will move to that community where their preference patterns, which are set, are best satisfied.”¹⁵ He also acknowledged that his assumptions are never fully met in practice.¹⁶ Tiebout nevertheless believed he had identified a market-like mechanism that could ensure a reasonably efficient match between the kinds of government policies citizens want and the kinds of government policies they get.¹⁷

movements of men and capital between the states . . . limit to a great extent the scope of the economic policy of the individual states.”); FREDERICK J. TURNER, *THE FRONTIER IN AMERICAN HISTORY* 82-83, 97 (Robert E. Krieger Publ’g Co. 1976) (1920) (describing frontier regions’ competition for settlers).

¹² Tiebout, *supra* note 1, at 418.

¹³ Indeed, for purposes of constructing his model, Tiebout assumed state and local officials would never substantially change their taxing and spending policies. He argued that, unlike federal politicians, who must try to adapt to their constituents’ preferences, state and local governments “have their revenue and expenditure patterns more or less set.” *Id.*

¹⁴ *See id.* at 420 (“In this model there is no attempt on the part of local governments to ‘adapt to’ the preferences of consumer-voters. Instead, those local governments that attract the optimum number of residents may be viewed as being ‘adopted by’ the economic system.”).

¹⁵ *See id.* at 419 (identifying seven categories of assumptions).

¹⁶ *See id.* at 423 (acknowledging, for example, that “[c]onsumer-voters do not have perfect knowledge and set preferences, nor are they perfectly mobile”). For a brief overview of the voluminous literature on the validity of Tiebout’s assumptions, see Vicki Been, *Exit as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 515-16 (1991). Tiebout’s model has been criticized on other grounds, too. *See, e.g.,* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420-21 (1990) (stating that citizens’ mobility “is constrained by a variety of economic and social factors that tend to affect poorer people more than affluent ones” and that “investors of capital and owners of businesses, rather than residents, are the prime beneficiaries of the system of multiple jurisdictions and ease of movement”). *But cf.* Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEGAL STUD. 201, 232 (1996) (concluding that migration patterns within the United States suggest that states compete with one another for, among other things, “high human capital debtors by offering them a fresh start from foreign creditors”).

¹⁷ *See* Tiebout, *supra* note 1, at 424; *cf.* THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* 29-31 (1990) (conceding that Tiebout’s model is not perfect, but contending that it nevertheless points in a fruitful direction); Been, *supra* note 16, at 515-17, 527-28 (concluding that, despite the criticisms that have been leveled against Tiebout’s model, the evidence indicates that citizens do “consider a community’s public service and tax packages when they choose where to live” and that state

It would be exceedingly difficult to find nine pages of scholarship that have exerted a greater impact on the ongoing debate about federalism and the ideal distribution of power between the state and federal governments.¹⁸ In regulatory settings extending far beyond the taxing and spending domains on which Tiebout focused, it has become commonplace for courts and scholars to point to the benefits that purportedly accrue when the federal government limits its involvement in regulatory affairs, permitting states and localities to regulate important matters and to compete with one another for mobile residents.¹⁹ In a now-familiar recitation, for example, the Rehnquist Court stated that decentralization and interstate competition are among federalism's principal justifications:

[Federalism] preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.²⁰

and local governments do “compete for residents by attempting to offer desirable public service/tax packages”); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 34 (1983) (stating that, even though Tiebout's “assumptions are so unrealistic that they could not be satisfied,” competition among jurisdictions may still produce “a powerful *tendency* toward optimal legislation”).

¹⁸ Tiebout's article continues to provoke a tremendous outpouring of scholarship. Those seeking an extended introduction to the literature might begin with COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM (Daphne A. Kenyon & John Kincaid eds., 1991), or DYE, *supra* note 17. Readers will find a shorter but still admirably thorough introduction in Been, *supra* note 16, at 506-09, 514-28.

¹⁹ In his article, Tiebout rarely used the word “competition.” Although he did acknowledge that communities compete with one another, *see* Tiebout, *supra* note 1, at 422 & n.18, he also assumed that state and local governments' taxing and spending patterns would remain static, a feature one would not expect to encounter among governments continually vying against one another for the optimum mix of residents. *See id.* at 418, 420; *supra* note 14 and accompanying text. Yet the relationship between mobility and competition is clear. If the officials of a state or locality regulate in unpopular ways, thereby driving coveted taxpayers to other jurisdictions, those officials surely will amend their policies in an effort to retain and attract residents—and thus the dynamics of competition are set in motion. *See* Briffault, *supra* note 16, at 400-01. Tiebout himself acknowledged that it was unrealistic to assume that state and local governments would never alter their taxing and spending patterns. *See* Tiebout, *supra* note 1, at 418 n.11, 423-24.

²⁰ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also* *New York v. United States*, 505 U.S. 144, 157 (1992) (stating that federalism's benefits “have been extensively catalogued elsewhere” and citing *Gregory*); *Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring) (noting that a state may attempt to attract residents from other states by offering attractive regulatory packages and stating that this “is a healthy form of rivalry”); *Petersburg Cellular P'ship v. Board of Supervisors*, 205 F.3d 688, 700 (4th Cir. 2000) (quoting *Gregory*'s recitation of federalism's values); *Chlorine Inst. v. California Hwy. Patrol*, 29 F.3d 495, 498 (9th Cir. 1994) (same). *Cf.* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous

Scholars have repeatedly echoed those themes.²¹ Indeed, many have pressed beyond making general observations about the benefits of interjurisdictional competition and have employed Tiebout's model in a wide range of particularized settings. Some have contended, for example, that a state would obtain a desirable advantage over its competitors if it adopted particular new regulations.²² Some have argued that judicial review is unnecessary in certain areas because competitive forces will prevent state and local regulators from overreaching.²³ Others have asserted that interstate competition can

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.”).

²¹ In the legal literature, Michael McConnell has advanced one of the most frequently cited arguments that interstate competition should be regarded as among federalism's chief virtues. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498-500 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) (arguing that “[a] consolidated national government . . . stifles choice and lacks the goad of competition” and that federalism encourages the states to regulate in a manner that will attract taxpayers to their communities). But McConnell is far from alone. See, e.g., MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 133 (1999) (“Federalism's chief virtue . . . is citizen choice and state competition.”); DAVID SHAPIRO, *FEDERALISM: A DIALOGUE* 78 (1995) (“The argument rooted in the value of competition among the states, especially when combined with the right of exit of capital or labor, remains at the heart of the economic case for federalism.”); Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, in *THE NEW FEDERALISM: CAN THE STATES BE TRUSTED?* 3, 11-12 (John Ferejohn & Barry R. Weingast eds., 1997) [hereinafter *THE NEW FEDERALISM*] (“In the same way as different types of individuals choose different shopping centers that provide varying mixes of products and services, under decentralization these individuals will choose (by deciding where to live) different types of communities that provide varying mixes of public services.”); Ronald J. Krotoszynski, Jr., *Listening to the “Sounds of Sovereignty” But Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 21-22 (1998) (arguing that citizens' liberty is enhanced when they are permitted to choose from a wide range of regulatory schemes); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 131-32 (1997) (“Unlike a unitary national government, which reduces choice and is relatively unaffected by competition, state governments have an incentive to implement policies that not only maximize utility for a majority of voters already in the state but also serve to attract additional taxpayers.”); Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 286, 290-92 (1993) (arguing that interstate competition “limits the success” of rent-seeking behavior because, if a state imposes regulations that are too onerous, those disadvantaged by the regulations will move to another state); David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1081 (1996) (“States are reluctant to restrict liberties . . . for fear that people will leave and move to other states . . .”).

²² See, e.g., Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriages*, 68 S. CAL. L. REV. 745, 747-48 (1995) (arguing that competition for tourism revenues gives states an incentive to be among the first to solemnize same-sex marriages); cf. Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83, 87-93 (1998) (discussing issues relating to marriage and interstate competition).

²³ See, e.g., Been, *supra* note 16, at 478 (arguing that, in many instances, close judicial scrutiny of land-use exactions is unnecessary because competition among local governments for real-estate development will prevent those governments from imposing unreasonable burdens on developers); cf. WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 367 (1995) (stating that, while judges often are not well situated to resolve takings disputes, judicial intervention is likely appropriate for property owners who “cannot be protected by the threat of economic exit and for whom

lead to desirable outcomes in specific areas of concern, such as welfare,²⁴ taxation,²⁵ electronic commerce,²⁶ public education,²⁷ criminal sentencing,²⁸ antitrust,²⁹ corporate charters,³⁰ bankruptcy,³¹ securities regulation,³² and the environment.³³

political coalitions are unlikely prospects”); Frederick T. Goldberg, Note, *Equalization of Municipal Services: The Economics of Serrano and Shaw*, 82 YALE L.J. 89, 97 (1972) (stating that, when courts compel localities to provide identical levels of benefits, they often interfere with citizens’ ability to make utility-maximizing choices about where to live).

²⁴ See, e.g., DYE, *supra* note 17, at 189 (“[W]hile we acknowledge that competitive federalism raises some theoretical concerns about redistributive policy, we remain convinced that the equity preferences of society are better served by multiple competing governments than centralized monopoly government.”); F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 SUP. CT. ECON. REV. 141, 176 (1997) (concluding that it is appropriate to give states substantial responsibility for shaping welfare standards).

²⁵ See, e.g., Lior Jacob Strahilevitz, *The Uneasy Case for Devolution of the Individual Income Tax*, 85 IOWA L. REV. 907, 910-11 (2000) (proposing that the federal income tax be abolished and that states be given primary responsibility for devising means of raising revenue for the federal government’s use).

²⁶ See, e.g., Larry E. Ribstein & Bruce H. Kobayashi, *State Regulation of Electronic Commerce*, 51 EMORY L.J. 1, 78 (2002) (“Electronic commerce is best regulated at the state rather than the federal level.”).

²⁷ See, e.g., Caroline M. Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 90 AM. ECON. REV. 1209, 1236 (2000) (concluding “that Tiebout choice among public-school districts raises school productivity”).

²⁸ See, e.g., Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 755-58 (2002) (arguing that differing sentencing standards among states are often preferable to a uniform federal sentencing standard because variations enable citizens to live in a jurisdiction with standards they favor).

²⁹ See, e.g., Easterbrook, *supra* note 17, at 50 (“If any branch of federal law is to recognize the power of competition to improve the lot of people, it is hard to think of a more fitting place to start than antitrust.”).

³⁰ See, e.g., Roberta Romano, *State Competition for Corporate Charters*, in THE NEW FEDERALISM, *supra* note 21, at 129, 149 (“The best available evidence indicates that, for the most part, the race [among states for corporate charters] is for the top and not the bottom in the production of corporate laws.”); cf. Ralph Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POL’Y 127, 128-29 (1982) (stating that Delaware sparked a competition among states “to establish the optimal corporation code”). *But see* Henry N. Butler, *Corporation-Specific Anti-Takeover Statutes and the Market for Corporate Charters*, 1988 WIS. L. REV. 365, 377-78 (discussing states’ failure to respond appropriately to corporations seeking protection from takeovers); Alan E. Garfield, *State Competence to Regulate Corporate Takeovers: Lessons from State Takeover Statutes*, 17 HOFSTRA L. REV. 535, 539 (1989) (stating that interjurisdictional competition has caused states to protect “managers from hostile takeovers without any credible concomitant benefit to shareholders”).

³¹ See, e.g., G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, 74 AM. BANKR. L.J. 227, 229-30 (2000) (arguing that interjurisdictional competition provides important benefits in the field of bankruptcy regulation).

Other scholars have made comparable arguments in a more systematic fashion, arguing that Tiebout's model strongly suggests we should strip power from the federal government across a broad spectrum of areas. If Tiebout's insights are on target, these scholars contend, we ordinarily should resist monolithic national "solutions" to regulatory problems, and should instead devolve greater power upon states, counties, and municipalities, thereby enabling citizens to choose from among a diverse array of regulatory schemes. Alice Rivlin argues, for example, that "[t]he federal government should eliminate most of its programs in education, housing, highways, social services, economic development, and job training."³⁴ Thomas Dye contends that state and local governments should be given primary responsibility for a wide range of matters, including education, welfare, health care, transportation, and worker training.³⁵ Michael Greve argues that "[f]rom welfare to education to environmental policy, there are lots of policy arenas where federalism is an attractive alternative" to centralization.³⁶ Paul Peterson contends that, because state and local governments "are disciplined by market forces," they should be given primary responsibility for providing "the physical and social infrastructure necessary to facilitate a country's economic growth," such as transportation and education.³⁷

Of course, no one has said that the federal government should withdraw from the domestic arena entirely. Many have argued, for example, that the federal government is best positioned to redistribute wealth because, if a state or local government "attempts in any serious way to tax the rich and give to the poor, more poor people will enter the

³² See, e.g., Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2361 (1998) ("This Article proposes extending the competition among the states for corporate charters to two of the three principal components of federal securities regulation: the registration of securities and the related continuous disclosure regime for issuers; and the antifraud provisions that police that system.").

³³ See, e.g., Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE J. ON REG. 23, 66 (1996) (concluding that, unless federal intervention is necessary to ameliorate externalities, states should have the power to shape their own environmental policies, so that they can "compete to attract new businesses, . . . compete for jobs and revenues, and . . . compete to offer residents better environmental quality"); cf. Richard L. Revesz, *Federalism and Environmental Regulation: A Critique*, in *THE NEW FEDERALISM*, *supra* note 21, at 97, 120-25 (concluding that the federal government frequently fails to recognize when federal regulation of environmental matters is and is not preferable).

³⁴ ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES & THE FEDERAL GOVERNMENT* 17 (1992).

³⁵ DYE, *supra* note 17, at 5; see also *id.* at 99-115, 190-91 (arguing that Congress robs citizens of the benefits of interstate competition when it intervenes in a broad array of fields).

³⁶ GREVE, *supra* note 21, at 143; see also *id.* at 14 (arguing that, when it capitulated to the New Deal and abandoned the task of articulating limits on Congress's enumerated powers, the Supreme Court eviscerated the possibility of meaningful, liberty-enhancing competition among the states).

³⁷ PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 17-18, 25 (1995).

locality, even as the rich will depart.”³⁸ Others have pointed out that, when one state’s regulatory scheme imposes positive or negative externalities on other states’ residents, federal intervention may be required in order to ensure that costs and benefits are efficiently distributed³⁹—a subject on which I shall focus in Part III. There also is wide agreement that federal regulation may be appropriate when economies of scale are present.⁴⁰ A few have argued more generally that legal scholars are too quick to assume that devolution inevitably will lead to efficient, welfare-enhancing competition among state and local governments.⁴¹ Without question, however, Tiebout’s model has fundamentally altered the way many American jurists think about the workings of federalism.

In this article, I argue that citizens’ interests and the dynamics of federalism are far more complicated than the devolutionary proposals of Tiebout’s adherents suggest. In

³⁸ *Id.* at 27; accord Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 587-88 (2000) (acknowledging that redistributive programs might fail if fully funded and administered by states in competition with one another); Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America’s Public Income Transfer Programs*, 14 YALE J. ON REG. 123, 144-47 (1996) (concluding that devolutionary welfare-reform proposals are substantially animated by federal legislators who hope that the states will treat the poor in “nasty” ways that federal legislators are too cowardly to advocate); see also Moulton, *supra* note 21, at 136, 139-41 (stating that decentralization is undesirable if it “threatens the efficiency of state-based redistributive policies,” provokes a “race to the bottom,” or thwarts efforts to achieve economies of scale). *But see supra* note 24 (citing contrary authorities).

³⁹ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 636 (4th ed. 1993) (“If either the benefits or costs of an activity within a state accrue to nonresidents . . . , the incentives of the state government will be distorted.”); McKinnon & Nechyba, *supra* note 21, at 6-9 (arguing that federal intervention is appropriate when state regulation produces positive or negative externalities); Moulton, *supra* note 21, at 136-41 (arguing that decentralization is undesirable if it imposes positive or negative externalities); Peter W. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67, 71 (1996) (arguing that proponents of interstate competition in the area of environmental regulation erroneously assume that state officials are able to measure the costs and benefits of each proposed regulation, that states’ regulations rarely impose externalities, and that state officials never will be captured by groups that favor industry over the environment in ways a majority of citizens would find objectionable); cf. RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 71-72 (1988) (arguing that state legislators and state judges attempt to ensure large damage awards for residents harmed by products produced by nonresident manufacturers).

⁴⁰ See Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 565-66 (1994).

⁴¹ See, e.g., William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 219-78 (1997) (examining the ways in which some economists have distanced themselves from Tiebout’s model in recent years, arguing that legal scholars have failed to keep pace with these developments, and contending that proponents of devolution in any given area bear the burden of proving that competitive forces will lead to desirable outcomes); cf. Truman F. Bewley, *A Critique of Tiebout’s Theory of Local Public Expenditures*, 49 ECONOMETRICA 713, 713 (1981) (asserting that “Tiebout’s notion of equilibrium with local governments does not have the nice properties of general competitive equilibrium, except under very restrictive assumptions”).

many instances, it surely is true that some of federalism's benefits can be achieved if mobile citizens are free to choose from among a variety of regulatory packages when deciding where to live. The very mobility on which devolutionary arguments depend, however, also gives individuals strong incentives to oppose decentralization and to favor a regime in which important matters are regulated to a significant degree by the federal government.⁴²

In Part II, I briefly elaborate on the argument commonly made in support of the proposition that efficiencies and citizens' happiness would best be secured in the United States' mobile society by devolving greater power upon state and local governments. I then point out that, despite years of political and scholarly conversation aimed at achieving precisely that kind of decentralization, citizens from across the political spectrum remain stubbornly focused on achieving federal legislative victories on countless issues they regard as important. I conclude Part II by asking whether these citizens are simply irrational, failing to appreciate the strength of devolutionary arguments, or whether there are sensible reasons why a mobile citizenry might actually prefer a significant measure of centralization.

In Part III, I identify three reasons why a mobile—and rational—public might demand federal legislation that reflects their strongly held regulatory preferences. First, citizens who might one day want or need to move across state lines have an interest in securing federal legislation aimed at maximizing the number of jurisdictions in which they would be happy to live. Second, regardless of the likelihood of their own future mobility, citizens in a mobile society have an interest in favorably shaping the norms and regulatory preferences of their future neighbors, no matter where in the country those future neighbors currently reside. Third, citizens in a mobile society have an interest in minimizing the occasions on which they feel alienated from the national community. I argue that, as a result of these interests, citizens suffer negative externalities when jurisdictions other than their own adopt regulations that those citizens find significantly objectionable. By favoring centralization on issues they regard as important, therefore, citizens manifest an intuitive understanding of a truth long recognized by political economists: one of the best remedies for interstate externalities is federal legislation.

Of course, none of this means that it never is a good idea to devolve power upon states and localities and to encourage them to compete with one another. As I conclude in Part IV, however, scholars and ordinary citizens alike face an exceptionally difficult task—namely, determining when states and localities should regulate in an effort to maximize the number of regulatory alternatives from which mobile citizens may choose and when the federal government should regulate in an effort to minimize the negative externalities many citizens suffer when jurisdictions other than their own adopt regulations those citizens find unacceptable.

⁴² For a discussion of the ways in which federalism offers citizens a choice between state and federal regulation, see Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329 (2003).

II. MOBILITY AND THE CASE FOR DECENTRALIZATION

Americans are highly mobile. Every year since 1984, more than forty million Americans have moved from one residence to another.⁴³ For example, between March 1999 and March 2000—the most recent year for which the United States Census Bureau provides statistics—43.4 million Americans changed their place of residence.⁴⁴ While many of those who moved during that year chose to remain within the same county, many others did not: 8.8 million moved to a different county within the same state and 8.4 million moved across state lines.⁴⁵ Interstate moves constitute a growing percentage of the total number of moves made each year, rising from approximately fifteen percent of all moves in 1997-1998 to more than 19 percent in 1999-2000.⁴⁶ Correspondingly, intra-county moves constitute a decreasing percentage of all moves, falling from 64 percent to 56 percent between those same two time periods.⁴⁷

Not surprisingly, people move for a variety of reasons. Of the more than 120 million Americans who moved during the three-year period spanning March 1997 and March 2000,⁴⁸ for example, approximately one-half moved for housing-related purposes, such as to purchase a home, find more affordable housing, or relocate in a better neighborhood.⁴⁹ Approximately a quarter moved for family-related reasons, such as to bring households together after marriage, divide households after divorce, or accommodate children.⁵⁰ Between sixteen and seventeen percent moved for work-related

⁴³ See U.S. CENSUS BUREAU, ANNUAL GEOGRAPHICAL MOBILITY RATES, BY TYPE OF MOVEMENT: 1947-2000 tbl. A-1 (2001) [hereinafter ANNUAL GEOGRAPHICAL MOBILITY RATES], available at <http://www.census.gov/population/socdemo/migration/tab-a-1.txt>. When I use the term “American” in my descriptions of Census Bureau data, I intend to refer to all residents of the United States, and not more narrowly to United States citizens. My terminology thereby reflects the Census Bureau’s own use of the term “American,” as well as the Bureau’s decision not to distinguish between citizens and non-citizens when gathering and reporting data regarding people’s mobility within the United States.

⁴⁴ See JASON SCHACHTER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: GEOGRAPHICAL MOBILITY (P20-538) 1 (2001) [hereinafter GEOGRAPHICAL MOBILITY], available at <http://www.census.gov/population/www/socdemo/migrate.html>.

⁴⁵ See ANNUAL GEOGRAPHICAL MOBILITY RATES, *supra* note 43, at tbl. A-1.

⁴⁶ See GEOGRAPHICAL MOBILITY, *supra* note 44, at 2.

⁴⁷ See *id.*

⁴⁸ See ANNUAL GEOGRAPHICAL MOBILITY RATES, *supra* note 43, at tbl. A-1 (indicating that 128.5 million Americans moved between 1997 and 2000). The Census Bureau does not track whether a person who moved in a given year also moved in a preceding year. Consequently, although there surely were repeat movers between 1997 and 2000, the Census Bureau cannot be certain of their number.

⁴⁹ See JASON SCHACHTER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: WHY PEOPLE MOVE: EXPLORING THE MARCH 2000 CURRENT POPULATION SURVEY (P23-204) 2 (2001) [hereinafter WHY PEOPLE MOVE], available at <http://www.census.gov/population/www/socdemo/migrate.html>.

⁵⁰ See *id.*

reasons, such as to look for work, accept a new job, or reduce the length of their commute.⁵¹ The balance moved for a variety of other reasons; some moved to attend college, for example, while others moved to alleviate health concerns or to live in a more pleasing climate.⁵² Regardless of the reasons underlying Americans' changes of residence, however, ours is indisputably a constantly shifting population.

Americans' desire for mobility has not escaped the law's attention. The Supreme Court has declared that all Americans enjoy a "firmly established" right to travel from one state to another, even though that right "finds no explicit mention in the Constitution."⁵³ Chief Justice Taney noted more than 150 years ago that "[w]e are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."⁵⁴ The right to travel encompasses not only the right temporarily to cross state lines whenever one sees fit, but also the right to establish one's residence in a different state.⁵⁵ If a state adopts measures aimed at stemming the tide of people moving across its borders, therefore, it stands at great risk of having those measures struck down. In *Saenz v. Roe*, for example, the Court invalidated a California statute aimed at reducing

⁵¹ *See id.*

⁵² *See id.* Interestingly, the Census Bureau's data do not directly indicate that people often move in order to live under a more favorable regulatory regime. Such intentions may lie beneath the surface, however, when people report that they moved in order to find such things as better housing, better jobs, better schools, or better health care. Although it is stronger for intrastate moves than for interstate moves, there is at least limited evidence that people do sometimes relocate in order to find more amenable regulations. *See* Been, *supra* note 16, at 515-17; Easterbrook, *supra* note 17, at 44 & n.46.

⁵³ *United States v. Guest*, 383 U.S. 745, 757-58 (1966); *see also* *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."); *Zobel v. Williams*, 457 U.S. 55, 66 (1982) (Brennan, J., concurring) (stating that there is a powerful "federal interest in free interstate migration" and that efforts to link this interest with particular constitutional texts "have proved both inconclusive and unnecessary").

⁵⁴ *The Passenger Cases*, 48 U.S. 283, 492 (1849) (Taney, J., dissenting).

⁵⁵ In *Saenz v. Roe*, 526 U.S. 489 (1999), the Court explained that the right to travel has at least three dimensions:

It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Id. at 500; *see also* JOHN ELY, *DEMOCRACY AND DISTRUST* 178-79 (1980) (stating that the right to travel encompasses the right to change one's residence and that this is important because it protects a person's ability to leave an "oppressive" community and relocate in a community that "he or she finds more compatible").

the welfare benefits paid to those who had lived in the state less than one year.⁵⁶ Applying strict scrutiny, the Court determined that California's welfare scheme unjustifiably discriminated against new residents.⁵⁷

The right to travel does not present the only nexus between the law and Americans' mobility. The capacities of federalism itself may be tapped to maximize citizens' freedom and happiness in ways relating directly to their choice of places to reside. Tiebout's model and modern-day scholars' call for devolution present one such way of thinking about the connections between citizens' mobility, freedom, and happiness: the federal government might abstain from regulating numerous dimensions of the domestic arena, leaving state and local governments free to distinguish themselves from one another in a wide variety of ways.⁵⁸ In the eyes of devolutionists, freedom in this context is measured by the number of different regulatory schemes from which citizens can choose when looking for a place to live. The greater the variety of their options, the more likely it is that citizens will be able to find at least one state or locality that offers a regulatory package that closely matches their own preferences. To maximize the likelihood that they can find a suitable place to reside, therefore, citizens have an interest in devolving power to states and localities. So long as they are able to relocate for reasons relating to governments' differing policies, citizens can then use their mobility to maximize their happiness with the regulations under which they live.

Michael McConnell nicely illustrates the reason citizens might favor devolution.⁵⁹ Suppose there are two states, X and Y, in each of which ten million citizens reside. Suppose further that 70 percent of X's citizens wish to ban smoking in public buildings and that 30 percent of X's citizens do not, while only 40 percent of Y's citizens wish to ban smoking in public buildings and 60 percent do not. If X and Y are permitted to establish their own policies on the matter, X likely will ban smoking in public buildings and Y will permit it, causing 13 million citizens (or 65 percent of the total) to be happy with the public-smoking laws under which they live. If the federal government followed the will of the majority and uniformly banned smoking in public buildings, however, only 11 million citizens (or 55 percent of the total) would be happy. If a citizen has a preference on the matter of public smoking, therefore, she stands a better chance of living

⁵⁶ California's statute declared that, if a person had resided in the state for fewer than twelve months, his or her welfare benefits would be capped at the amount he or she would have received in his or her previous state of residence. *Saenz*, 526 U.S. at 492-93 & n.1.

⁵⁷ *See id.* at 498-507 (relying on the Citizenship Clause and the Privilege and Immunities Clause of the Fourteenth Amendment); *see also* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

⁵⁸ *See supra* notes 5-37 and accompanying text (recounting Tiebout's argument and describing some of its present-day manifestations). In Part III, I present a very different way of thinking about the relationship between mobility, freedom, and happiness. *See infra* notes 107-10 and accompanying text.

⁵⁹ *See* McConnell, *supra* note 21, at 1494.

under a regulatory regime she finds acceptable if the matter is left in states' hands than she would if Congress were to impose a uniform law. McConnell concludes that "this is a powerful reason to prefer decentralized government."⁶⁰

Faced with such an argument, one might predict that citizens quickly would fall in line to support politicians advancing devolutionary agendas. As John Jay observed more than two centuries ago, "the people of any country (if, like Americans, intelligent and well-informed) seldom adopt and steadily persevere for many years in an erroneous opinion respecting their interests."⁶¹ Moreover, the United States is a nation with nearly 200 million citizens of voting age whose preferences differ on numerous issues.⁶² If centralization inhibits rather than enhances freedom by minimizing people's ability to shop for regulatory regimes that mirror their own preferences, won't sensible citizens look skeptically on suggestions that public problems be addressed through federal legislation, and won't they instead favor a regime under which decentralization is the rule rather than the exception?

The likelihood that citizens would prefer decentralization seems even greater when one considers the fact that, even when citizens secure favorable federal legislation on a controversial issue, their victory comes with significant baggage attached. The activist who prevails in Congress today helps to establish an understanding among his or her fellow citizens that the subject matter in question is appropriately regulated by federal, rather than state or local, officials. When that activist's political opponents gain control of the federal legislative machinery, therefore, they will be positioned to seize upon the societal understanding that the activist helped to create and to enact federal legislation that deprives the activist of the ability to find even one state or locality in which the regulatory climate reflects his or her own priorities. When one considers all of the other benefits of state and local regulation,⁶³ one might thus confidently predict that

⁶⁰ *Id.* Strictly speaking, of course, McConnell's argument does not demonstrate that, in his posited scenario, the issue of smoking in public buildings would be better regulated by state—rather than county, municipal, or other local—policymakers. As McConnell indicates, the same logic that weighs against federal regulation in his illustration might also weigh against state-level regulation, depending upon the geographic distribution of preferences within a given state. *See id.* (stating that local governments may sometimes be better positioned to regulate than the states). It might even be the case that citizens' happiness would be maximized in certain instances if particular matters—such as smoking—were not regulated even at the municipal level, leaving individual businesses, neighborhoods, or other groups of people free to establish their own policies, based upon their own preferences and upon the preferences of those with whom they regularly come into contact, such as employees and customers.

⁶¹ THE FEDERALIST No. 3, at 41-42 (John Jay) (Clinton Rossiter ed., 1961).

⁶² *See* AMIE JAMIESON ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000 (P20-542) 5 at tbl. A (2002) [hereinafter VOTING AND REGISTRATION] (stating that there were 186.4 million American citizens of voting age at the time of the November 2000 presidential election), available at <http://www.census.gov/prod/2002pubs/p20-542.pdf>.

⁶³ *See* McConnell, *supra* note 21, at 1492-511 (reciting numerous additional reasons why the Founders opted for a system of dual sovereignty rather than a monolithic national government); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT.

rational citizens ordinarily would shun the high-stakes approach of seeking federal legislation on important issues, and would instead favor the less-risky approach of identifying a handful of states and localities in which to seek favorable legislation.

Politicians and activists do sometimes invoke the rhetoric of devolution and states' regulatory prerogatives.⁶⁴ To a remarkable extent, however, Americans of all political persuasions—conservatives, moderates, and liberals alike—appear steadfastly committed to obtaining federal legislation on seemingly countless issues about which they care. Indeed, our political culture is now one in which virtually every issue of significant public consequence is debated at the federal level.⁶⁵ Although there was a time when state legislation was regarded as the norm and federal law as the exception,⁶⁶ those days have passed.⁶⁷ When the political winds are blowing favorably in their

REV. 341, 380-414 (identifying numerous functions that states may serve in our federal system of government); *see also* Pettys, *supra* note 42, at 351-52 (citing data that indicate citizens believe state and local governments use tax revenues more efficiently than the federal government).

⁶⁴ *See, e.g.*, REPUBLICAN PLATFORM 2000: RENEWING AMERICA'S PURPOSE. TOGETHER, <http://www.rnc.org/gopinfo/platform> (last visited June 1, 2003) (on file with the author) (outlining areas in which Republicans believed federal action was needed at the time of the 2000 presidential election, but also arguing that it was necessary "to shift power from Washington back to the states"). Ronald Reagan was elected in 1980, for example, after promising to strip power from Washington bureaucrats. *See* RICHARD S. WILLIAMSON: REAGAN'S FEDERALISM: HIS EFFORTS TO DECENTRALIZE GOVERNMENT 13-15 (1990) (arguing that, by 1980, the federal government had grown too large, too intrusive, and too wasteful, and that "Reagan's election was a mandate to clean up the mess"); John Shannon & James E. Kee, *The Rise of Competitive Federalism*, 9 PUB. BUDGETING & FIN. 5, 13 (1989) (contending that Reagan articulated the public's unhappiness with always looking to Washington for solutions); *see also* AMERICAN FEDERALISM: A NEW PARTNERSHIP FOR THE REPUBLIC (Robert B. Hawkins, Jr. ed., 1982) (collecting articles written in response to Reagan's federalism proposals).

⁶⁵ *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 829 (1992) ("[A]t this stage in our national life, Americans tend to focus on and debate issues concerning fundamental values primarily on a national level."); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 146 (1998) ("[I]t has become commonplace to believe that issues of national consequence should be addressed by federal laws."); *cf.* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1149 (1993) ("The central state has largely captured public life.").

⁶⁶ *See* William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 733 (1995) (stating that, as recently as the 1950s, people regarded federal intervention in domestic matters as a deviation from the state-focused norm).

⁶⁷ Shep Melnick elaborates:

For most of their history, Americans seeking government assistance looked first to those governments closest at hand and to the national government only if all else failed. Today, in contrast, even Republicans allegedly committed to decentralization impatiently push for aggressive federal action on such traditionally state and local matters as crime control, tort reform, child support payments, and abortion.

R. Shep Melnick, *Federalism and the New Rights*, 14 YALE J. ON REG. 325, 342 (1996); *cf.* Robert Post, *Federalism in the Taft Court Era: Can It Be Revived?*, 51 DUKE L.J. 1513, 1637 (2002) (arguing that the

direction, many—perhaps most—people today are unwilling to forego the opportunity to establish federal standards on issues they regard as significant. As a result, “there are currently few areas, if any, which the political culture treats as outside the range of appropriate federal governance,”⁶⁸ and the language of decentralization often is employed only because the prospect of achieving victory at the national level appears temporarily foreclosed.

Consider, for example, the issues of abortion and physician-assisted suicide. NARAL Pro-Choice America celebrates the extent to which *Roe v. Wade*⁶⁹ established a uniform, national baseline for abortion regulations, complains that *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁷⁰ “opened the floodgates to a relentless, purposeful effort to erode and burden the right to choose, particularly through state legislation,” and warns that President George W. Bush favors “devolving power to the states to regulate abortion free from federal restraints.”⁷¹ Conservatives, on the other hand, once decried the federalization of abortion law and urged the Court to return control of the matter to the states.⁷² Now that Republicans control the seats of power in

Great Depression “effectively legitimated the federal government as the authentic voice of a genuine, national democratic will” and that “by the conclusion of World War II there was less reason constitutionally to distrust national, as distinct from state, regulation”).

⁶⁸ Marshall, *supra* note 66, at 733; *see also id.* at 721-22 (stating that “virtually every constituency supports federalization when it is consistent with their own substantive agenda”).

⁶⁹ 410 U.S. 113, 162-66 (1973) (adopting a trimester- and viability-based framework for evaluating the constitutionality of legislation restricting a woman’s ability to obtain an abortion). *See generally* Margaret G. Farrell, *Revisiting Roe v. Wade: Substance and Process in the Abortion Debate*, 68 IND. L.J. 269, 307 (1993) (stating that “*Roe* preempted state moral authority over abortion and elevated its regulation to the federal level”).

⁷⁰ 505 U.S. 833, 869-79 (1992) (plurality opinion) (rejecting *Roe*’s trimester framework and applying an “undue burden” analysis instead); *Stenberg v. Carhart*, 530 U.S. 914, 938-46 (2000) (applying the *Casey* plurality’s “undue burden” analysis).

⁷¹ NARAL PRO-CHOICE AM., WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS iii (12th ed. 2003), *available at* <http://www.naral.org/publications/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=2143>; *see also* Kate Zernike, *30 Years After Abortion Ruling, New Trends but the Old Debate*, N.Y. TIMES, Jan. 20, 2003, at A1 (stating that, after *Casey*, “[s]tates rushed in” to impose new restrictions on women seeking abortions). *See generally* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 452-53 (1992) (predicting that the *Casey* Court’s “undue burden” analysis would permit states to adopt a patchwork of differing abortion regulations).

⁷² In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), for example, President George Bush’s Acting Solicitor General filed a brief on behalf of the United States, arguing that *Roe* should be abandoned and that the Court should “unequivocally announce its intention to allow the States to act ‘free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.’” Brief for the United States as Amicus Curiae Supporting Appellants at 11, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 93 (1976) (White, J., dissenting)). The National Right to Life Committee has similarly lamented the

Washington, D.C., however, conservatives have secured federal legislation of their own, banning so-called partial-birth abortions.⁷³

By way of comparison, consider the battle over physician-assisted suicide—an issue raising comparable concerns regarding human life, privacy, and personal autonomy. Oregon’s Death with Dignity Act⁷⁴ authorizes physicians to prescribe medications to help certain patients take their own lives. The United States Attorney General, John Ashcroft, has concluded that the federal Controlled Substances Act⁷⁵ prohibits prescribing medications for the purpose of helping a person to commit suicide and so he has sought to invalidate Oregon’s law.⁷⁶ In other words, the Bush Administration is leading a federal charge to prevent states from making their own decisions about a moral issue on which Americans are sharply divided.⁷⁷ Liberals, meanwhile—those who believe individuals should be free to make their own decisions regarding the termination of their own lives—find themselves contending that the federal government is making “an unprecedented intrusion into an arena historically left to the states—the regulation of the

fact that *Roe* established a uniform national law, “legaliz[ing] the practice of human abortion in all 50 states.” NATIONAL RIGHT TO LIFE COMMITTEE MISSION STATEMENT, at <http://www.nrlc.org/missionstatement.htm>.

⁷³ See Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201; see also *President’s State of the Union Message to Congress and the Nation*, N.Y. TIMES, Jan. 29, 2003, at A12 (providing a transcript of President Bush’s January 2003 State of the Union address and quoting the President as asking Congress “to protect infants at the very hour of birth and end the practice of partial-birth abortion”); Richard W. Stevenson, *Bush Signs Ban on a Procedure for Abortions*, N.Y. TIMES, Nov. 6, 2003, at A1 (reporting on the legislation’s enactment).

⁷⁴ OR. REV. STAT. §§ 127.800-.897 (2001).

⁷⁵ 21 U.S.C. §§ 801-950 (2000).

⁷⁶ See *Oregon v. Rasmussen*, 192 F. Supp. 2d 1077, 1078-84 (D. Or. 2002) (describing Oregon’s dispute with the Bush Administration); cf. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (holding that terminally ill patients do not have a fundamental right to physician-assisted suicide and that a state statute forbidding the practice must merely “be rationally related to legitimate government interests”).

⁷⁷ See Sam H. Verhovek, *Federal Agents Are Directed to Stop Physicians Who Assist Suicide*, N.Y. TIMES, Nov. 7, 2001, at A20 (stating that some believe Attorney General Ashcroft’s position “fl[ies] in the face of the Bush administration’s avowed interest in upholding the rights of states to make their own decisions on most policy matters”); cf. *Glucksberg*, 521 U.S. at 735 (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”). In a similar vein, the Bush Administration has picked up where the Clinton Administration left off, attempting to thwart California’s Proposition 215—an initiative approved by California voters in 1996 that would allow seriously ill individuals to use marijuana if their doctors approve. See Bob Egelko, *White House Escalates Pot War*, S.F. CHRON., July 11, 2003, at A1 (describing Proposition 215 and the Clinton and Bush Administrations’ various actions against it).

practice of medicine.”⁷⁸ That is hardly the rhetoric that defenders of individual autonomy and choice typically employ when speaking about abortion.

Similar gaps between rhetoric and practice are easily found in other areas, as well.⁷⁹ One cannot help but conclude that the views of citizens, activists, and politicians regarding the proper distribution of government power often depend primarily on who controls the state and federal governments at any given moment in time, rather than on deeply held philosophical convictions about whether one method of government is more likely than another to maximize citizens’ freedom and happiness.⁸⁰

If Tiebout and his followers are correct when they argue that devolution offers the best opportunity to satisfy citizens’ preferences, why has that argument failed to find firm traction among American citizens? Why do Americans find it so difficult to resist the urge to carry on their debates at the federal level? Are they simply irrational, failing to recognize that losses in Congress are more liberty-restricting than losses in a few states’ legislatures? Do they simply fail to appreciate the normative power of devolutionary arguments?

There are, in fact, good reasons why citizens from across the political spectrum might favor centralization, notwithstanding the ways in which it prevents those with different preferences from disaggregating into separate jurisdictions. Ironically, those reasons are grounded in the very same mobility that fuels devolutionists’ argument that

⁷⁸ Marcia Coyle, *U.S., Oregon to Renew Suicide Fight*, NAT’L L.J., Aug. 19, 2002, at A1 (quoting Kathryn Tucker, legal director of Compassion in Dying, an organization that believes terminally ill patients are entitled to secure the help of a physician in terminating their own lives); *see also id.* (noting that the federalism argument advanced in support of Oregon’s law might also be deployed in support of a state’s ability to ban abortion). *See generally* J. DONALD SMITH, *RIGHT-TO-DIE POLICIES IN THE AMERICAN STATES: JUDICIAL AND LEGISLATIVE INNOVATION passim* (2002) (providing a wide-ranging discussion of states’ differing policies on matters relating to the termination of human life).

⁷⁹ *See, e.g.*, Marshall, *supra* note 65, at 140-42 (citing numerous examples of federal legislation sponsored by conservatives who on other occasions oppose centralization); Marshall, *supra* note 66, at 721-22 (citing conservatives’ efforts to cap punitive damages in tort cases and to enact anti-crime legislation); *Mr. Cheney’s Wisdom*, WASH. POST, Aug. 6, 2003, at A16 (contrasting President Bush’s apparent desire for a federal law banning same-sex marriages with Vice President Cheney’s statement, during the 2000 presidential campaign, that “different states are likely to come to different conclusions and that’s appropriate”); *cf.* James B. Staab, *The Tenth Amendment and Justice Scalia’s “Split Personality”*, 16 J.L. & POL. 231, 293-98 (2000) (arguing that Justice Scalia believes conservatives should use the federal legislative machinery to achieve conservative policy goals, rather than broadly shun federal action in deference to state legislation).

⁸⁰ *Cf.* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 265 (1990) (stating that people either extol the virtues of state autonomy or invoke the centralizing power of the Supremacy Clause, depending on their political objectives at the moment); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 948 (1994) (concluding that “people declare themselves federalists when they oppose national policy, and abandon that commitment when they favor it”).

citizens should be permitted to shop among states and localities for amenable regulatory regimes. In short, a citizen in a highly mobile society suffers intangible negative externalities when a jurisdiction other than his or her own regulates in a manner he or she finds significantly objectionable. When that occurs, the citizen has an interest in securing the remedy that political economists frequently prescribe for interstate externalities: federal legislation.

III. EXTERNALITIES AND THE ALLURE OF CENTRALIZATION

A. Decentralization's Nemesis

When he first introduced his thesis that competition among states and localities can yield efficient, citizen-pleasing regulatory packages, Tiebout acknowledged that the power of his model would be diminished when a government's regulations create "external economies or diseconomies."⁸¹ He further acknowledged that such externalities frequently exist and that, when "the external economies and diseconomies are of sufficient importance, some form of integration may be indicated."⁸² Today, externalities are indeed widely recognized as one of the greatest challenges that decentralization's proponents must confront.⁸³

An externality exists "when someone is seriously affected for good or ill as a result of a decision to which he or she was not a party,"⁸⁴ but is not charged for the benefits he or she receives or compensated for the harms he or she suffers.⁸⁵ As that

⁸¹ Tiebout, *supra* note 1, at 419.

⁸² *Id.* at 423; *see, e.g., id.* ("Not all aspects of law enforcement are adequately handled at the local level. The function of the sheriff, state police, and the FBI—as contrasted with the local police—may be cited as resulting from a need for integration.").

⁸³ *See* SHAPIRO, *supra* note 21, at 39 (stating that externalities are "dreaded by all economists who espouse the virtues of unfettered competition"); Bratton & McCahery, *supra* note 41, at 212 (stating that externalities are "universally recognized" as a threat to Tiebout's thesis); *see also supra* note 39 (citing additional authorities).

⁸⁴ JAMES E. MEADE, *THE THEORY OF ECONOMIC EXTERNALITIES: THE CONTROL OF ENVIRONMENTAL POLLUTION AND SIMILAR SOCIAL COSTS* 45 (1973).

⁸⁵ Arthur C. Pigou provides the classic definition of an externality:

[T]he essence of the matter is that one person A, in the course of rendering some service, for which payment is made, to a second person B, incidentally also renders services or disservices to other persons . . . of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties.

A.C. PIGOU, *THE ECONOMICS OF WELFARE* 183 (4th ed. 1962); *cf.* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *STAN. L. REV.* 387, 398 (1981) (stating that "an externality [is] a cost, associated with an activity, which is not reflected in the activity's price because transaction costs prevent those on whom the loss falls from making a contract with whoever might prevent it"). *See generally* P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 332-34 (1979) (tracing the modern

definition suggests, externalities can appear in both positive and negative forms. John Stuart Mill famously illustrated positive externalities when he wrote of the benefits sailors enjoy when passing through waters illuminated by a lighthouse: those sailors may never have contributed toward the cost of the lighthouse, nor are they charged each time they benefit from the lighthouse's beam, but they do benefit just the same.⁸⁶ Pollutants emitted by factories provide an equally familiar illustration of negative externalities: citizens far downwind or downstream might suffer terribly from a factory's toxic emissions, yet may never be compensated for the harms inflicted upon them.⁸⁷

Externalities do not exist merely in tangible forms, such as lighthouses and pollution—they have intangible manifestations, as well.⁸⁸ Guido Calabresi and Douglas Melamed recognize, for example, that poverty imposes a negative externality on all who are distressed by the knowledge that some lack the financial resources necessary to meet their own basic needs.⁸⁹ Einer Elhauge acknowledges that some citizens' inability to obtain appropriate medical care causes others to "feel moral discomfort."⁹⁰ Clayton Gillette points out that a housing association's discriminatory exclusion practices may affect "even those who are not directly excluded, because the basis of exclusion makes them uncomfortable about living in a society where such exclusions are practiced."⁹¹ It

notion of externalities to the early nineteenth century); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836-1937*, at 200-01 (1991) (providing a brief overview of the evolution of economists' understanding of externalities).

⁸⁶ See JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* (1848), *reprinted in* 3 *COLLECTED WORKS OF JOHN STUART MILL* (J.M. Robson ed.), at 968 (1965).

⁸⁷ Numerous writers have used environmental pollution to illustrate negative externalities. See, e.g., Bratton & McCahery, *supra* note 41, at 212; Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 1 (1960); Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 407 (1997).

⁸⁸ See, e.g., MEADE, *supra* note 84, at 33-34 (stating that externalities can exist in the form of emotional reactions, such as "envy and sympathy"); Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 *VA. L. REV.* 1347, 1392 (1997) ("[I]t is entirely plausible that local actions generate credible and legitimate third-party effects even though they fall outside the scope of traditional physical or fiscal externalities.").

⁸⁹ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1111-12 (1972); accord MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 191 (1962) ("I am distressed by the sight of poverty; I am benefited by its alleviation . . .").

⁹⁰ See Einer Elhauge, *Allocating Health Care Morally*, 82 *CAL. L. REV.* 1451, 1483 (1994).

⁹¹ Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 *U. CHI. L. REV.* 1375, 1432 (1994); see also Gillette, *supra* note 88, at 1392 ("A state that permits slavery will impose costs on abolitionists from other states in the same union, greater than the harms those same abolitionists would suffer were slavery practiced by a nation of which they were not citizens.").

may not always be possible to assign an objectively determined monetary value to such intangible externalities,⁹² but the difficulty of their valuation makes them no less real.⁹³

Externalities pose a tremendous threat to devolutionary models of government regulation because they disrupt the relationship between governments' policies and citizens' preferences.⁹⁴ Tiebout's objective was, again, to identify a means by which government policies could efficiently be aligned with citizens' preferences, and he concluded that local regulation, when coupled with a mobile citizenry, can provide a powerful means of achieving that goal.⁹⁵ Yet if the actions of one local jurisdiction confer benefits or inflict harms on residents of other jurisdictions, the link between preferences and realities may be broken. Economists have long recognized, for example, that a manufacturer likely will produce greater quantities of a harmful product if it is permitted to evade liability for the harm its product causes, just as it might produce lesser quantities of a beneficial product if it is not able to charge all who benefit from the product's use.⁹⁶ In the same way, politicians in a state or locality might regulate in a manner that harms residents of other jurisdictions if they conclude they will not be held politically accountable for their actions, just as they might choose not to adopt broadly beneficial regulations if they determine that many of those benefits will be conferred on nonresidents who cannot provide rewards on election day.⁹⁷

When Chief Justice Marshall and his colleagues concluded in *McCulloch v. Maryland*⁹⁸ that the State of Maryland could not tax the federally chartered Second Bank

⁹² See Calabresi & Melamed, *supra* note 89, at 1111 (stating that some negative externalities “do not lend themselves to collective measurement which is acceptably objective and nonarbitrary”); Gillette, *supra* note 88, at 1402 (“Of course, taking [intangible] externalities into account makes it exceptionally difficult to calculate ‘social costs and benefits.’”); see also Donald J. Boudreaux et al., *Talk Is Cheap: The Existence Value Fallacy*, 29 ENVTL. L. 765, 768 (1999) (asserting that “existence values”—the positive, intangible externalities many people experience knowing that environmental treasures exist and are being well preserved—are real but exceedingly difficult to quantify).

⁹³ Cf. Elhauge, *supra* note 90, at 1485 (“[T]he moral discomfort at issue seems quite real, especially in dramatic cases where health care could save individuals from suffering severe pain or even death. It is indeed hard to see how one could face such human misery with indifference.”).

⁹⁴ I am primarily interested here in externalities that trace their origins, at least in part, to state and local regulators.

⁹⁵ See *supra* notes 5-17 and accompanying text (describing Tiebout's agenda and thesis).

⁹⁶ See, e.g., ALBERT BRETON, *COMPETITIVE GOVERNMENTS: AN ECONOMIC THEORY OF POLITICS AND PUBLIC FINANCE* 210 (1996); PIGOU, *supra* note 85, at 183-86; LeBoeuf, *supra* note 40, at 567.

⁹⁷ Of course, non-residents may try to influence the outcome of distant localities' elections, such as by funneling campaign contributions to particular candidates. See Gillette, *supra* note 88, at 1406. Non-residents cannot cast ballots in those elections, however, and so their political influence is diminished. Moreover, the cost of lobbying in multiple jurisdictions may be substantial. See *infra* note 112 and accompanying text.

⁹⁸ 17 U.S. (4 Wheat.) 316 (1819).

of the United States, for example, they were driven in part by what we recognize today as an aversion to negative externalities and to the political unaccountability on which those externalities thrive.⁹⁹ After emphasizing that “the influence of the constituents over their representative[s]” is the primary force that protects citizens from abusive exercises of the taxing power,¹⁰⁰ Marshall wrote:

Why . . . should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.¹⁰¹

By insisting that “measures which concern all” be entrusted to the federal government, Marshall foreshadowed a remedy that political economists now commonly

⁹⁹ Despite these early impulses to look unfavorably upon state and local regulations that have negative effects beyond their borders, the modern doctrine of externalities did not begin fully to emerge until the early twentieth century. See HOVENKAMP, *supra* note 85, at 200-01 (“The doctrine of externalities was most fully developed by the British marginalists after the turn of the century, principally Arthur Cecil Pigou of Cambridge.”).

¹⁰⁰ *McCulloch*, 17 U.S. at 428.

¹⁰¹ *Id.* at 431. Marshall reiterated the point later in the opinion:

The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole

Id. at 435-36. The Framers’ determination to prevent the states from erecting trade barriers amongst themselves provides an additional illustration of early concerns regarding externalities. See *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (stating that the Constitutional Convention was called, in part, based upon “the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation”); Friedman, *supra* note 87, at 407 (stating that a determination to restrict the negative externalities states can impose on one another “arguably underlies the discrimination prong of the Supreme Court’s dormant Commerce Clause analysis”).

prescribe when a state extends its reach beyond the domain of its political accountability.¹⁰² Focusing on negative externalities, Barry Friedman explains:

When states regulate, it sometimes is the case that the benefits of regulation are felt within the borders of the state, but the burdens or costs are exported. These exported costs are called externalities, and political economists generally agree that it is appropriate for the national government to restrict regulation by the states that may impose great negative externalities on sister states.¹⁰³

Scholars turn to federal intervention as a remedy for such externalities because it helps to ensure that regulatory responsibility ultimately rests on the shoulders of the “level of government that can fully internalize [all of] the costs and benefits.”¹⁰⁴ After all, when externalities occur across state lines, federal lawmakers are often the only government officials who “have the appropriate incentives to regulate the externality-generating activity” in a manner that takes into account all of the factors at issue.¹⁰⁵ Recognizing

¹⁰² See, e.g., SHAPIRO, *supra* note 21, at 41-42 (stating that externalities “preclude an environment in which those in each state bear all or substantially all of both the costs and benefits of their actions” and that, when externalities are present and regulatory action is deemed an appropriate solution, “social welfare is more likely to be maximized when such action is taken on a national level”); Bratton & McCahery, *supra* note 41, at 212 (stating that federal regulation is often appropriate in order to “police externalities pursuant to economic theory’s command that the scope of regulation match the domain of its costs and benefits”); McKinnon & Nechyba, *supra* note 21, at 9 (stating that externalities create “a distortion of policies away from what is optimal” and that “[s]uch distortions could be avoided by a central government that takes into account costs and benefits for all residents”); Moulton, *supra* note 21, at 136-38 (arguing that centralization may be required in order to internalize both positive and negative externalities).

To be sure, scholars do not always regard government regulation as the ideal solution to problems involving negative externalities. With respect to negative externalities in the private sector, for example, Ronald Coase famously pointed out that, when transaction costs are sufficiently low, government intervention may be unnecessary because those harmed by a particular externality may be able to negotiate an acceptable resolution with the externality’s creator. See Coase, *supra* note 87, at 1-15. The primary thrust of Coase’s argument, however, was not that government regulation should be jettisoned in favor of private bargaining. Indeed, he conceded that government regulation provides a more sensible alternative when transaction costs are high, as they often are when a large number of people are affected by an externality. See *id.* at 17-18. Rather, his purpose was to encourage economists to take transaction costs into account when framing solutions to real-world problems. See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 15 (1988) (“It would not seem worthwhile to spend much time investigating the properties of . . . a world [without transaction costs]. What my argument does suggest is the need to introduce positive transaction costs explicitly into economic analysis so that we can study the world that exists.”).

¹⁰³ Friedman, *supra* note 87, at 407.

¹⁰⁴ Thomas S. Ulen, *Economic and Public-Choice Forces in Federalism*, 6 *GEO. MASON L. REV.* 921, 928 (1998).

¹⁰⁵ *Id.* Of course, there is no guarantee that federal actors will legislate in a manner intended to secure the wider public’s best interests. See, e.g., Gillette, *supra* note 88, at 1356-57 (pointing out that federal politicians have numerous incentives to regulate matters that would best be left to local officials). As a structural matter, however, the federal government has greater incentives than state politicians to

that externalities can thwart the mechanisms of representative government, even those who generally favor decentralization thus concede that “[e]xternalities present the principal countervailing consideration in favor of centralized government.”¹⁰⁶

B. Decentralization in a Mobile Society: Three Negative Externalities

Due to the high degree of mobility in the United States, Americans suffer at least three intangible negative externalities when states other than their own regulate in a manner they find significantly objectionable. First, mobile citizens have an interest in maximizing the number of places in which they would be happy to live. As a result, they suffer an externality when any state adopts regulations that render it an undesirable place to reside. Second, even if they are themselves unlikely to move from one state to another, citizens have an interest in shaping the norms and regulatory preferences of their future neighbors. To the extent that laws shape people’s norms and preferences, therefore, citizens in our mobile society suffer an externality when any state enacts laws that those citizens find unacceptable. Third, due in part to their great mobility, many Americans wish to regard themselves as members of a national community. When states regulate in ways that sharply conflict with an individual’s deeply held values, therefore, that individual suffers an externality in the form of a profound sense of alienation from the community to which he or she wishes to belong. The more mobile that American society becomes, the more sharply will citizens feel these three externalities and thus the more determined citizens may become to resist the logic of devolutionists and to seek legislative remedies in Congress.

1. Our Moving Alternatives

As the Census Bureau’s data indicate, Americans change their places of residence for a variety of reasons: jobs take them to new locales, housing prices rise and fall, marriages form and dissolve, children grow up and venture out on their own, health concerns emerge and fade, and numerous additional concerns and interests cause citizens

legislate for the common good, because it is politically accountable to a larger proportion of the citizenry. If a factory in southern Minnesota dumps toxins into the Mississippi River, for example, killing fish all the way down to the Gulf of Mexico, Minnesota politicians may lack the incentives necessary to demand that the factory reform its practices, while citizens in states south of Minnesota will be unable to hold Minnesota politicians accountable for their failure to act. Minnesota lawmakers, therefore, might adopt environmental policies that give the factory little reason to reduce its polluting activities. The federal government, however, is accountable to citizens in all of the states concerned and so has an incentive to take into account all of the costs and benefits of the factory’s actions and to regulate in the manner that it determines best serves society’s multiple interests. *Cf. Illinois v. City of Milwaukee*, 406 U.S. 91, 104-07 (1972) (explaining why the federal government has an interest in protecting interstate waterways from pollution by individual states and citizens).

¹⁰⁶ See McConnell, *supra* note 21, at 1495; see also *id.* (“That significant federal effects of this sort provide justification for national decisions is well understood—hence federal funding of defense, interstate highways, national parks, and medical research, and federal regulation of interstate commerce, pollution, and national labor markets.”). *But cf. supra* notes 59-60 and accompanying text (recounting a portion of McConnell’s argument in favor of local regulation).

periodically to reevaluate their living preferences.¹⁰⁷ Because our geographic choices are colored by so many factors over the course of our lives, many of us cannot predict with certainty where we will live two, ten, or twenty years down the road. We cannot be sure what jobs we will hold, what relationships we will enter, what personal interests will emerge, what health problems will arise, or where our other family members will choose to live—yet all of these factors, and more, will bear upon our selection of places to reside.

At least two important consequences flow from the variety of influences that shape our geographic paths. First, it is unrealistic to presume that citizens always will choose to live in a state or locality based primarily on that jurisdiction’s regulatory regime. It is a rare person whose employment, wealth, relationships, health, housing options, and other life circumstances enable him or her to move to and remain in whatever place offers the regulatory package he or she finds most attractive. Jurisdictions’ varying regulatory policies certainly may be a factor in our selection of places to reside,¹⁰⁸ but our lives are too multi-dimensional to suppose that our regulatory preferences always will play a decisive role in the analysis.¹⁰⁹ Second, we cannot narrowly focus our lobbying resources on the municipalities, counties, and states in which we will one day live. If we could identify in advance all of the places we will one day reside, we could become active in the political lives of those jurisdictions, seeking to shape their policies in ways we will find desirable once we arrive. Lacking that predictive power, however, we cannot be sure where to focus our law-shaping energies.

Mobile citizens have powerful incentives, therefore, to define the relationship between their mobility and their freedom in a manner strikingly different from the way Tiebout’s devolutionists would define it. As I explained in Part II, devolutionists measure citizens’ freedom by the number of significantly different regulatory packages from which those citizens can choose when selecting a place to reside.¹¹⁰ Yet because Americans may live in a variety of unpredictable locations over the course of their lives, and will choose those locations for a variety of reasons, they have a strong interest in defining their freedom not by the number of different regulatory regimes from which they can choose, but rather by the number of different jurisdictions in which they would be happy to live. The greater the number of jurisdictions whose regulatory environments a citizen finds desirable, the greater the likelihood she will be happy when her life leads her to an unexpected location.

¹⁰⁷ See *supra* notes 48-52 and accompanying text.

¹⁰⁸ See Been, *supra* note 16, at 515-17 (surveying various studies and concluding that citizens do at least “consider a community’s public service and tax packages when they choose where to live”).

¹⁰⁹ See Friedman, *supra* note 87, at 387-88 & n.300 (stating that people tend to move “for reasons largely unrelated to government policy decisions” and citing some of the limited data on the subject).

¹¹⁰ See *supra* text following note 58.

Viewed from the perspective of a mobile citizen, therefore, a governmental regime marked by pervasive decentralization is likely to give rise to externalities.¹¹¹ To be sure, some of those externalities will be positive. When states regulate controversial matters, states other than one's own will sometimes adopt regulations that one finds entirely agreeable. When this occurs, a citizen experiences a positive externality—without any effort on his or her part, other states have rendered themselves an attractive place to live. On other occasions, however, states regulating controversial matters will choose to regulate in ways a citizen finds unacceptable. On these occasions, the mobile citizen experiences a negative externality—states that he or she might once have regarded as possible places of residence now appear notably unattractive.

When confronted with negative externalities of this sort, how should rational citizens respond? They could simply decline to live in those jurisdictions that adopt objectionable policies, but this might require them to make geographic choices they regard as far less than optimal with respect to such matters as employment, family, health, or recreation. Alternatively, rational citizens could resign themselves to the fact that they might have to campaign for regulations they find favorable each time they move to a new jurisdiction. Yet even the most activist-minded citizens may find this option unattractive, as it requires them repeatedly to duplicate their lobbying efforts and to choose whether to put down roots in a jurisdiction without knowing whether they ever will manage to transform that jurisdiction into a favorable regulatory climate.

Citizens need not be steeped in political or economic theory to recognize that there may be a more attractive option, one that would maximize the likelihood that they will be happy no matter where in the nation their life circumstances take them—namely, they can seek federal legislation embodying their own preferences. If a citizen can persuade the federal government to adopt nationwide standards embodying her preferences on those matters about which she deeply cares, the citizen's freedom of movement—at least so far as domestic regulatory standards and priorities are concerned—will be maximized. Not only will favorable federal legislation maximize the citizen's mobility, but it also will spare her from having to identify—and then divide her lobbying resources among—all jurisdictions in which she thinks she might one day wish to live.¹¹² If Congress enacts legislation matching her personal preferences, the citizen need not worry about whether changes in her job, family, health, or interests will prompt her one day to move to a state in which she had not previously considered residing. Nor need she worry about having to duplicate her lobbying efforts each time she moves to a different jurisdiction. When she prevails in Congress, she can regard all fifty states as viable moving alternatives.

¹¹¹ For a definition of positive and negative externalities, see *supra* notes 84-87 and accompanying text.

¹¹² *Cf.* Macey, *supra* note 80, at 271 (stating that “it is simply less expensive to obtain passage of one federal statute than to obtain passage of fifty state statutes” and that, even if one does choose to fight a political battle on a state-by-state basis, “political support must still be provided to federal regulators to induce them to forbear from later preempting the field”).

Revisiting the public-smoking hypothetical Michael McConnell uses to illustrate the advantages of devolution,¹¹³ we can thus predict that many citizens in that hypothetical might shun the decentralized regulatory scheme that McConnell uses the hypothetical to endorse. McConnell conceded that his argument for devolution would be weakened if externalities were present.¹¹⁴ For those citizens with deeply held views on the matter of smoking in public buildings, state regulation may give rise to just such an externality. If it were realistic to assume that, once situated in a state, citizens would remain there for the balance of their lives, then the argument for decentralized government would be powerful. When applied to the highly mobile citizenry of the United States, however, the power of that argument is diminished. Citizens frequently *do* feel compelled to move for reasons having little or nothing to do with jurisdictions' regulatory policies. In McConnell's example, therefore, those citizens of states X and Y who care about the issue of public smoking might not want to allow each state to establish its own policy on the matter, even if, at a particular moment in time, decentralized regulation would maximize the citizenry's happiness. So long as citizens frequently move across X's and Y's shared border—or believe that such changes of residence are likely—their desire to maximize their moving alternatives gives them an incentive to fight their political battles at the national level.¹¹⁵ Whether the Constitution delegates to Congress the power to regulate smoking in public buildings or any other particular matter is, of course, a separate question. But it should come as no surprise that, notwithstanding devolutionists' claim that decentralization often would maximize citizens' happiness with the government policies under which they reside, mobile Americans often stubbornly insist upon securing federal legislation that reflects the regulatory priorities they hold most dear.

There are two occasions when we should expect to find that mobile citizens might not feel a strong incentive to try to maximize their happiness and freedom in this

¹¹³ See *supra* notes 59-60 and accompanying text.

¹¹⁴ See McConnell, *supra* note 21, at 1494.

¹¹⁵ Of course, citizens comprising a majority on a controversial issue have a greater incentive to pursue a national policy than citizens comprising a minority. In McConnell's example, 55 percent support a ban on smoking in public buildings and 45 percent oppose it. See *supra* notes 59-60 and accompanying text. If citizens conduct their debate at the national level, those in the majority presumably will prevail and will maximize their moving options, while those in the minority will be deprived of a single state in which they can happily live. Yet even those in the minority may wish to resolve the issue at the national level. They may not realize they are in the minority, for example, until after the national debate has begun and until a vote on the issue has been taken. Even once citizens recognize they are in the minority, they may believe that, through a national debate on the issue, they can persuade their opponents to change their views or to strike some form of mutually acceptable compromise. Those in the minority might believe, for example, that they attach greater importance to the issue than many of those in the majority, and that they will be able to persuade those in the majority to honor these strongly held preferences or to grant concessions in exchange for political favors on other issues. Moreover, even if those in the minority recognize they will lose in a national vote on the smoking issue, they may believe they comprise a national majority on other issues, and thus they might desire a political culture in which debates on controversial issues ordinarily are conducted at the national level.

ambitious, nation-encompassing way. First, a citizen might find a system of state and local regulation acceptable for those matters that are relatively uncontroversial. As a function either of their own preferences or of competition for residents, for example, state and local politicians can be relied upon to provide such things as road maintenance and police and fire protection, because those are things that virtually all citizens desire. Some states may do a better job than others of providing these services, but no state will disregard them entirely. But when people substantially disagree about the way in which politicians should govern, citizens will need federal intervention if they wish to be certain they will find the regulatory conditions favorable no matter where in the United States they choose to live.

Second, citizens likely will prefer decentralization when they believe federal politicians would enact laws that sharply conflict with those citizens' own preferences. On these occasions, we may expect to find citizens urging that the matter be regulated at the state or local level, thereby leaving open the possibility that they will be able to find at least a handful of jurisdictions in which they would be happy to live. But when mobile citizens believe they and their political allies can prevail in Congress, they have an incentive to seek federal legislation that will render the entire nation a desirable regulatory environment. And that, of course, is precisely how citizens and politicians typically behave in today's political arena: they often seek federal legislation on issues they regard as important, and resort to the rhetoric of devolution and states' rights when the prospects of prevailing at the federal level appear discouragingly dim.¹¹⁶

2. Our Future Neighbors' Norms and Regulatory Preferences

Citizens need not themselves be likely ever to move from one state to another in order to suffer a negative, mobility-derived externality when states other than their own regulate in ways they find objectionable. We each have an interest in the norms and regulatory preferences of our future neighbors—those who will one day live in our towns and cities and play a role in shaping local policies on those matters about which we care but that are not regulated solely by the federal government. We each suffer a negative externality, therefore, when jurisdictions other than our own enact norm- and preference-shaping legislation that we find undesirable.

In the burgeoning literature on the relationship between laws and norms, scholars define norms in a variety of ways.¹¹⁷ Robert Ellickson, for example, defines norms as

¹¹⁶ See *supra* notes 65-80 and accompanying text.

¹¹⁷ Eric Posner recently proposed a conception of norms that is somewhat different from the more conventional conceptions I employ here. See ERIC POSNER, *LAW AND SOCIAL NORMS* (2000). In short, Posner contends that “the social norm has no independent power, it is not an exogenous force, it is not internalized; it is a term for behavioral regularities that emerge as people interact with each other in pursuit of their everyday interests.” *Id.* at 26. He argues that “good types”—those who highly value the prospects of future cooperation—often signal that they are indeed good types by behaving in ways that are costly in the short term but that enable society's good types to identify one another and to enjoy cooperative relationships with one another in the long run. See *id.* at 18-25. Posner contends that the “norm” label is often applied to the behavioral patterns that emerge from such signaling behavior. See *id.* at 34. He

standards of behavior that an individual “enforces on himself by means of self-administered feelings of guilt and pride.”¹¹⁸ Richard McAdams argues that a norm arises when individuals know that society has reached a consensus on a given matter and that, if they behave in a way that violates that consensus, they will lose the “esteem” of others.¹¹⁹ Robert Scott defines norms as behavioral obligations that arise “either from an internalized sense of duty, or from a fear of external sanctions such as shaming or shunning, or from both.”¹²⁰ Cass Sunstein broadly describes norms as “social attitudes of approval or disapproval, specifying what ought to be done and what ought not to be done.”¹²¹ For purposes of my argument here, it will suffice to assume that each of these definitions paints an important part of the picture. Regardless of whether the sanctions for violating a norm are imposed internally or externally, individuals have a powerful interest in avoiding those sanctions by complying with the surrounding norms and by living amongst people whose norms they share.

There is a growing consensus among legal scholars that laws can help to construct social norms and thereby influence human behavior in ways that likely could not be achieved in the absence of norms and the informal mechanisms through which they are

concedes, however, that his theory does not explain all norm-driven behavior (such as leaving tips when dining in distant towns or stopping at red lights in deserted neighborhoods), *see id.* at 38-39, and that his theory probably does not adequately account for the role of emotions, *see id.* at 46.

¹¹⁸ Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 540 (1998). Ellickson authored the book that helped launch the legal community’s growing interest in norms. *See* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 167 (1991) (setting forth the thesis that “members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another”); *see also id.* at 283 (arguing that, when disputes arise within such groups, lawmakers often would be best advised to refrain from intervention and to allow the group’s members to resolve the dispute for themselves); *cf.* GARY S. BECKER, *ACCOUNTING FOR TASTES* 225 (1996) (“Norms are those common values of a group which influence an individual’s behavior through being internalized as preferences.”); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1664-65 (1996) (arguing that “internalization of norms is the ultimate decentralization of law” and that “someone who has internalized a norm feels guilt from violating it and pride from obeying it”).

¹¹⁹ *See* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355 (1997) [hereinafter McAdams, *The Origin of Norms*]; *see also* Richard H. McAdams, *Accounting for Norms*, 1997 WIS. L. REV. 625, 634-35 (arguing that, even if a norm is not internalized and so an individual does not feel guilty if she violates it, the norm can still influence an individual’s behavior if she cares what others think of her and if she believes that others will disapprove if she behaves in a particular manner).

¹²⁰ Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1610 (2000).

¹²¹ Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996); *see also id.* at 915 (stating that norms often are enforced through “reputational incentives [that] impose high costs on deviant behavior,” such as by causing violators to feel shame or embarrassment).

enforced.¹²² Scholars have argued that laws shape norms (and thus behavior) in a variety of ways, such as by identifying conduct that society regards as acceptable and unacceptable; by creating expectations about how citizens will behave; and by changing people's beliefs about the risks and benefits of particular activities, about the values around which society has coalesced, and about the kinds of individuals who engage in particular kinds of behavior.¹²³

If laws do help to construct social norms, then they surely also help to shape citizens' regulatory preferences. Citizens often possess deeply held convictions regarding a wide range of regulatory concerns, from such mundane matters as littering and cleaning up after one's dog in public areas, to more profound matters, such as caring

¹²² See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 193 (1989) ("Law contributes to community primarily by establishing norms that identify a group as people who owe to each other not merely some specific obligations, but a loyalty whose boundaries are only vaguely defined."); *id.* at 194 ("Law expresses community norms, and it applies them to particular situations by interpreting the norms in the light of community morality and other community understandings."); POSNER, *supra* note 117, at 30-33 (contending that laws can help to shape norms by creating "focal points" for individuals' signaling behavior and by changing people's beliefs about what kinds of individuals do and do not engage in particular kinds of conduct); Kenneth G. Dau-Schmidt, *Legal Prohibitions as More Than Price: The Economic Analysis of Preference Shaping Policies in the Law*, in *LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES* 153, 155 (Robin Paul Malloy & Christopher K. Braun eds., 1995) [hereinafter Dau-Schmidt, *Legal Prohibitions*] (arguing that law can shape people's preferences "by encouraging habit formation or by stigmatizing certain activities as good or bad"); Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the "Bad Man" of Holmes*, 78 B.U. L. REV. 903, 904 (1998) ("Decentralized law works best when spontaneous obedience and private enforcement supplement state coercion."); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 2 (arguing that "in addition to creating disincentives for criminal activity, criminal punishment is intended to promote various social norms of individual behavior by shaping the preferences of criminals and the population at large"); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 41, 63 (2002) (arguing that laws can influence norms and behavior "[b]y changing the social meaning of a particular activity" and that laws accomplish that objective "by either affecting the certainty of a belief or by affecting evaluations of consequences"); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the "Sticky Norms" Problem*, 67 U. CHI. L. REV. 607, 608 (2000) (arguing that government can best change norms when it condemns the targeted conduct "only slightly more than does the typical decisionmaker," rather than condemn the conduct in a manner widely perceived as too severe); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 949-50, 997 (1995) (arguing that "some [social meanings] are constructed by government" and that "social meanings can function as selective incentives to induce action according to a social norm"); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650-52 (2000) (arguing that laws shape behavior not only by imposing sanctions, but also by declaring values and by creating an expectation that people will behave in particular ways); McAdams, *The Origin of Norms*, *supra* note 119, at 397-408 (arguing that law can shape norms by publicizing society's judgments on various matters and by concretely defining what it means to comply with abstract, general norms that many have internalized); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031-33 (1996) (contending that laws can shape norms by identifying desirable behavior and thereby changing the social meaning of conduct); Cass R. Sunstein, *Social Norms and Big Government*, 15 QUINNIPIAC L. REV. 147, 159 (1995) (arguing that law serves a norm-shaping "expressive function" by signaling and promoting "national or social commitments").

¹²³ See *supra* note 122 (citing authorities).

for the poor and the sick, raising children, and preserving the environment. Because these preferences are based at least in part on the norms that influence citizens' judgments about such matters, laws' norm-shaping function brings laws' effects full circle: laws shape not only the norms that prevail in a society, but the kinds of laws that citizens desire, as well.¹²⁴

Laws' norm- and preference-shaping power is widely perceived. Indeed, although it is a fairly recent focus of legal scholarship,¹²⁵ the notion that laws shape norms and preferences has long been in circulation. After initially opposing the idea of a federal bill of rights,¹²⁶ for example, James Madison eventually changed his mind for reasons that—as described by historians Stanley Elkins and Eric McKittrick—sound strikingly modern:

[Madison eventually conceded] that a bill of rights, properly framed, would do no harm. But in the course of time he had found more positive grounds. Believing as he did that the greatest likelihood of tyranny and the true danger to liberty lay in abuses by the majority rather than by the government (the government being but the majority's instrument), Madison reasoned that a bill of rights would function not so much as a specific set of rules but as a kind of public standard. Its benefits were of a sort that would accrue over time, the values which it embodied being gradually internalized by the whole society.¹²⁷

To the extent that Americans today feel deep commitments to such values as free speech, freedom of religion, and freedom from unwarranted searches and seizures, we likely feel those commitments at least in part because, just as Madison predicted, the Bill of Rights

¹²⁴ Cf. Dau-Schmidt, *Legal Prohibitions*, *supra* note 122, at 158-63 (stating that “[t]here are a variety of laws that seem consciously aimed at influencing people’s preferences” and giving as examples laws concerning seatbelts, child-safety seats, drunk driving, recycling, and discrimination); Sunstein, *On the Expressive Function of Law*, *supra* note 122, at 2022 (stating that “disagreements about law are frequently debated over the expressive content of law”).

¹²⁵ Cf. Cooter, *supra* note 122, at 905 (“Legal scholars . . . underestimated the effects of social norms until empirical research proved that they control behavior in spite of law.”).

¹²⁶ See STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800*, at 60 (1993) (“Madison had at first been among those who felt that a federal bill of rights was unnecessary, such rights already being provided for in most of the state constitutions. The amending power, moreover, might become a great force for mischief if resorted to before the Constitution went into effect.”).

¹²⁷ *Id.* at 61. In a letter to Thomas Jefferson, for example, Madison wrote, “The political truths declared in that solemn manner [will] acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, [will] counteract the impulses of interest and passion.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 *THE PAPERS OF THOMAS JEFFERSON* 16, 20 (Julian P. Boyd ed., 1958) (quoted in ELKINS AND MCKITTRICK, *supra* note 126, at 61-62).

has helped to instill in our society a strong, normative sense of how public officials should and should not treat us.¹²⁸

Scholars, politicians, and lay citizens today similarly perceive causal links between laws, norms and regulatory preferences. That perception frequently prompts individuals to support or oppose legislative proposals in part because they believe that, if enacted, those laws would redefine the range of socially approved conduct and thereby trigger additional legislative enactments of a desirable or objectionable nature. The debate about whether to launch oil-drilling operations in Alaska's Arctic National Wildlife Refuge, for example, is likely at least as much about the environmental norms that should prevail in this country as it is about the wisdom of drilling for oil in that particular region.¹²⁹ Thinking along just such lines, Lynn Blais credits the federal environmental laws of the 1970s with helping Americans to value the environment more highly, thereby causing them to resist more recent efforts to dilute the protections afforded by those laws.¹³⁰ Conversely, she worries that adopting lax environmental regulations today will cause citizens to lessen their regard for environmental treasures tomorrow, thereby paving the way for lawmakers to regulate the environment in additional undesirable ways.¹³¹

¹²⁸ Cf. JOHN RAWLS, *POLITICAL LIBERALISM* 163-64 (1993) (describing a process by which even recalcitrant citizens may come to cherish certain constitutionally protected rights and liberties).

¹²⁹ Senator John Kerry, of Massachusetts, has argued, for example, that the debate about oil-drilling operations in the Arctic National Wildlife Refuge poses "a test of whether our nation has a conservationist ethic." See *EPA Head Seeks "Long-Term" Solutions on Pollution, Energy*, ROLL CALL (Apr. 13, 2001).

¹³⁰ See Lynn E. Blais, *Beyond Cost/Benefit: The Maturation of Economic Analysis of the Law and Its Consequences for Environmental Policymaking*, 2000 U. ILL. L. REV. 237, 250. Blais writes:

Recognition of the fact that social norms shape private preferences is both the most important lesson for environmental policy resulting from the maturation of economic analysis and really nothing new at all. In fact, the environmental protection revolution of the 1970s was characterized by the dramatic enactment into federal law of environmental preferences not shared by a large portion of the public. Twenty-five years later, these preferences were so widely held and deeply entrenched that the 104th Congress could not succeed in its attempt to explicitly restructure environmental law along cost/benefit lines.

Id.

¹³¹ She writes:

Our understanding of the malleability of private preferences suggests that we should be wary of adopting, on a grand scale, policies that treat degradation of natural resources as just another cost of doing business. To a generation raised in an era of effluent fees and tradable emissions permits, pollution will be just another input in the production decision. . . . Unreflective equation of nonrenewable natural resources with other inputs to production is not responsible policymaking.

Id.

The debate about same-sex marriage provides another example. Consider the Defense of Marriage Act, which defines marriage as “a legal union between one man and one woman” and declares that no state shall be required to recognize same-sex marriages solemnized in other states.¹³² The legislation’s supporters argued that “[c]ivil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality,” and that states should be permitted to use their laws to express both “moral disapproval of homosexuality” and the “conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”¹³³ Worrying about the consequences of honoring same-sex marriages, one representative asked his colleagues, “Should this Congress tell the children of America that we as a society believe there is no moral difference between homosexual relationships and heterosexual relationships?”¹³⁴ Those who favor recognizing same-sex marriages, meanwhile, often take the position that they do precisely because of the norm-shaping power that they believe such recognition might exert. One author predicts, for example, that “[i]f same-sex unions gain the imprimatur of marriage, then inevitably, same-sex couples will gain social acceptance as parents, as well; such a conceptual shift could irrevocably alter traditional notions of the family unit.”¹³⁵ Another writes that many gays and lesbians desire “inclusion in the

¹³² See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000), 28 U.S.C. § 1738C (2000)); cf. Elizabeth Shogren, *Foes of Gay Marriage Find New Momentum*, L.A. TIMES, Aug. 1, 2003, at 1 (describing efforts by predominantly Republican federal politicians to secure federal legislation banning same-sex marriages).

¹³³ H.R. REP. NO. 104-664, at 15-16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919-20; cf. *Lawrence v. Texas*, 123 S. Ct. 2472, 2496 (2003) (Scalia, J., dissenting) (accusing his colleagues in the majority—who overturned Texas’s anti-sodomy statute—of “sign[ing] on to the homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct”).

¹³⁴ 142 CONG. REC. 17,079 (1996) (statement of Rep. Canady); *see also id.* at 17,070 (statement of Rep. Barr) (“The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundation of our society: the family unit.”); *id.* at 17,082 (statement of Rep. Smith) (“Same-sex ‘marriages’ . . . legitimate unnatural and immoral behavior. And they trivialize marriage as a mere ‘lifestyle choice.’”). George Dent similarly argues:

Recognition of gay marriages would mutilate the [traditional-family] norm by granting, for the first time in history, equal honor to partnerships that inherently exclude the creation of life. . . . Like legalizing bestiality, cloning, and baby-selling, validation of gay marriage would not cause direct, proximate harm but it would damage society by degrading the way we see and relate to others.

George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 598 (1999).

¹³⁵ Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL’Y 203, 245 (1997).

societal institution of marriage, in its norms and traditions, with the legitimacy, acceptance, and recognition that follow.”¹³⁶

Citizens’ belief in laws’ norm-shaping power extends even to laws that are impotent but that nevertheless remain on a jurisdiction’s books.¹³⁷ Consider the votes taken only a few years ago in South Carolina and Alabama on the issue of interracial marriage. In its 1967 ruling in *Loving v. Virginia*,¹³⁸ the Supreme Court struck down Virginia’s anti-miscegenation statutes on equal protection and substantive due process grounds.¹³⁹ Until recently, however, the constitutions of South Carolina and Alabama still contained provisions banning interracial marriages.¹⁴⁰ In 1998 and 2000, respectively, South Carolina and Alabama citizens voted to strip those provisions from their states’ constitutions.¹⁴¹ The votes, however, were far from unanimous.¹⁴² As a legal matter, of course, the issue was moot: *Loving* holds that the Fourteenth Amendment does not permit a state to use racial criteria when determining whether two individuals may

¹³⁶ Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 515 (2000); cf. Nancy Ehrenreich, *A Trend?: The Progressive Potential in Privatization*, 7 DENV. U. L. REV. 1235, 1251 (1996) (“[S]ame-sex marriage has been criticized by some in the gay community, on the grounds that it constitutes capitulation to heterosexual norms. Others, however, see it as a radical effort to transform the very concept of marriage.”); Samuel A. Marcossou, *Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their “First Line of Defense” in the Same-Sex Marriage Fight*, 24 J. CONTEMP. L. 217, 248 (1998) (“The message of disapproval of homosexual relationships sent by denying them the legal status of ‘marriage’ is meant to reinforce and idealize heterosexuality . . .”). See generally Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 978, 981-82 (1997) (advising proponents of gay and lesbian rights to focus not on “rule-shifting” laws that confer benefits yet fail to “engage the attention of the public,” but rather on “culture-shifting” laws that transform the basic principles on which our society rests).

¹³⁷ Cf. Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 685-733 (2001) (discussing the harms caused by unenforced anti-sodomy laws in South Africa).

¹³⁸ 388 U.S. 1 (1967).

¹³⁹ *Id.* at 11-12.

¹⁴⁰ See ALA. CONST. art. IV, § 102 (“The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.”) (repealed 2000); S.C. CONST. art. III, § 33 (“The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void.”) (repealed 1998).

¹⁴¹ See Kim Chandler, *State Voter Turnout Hit 68%, 2nd Highest Ever*, BIRMINGHAM NEWS, Nov. 2, 2000 (reporting that Alabama’s amendment was approved in the statewide election); *Legislative Roundup*, THE HERALD (Rock Hill, S.C.), Feb. 28, 1999, at 6B (reporting that the South Carolina legislature ratified the amendment approved by voters in the statewide election).

¹⁴² See Chandler, *supra* note 141 (reporting that a majority of voters in 23 of Alabama’s 67 counties voted against the amendment); *Controversial Amendments*, THE HERALD (Rock Hill, S.C.), Nov. 5, 1998, at 11A (reporting that 38 percent of South Carolina voters cast their ballots against the amendment).

marry one another. Citizens in Alabama and South Carolina nevertheless debated and split on the issue, in large part because they disagreed about the normative message their states' legal texts should communicate to residents and visitors.¹⁴³

In every instance in which laws influence individuals' norms and regulatory preferences, therefore, citizens in a mobile society suffer a negative externality when jurisdictions other than their own regulate controversial matters in objectionable ways: those laws help to instill undesirable norms and preferences in individuals who may one day reside in, vote in, and generally help to shape the objecting citizens' own local communities.¹⁴⁴ Because the Constitution forbids a state from preventing other states' citizens from moving to a location within that state's own borders,¹⁴⁵ a state cannot insulate itself from the undesirable norms and regulatory preferences that are fostered in other jurisdictions. As a result, citizens may find themselves, over time, surrounded by neighbors whose norms and preferences they do not share.

Finding a remedy for the development of undesirable norms and preferences in other jurisdictions is difficult, absent federal action. After all, just as mobile citizens cannot predict precisely where they will live over the course of their lives,¹⁴⁶ neither can they identify the jurisdictions from which their future neighbors will come. Consequently, they cannot narrowly focus their lobbying energies on those states in

¹⁴³ See, e.g., Bill Pryor, *Black and White, Repealing Marriage Ban is a Moral, Legal, Economic "Yes"*, BIRMINGHAM NEWS, Oct. 1, 2000 (arguing that approving Alabama's amendment "would allow Alabamians to send a powerful and positive message about our great state"); *The Digest*, BIRMINGHAM NEWS, Nov. 2, 2000 ("If [the Alabama amendment is] defeated, it'll send an ugly message to the world about Alabama.") (quoting Rep. Alvin Holmes, a sponsor of the amendment).

¹⁴⁴ Of course, if those who perceive a causal link between laws and norms are mistaken, and if laws actually have little or no impact on the norms that prevail in society, then the argument that there is a powerful externality to be remedied (or that federal law can itself provide that remedy) is plainly undercut. Yet until citizens are persuaded that there is no causal connection between laws and norms, we should expect to find them often resisting devolutionists' contention that state and local lawmakers ordinarily should have primary responsibility for regulating controversial matters.

¹⁴⁵ See *supra* notes 53-57 and accompanying text. Just as the Constitution prevents a state from shutting its doors to prospective new residents, the so-called Dormant Commerce Clause limits a state's ability to shut its doors to—or otherwise constrict the flow of—goods and services originating in other states. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 401-34 (2d ed. 2002) (providing an overview of the Commerce Clause's negative implications). When it comes to regulating the countless goods and services that cross state lines, therefore, the Constitution itself gives citizens powerful incentives to seek their desired legislative remedies at the national level. In this regard, the interstate movement of goods and services has implications that are exactly the opposite of those that Tiebout's followers draw from the interstate movement of individuals: it promotes a regulatory regime marked by centralization, rather than decentralization. That disparity begins to fade when one takes into account the externalities mobile citizens may suffer when jurisdictions other than their own regulate in objectionable ways. Just as citizens may want to seek Congress's protection from harmful goods manufactured in other states, for example, citizens may want to seek Congress's protection from undesirable norms fostered in other states, as well.

¹⁴⁶ See *supra* notes 107-08 and accompanying text.

which their future neighbors currently reside. Even if they could identify their future neighbors, they surely would find that they are scattered across numerous jurisdictions.¹⁴⁷ If citizens can obtain federal legislation that reflects their own norms and regulatory preferences, however, they need not worry about where in the nation their future neighbors currently live or about dividing their lobbying resources among a large number of disparate jurisdictions. A citizen might seek federal legislation that articulates a norm at a fairly high level of abstraction, leaving state and local jurisdictions free to distinguish themselves in a variety of ways but assuring the citizen that those distinctions will not violate the broadly articulated norm. Alternatively, a citizen might seek federal legislation that is highly detailed in nature, thereby rendering state and local regulation less relevant and making it less likely that state and local jurisdictions will shape their citizens' norms in undesirable ways. In either case, however, the citizen can attempt to use federal law to push people residing throughout the country toward norms and regulatory preferences that he or she finds desirable.

3. Our Membership in the National Community

Many United States citizens regard themselves as members of a national community.¹⁴⁸ Although they each belong to a variety of smaller political and non-political communities, as well, many citizens find that their communal identities as Americans constitute an important dimension of their "sense of self."¹⁴⁹ As Kenneth

¹⁴⁷ Indeed, some of the citizen's future neighbors likely reside in other countries. Federal legislation may serve the citizen's interests even with respect to these prospective neighbors, if that legislation helps to define and express the norms under which Americans have chosen to live, and thus helps to ensure that those who move to the United States either share or are willing to abide by its norms.

¹⁴⁸ See, e.g., ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 250 (1996) (stating that, in numerous interviews with Americans, the authors discovered "a widespread and strong identification with the United States as a national community"); Gardner, *supra* note 65, at 823 ("Certainly one of the foundational and indispensable beliefs of American political and social life is that we are a nation, which is to say that we constitute collectively a certain community.").

¹⁴⁹ Rubin & Feeley, *supra* note 80, at 945-46 ("[T]he United States has one political community and that political community is the United States. . . . It is the nation as a whole that constructs our sense of self and that provides a sense of participation in a larger group."); cf. KARST, *supra* note 122, at 30 ("The essential meaning of American identity is adherence to the ideology of the American civic culture and behavior in accordance with that culture's norms."); *id.* at 173 ("For every one of us, the sense of belonging to a community is one of the foundations of self-identification, of individuality."). Not only does this sense of national community provide a defining focal point for each of its members, but, as Robert Burt has argued, it also helps to legitimate the notion of majority rule:

The norm of majority rule implicitly relies on the possibility of some underlying communal identity among winners and losers. Its practical working assumption is that members of the existing electoral majority are not locked in exclusive alliance with one another but that some, at least, are sufficiently prepared to find common ground with the existing minority in order to hold open the prospect of a redefined communal majority in which today's loser becomes tomorrow's winner.

Karst has observed, for example, “it seems no exaggeration to say that today most of us think of ourselves first as Americans and only secondarily as New Yorkers or Californians or Alabamans. Before the small-town basketball game begins, the high school band plays ‘The Star-Spangled Banner.’”¹⁵⁰

Americans’ mobility plays a significant role in creating this widespread perception of national community—citizens’ own geographic paths and those of their families, friends, and colleagues create connections and associations that touch far-reaching areas of the nation.¹⁵¹ Moreover, having lived in a variety of locations over the course of their lives, many individuals lack the deep sense of localized identity that often comes with living most of one’s life in the same location, and so they broaden their geographic conceptions of community.¹⁵² Numerous other factors play a role, as well. The nation’s dealings with war and terrorism, the Constitution’s uniform extension of rights to persons in all states, the ease of coast-to-coast communication, the integration of the nation’s economy and the easy movement of products across state lines, the pervasiveness of news and entertainment media that reach national markets, businesses’ widespread use of franchising—these and other phenomena all combine to give citizens the strong sense that they are joined with one another in a nationwide community.¹⁵³

Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 456 (1984).

¹⁵⁰ KARST, *supra* note 122, at 180; *cf.* Gardner, *supra* note 65, at 837 (“Americans have a communal identity, but it is a national and not a state identity.”).

¹⁵¹ *See* KARST, *supra* note 122, at 180 (“The reasons for this heightened national identification are easy to see. . . . Large numbers of us are highly mobile both in capacity and in inclination—and even those who stay put are part of national networks of relatives and friends scattered across the land.”); *cf.* Gardner, *supra* note 65, at 828 (arguing that distinctions marking subnational communities frequently fade because “the ease of mobility and the national structure of the economy all but guarantee quick dilution of any truly significant local traits”); Kahn, *supra* note 65, at 1150 (“As [highly mobile] individuals lose a geographic focus in their lives, they inevitably turn to the national government as the primary focus of public life.”).

¹⁵² *Cf.* ROBERT A. NISBET, *THE QUEST FOR COMMUNITY* 163 (1971) (stating that, when other forms of association have faded, people often turn to politics and to political communities in order to feel like they are a part of something larger than themselves); Briffault, *supra* note 16, at 413 (stating that “community bonds within localities [in a highly mobile society] cannot be very strong”). Nisbet certainly does not celebrate the extent to which citizens turn to centralized government for a meaningful experience of community; indeed, he faults centralized government for itself causing “those dislocations of social structure and uprootings of status which lie behind the problem of community in our age.” NISBET, *supra*, at 98. Nevertheless, he acknowledges that people in many modern nations do seek community in their national governments. *See id.* at 119-20 (arguing that centralized government often wins citizens’ loyalty, thereby marginalizing the lesser forms of association on which citizens once relied).

¹⁵³ A number of scholars have identified one or more of these phenomena as important influences in the development of citizens’ sense of membership in a national community. *See, e.g.*, KARST, *supra* note 122, at 180-81; Gardner, *supra* note 65, at 828-29; Kahn, *supra* note 65, at 1150; Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 986 (1985); Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1051-56 (1997).

One of the essential components of any community is a core set of shared values.¹⁵⁴ Many of the norms that operate within a community, for example, serve both to express the values around which that community has coalesced and to ensure that the community's members behave in accordance with those values.¹⁵⁵ Indeed, community-definition and community-preservation are among the reasons that groups of people unleash norms and their powerful enforcement mechanisms in the first place: norms help to establish a strong link between an individual's good standing within a community and that individual's willingness to abide by the community's value-laden judgments. One cannot continually find oneself on the receiving end of norms' sanctions—whether those sanctions take the form of guilt, shunning, loss of respect, or some other undesirable phenomenon¹⁵⁶—and still regard oneself as a full-fledged, value-sharing member of the community in which those sanctions are applied.

Although shared values are essential to any community, articulating the values that purport to define membership in the United States' national community is far from easy.¹⁵⁷ Of course, some of the nation's unifying values are fairly well established. The Constitution, for example, expresses values to which most Americans readily subscribe.¹⁵⁸ Many citizens probably also would agree with Professor Karst when he argues that among “the central values of today's American civic culture [are] individualism, egalitarianism, democracy, nationalism, and tolerance of diversity.”¹⁵⁹ As

¹⁵⁴ See KARST, *supra* note 122, at 190 (“The heart of community . . . is not so much the cool calculation of interests as the ‘moral cohesion’ of shared values.”); Gardner, *supra* note 65, at 823 (“The existence of [shared] values is a necessary condition for the emergence of a community . . .”).

¹⁵⁵ See *supra* notes 117-21 and accompanying text (discussing norms and their enforcement mechanisms).

¹⁵⁶ See *supra* notes 117-21 and accompanying text (discussing norms and their enforcement mechanisms).

¹⁵⁷ Cf. ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 9 (1991) (defining “the good society” as one in which citizens all are engaged in the quest to identify “those things that are necessarily matters of the good of all,” notwithstanding that society's many points of diversity); KARST, *supra* note 122, at 31 (“A minimum requirement of nationhood is a set of universal norms.”); Lawrence E. Mitchell, *Understanding Norms*, U. TORONTO L.J. 177, 246 (1999) (observing that “a diverse society must have some stabilizing norms to which all (or pretty much all) agree, and which at the margins trump other, more localized, commitments, in order to maintain itself as a society”); Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 347 (1997) (acknowledging that “[t]here are, to be sure, some demands that must be imposed on every member and every group in society as a minimum requirement of their living in it”).

¹⁵⁸ See Gardner, *supra* note 65, at 824 (“Our constitutional language and culture hold the U.S. Constitution to be the repository of the fundamental values of the national community, a community to which every citizen belongs.”).

¹⁵⁹ KARST, *supra* note 122, at 31; cf. Mark Tushnet, *Federalism as a Cure for Democracy's Discontent*, in *DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY*, 307, 315 (Anita L. Allen & Milton C. Regan, Jr. eds. 1998) (stating that “to be an American is to orient your political action toward realizing the principles of the Declaration [of Independence] and the Preamble [to the Constitution]”).

the Constitution's text and Karst's recitation suggest, however, one must operate at a level of great abstraction if one wishes to identify the values that unite America's diverse citizenry. Once one moves to a fact-specific level and tries to state how particular values relate to one another, how governments should regulate the lives of their constituents, and how public and private actors should behave in particular circumstances, controversies frequently erupt.¹⁶⁰ Although most Americans likely would agree that tolerance of diversity is a nationally shared value, for example, citizens have different conceptions of when such tolerance is actually appropriate.¹⁶¹

Because citizens share a number of overarching values but frequently disagree about both how and which values should apply in particular circumstances, and because most individuals subscribe to other values that they regard as vital but that do not enjoy nationwide support, the national community is not fully formed, but rather remains at least a step or two—and perhaps a great many steps—beyond the citizenry's reach.¹⁶² Even if a genuine national community has not been entirely realized, however, many citizens nevertheless wish to edge ever closer to a sense of full membership in such a community, and thus we find competing constituencies continually trying to push the nation toward values that those constituencies believe one should have to possess in order to enjoy full membership in American society. Regardless of whether the issue is education, crime, drugs, abortion, suicide, marriage, tort reform, welfare, or any other matter of public importance, one frequently finds that, while some citizens are willing to tolerate a significant measure of legislative pluralism, others insist that the nation be governed in accordance with a particular value judgment.¹⁶³ When people disagree about the ways in which such value-laden matters should be regulated, therefore, the stakes are

¹⁶⁰ See KARST, *supra* note 122, at 32 (stating that the nation's unifying values must be stated "at a high level of abstraction" and that, "[w]hen you try to apply them in making particular choices, the [values] are bound to come into conflict"). Glen Robinson argues that the task of framing more specific nation-unifying values is futile. He contends that, while we might "share enough sufficiently enduring values to create a stable society," those values are not great in number and do not provide a basis "for transforming the 'great society' into a 'great community.'" Robinson, *supra* note 157, at 345-46. Although his judgment might ultimately be vindicated, a substantial portion of the national citizenry persists in its efforts to define the national community according to values they hold dear. See *supra* notes 65-80 and accompanying text.

¹⁶¹ Cf. Robinson, *supra* note 157, at 307 ("A liberal society is definitionally one that tolerates and accommodates different communities as well as different individuals . . .").

¹⁶² Cf. RAWLS, *supra* note 128, at 42 (stating that "a well-ordered democratic society . . . is not a community . . . , if we mean by a community a society governed by a shared comprehensive religious, philosophical, or moral doctrine"); see also *id.* at 36 (stating that "the diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy").

¹⁶³ Cf. Tushnet, *supra* note 159, at 310 (distinguishing between "fundamental interests," which are "values that a person believes must be implemented if the society in which he or she lives is to be regarded as minimally just," and "nonfundamental interests," which are "values that a person holds, but that the person acknowledges can be reasonably rejected by others").

high: competing groups of citizens each have an incentive to use the nation's lawmaking machinery to try to define the national community in a way that gives those individuals a strong sense that they belong, that they are at home, no matter where in the country they happen to reside.¹⁶⁴

If citizens find that the nation's laws reflect values they regard as deeply objectionable, they may experience a profound and disquieting sense of alienation.¹⁶⁵ This alienation might flow from shunning, which a citizen may suffer upon violating a social norm. Yet even in the absence of shunning, citizens may experience alienation in the form of a deep-seated perception that they are marginalized from the life of the community because their own values are neither shared by others nor expressed in other citizens' conduct.¹⁶⁶

¹⁶⁴ Mark Tushnet suggests that "federalism can be something of a way station from a society in which people have widely divergent values into one in which they have convergent ones." *Id.* He explains:

In brief, I believe that federalism holds out the possibility of mutually profitable economic and cultural exchanges that gradually erode differences over fundamental interests, and that, given enough time, people may come to see that the benefits of those exchanges outweigh the incremental changes in fundamental interests that accompany each exchange, until the incremental changes accumulate into a larger transformation in fundamental views.

Id.; see also Mark Tushnet, *Federalism and Liberalism*, 4 CARDOZO J. INT'L & COMP. L. 329, 340-44 (1996) (advancing the same argument).

¹⁶⁵ See, e.g., Melvin Seeman, *On the Meaning of Alienation*, in ALIENATION AND THE SOCIAL SYSTEM 45, 52 (Ada W. Finifter ed., 1972) (stating that alienation occurs when a person "assign[s] low reward value to goals or beliefs that are typically highly valued in the given society"). Ada Finifter similarly recognizes that alienation occurs when a person rejects "political norms and goals that are widely held and shared by other members of society." Ada W. Finifter, *Dimensions of Political Alienation*, in ALIENATION AND THE SOCIAL SYSTEM, *supra*, at 189, 191; see also Ada F. Finifter, *Introduction*, in ALIENATION AND THE SOCIAL SYSTEM, *supra*, at 1, 9 (stating that "alienation is produced by a discrepancy between strongly internalized aspirations, norms and values, on the one hand, and the opportunities perceived by the individual for fulfilling them, on the other").

¹⁶⁶ See generally NISBET, *supra* note 152, at ix, xii (arguing that "community is the essential context within which modern alienation has to be considered" and that an individual experiences alienation when he or she "find[s] a social order remote, incomprehensible, or fraudulent; beyond real hope or desire; inviting apathy, boredom, or even hostility"). The fact that such alienation is undesirable is certainly not unknown to the law. Justice O'Connor believes, for example, that the Establishment Clause serves, at least in part, to prevent governments from alienating citizens from the nation's political community by endorsing religion:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . Endorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Alienation is not confined to those instances in which the nation's laws actively regulate in a manner a citizen finds objectionable. If the nation passively permits a state or locality to regulate in ways a citizen finds unacceptable, the citizen may experience the same sense of alienation from the national community, regardless of whether the offending state or locality is the citizen's own. The Civil War, for example, was fought in part because many citizens, in both free and slave-holding states, were unwilling to accept the fact that they shared their United States citizenship with individuals who enslaved other human beings.¹⁶⁷ The abortion debate persists in this country today in part because, regardless of whether abortion is regulated at the state or national level, many citizens cannot feel fully at home in a nation in which the opposing side's values are ever permitted to prevail.

Alienation from a nationwide community in which citizens covet membership, therefore, is yet another externality for which citizens in a mobile society may desire a federal legislative remedy: when any of the nation's sovereigns regulate in a manner that a citizen finds significantly objectionable, that citizen may suffer an unwanted sense of exclusion. Federal legislation offers citizens an opportunity to strengthen their sense of belonging by expressing values those citizens find desirable,¹⁶⁸ by making it more costly to behave in ways that violate those values, and by strengthening the nation's commitment to those values.¹⁶⁹ The greater citizens' desire to feel that they are members of a national community and the greater their belief that federal legislation offers a

Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (reiterating this community-focused line of reasoning); Lee v. Weisman, 505 U.S. 577, 607 n.9 (1992) (Blackmun, J., concurring) (same); Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring in the judgment) (same). See generally U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

¹⁶⁷ Cf. Rubin & Feeley, *supra* note 80, at 947 (stating that, prior to the Civil War, slavery's advocates probably could have "advance[d] a valid claim of political community on behalf of their desire to avoid a centralized national policy," but that "the extent to which people of the time believed that the southern states were entitled to protection as separate political communities depended on their feelings about slavery itself"). Clayton Gillette writes:

Given that membership within some form of union recognizes an affinity of interests and culture among all members, the conduct of any one member will often generate [intangible negative externalities]. A state that permits slavery will impose costs on abolitionists from other states in the same union, greater than the harms those same abolitionists would suffer were slavery practiced by a nation of which they were not citizens.

Gillette, *supra* note 88, at 1392.

¹⁶⁸ Cf. Sunstein, *supra* note 121, at 159 ("Law . . . often has an expressive function in the sense that it signals national or social commitments The expressive function of law doesn't have to do directly with consequences but instead with the norms that are being signaled and promoted.").

¹⁶⁹ Cf. *supra* notes 122-43 and accompanying text (discussing laws' norm-shaping power).

powerful tool for articulating and shaping the values that define membership in that community, therefore, the more assiduously will they resist devolutionists' argument that significant regulatory power should be stripped from the federal government and conferred upon state and local authorities.

IV. CONCLUSION: CONFRONTING THE PARADOX

One cannot fully engage in the ongoing debate about the ideal distribution of power in our federal system of government without taking thoughtful account of Americans' remarkable mobility. Numerous scholars have indeed seized upon one set of our mobility's implications, arguing that increased regulatory responsibility should be shifted from the federal government to state and local authorities, so that mobile citizens can select from among a diverse array of regulatory regimes when choosing a place to reside.¹⁷⁰ Decentralization's proponents, however, have told only half of mobility's story. The very same mobility on which those devolutionary proposals depend paradoxically also gives rise to strong incentives for citizens to oppose decentralization and to seek federal legislation on controversial issues they regard as important. In our highly mobile society, a citizen suffers an intangible, negative externality¹⁷¹ when a state or locality other than his or her own regulates in a manner that renders that jurisdiction an undesirable place for the citizen to live,¹⁷² that shapes the norms and regulatory preferences of that jurisdiction's mobile residents in ways that the citizen regards as undesirable,¹⁷³ or that causes the citizen to feel alienated from a national community to which he or she wishes to belong.¹⁷⁴ As a result, when citizens insist on seeking federal legislation for those matters about which they deeply care,¹⁷⁵ they may be acting not in foolish disregard of devolutionists' logic, but rather in accordance with a widely recognized truth in our political economy: federal intervention often can provide an effective remedy for interstate externalities.

If citizens' mobility paradoxically provides strong incentives for citizens both to seek and to resist decentralization, how should regulatory power actually be allocated among the nation's various governments? After all, there is a vast array of areas in which the federal government's constitutionally delegated regulatory authority overlaps with the regulatory power of the states.¹⁷⁶ For each of those areas, how are we to distinguish

¹⁷⁰ See *supra* notes 21-37 and accompanying text (describing these scholars' arguments).

¹⁷¹ See *supra* notes 84-93 (defining externalities).

¹⁷² See *supra* notes 107-16 and accompanying text.

¹⁷³ See *supra* notes 117-47 and accompanying text.

¹⁷⁴ See *supra* notes 148-69 and accompanying text.

¹⁷⁵ See *supra* notes 65-80 and accompanying text (describing citizens' frequent insistence on federal—rather than state or local—regulation).

¹⁷⁶ See Pettys, *supra* note 42, at 364-66.

between (a) those instances in which the federal government should permit state and local officials to regulate, thereby enabling mobile citizens to shop for the regulatory packages they find most desirable, and (b) those instances in which state and local regulations would cause numerous mobile citizens to suffer unacceptable externalities? Determining when mobility-derived externalities warrant federal intervention is a problem that lies at the core of the perpetual debate among scholars, politicians, and ordinary citizens about the proper role of the federal government in regulating the nation's domestic affairs.

The significance of that problem, however, is matched in magnitude by the difficulty of its resolution. One must somehow quantify decentralization's intangible externalities if one wishes precisely to compare the costs and the benefits of decentralization or its opposite in any given setting. And yet intangible externalities are famously slippery creatures—they usually resist objective measurement.¹⁷⁷ Indeed, the difficulties one encounters when trying to gauge the severity of those externalities illustrate the fundamental problem from which Tiebout himself tried to spare us—namely, determining how to ascertain citizens' preferences, as well as the strength of those preferences, on a host of complex regulatory concerns. Tiebout's core insight was that, when state and local officials regulate important matters, politicians need not attempt to read their constituents' minds and citizens need not worry about trying to give voice to their precise wishes in elections; instead, citizens can choose for themselves those regulations they prefer by simply moving to the jurisdiction that offers the regulatory package they find most attractive. When the issue is whether the federal government should intervene in order to ameliorate decentralization's intangible externalities, however, citizens cannot use their mobility to reveal the nuances of their desires, because the federal government does not appear to compete with numerous other jurisdictions in an effort to keep mobile United States citizens within the nation's borders.¹⁷⁸ How, then, are we to determine when decentralization's intangible externalities necessitate federal intervention and when they do not?

Although scholars would do well to frame the question in that way and to bring their skills to bear on its resolution, the nation's governance cannot be put on hold pending a scholarly consensus about how best to address the nation's many domestic concerns. The nation's sovereigns—ordinary citizens—are continually confronted with issues demanding their attention, and, in each instance in which federal and state regulatory powers overlap, citizens must confront the mobility paradox, deciding for themselves whether they believe particular matters are best regulated by the federal government, by state and local authorities, or by some combination thereof.

¹⁷⁷ See *supra* note 92 and accompanying text.

¹⁷⁸ Of course, a citizen might become so dissatisfied with the federal government's behavior and so attracted to a different nation's regulatory practices that he or she decides to move to a different nation entirely. Yet it seems highly unlikely that citizens will exit the country in such numbers, and for such clearly ascertainable reasons, that a significant market signal would be sent indicating that the federal government needs to become less or more involved in regulating certain aspects of the nation's domestic affairs. Cf. *supra* note 8 (noting Tiebout's similar assumption that people do not move across national borders as readily as they move across subnational borders).

In sorting out the implications of their mobility for their own regulatory preferences, citizens must perform their analysis on at least two different levels. First, of course, they must consider each specific regulatory issue about which they care, ascertain the strength of their preferences in that area, and then decide whether the given issue is one for which decentralized lawmaking would likely cause them to suffer unacceptable externalities or whether it is one for which they desire (or at least would be willing to tolerate) a significant measure of regulatory diversity among the nation's state and local governments. Once they have made that determination, they must find ways to give effect to their preferences through the ordinary channels of political activity, even if those channels fall short of enabling citizens to express their preferences in all of the fine-tuned ways we might prefer.¹⁷⁹

Second, and more broadly, citizens must decide whether, in any given regulatory setting, they wish to contribute to a political culture in which we debate and resolve important issues principally at the national level. As I noted earlier,¹⁸⁰ political losses in Congress are generally more costly than losses sustained at the state or local level, because losses in Congress may deprive a citizen of the opportunity to find any American jurisdiction where the matter in question is regulated in a manner he or she finds desirable. Yet each time a citizen endorses the federal government's involvement in a particular area of regulatory concern, that citizen contributes to a societal understanding—among political allies and opponents alike—that the federal government ought to play a significant role in regulating such aspects of the nation's domestic affairs. Even those in the national majority on a given issue, therefore, have an incentive not to seek federal legislation implementing their preferences unless they are driven by powerful negative externalities or some other vital concern. If citizens in the majority do not have strong preferences on the matter at issue, would not suffer significant externalities if the matter were diversely regulated by state and local authorities, and do not have any other persuasive justification for seeking federal intervention, but they nevertheless attempt to impose their will on all of their fellow citizens through federal legislation, they thereby needlessly help to establish a norm of centralization that may work to their disadvantage when those same citizens later find themselves in the national minority on an issue about which they deeply care. There is a price to be paid, in other words, for seeking to impose one's will on the entirety of the American public.

When viewed from that perspective, one cannot help but be struck by the fact that so many Americans so frequently appear willing to pay centralization's price.¹⁸¹ When citizens persist in their demand for federal legislation, despite the high stakes involved in seeking one's legislative victories at the federal level and despite devolutionists' arguments for shifting power away from the federal government, they may be

¹⁷⁹ See *supra* notes 5-7 and accompanying text (noting that economists generally believe "voice" is a less powerful means than "exit" for expressing one's preferences).

¹⁸⁰ See *supra* text preceding note 63.

¹⁸¹ See *supra* notes 65-80 and accompanying text (describing citizens' frequently manifested preference for federal regulation).

manifesting nothing less than a strong conviction that the potential benefits of a culture of centralization are worth the costs. Of course, one might dismiss the frequent drive for federal legislation as the product of ignorance, concluding that shortsighted citizens simply do not understand the harm they are causing themselves when they forego a rich variety of regulatory options at the state and local level. But perhaps these citizens intuitively know precisely what they are doing—namely, mitigating the negative externalities they would suffer in our highly mobile society if state and local governments were permitted to regulate numerous important matters in objectionable ways. Perhaps citizens are choosing to resolve the mobility paradox, in other words, not by using their mobility to shop for state and local regulatory environments they deem desirable, but rather by concluding that their mobility makes federal legislation essential.