The Campaign Finance Safeguards of Federalism

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Abstract

This article provides the first systematic account of the relationship between campaign finance and federalism. Federalism—a fundamental characteristic of the constitutional structure—depends for its stability on political mechanisms. States and their advocates and representatives in Congress, federal agencies, political parties, intergovernmental lobbying groups, and other political forums work together to check federal interference with state governments. Entire normative theories of federalism depend on the assumption that this system of political safeguards is working effectively in the background. But the federalism and constitutional theory literatures lack a rigorous account of the effects of dramatic political change on pro-federalism political dynamics. Building that account is particularly timely now. Political safeguards work only if states retain significant political influence. But, as recent elections vividly demonstrate, Citizens United has created a new class of political operators—of which Super PACs are emblematic—whose potential political influence may be limitless. This article’s thesis is that Super PACs have the capacity to undermine all conventional political safeguards of federalism, pushing states far enough down the hierarchy of political influence to dramatically reshape the our system of government. This highlights the underappreciated extent to which Citizens United may have long-term structural consequences other than its effects on democratic representation. These developments have significant normative implications for federalism theory—at a minimum, they require reexamining the common assumption, central to numerous normative claims, that national political process is a durable channel for state self-defense. They also suggest new normative claims concerning campaign finance doctrine. If sustaining federalism is a compelling governmental interest, then federalism problems may justify new campaign spending restrictions despite the First Amendment and the reasoning of Citizens United, which otherwise appear to preclude further reforms.

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Assistant Professor, Florida State University College of Law. Sam Issacharoff; Jake Linford, Jim Gardner, Mark Seidenfeld, Franita Tolson, Hannah Wiseman, Ernie Young, [others], and participants in workshops at Florida State, [others]. This is a draft; please do not circulate or cite it without the author’s permission.
INTRODUCTION

The 2012 election cycle, at over $6 billion in total spending, was the most expensive in history.1 Super PACs and other outside spending groups accounted for an unprecedented $1.3 billion, the vast majority of which came from a small set of ultra-wealthy “megadonors”—over 60 percent of Super PAC money was donated by 91 individuals giving more than $1 million each and 97 percent came from about 1900 donors giving more than $10,000 each.2 The two presidential campaigns raised $394 million from donors of less than $200 each; an amount that Super PACs raised from 630 donors of $100,000 or more.3

The advent of Super-PAC politics in the wake of Citizens United v. Federal Election Commission4 has changed federal elections and the incentives faced by federal candidates and officeholders seeking reelection. The explosive growth in electoral spending by Super PACs and other organizations answerable to neither candidates nor political parties—much less voters—threatens to capture and divert the policymaking apparatus to serve the agendas of these megadonors, drowning out the influence of less wealthy or less disciplined groups. Among the displaced are those who press state-government interests in federal policymaking—the “federalism constituency” essential to federalism’s political safeguards. Despite the longstanding consensus that such safeguards exist and are important for the stability of the constitutional structure, theorists have not examined the interactions of campaign finance with federalism. This Article provides the first systematic account of those interactions and explores the implications of Citizens United—particularly the growing power of Super PACs and similar groups—for federalism’s political safeguards. Different theories emphasize different segments of the federalism constituency; but unregulated outside electoral spending swamps that constituency’s influence in general, and thus undermines nearly every account of federalism’s political safeguards. Diminished political safeguards threaten to shift the burden of federalism reinforcement to a judiciary with demonstrably limited capacity to implement structural norms. These effects require reworking positive and normative federalism theories and, if federalism’s value is significant enough, reworking federalism or campaign finance doctrine to counteract the consequences of Citizens United.

Citizens United drew serious criticism5 and rekindled debates about elections and democracy in general;6 subsequent extension of the Court’s reasoning into license for

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3 Illinois PIRG & Demos, supra note 2, at 2–3.
4 130 S. Ct. 876 (2010).
unlimited fundraising and spending by outside groups like Super PACs fueled further controversy. The “firewall” separating Super PACs from candidates and parties is porous at best; thus, “in practice, a [Super PAC] is part of the campaign of the candidate it is aiding,” and their expenditures are “for all practical purposes contributions to candidates” for which outside benefactors likely expect something in return. Other changes in campaign finance law redirect donations from political parties to these groups, circumventing the parties’ moderating effect that might otherwise temper megadonor demands. The ramifications for democracy are enormous. The results in 2012 appear comforting—the largest Super PACs lost two-thirds of the races they funded; and while the majority of outside spending was directed against Democratic candidates, President Obama was re-elected and a number of democratic senate and house nominees won despite large Super-PAC outlays on behalf of their opponents. But it is a mistake to conclude that Citizens United and its progeny have been proved insignificant. Megadonors appear undeterred and say they’ll spend more on the next election. And there are subtler but potentially more significant effects to assess: Increased outside


8 Briffault, supra note 7, at 1685.

9 Michael S. Kang, The End of Campaign Finance Law, 98 VA. L. REV. 1, 42–44 (2012); see Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 TEX. L. REV. 1705, 1714 (1999) (noting that influence of large donors giving through normal channels is “profoundly qualified by … candidates who must stake out positions across a variety of interests and by political parties that have strong institutional interests in hewing to a middle course”).


spending exacerbates the “polarizing, attack orientation of contemporary political advertising” and heightens the potential capture of officials by interest groups—long the central concern of campaign finance regulation. Elected officials have different incentives now: If they say the right things and vote the right way, they gain access to a new unlimited mountain of campaign money; if they act against outside-group interests, they face the prospect of that mountain supporting a challenger. This dramatically increases the influence of large donors over federal officials’ agendas. Even candidates who oppose Super PACs and outside spending have to rely on it to stay competitive. These dynamics also threaten democratic participation by expanding the perception that wealthy interests control the government, and by decreasing candidates’ incentives to cultivate broader bases of smaller donors.

Unexamined so far, however, are the effects of Super-PAC politics—and, indeed, of modern campaign finance law generally. Federalism and campaign finance seem unrelated at first blush—the structure of government presumably does not change from election to election. A central thesis of this Article, however, is that they are connected in important ways. First, Citizens United and its progeny have changed the structure of American politics in ways that have serious implications for federalism’s political safeguards. Second, damage to these safeguards may undermine federalism’s democracy-enhancing benefits—expanded opportunities for civic participation, enhanced accountability and responsiveness, etc.—that might otherwise compensate for expanded interest-group influence. Shoring up the system of political federalism against these threats might form part of a systemic solution to the broader problems Citizens United creates for democracy.

13 Isaacharoff & Karlan, supra note 9, at 1714–15.
15 See Briffault, supra note 7, at 1692; Hasen, supra note 11.
20 See infra, notes 50–55 and accompanying text.
The central political-safeguards thesis rests in part on the uncontroversial observations that judicial efforts on federalism have been ineffectual\(^{21}\) and that state governments nevertheless remain viable components of the constitutional system.\(^{22}\) Therefore, some non-judicial mechanism has preserved the states.\(^{23}\) While most scholars agree that there are such mechanisms, there is significant debate about their nature.\(^{24}\) Some cite the incentives generated by states’ role in constituting the federal government and the sub-national constituencies to which most federal officials are answerable;\(^{25}\) others emphasize political parties,\(^{26}\) intergovernmental lobbying,\(^{27}\) and state collaboration in federal administrative processes;\(^{28}\) and yet others point to inertia in federal institutions,\(^{29}\) or other mechanisms.\(^{30}\) We can usefully distinguish ex ante safeguards that provide incentives for federal officials to consider state interests before acting from ex post safeguards that provide states with influence over the implementation of federal programs.\(^{31}\) The former seem more important than the latter because they empower states to shape federal policy from the outset and because they are the better-accepted backstops for judicial review.\(^{32}\) These mechanisms interact in complex ways; and while complexity increases the system’s durability, it is also a liability if disruption of one component disproportionately affects others or the system as a whole.\(^{33}\) Even if we cannot identify the “correct” safeguards or distinguish the candidate mechanisms by importance, we can assess the implications of significant political shifts for the system.

Super-PAC politics may undermine each of these political safeguards. Drawing on both constitutional theory and insights from public and social choice theory, political theory, systems theory, political science literatures on parties and lobbies, among others, I argue that dramatically increasing the influence of private interests in federal

\(^{21}\) See, e.g., Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 16–22 (2005).


\(^{23}\) See id. at 221.


\(^{25}\) See Wechsler, supra note 24.

\(^{26}\) See generally Kramer, supra note 22.

\(^{27}\) See generally JOHN D. NUGENT, *SAFEGUARDING FEDERALISM* (2011).


\(^{30}\) See infra notes 113–117 and accompanying text.

\(^{31}\) Compare, e.g., Kramer, supra note 22 (ex ante), with Gerken, supra note 28 (ex post).


elections drives a greater wedge between candidates and their local constituencies, damages networks of state and federal officials in political parties, swamps the influence of intergovernmental lobby groups that advocate states’ institutional interests in Washington, and, by decreasing the diversity of interests to which federal policymakers are accountable, makes less onerous the very federal law-making process whose inertia arguably holds back the tide of federal action impacting the states. The states have proven resilient and adaptable political operators, remaining viable through various changes to the campaign finance environment, including the introduction of comprehensive federal regulation, the exploitation of issue-ad and soft-money loopholes, and subsequent reforms. But these post-Citizens-United developments are qualitatively different and may be significant enough to outpace the states’ capacity for adaptation. Past increases in private interest-group influence—facilitated, for example, by the advent of soft money—were in part offset by party mediation and remained limited enough to require candidates to remain somewhat loyal to their sub-national constituencies. Super PACs can fund entire campaigns themselves, circumventing the parties and eliminating the need to cultivate small donors. Elections are important moments in which voters may reward or punish officials for their approaches to federalism; but as voters’ influence decreases, this becomes less and less of a true federalism safeguard.34 Already, political professionals blame Super PACs for dramatic decreases in state political party fundraising; voters overwhelmingly feel disconnected from their elected representatives; and lobbyists affiliated with Super PACs or their donors wield significantly enhanced leverage in Washington.35 Even if Super PACs do not consistently oppose state interests, their unlimited financial influence means that their donors’ priorities will displace those of states, pushing state preferences down or off the federal agenda and, thus, still effectively short-circuiting the political safeguards.

A thorough account of the connections between campaign finance and federalism highlights the importance of incorporating structural considerations into campaign finance theory and doctrine; and it requires adapting federalism theory to political reality. This supports new normative claims in both fields. Super-PAC politics might justify new approaches to federalism doctrine that either reinforce damaged safeguards or introduce a more effective judicial approach. Also intriguing are the possibilities for new normative claims about campaign finance doctrine. For example, the Citizens United Court focused solely on the free-speech implications of campaign finance regulations and rejected everything but the narrow government interest in precluding quid-pro-quo corruption—direct cash-for-votes exchanges—as a constitutionally permissible basis for spending restrictions.36 Campaign finance scholars argue that this closes most avenues for ameliorative reforms.37 This Article demonstrates that constitutional norms other than the First Amendment are at stake—tension between post-Citizens United law and federalism norms suggests a new approach to campaign finance issues. The government

34 See Sean Nicholson-Crotty, National Election Cycles and the Intermittent Political Safeguards of Federalism, 38 PUBLIUS 295 (2008) (presenting evidence that political safeguards are most effective in election years).
36 Citizens United, 130 S. Ct. at 909.
interest in preserving the fundamental character of the constitutional structure, added to
the conventional anticorruption rationale, provides an entirely new and untried basis for
regulation that might, finally, outweigh outside groups’ interests in speaking by funneling
large sums of money to political campaigns.\footnote{Cf. Overton, supra note 18 (proposing increasing
democratic participation as a new government interest justifying regulation).}

In Part I, I canvas federalism theory, highlighting a variety of mechanisms proposed
as part of the system of political safeguards, the system’s vulnerabilities to disruptions
of the broader political process, and, by situting the safeguards in several theoretical
contexts, various normative implications of their disruption for federalism theory. In Part
II, I discuss the development of modern campaign finance law both to frame \textit{Citizens
United} and subsequent actions and to highlight various senses in which campaign finance
regulation and federalism have long interacted. I also explore the impact Super PACs
and other outside groups in the election cycles after \textit{Citizens United}. In Part III, I set out
the implications of these developments for the political safeguards. I conclude with brief
examinations of the directions that a new federalism theory incorporating a more realistic
assessment of the conventional political safeguards might take and the new normative
case for modifying campaign finance doctrines.

\section{Politics in Federalism Theory}

The claim that there are political safeguards for federalism is a constitutional
bromide—the two levels of the federal system are meant to interact and check each other,
as do the branches of the federal government.\footnote{See generally THE FEDERALIST Nos. 45, 46 & 51 (James Madison) (Clinton Rossiter, ed. 1986), at 288–
300, 318–23.} Madison’s “double security” for liberty consisted of, “first,” the division of power “between two distinct governments” that
would interact, compete for popular support, and prevent each other from growing too
powerful.\footnote{THE FEDERALIST No. 51, supra note 39, at 323.} Even if nothing else is settled, political changes that undermine states’
capacity to resist federal encroachment through the mechanisms of this system undermine
a basic structural mandate of the Constitution.\footnote{New York v. United Sates, 505 U.S. 144, 157 (noting that federalism must be enforced “even if one
could prove that federalism secured no advantages to anyone”).}

Scholars disagree on the particulars of federalism’s non-judicial safeguards, how well
they function, and the significance of their existence and effectiveness for other aspects
of federalism theory, doctrine, and practice. In this Part, I survey views about the nature
of the political safeguards and the normative stakes for federalism theory if they are
undermined. Keep in mind, first, that because these safeguards often figure in more
general theories of federalism; changes to political safeguards may require new
theoretical or normative accounts of the legitimacy and value of judicial intervention on
federalism, the nature and content of constitutional federalism norms or judicial
federalism doctrine, the best allocation of federalism-related decision-making among
institutions, and others things. Second, and regardless of one’s normative theory of
federalism, there is a natural affinity between the values of federalism—enhanced
government responsiveness and civic participation, among others—and the values that
we draw on to structure campaign law, including democratic accountability, freedom of
expression, equal access and representation, and others. This underscores my claim that we should account for campaign law’s effects on federalism.\textsuperscript{42} Insofar as a durable federalist constitutional system fosters these democratic values, damaging federalism may be a different way that \textit{Citizens United} and its analytical offspring damage democracy generally. The corollary is that strengthening federalism may counteract the antidemocratic effects of interest-group influence to diminish that damage. Assessing these possibilities requires understanding the political aspects of federalism and their place in constitutional theory.

\textbf{A. The Normative Import of Political Safeguards}

Historically, a central premise of federalism theory was that the Constitution establishes separate spheres of federal and state regulatory authority and precludes the levels from interfering with each other’s domains.\textsuperscript{43} This “dual federalism” account leaves little room for political safeguards—its crisp conceptual categories are designed for judicial enforcement as external constraints on the political process. Other theories—predicated on originalism, for example—posit a similarly fixed allocation of power.\textsuperscript{44} Federalism \textit{does}, however, have non-judicial aspects—federal and state officials bargain over regulatory jurisdiction throughout the federal policymaking process; and dualism fails insofar as it ignores these extra-judicial processes or suggests that they have no bearing on the articulation and enforcement of federalism norms.\textsuperscript{45} The normative import of political change for federalism theory, however, varies with one’s underlying view of the relationship between federalism’s political aspects and constitutional federalism norms.

Perhaps the Constitution requires noting like an allocation of power, but only that states play a certain role in the national political process.\textsuperscript{46} Drastic changes that fall short of eliminating states’ prescribed political role but diminish the political process’s tendency to protect federalism, on this view, either lack a judicial corrective—because politics is the exclusive permissible safeguard—or provide new grounds for judicial intervention on a representation-reinforcement theory.\textsuperscript{47} If the Constitution entrenches no

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\item[42]\textit{See generally} ROBERT SCHAFFNER, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009) (values of federalism); \textit{Overton}, supra note 18, at 1259–65 (values of campaign finance law).


\item[44]\textit{See, e.g.,} RAOUl BERGER, FEDERALISM: THE FOUNDERS’ DESIGN (1987).

\item[45]\textit{See, e.g.,} Wechsler, \textit{supra} note 24. \textit{See also} Young, \textit{supra} note 21, at 132; Corwin, \textit{supra} note 43 (detailing abandonment of dual federalism).


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general federalism norms, then judicial review of federalism issues—aside from enforcing those few textual provisions that expressly address states—is justifiable, if at all, only on non-federalism grounds.\textsuperscript{48} Political change that destabilizes the structure threatens federalism’s instrumental benefits, but on this view creates no constitutional justification for judicial intervention unless it violates non-federalism norms. Federalism-oriented normative claims, on this view, must be grounded on federalism’s instrumental values.\textsuperscript{49}

“Compatibilist” federalism theories skip questions about federalism norms to propose structural innovations with various substantive goals whose benefits depend on federalism’s instrumental values—benefits of regulatory pluralism, for example—and whose success depends on the stability of those values.\textsuperscript{50} In environmental law, for example, federal-state cooperation arguably could improve pollution control, renewable energy development, and ecosystem management, among other things.\textsuperscript{51} Others propose innovations aimed at broader objectives—enhancing rights protection, democratic accountability and participation, etc.\textsuperscript{52} These instrumental values depend on political safeguards: The very possibility of regulatory experimentation in “laboratories of democracy” or pluralistic regimes with regulations tailored to local conditions depends on preserving some independent state authority.\textsuperscript{53} Judicial intervention has not appreciably impeded federal preemption—which threatens precisely this state regulatory autonomy; thus durable federalism values seem to require, among other things, political means for states to resist federal encroachment.\textsuperscript{54} Political change that undermines the political safeguards, then, may undermine compatibilist normative claims that depend on federalism’s instrumental values for their defensibility. It may also undermine cooperative regimes by increasing centralizing pressures or decreasing states’ willingness to enforce federal mandates. The real theoretical impact depends on the values at stake.

It is worth noting that most federalism theories leverage these instrumental values in some sense—their existence, if not their weight, is a matter of general consensus. And if, as some hold, robust federalism enhances democratic accountability, responsiveness, and civic participation in our system, then political change that undermines federalism may


\textsuperscript{49} See generally Garrick B. Pursley, \textit{Federalism Compatibilists}, 89 TEX. L. REV. 1365, 1383–92 (2011) (canvassing instrumental arguments); Young, \textit{supra} note 21, at 8 (discussing federalism’s values).

\textsuperscript{50} Pursley, \textit{supra} note 49 (defending terminology).


\textsuperscript{54} See generally Young, \textit{supra} note 21, ta 134–44 (emphasizing preemption’s effects).
be critiqued as undermining values also central to campaign finance debates. This symmetry suggests, in other words, that the connection between the fields is deeper and perhaps more important than has been noted; and that normative claims in one field might benefit from justification in terms of the other—hence, my argument that federalism’s complimentary instrumental value further supports modifying campaign finance doctrine to better account for federalism considerations.

Most contemporary federalism theories advance more modest claims. We might, for example, avoid interpretive controversy by hypothesizing a simple federalism norm requiring only that there be both federal and state governments and that neither level of government may undermine the separate existence of the other. This leaves power allocation issues for constitutional “construction”—for federalism, an iterative, multi-track process by which constitutional permissions and prohibitions are contested, clarified, resolved, and altered in the interactions between federal and state officials in and beyond mandatory channels—including within political parties, lobbying groups, and informal negotiations. Participants in construction may weight conventional federalism values and other pragmatic considerations equally. On this account, political safeguards are important but their optimal structure is influenced by a wider variety of pragmatic factors—“administrative safeguards of federalism,” for example, may be consistent with our hypothetical “thin” federalism norm and justified on efficiency or institutional-capacity grounds. Alternatively, the Constitution may require some exclusive federal and state powers, concurrent authority over most subjects, that some federal actions pass through the state-protective Article I legislative process, and that the levels cannot interfere significantly with each other’s authority. Here, power allocation norms should be articulated and enforced primarily in the political process, which is better suited to questions of regulatory capacity in areas of concurrent authority. Judicial review is better suited to enforcing clear preclusions of federal or states action, the non-interference norm, and to maintain a rough balance of power. Eroding mandatory political safeguards may on this view violate constitutional norms and destabilize the system enough to require compensating adjustments.

60 See generally Pursley, supra note 49 (cannassing pragmatic federalism claims).
61 See Young, supra note 47, at 1816–30.
62 See, e.g., Stuart M. Benjamin & Ernest A. Young, Tennis with the Net Down: Administrative Federalism Without Congress, 57 DUKE L.J. 2111 (2008) (arguing that Article-I process is “non-optional”); see also Young, supra note 47, at 1748–60 (defending compensating adjustments).
These are summary characterizations of nuanced positions in a complex debate. Most views do, however, assume that some non-judicial safeguards protect the system against disruptions that courts cannot or should not address. The normative significance of eroding non-judicial safeguards varies with the relative importance assigned to judicial and political enforcement. That prioritization may be based on constitutional or comparative-institutional-capacity considerations. If the division of labor is constitutionally mandatory, then damaging the political safeguards directly undermines the federalism norms themselves or the handling of federalism issues assigned to political institutions. If political safeguards are primary for instrumental reasons, their erosion may justify expanding judicial intervention to compensate. If courts lack capacity, then we have new reasons to reinvigorate political safeguards legislatively or with different campaign finance doctrine. If judicial review is primary, then we might similarly cite process failures to justify more or different judicial intervention. If judicial enforcement is inherently ineffective for some federalism disputes; eroding non-judicial mechanisms will increase non-remediable violations and, thus, threaten federalism’s instrumental benefits.

Aside from enforcing norms, non-judicial safeguards also may provide important forums for constitutional construction. Construction generates quasi-constitutional norms that are relatively binding on repeat players—similar to congressional precedents but with varying binding force. On some accounts of constitutionalism, non-judicial views of constitutional meaning are significant in themselves, and in any event on a thin-norm federalism theory—or a theory in which federal and state authority is largely concurrent—these constructive norms guide actors where the Constitution itself does not and thus have tremendous practical significance. For federalism, this naturally suggests that state officials should have a role in deciding power allocation issues that are subject to construction. If states are excluded, the system loses their expertise and perspective as well as the legitimizing value of their participation in negotiating these quasi-constitutional federalism norms.

Judicial review has had practically no effect on the allocation of federal and state power, even at high points of judicial attention to federalism—e.g., the era of Commerce-Clause formalism preceding the New Deal in which the Court enforced dual federalism religiously but with little practical impact on state power or federal expansion. The

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63 See Pursley, supra note 49 (canvassing views).
64 Compare CHOPER, supra note 46 with Young, supra note 47 at 1816–26.
65 See sources cited supra, note 57.
67 See Peabody & Nugent, supra note 58, at 54 (intergovernmental lobby helps define “spheres of federal and state authority”).
68 See NUGENT, supra note 58, at 6–8.
69 See Ryan, Negotiating, supra note 33, at 7 (“bargaining …enables a partnership of state and federal actors to interpret constitutional directives …across the state-federal divide.”).
Rehnquist Court’s attempt at a “federalist revival,” too, made little difference—bolstering state sovereign immunity and enforcing an anti-commandeering principle are not much use when the actions most dangerous for state power—federal preemption and conditional spending—remain essentially unrestrained. Nevertheless, state governments remain robust components of our system. Non-judicial safeguards—whatever their form—therefore must be central to explaining what has stabilized federalism for so long. Threats to the political safeguards, a fortiori, can create serious systemic problems.

B. Varieties of Political Safeguards

It is difficult to specify a correct allocation of federal and state power—it is contested, shifting and largely a policy question—but the processes that sustain some balance are easier to identify and perhaps more important. Despite disagreement about the scope and content of constitutional federalism norms; most federalism scholars assume that there are non-judicial safeguards even as they focus primarily on judicial federalism doctrine. The few who have examined the matter at length identify several plausible non-judicial safeguards.

Wechsler’s seminal paper highlighted two, both of which have since been drawn into doubt. The first was a political “mood” in which national action was “regarded as exceptional . . . an intrusion to be justified by some necessity, the special rather than the ordinary case.” This may once have imposed special burdens on those seeking federal action; but today, the default in many areas is an expectation of federal action. Wechsler’s principal focus was on the states’ “crucial role in the selection and the composition of the national authority.” By making federal officials dependent on state governments—through state control of House electoral districts, etc.—and geographically limited sub-national constituencies, the argument goes, the Constitution gives states a voice in federal policymaking sufficient to protect themselves against federal intrusion. Federal lawmakers have incentives to consider state preferences because states control their political fortunes to a degree. Critics charge that this conflates the interests of geographically circumscribed constituencies with the interests of state governments as institutions. Indeed, federal officials’ incentive to maximize constituent support by

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71 See Kramer, supra note 22, at 230–33; Young, supra note 21, at 130–60.
72 See Kramer, supra note 22, at 227–28.
74 Cf. Young, Two Cheers, supra note 6, at 1367.
76 Wechsler, supra note 24, at 545. See id. at 544–45.
77 See Baker & Young, supra note 19, at 113; Larry D. Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1506 (1994).
78 Wechsler, supra note 24, at 546.
79 See Kramer, supra note 24, at 222–23.
delivering policy will often place them in *competition* with state institutions serving the same voters—they will opt for federal action, for which they can claim credit, even at the expense of state autonomy.  

80 Things would be different if constituents valued federalism in itself; but most voters prioritize substantive policy objectives over structural matters.  

And where Congress does respond to state interests, politically powerful states—e.g., battleground states—tend to attract disproportionate attention from officials concerned with their own and their parties’ long-term political goals.  

82 Thus, a small minority of states can, through federal action, impose their preferences on the others—contravening state coequality norms proposed by some, rendering Wechsler’s safeguard counterproductive for many states and, by fostering interstate discord, a serious threat to long-term structural stability.  

83 These criticisms reproduce the puzzle of states’ continuing viability. One well-known proposed solution is Larry Kramer’s argument that political parties safeguard federalism by “creat[ing] a political culture in which members of local, state, and national networks . . . work for the election of candidates at every level;” federal officials thus learn of and have incentives to prioritize state preferences.  

84 This results from American parties’ prioritizing elections over policy programs and their decentralized structures, which connect “state and local organizations” from across the nation “[with] a shared interest in the outcome of national (and especially presidential) elections.”  

Party structure promotes relationships and establishes obligations among officials that cut across governmental planes. . . . [T]he obligation to support party candidates [does not] end on election day, for staying in power constrains successful candidates to work with their counterparts at other levels. A member of Congress, even a President, will need to help state officials either as a matter of party fellowship or in order to shore up the willingness of state officials to offer support in the future; the same thing is true in reverse. The whole process is one of elaborate, if diffuse, reciprocity; of mutual dependence among party and elected officials at different levels . . . .  

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The history of American parties suggests, moreover, that this network “has proved to be remarkably durable and effective”—and thus may be a reliable federalism safeguard.87

There are other views. Professor Clark argues that inertia in federal law-making processes is a systemic federalism safeguard.88 The Supremacy Clause makes federal encroachment on state power possible only through the Article I legislative process,89 which, with its bicameralism and presentment requirements and numerous vetogates at which minority interests can block action, is resource- and time-intensive.90 State law is the constitutional default in our system; thus, slowing the rate of preemptive federal law-making preserves state regulatory authority.91 Article I, then, establishes a set of “procedural safeguards for federalism.”92 Administrative law scholars propose agency-centric accounts. One argument is that federal administrative expansion is actually beneficial for federalism because agencies are better equipped—as institutions—that Congress or courts to account for state interests;93 another is that administrative law principles are on-balance better than existing judicial federalism doctrines for protecting state regulatory power.94 Kramer argues that the many and varied cooperative federal-state regulatory regimes make federal agencies similar to political parties in fostering federal interaction with and dependence on the states, creating additional pro-federalism incentives.95

These updated accounts better reflect current political realities; but critics charge that Kramer ignores centralization in the parties that has diminished the influence of state officials and party committees;96 and that Clark’s view incorporates no protection for states against non-legislative federal enactments that do not face the onerous Article I process.97 Administrative federalism advocates draw criticism from conventional theorists who remain leery of agency processes and preemptive federal regulations.98

A second category of arguments turn on different conceptions of the sort of state power needed for stable federalism.99 Conventional theorists focus on state regulatory

87 Id. at 278.
88 See generally Clark, supra note 29.
91 Clark, supra note 29, at 1339. See Young, supra note 21, at 89 (state-law default); cf., Medtronic, Inv. v. Lohr, 518 U.S. 470, 485 (1996) (presumption that “historic police powers of the States were not to be superseded ... unless that was the clear and manifest purpose of Congress”).
92 Id. at 1339.
94 Kramer, supra note 77, at 1520–29.
95 See Frymer & Yoon, supra note 19, at 980. For other criticisms, see Baker & Young, supra note 19, at 115; Young, supra note 21, at 75–80; Lynn A. Baker, Putting the Safeguards Back Into the Political Safeguards of Federalism, 46 VILL. L. REV. 951 (2001).
96 See Young, supra note 21, at 89–90.
97 See, e.g., Benjamin & Young, supra note 62; Ernest A. Young, Executive Preemption, 102 NW. U. L. REV. 869 (2008).
autonomy—power to regulate on some subjects without federal interference. Others, however, emphasize states’ leverage in bargaining with federal officials over practical power-allocation question that are not resolved by the Constitution. Professor Ryan demonstrates that “federalism bargaining permeates American government[.]

[F]amiliar forms of negotiation used in lawmaking (such as the Stimulus), negotiations over various kinds of law enforcement (such as immigration or pollution), negotiations under the federal spending power (such as the No Child Left Behind Act of 2001), and negotiations for exceptions under otherwise applicable laws (such as the Endangered Species Act) . . . [as well as] negotiated federal rulemaking with state stakeholders (as was used to regulated storm water pollution), federal statutes that share policy design with states (such as Medicaid), staggered programs of iterative shared policymaking (as used to regulate auto emissions), and intersystemic signaling negotiations by which independently operating state and federal actors trade influence over the direction of evolving interjurisdictional policies (as reflected in medical marijuana enforcement).

This highlights the role of lobbying organizations representing sub-national governments—the National Governors Association, National Conference of State Legislatures, etc.—and other channels of federal-state bargaining in reinforcing federalism. While these dynamics are largely overlooked in legal scholarship, political scientists view them as important functional safeguards. In principle, since state officials themselves are involved, these mechanisms feature precisely the state institutional interests that are missing from Wechsler’s theory; and they affect both the legislative and implementation phases of the federal policy process—lobbying and negotiation occur in Congress and in federal agencies. Significant intergovernmental-lobby achievements include the devolutionary provisions of Safe Drinking Water Act reauthorization and the Unfunded Mandates Reform Act (UMRA) framework for heightened congressional deliberation about legislation’s federalism impacts. More recently, they helped secure $250 billion in federal funding for state programs in the 2009 federal stimulus package and won concessions for states in the Dodd-Frank Act.

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100 See, e.g., Young, supra note 21, at 51–63.
101 Ryan, Negotiating, supra note 33, at 7–8.
102 See generally NUGENT, supra note 58 (emphasizing intergovernmental lobby groups’ role in federalism).
103 See NUGENT, supra note 58, at 9.
104 NUGENT, supra note 58, at 6–9; Garrick B. Pursley, Preemption in Congress, 71 OHIO ST. L.J. 511, 572–76 (2010); Young, supra note 21, at 79.
105 NUGENT, supra note 58, at 144–45.
Relatedly, Professor Gerken focuses on the access and influence states enjoy as crucial implementers of federal policy that compensate for federal resource constraints.\textsuperscript{109} Even where states lack regulatory autonomy or are subservient participants in cooperative regimes; their implementation capacity creates incentives for federal officials to accommodate state preferences and has prompted changes in federal environmental and welfare programs, among others.\textsuperscript{110} This form of state power is “interstitial and contingent on the national government’s choice not to eliminate it”—a “power of the servant” that may extend from pre-enactment lobbying through the life of a program.\textsuperscript{112}

This is not an exhaustive catalogue. Scholars also suggest partisan gerrymandering, state constitutional amendment processes, and modern distrust of bureaucracy and fragmented public opinion (in a Wechsler-like dynamic), among other things, as non-judicial federalism safeguards.\textsuperscript{113} Despite disagreements about the details, however, few deny the existence of non-judicial safeguards—developments like the UMRA strongly suggest that they exist—and it is unlikely that courts could preserve federalism alone. My own view is that none of these accounts is complete in itself: Each mechanism has pro-federalism effects and they interact to form a complex system operating across governmental processes to sustain states’ structural presence.\textsuperscript{115} Federal and state officials connected through party networks may also work together in cooperative regulatory settings; state officials may gain clout within parties through successful intergovernmental lobbying and, thus, may become national candidates or party leaders; sitting members of Congress depend on party networks for future electoral support, and so forth.\textsuperscript{116} Some mechanisms depend on political contingencies rather than anything constitutionally mandatory,\textsuperscript{117} but this distinction matters little for assessing the system’s present stability. Contingent and mandatory mechanisms interact—this makes the system

\textsuperscript{109} See generally Gerken, supra note 99, at 1553–60; Gerken, supra note 28; Bulman-Pozen & Gerken, supra note 28.
\textsuperscript{110} See Bulman-Pozen & Gerken, supra note 109, at 1274–82 (citing Thomas O. McGarit, Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level, 27 PAC. L.J. 1521 (1996)); Ryan, Negotiating, supra note 33, at 31–36, 78–81 (highlighting state bargaining in cooperative regimes); Gerken, supra note 99, at 1558 (examples).
\textsuperscript{111} Gerken, supra note 109, at 1531 n.48. A more controversial possibility is that states might resist or disobey federal implementation directives and shape federal programs more directly according to state preferences—Gerken’s “uncooperative federalism.” See Bulman-Pozen & Gerken, supra note 99, at 1292. There is little doubt that states’ implementation resources are sufficiently important to insulate such actions from federal reprisal in some contexts; but this treads a bit closer than is comfortable to the outer limit of what is permissible on my view of our structural norms. See Pursley, supra note 56, at 512–19 (hypothesizing an implied preclusion of state action that undermines the constitutional structure).
\textsuperscript{112} See Gerken, supra note 109, at 1553–64; Bulman-Pozen & Gerken, supra note 99, at 1292; Gerken, supra note 109.
\textsuperscript{114} See Young, supra note 21, at 79.
\textsuperscript{115} See generally Bednar, supra note 33; BEDNAR, supra note 33; cf. Young, supra note 21, at 1778 (“web” of relationships); Ryan, supra note 33 (variety of negotiating forums); Ryan, Negotiating, supra note 33 (similar); Peabody & Nugent, supra note 58, at 56 (similar).
\textsuperscript{116} See Kramer, supra note 21, at 285–86.
\textsuperscript{117} See Young, supra note 21, at 74–75.
stronger but also means that undermining one mechanism may have outsized consequences for others and for the system as a whole. The distinction may, however, matter for the normative implications of political change. Contingent mechanisms naturally change over time; erosion of mandatory mechanisms may be a constitutional violation.

II. Disrupting the System

One of the most significant changes in national politics in recent decades is the expansion of independent expenditures by outside groups—not campaign contributions, but spending outside the control of candidates or parties—to influence federal elections. All non-judicial federalism safeguards depend on stable political processes in which states retain influence—they depend, in other words, on the existence of durable incentives for federal officials to take state interests seriously. The unprecedented explosion of independent spending following Citizens United threatens these conditions, and thus threatens the system.

Unregulated independent expenditures should worry federalism theorists for the same reason that it worries advocates of campaign finance regulation: Those capable of spending large amounts to elect candidates exercise outsized influence in government. That, in itself, might be viewed as a form of corruption requiring regulation; but even under the narrower view of corruption adopted in Citizens United there remains an obvious interest-mismatch problem. Those with the resources to spend lavishly on campaign-related activities tend to be wealthy individuals and organizations. Public choice theory suggests that these spenders often have preferences that conflict with the general public interest. So, too, their preferences—for cost-reducing regulatory standardization or deregulation, in particular—often will conflict with states’ interests in continuing regulatory power. In this Part, I describe how Citizens United and its progeny

119 See supra, notes 55–65 and accompanying text.
120 Expenditures that are coordinated with campaigns are deemed contributions subject to federal contribution limitations, which survive Citizens United for campaigns and parties. See FEC v. Colo. Republican Fed. Campaign Comm’n, 533 U.S. 431, 464 (2001). It’s difficult to police coordination; thus the dissolution of independent expenditure limitations may functionally dissolve contribution limits as well. See Richard Briffault, The Political Parties and Campaign Finance Reform, 100 Colum. L. Rev. 620, 659 n.160 (2000).
121 The Federal Election Campaigns Act (FECA) defines “independent expenditure” as “an expenditure …expressly advocating the election or defeat of a clearly identified candidate; and …that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.” 2 U.S.C. § 431(17) (2010); see 11 C.F.R. § 100.16(a) (2010).
123 Citizens United, 130 S. Ct. at 909.
deregulate outside electoral spending, making it possible for outside-group influence to grow without limit. The power of money in politics is a longstanding concern; but the world is categorically different now—federal law after *Citizens United* funnels large amounts of money away from party control to independent groups empowered to build enormous influence over specific candidates by spending without limit to directly advocate for their election. As this new form of independent spending becomes increasingly central to campaign strategy—and Super PACs already were the primary ad buyers in the 2012 Republican presidential primary—it will expand channels of influence over federal officeholders for interests potentially hostile to state autonomy. This could bring down the system of federalism if outside groups become significant enough in national campaigns to replace—or significantly diminish—the influence of state governments and their advocates in national political parties, lobbies, and other settings.

A. Federal Campaign Finance Law—FECA to BCRA

*Citizens United* changes the regulatory landscape for outside groups that wish to spend money to influence elections, and in so doing changed the structure of electoral politics. At issue was a provision of the 2002 Bipartisan Campaign Reform Act (BCRA) that prohibited corporations and unions from spending general treasury funds on “electioneering communications”—communications that expressly advocate for the election or defeat of a candidate proximate to an election date. This expanded a provision of the 1972 Federal Election Campaigns Act that precluded corporations and unions from using general treasury funds for campaign contributions or independent expenditures underwriting “express advocacy”—famously defined by the Court as a communication containing certain “magic words” indicating the sponsor’s preference regarding a particular federal candidate.

Corporations and unions have been subject to campaign spending restrictions of one form or another for the better part of a century. *Citizens United* did not alter existing contribution limits on outside groups, corporations, and unions. The dramatic spending increases in recent decades have come in the form of independent expenditures. The legal status of independent expenditures has developed in part as a

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125 See infra, Part III(B).
127 See infra, Part III(A).
128 See Briffault, supra note 7, at 1683–87 (post-*Citizens-United* system a “wild west”).
133 See 34 Stat. 864, ch. 420 (1907) (Tillman Act, banning corporate and union contributions).
135 See supra, note 121 and accompanying text.
function of the development of the law governing corporate and union campaign spending. Corporations have not, however, been politically hobbled—they have long been permitted to form Political Action Committees—“separate, segregated fund[s] to be utilized for political purposes,” including making contributions to candidates and parties and independently funding express advocacy. Contributions to PACs are limited both by source and in amount—PACs may solicit only from the shareholders, executives, and administrative personnel of the underlying corporation and, in some instances, their family members; and those contributions are limited to $5,000 per year. There are no limits PACs’ independent spending. Thus through PACs, corporations could do—somewhat indirectly—some of the things that federal campaign finance law barred them from doing directly before *Citizens United*.  

FECA, as amended in 1974, also imposed general restrictions on contributions to candidates and parties and on independent “expenditures . . . relative to a clearly identified candidate” by individuals, groups, candidates and parties for election-related activity; imposed reporting and disclosure requirements for campaign spending; created a public financing system for presidential elections; and created the Federal Election Commission; among other things. The Supreme Court assessed FECA’s constitutionality against a First Amendment challenge in *Buckley v. Valeo*. It upheld the contribution limitations based on the government interest in preventing “quid pro quo corruption”—meaning the direct exchange of campaign money for votes or favors—as did the Court in *Citizens United*. But the Court struck down FECA’s expenditure limitations, concluding that “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”

Although *Buckley* did not squarely address the constitutionality of FECA’s ban on independent corporate and union campaign spending, the Court did indirectly narrow the ban’s scope. To avoid overbreadth, the *Buckley* Court construed FECA’s reporting and disclosure requirements—and by implication the ban on corporate and union spending—

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139 See Briffault, *supra* note 136, at 644.


143 Id. at 26–27.


145 See *Buckley*, 424 U.S. at 39–44.

to apply only to “express advocacy”—communications directly advocating the election or defeat of a specific, clearly identified candidate.147 Express advocacy, the Court explained in a footnote, could be distinguished by its use of words like “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’”148 This interpretation gave rise to “issue advocacy”—the creation of campaign-related communications carefully designed to fall outside Buckley’s technical definition of “express advocacy,” and thus outside the scope of FECA’s spending and disclosure requirements.149 Issue ads are often functionally indistinguishable from express advocacy from the voters’ perspective150—they could “advocate the election of clearly identified federal candidates” so long as they avoided using the magic words, but there is “little difference, for example, between an ad that urged viewers to ‘vote against Jane Doe’ and one that condemned Jane Doe’s record on a particular issue before exhorting votes to ‘call Jane Doe and tell her what you think.’”151 Thus PACs, corporations, unions, and other groups could spend unlimited sums on issue ads without running afoul of FECA restrictions—though they could not collect contributions over FECA caps—so long as the ads were not coordinated with federal candidates or instances of express advocacy.152 Issue-ad spending exploded before the BCRA was enacted—rising from about $135 million in the 1996–1997 election cycle to $500 million in 1999–2000.153 Nevertheless, clear electioneering was still controlled by the parties, whose capacity was dramatically expanded by soft-money.

FECA defines contributions as donations “made by any person for the purpose of influencing any election for Federal office”154 and requires that spending on federal-election activity by or coordinated with campaigns or parties be funded by contributions—“hard money.”155 Another FECA loophole developed in the late 1970s, when the FEC, in part at the urging of state party committees,156 ruled that party committees could fund “mixed purpose” election-related activities—activities that benefit the party ticket, including both state and federal candidates, as a whole—with “soft

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147 McConnell, 540 U.S. at 126.
148 See Buckley, 424 U.S. at 39–44 & n.52. See also McConnell v. Federal Election Comm’n, 540 U.S. 93, 103 (2003) (dubbing Buckley’s list of express advocacy hallmark terms the “magic words”). Most lower federal courts read Buckley’s “magic words” as a requirement for campaign activity to be considered “express advocacy” subject to FECA’s requirements. Richard Briffault, Soft Money Reform and the Constitution, 1 Election L.J. 343, 351 & n.67 (citing, as an example of the common approach, FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997); but also citing FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987), finding an instance of express advocacy without the magic words).
149 McConnell, 540 U.S. at 126–29; Hasen, supra note 146, at 588–89.
150 See McConnell, 540 U.S. at 126–27 (“Both [issue and express ads] were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words.”).
151 McConnell, 540 U.S. at 126–27.
152 McConnell, 540 U.S. at 130; Issue ads are treated as contributions under FECA regulations if coordinated with federal candidates or campaigns. See 2 U.S.C. § 441a(a)(7)(B)(i)(2000); Richard Briffault, supra note 120, at 625.
153 McConnell, 540 U.S. at 128 n.20.
155 McConnell, 540 U.S. at 122; see Briffault, supra note 120, at 628.
156 See Briffault, supra note 120, at 629 (noting that “[i]n the late 1970s, various state party committees began to press the FEC to allow them to use funds that did not comply with FECA to partially finance campaign efforts that help the party ticket as a whole, including both federal and state candidates”).
money” raised outside FECA’s dollar and source limitations. These rulings and a 1979 FECA amendment exempting state and local party-building activities from hard money requirements, combined to allow state parties to collect unlimited contributions from individuals, corporations, unions, PACs, and other non-party/candidate donors to fund a wide variety of state and local party-building and campaign activities—other than express advocacy—even if they benefit state and federal candidates. Soft money contributions were limited only by FEC regulations specifying permissible apportionment of hard and soft money and state campaign finance laws, many of which were more lenient than FECA. Soft money grew modestly in the 1980s, but began to surge after a 1995 FEC decision permitting the parties to use soft money for issue ads. It increased from $86 million in the 1992 election cycle to about $225 million in 1998, leveling off at nearly $500 million in 2000 and 2002. Importantly for our purposes, the national parties channeled significant soft money through state party committees, because state parties could use more soft money for campaign activities, infrastructure, and “shared voter mobilization programs such as direct mail campaigns and phone bank operations” that could benefit both state and federal candidates.

The 2002 Bipartisan Campaign Reform Act closed the soft money loophole almost entirely—barring (1) national-party and federal-candidate solicitation and use of soft

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160 National parties could fund 40 percent of most mixed-purpose activities with soft money, 11 C.F.R. § 106.5(b)(2)(1991); state party committees could combine hard and soft money based on the ratio of federal to nonfederal offices on their ballots, id., § 106.5(d)(1), “which in practice meant that they could expend a substantially greater proportion of soft money than national parties to fund mixed-purpose activities affecting both federal and state elections.” McConnell, 540 U.S. at 123 n.7.


162 Briffault, supra note 120, at 629.

163 FEC Advisory Opinion 1995–25 (1995); see Briffault, supra note 120, at 630–31. See also McConnell, 540 U.S. at 649 ("As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially. Of the two major parties’ total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($498 million) in 2000.").

164 See Briffault, supra note 120, at 630 (citing FEC Press Release, Political Party Fundraising Continues to Climb (Jan. 26, 1999); FEC, Press Release, FEC Reports on Political Party Activity for 1997–98 (1999)).


166 See Briffault, supra note 120, at 629; McConnell, 540 U.S. at 122–26; Nathaniel Persily, Soft Money and Slippery Slopes, 1 ELECTION L.J. 401 (2002).
money, including fundraising on behalf of outside groups; (2) contributions of soft money to state or local parties for “federal election activity”; and (3) state candidates’ use of soft money to fund electioneering communications.\footnote{167} It exempts donations to state or local party committees of up to $10,000 per year for party-building activity that does not refer to a clearly identified federal candidate.\footnote{168} The provision barring the use of corporate or union treasury funds for “electioneering communications”—broadcast communications targeted at constituents of clearly identified federal candidates 30 days before a primary or 60 days before a general election\footnote{169}—closes the sham issue-ad loophole.\footnote{170}

Congress enacted the BCRA during a period in which the Supreme Court appeared to be moving away from the jurisprudential core of \textit{Buckley}:\footnote{171} The Court gradually expanded the category of government interests justifying campaign finance regulations beyond \textit{Buckley}’s narrow focus on \textit{quid pro quo} corruption.\footnote{172} For example, the Court upheld a Michigan prohibition on corporate expenditures in state elections in view of the government’s interest in precluding “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”\footnote{173} Three later decisions made clear that this expanded definition of “corruption” includes “the broader threat from politicians too compliant with the wishes of large

\begin{footnotes}
\item[167] See 2 U.S.C. § 441(a)–(f) (2006). Cutting soft money cut into the parties’ newly expanded resources. \textit{Cf.} Briffault, \textit{supra} note 120, at 626 (“The parties …have done well under FECA. They raise far more money than ever before and they are playing a growing role in the financing of federal elections.”). I discuss this consequence in more detail infra, Part III(B).
\item[172] \textit{See}, e.g., \textit{McConnell}, 540 U.S. at 204–05.
\end{footnotes}
and identified restrictions on both coordinated party-PAC expenditures and corporate campaign contributions as permissible responses to that threat.¹⁷⁵

This new approach reached its apex in *McConnell v. FEC*.¹⁷⁶ The *McConnell* Court upheld BCRA’s soft money restrictions as permissible implementations of Buckley’s quid-pro-quo-corruption interest¹⁷⁷ as well as strong governmental interests in precluding wealthy donors from gaining “undue influence on an officeholder’s judgments,” preventing the “appearance of corruption” created by “the selling of access,”¹⁷⁸ preventing “the corrosive and distorting effects of” corporate wealth on the political process;¹⁷⁹ and “preventing circumvention of otherwise valid contribution limits.”¹⁸⁰ The Court suggested that holding permissible only regulations targeted at quid pro quo corruption or its appearance, to the exclusion of these other interests, defies “common sense and the realities of political fundraising;”¹⁸¹ thus the Court accorded substantial deference to Congress’s conclusions—for example, regarding the potential for state and local parties, or tax-exempt political organizations, to replace national party committees as “conduits” by which money might influence federal elections despite federal regulations.¹⁸²

In upholding BCRA’s provision barring sham issue ads the Court cited FECA’s corporate spending bar as proof that “Congress’s power to prohibit corporations and unions from using funds from their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections” is “firmly established.”¹⁸³ The Court further held that its expanded list of election-related government interests—especially those suggesting that “the special characteristics of the corporate structure require particularly careful regulation”—justified barring independent corporate and union funding of “electioneering communications,” including “sham” issue ads.¹⁸⁴ The Court deferred to Congress’s findings that corporations and unions were using their general treasuries “to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections,” and it joined Congress in concluding that most of these are “the functional equivalent of express advocacy” under *Buckley*.¹⁸⁵

¹⁷⁶ See *McConnell*, 540 U.S. at 141–158, 159–173, 174–185 (soft-money provisions); *id.* at 201–211 (electioneering-communications provisions).
¹⁷⁷ See, e.g., *McConnell*, 540 U.S. at 145; *id.* at 150–52 (citing examples of actual corruption—“evidence connect[ing] soft money to manipulations of the legislative calendar, leading to Congress’s failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation”).
¹⁷⁸ *McConnell*, 540 U.S. at 143 (quoting *Colorado Republican II*, 533 U.S. at 441).
¹⁷⁹ *Id.* at 205 (quoting *Austin*, 494 U.S. at 660).
¹⁸⁰ *Id.* at 185.
¹⁸¹ See *id.* at 152.
¹⁸² *Id.* at 174 (tax exempt organizations), *id.* at 185 (state and local parties).
¹⁸³ *McConnell*, 540 U.S. at 203.
¹⁸⁴ See *id.* at 203–05.
¹⁸⁵ See *id.* at 205–06. The Court here was responding to an over-breadth challenge, such that the “functional equivalent” language goes to the scope of regulation permitted by the relevant government interests, not necessarily to the existence of the government interests—a burden analysis, in other words.
B. Citizens United and the Birth of Super PACs

After *McConnell*, campaign finance doctrine moved dramatically back in *Buckley*’s direction. Among other things, the Roberts Court invalidated state contribution limits as overly stringent and narrowed BCRA’s restriction on electioneering communications to apply only to communications functionally identical to *Buckley*’s “express advocacy”—communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *McConnell* was then fully repudiated in *Citizens United*, where the Court invalidated all federal restrictions on independent expenditures by corporations and unions. The reasoning of *Citizens United* is more important than its immediate effect on corporate campaign spending. The majority expressly rejected *McConnell*’s broader “access corruption” model and held that campaign finance restrictions are only justifiable based on the governmental interest in preventing *quid pro quo* corruption. The Court thus easily concluded that independent expenditures—which by definition do not involve exchanges with candidates—“do not give rise to corruption or the appearance of corruption” and therefore cannot be regulated. In rejecting *McConnell*’s focus on the potential for wealthy interests to gain undue influence over candidates even without direct contact, the Court stated that influence is endemic to the democratic process: “[f]avoritism and influence are not . . . avoidable in representative politics. . . . [A] substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.”

A familiar metaphor is that campaign finance is “hydraulic”—“political money, like water, has to go somewhere,” and it will typically flow into the least regulated channel to the relevant objective. After the BCRA’s ban on parties’ use of soft money was upheld in *McConnell*, many soft-money donors shifted the contributions from the parties to outside groups, including tax-exempt “527” and “501(c)” organizations that can engage in federal election activity without satisfying the requirements applicable to

In the *Wisconsin Right to Life* cases, however, the Roberts Court converted this language into the criterion for a legitimate government interest in regulation. See *FEC v. Wisconsin Right to Life*, Inc. (*WRTL II*), 551 U.S. 449, 454–82 (2007).

186 See, e.g., *Hasen*, *supra* note 146, at 589–90 (arguing that this may be because Justices Roberts and Alito joined the Court).


188 *WRTL II*, 551 U.S. at 481.


190 See *Overton*, *supra* note 21, at 1264; *Kang*, *supra* note 9, at 4–5. See also *Briffault*, *supra* note 136 (arguing that *Citizens United*’s deregulation of corporate campaign spending is relatively insignificant because the *WRTL II* decision basically did that).

191 *Citizens United*, 130 S. Ct. at 909; see also *WRTL II*, 551 U.S. at 478–79 (quoting *Buckley*, 424 U.S. at 612; *McConnell*, 540 U.S. at 204).


193 *Citizens United*, 130 S. Ct. at 910 (internal quotation marks and citations omitted).

194 Issacharoff & Karlan, *supra* note 9, at 1708.

195 *Kang*, *supra* note 9, at 5.
registered political committees. Some focus on issue advocacy, but most engage in some combination of independent electioneering and “ground game” activities like canvassing, voter registration, direct mail, turnout operations, and so forth.

The 527 groups replaced parties as the preferred vehicle for unregulated campaign contributions and spending—taking in much of what would have flowed to parties as soft money before BCRA. The 2004 election cycle was “the summer of the 527s”—tax-exempt organizations spent over $400 million, or ten percent of total spending and nearly 25 percent of spending on the presidential contest, during that period. After disclosure requirements were put in place for 527 groups, the 501(c) designation became more attractive. Because 501(c)s must have a “primary purpose” other than electoral activity, they are not subject to FECA disclosure requirements. However, most 501(c)s are corporations; thus, until Citizens United, they were subject to corporate spending restrictions and had to rely on capped contributions or PAC activities. Despite the soft-money period and the growth of tax-status groups after McConnell, “the soft-money and electioneering communications provisions of BCRA … to a considerable degree restored the post-Watergate era campaign finance structure” and, despite their activity in 2004, outside groups were “peripheral” such that “the 2008 presidential election largely abided by the post-Watergate rules, supplemented by BCRA.” In short, the growth of outside-group influence during these periods had been stemmed, and something like the FECA baseline regulatory environment restored, until Citizens United.

The Citizens United Court’s conclusion that only the interest in preventing quid pro quo corruption justifies regulation prompted additional deregulation: The D.C. Circuit, relying on that reasoning, held in mid-2010 that political committees making only

197 See Holman & Claybrook, supra note 196, at 247.
198 Cf. Holman & Claybrook, supra note 196, at 247 (noting that 527s “had been the favorite vehicle for special interest groups seeking to influence federal elections, especially prior to the 527-disclosure law of 2000”). Briffault notes that some soft money was not redirected—corporations instead reduced political spending because outside groups could not provide access like parties. See Briffault, supra note 196, at 962–65.
199 See Stephen R. Weissman & Ruth Hassan, BCRA and the 527 Groups, in THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE Bipartisan Campaign Finance Reform Act 78, 104 (Michael J. Malbin, ed. 2004) (noting that total 527 expenditure in 2004 were $398.5 million, a significant increase from 2002). 527 spending accounted for about one-fifth of the roughly $2 billion spent by all groups on the 2004 presidential campaign. Briffault, supra note 196, at 961.
200 Holman & Claybrook, supra note 196, at 248–49; Briffault, supra note 170, at 685–86.
201 See 26 U.S.C. § 501(c) (2006). The “primary purpose” criterion parallels the Court’s holding in Buckley that only organizations whose “major purpose” is to nominate or elect a federal candidate is a “political committee” under FECA. See Buckley, 424 U.S. at 79.
203 Briffault, supra note 7, at 1683.
independent expenditures may accept unlimited contributions from individuals. The court exempted such groups from the $5,000 limit on contributions to PACs on the ground that independent electoral activity cannot give rise to *quid pro quo* corruption. The FEC quickly followed with advisory opinions allowing corporations and unions to contribute to IECs in unlimited amounts. Super PACs were born.

Unlike 527 and 501(c) entities, Super PACs are political committees subject to FECA, but they benefit from the combined effect of *Citizens United* and the post-*Citizens-United* deregulatory rulings permitting them to collect unlimited donations from any source and spend unlimited amounts on independent election-related activity. While there is still no formal regulation specific to Super PACs, FEC guidance establishes that they cannot contribute to or coordinate with federal campaigns. However, coordination is difficult to police and Super PACs have informal connections with candidates. Among other things, candidates and officeholders raise money for Super PACs; their former staffers often run Super PACs; campaigns and Super PACs hire the same consultants; Super PACs can use footage of candidates in their ads,

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204 See *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686, 696 (D.C. Cir. 2010).


including footage lifted from campaign ads;\textsuperscript{214} and some campaign plans have been posted online for anyone—including Super PACs—to view and follow.\textsuperscript{215}

Super PACs frequently circumvent the relatively weak federal disclosure requirements for political committees\textsuperscript{216}—donations through shell corporations with vague names or to affiliated non-profits are common as Super PACs need only disclose the corporation’s name.\textsuperscript{217} For example, American Crossroads Grassroots Political Strategies (GPS), a 501(c)(4) non-profit, runs the “American Crossroads” Super PAC: The non-profit can accept unlimited donations, protect the donors’ identities, and transfer the money to the Super PAC to spend, avoiding the “primary purpose” restriction.\textsuperscript{218} “[L]ess than half of the independent expenditures by outside groups during the 2010 election cycle were made with disclosure of the contributors’ identities,” in part because “outside groups have great incentives to avoid . . . disclosure when contributors prefer anonymity, and particularly when the independent expenditures are the type of inflammatory rhetoric that these groups are willing at times to sponsor.”\textsuperscript{219} Easy anonymity may therefore incentivize ideologically extreme campaign activity.

As professor Kang summarizes: “post-\textit{Citizens United}, outside groups that engage in forthright and extensive campaigning, in the form of independent expenditures, operate entirely outside campaign finance regulation as it had existed for more than thirty years since \textit{Buckley}. The three major pillars of campaign finance law—(1) source restrictions on corporations and unions; (2) contribution limits; and (3) disclosure of contributors and contributions—do not apply to them.”\textsuperscript{220} Super PACs’ election-related expenditures in 2010 totaled $62.3 million, and in 2012 totaled $680 million—a tenfold increase and roughly two-thirds of all independent electoral spending in 2012.\textsuperscript{221} “Dark money”—money for which the donor cannot be identified—appears to have roughly tripled in 2012 to about $400 million, or more than 35 percent of all outside spending.\textsuperscript{222}

\textsuperscript{214}Briffault, \textit{supra} note 7, at 1681.
\textsuperscript{215}Kang, \textit{supra} note 9, at 37 (“[I]n 2010 … the National Republican Congressional Committee publicly revealed its advertisement-buying strategy” allowing “Republican-allied groups, led by the United States Chamber of Commerce, to coordinate their own ad buys.”);
\textsuperscript{219}Kang, \textit{supra} note 220, at 49–50.
\textsuperscript{220}Kang, \textit{supra} note 9, at 35.
III. Super-PAC Politics and the Political Safeguards of Federalism

The rise of Super PACs and outside spending is the most significant development in American politics in a generation. All theories of political safeguards of federalism depend to some degree on states’ clout in the national lawmaking process. If interest group influence is to some extent zero-sum such that loyalty to private interests that provide substantial campaign resources will displace loyalty to state-promoting interests; then increased outside-group influence has negative consequences for all pro-federalism political mechanisms. Increased private-interest capture of federal officials disrupts the representational relationships between officials and the geographic constituencies that push them to safeguard state interests on Wechsler’s view. The increased capacity of outside groups to support federal candidates also threatens to marginalize political parties—especially state and local party committees—undermining Kramer’s institutional latticework for transmitting state concerns to federal officials. And enhanced access to federal candidates and officials because of increased campaign spending gives outside groups and their donors a competitive advantage over state lobbying organizations and state officials pressing state interests at various points in the policymaking process. While I focus on these three mechanisms—constituent pressure, parties, and intergovernmental lobbies—other political safeguards of federalism cannot help but be affected by this kind of tectonic shift in electoral politics. The political-safeguard systems’ complexity and integration with other political dynamics suggests that such a perturbation may create outsized systemic consequences.

A. Incentives to Accommodate State Preferences

The dramatic increase in outside electoral spending occasioned by Citizens United and its progeny may erode the relationship between federal candidates and their geographic constituencies. Wechsler’s view depends on those constituents’ interests in the health of their state governments providing reelection incentives for federal officeholders to make federalism-conscious policy decisions. If outside spending squeezes out the voices of local constituents—perhaps by providing so much campaign support that little actual constituent service is needed for reelection—then Wechsler’s safeguard is undermined. There is now a literature on the reasons Wechsler’s view is no longer persuasive—some argue that voters are uninformed about federalism; others that they simply do not care because their focus is increasingly on national issues or their substantive policy preferences reliably trump any structural preference. Some recent

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223 See Illinois PIRG, supra note 2.
225 Federal candidates are durably dependent on state governments to draw congressional districts and conduct presidential primaries. Wechsler, supra note 24, at 548–56. But it is not clear how significant this is relative to dependence on providers of significant campaign funding. The latter is, of course, more immediate; and the former is determined not just by the state government’s feelings about any particular federal candidate but by a large set of factors that may not be sensitive to changes in candidates’ policy priorities.
226 See generally Molly J. Walker Wilson, Behavioral Decision Theory and Implications for the Supreme Court’s Campaign Finance Jurisprudence, 31 CARDOZO L. REV. 679 (2010) (collecting sources for the proposition that television commercials are perceived as more effective than other means of voter persuasion).
227 E.g., Devins, supra note 81; McGinnis & Somin, supra note 81; Young, supra note 21, at 84–85.
evidence suggests that some voters may in fact care more about federalism than these critical accounts suggest and may pay particular attention to structural issues in election years; but even if there remains something to Wechsler’s mechanism, Super PACs threaten to undermine it decisively for the reasons I discuss here.\footnote{228}{See Mikos, supra note 81 (survey evidence corroborating some interest in federal per se); Nicholson-Crotty, supra note 34.} Another problem is that officials do not reliably prioritize their constituents’ views over those of supportive interest-groups. As independent expenditures have become functional equivalent to direct contributions; we should expect them to generate influence for donors proportional to their amount.\footnote{229}{See Issacharoff, supra note 14, at 126–27; McConnell, 540 U.S. at 205 (noting that “[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”).} Moreover, Super PACs have no systemic incentives to advocate federalism-reinforcing policies—more likely, they will disregard structural issues in favor of substantive policy preferences; use federalism rhetoric only strategically where it advances those underlying preferences; and, often, favor federal action contrary to state interests.\footnote{230}{Citizens United and its progeny thus likely shift federal officials’ incentives more decisively away from the interests of ordinary constituents therefore, on Wechsler’s view, the institutional interests of states.\footnote{231}{Aside from this primary problem, other post-Citizens-United dynamics are best explored in the context of Wechsler’s theory. First, the perception of corruption may erode remaining incentives for ordinary constituents to attempt to influence their federal representatives. (Citizens United and Super PACs have increased public concern about the corrupting influence of money in politics. The Court distinguishes quid pro quo exchanges from other forms of “ingratiation” or “access” that, on its view, are not sufficiently corrupting to justify campaign finance restrictions.\footnote{232}{See infra, notes 248–267 and accompanying text.} But the public apparently does not make the distinction—a significant majority view any service or favorable treatment for campaign supporters as corrupt and believe that large donors seek such rewards for their financial support.\footnote{233}{See OLSON, GROUPS, supra note 124, at 140–48 (describing capture of legislators); Issacharoff, supra note 14, at 125–28 (capture occurs though some concepts of corruption do not encompass its typical effects).} Second, significant outside-group support may replace the electoral support that federal candidates would otherwise seek from state government and party officials—endorsements, access to local information, fundraising and voter mobilization operations, etc.—and thereby close another channel for state interests to reach the agendas of federal officials.\footnote{234}{Worse, if those state officials’ (while public historically fears corporate influence; 70% now think officials favor Super PAC “megadonors”).}}}

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support becomes another resource under the control of Super PACs, perhaps in exchange for Super-PAC support for the state officials’ own political ambitions, federal candidates may get the benefit of localized support without the accompanying pressure to prioritize state interests.\textsuperscript{236}

As interest groups become more important to candidates’ electoral success, candidates and officials will increasingly prioritize interest-group demands over others. This is sometimes called “clientalism.” Outside groups’ new freedom to spend without limit to support candidates’ campaigns makes easier and more likely the formation of patron-client relationships between candidates and outside interests that can provide significant campaign resources.\textsuperscript{237} Systematic dynamics—including the nationalization of politics, the increasing cost of successful campaigns, and others—already foster interest group influence over policymakers.\textsuperscript{238} But we still might profitably focus on reducing the worst instances—the “boulevards” and “express lanes” of private influence.\textsuperscript{239} Regulation should attempt to prevent the formation of entrenched, long-term relationships in which officeholders “offer private gain from public action to distinct tightly organized constituencies, which in turn may be mobilized to keep compliant public officials in office.”\textsuperscript{240}

Among other things, the rise of Super PAC-funded elections promises to increase the influence of outside spending groups not connected to candidates’ geographic constituencies and narrow candidates’ agendas by narrowing their donor bases. Both phenomena increase the risk of clientalism. Super PACs enhance the influence of “megadonors” who can single-handedly fund campaigns.\textsuperscript{241} Such donors had been limited to capped PAC, party or candidate contributions or bankrolling their own ads or organizations; Super PACs lower these transaction costs—and increase incentives to give—by providing a ready-made mechanism for large donors to pool funds and attract political experts to ensure those funds are spent to greatest effect.\textsuperscript{242} Super PAC support thus may narrow a candidate’s agenda to that of a single individual, small group, or industry—and the risk of clientalism is greatest precisely “when there are only a few large donors, not when there are many who may be substantial but not critical.”\textsuperscript{243} Increased outside spending also undermines geographic constituencies by increasing

\textsuperscript{236}See infra notes 340–342 and accompanying text.
\textsuperscript{237}Issacharoff, supra note 14, at 127–29.
\textsuperscript{238}Id. at 129; Baker & Young, supra note 19, at 112–17 (nationalization).
\textsuperscript{239}Issacharoff, supra note 14, at 129.
\textsuperscript{240}Id. at 126.
\textsuperscript{242}Cf. Kang, supra note 9, at 12–13 (noting analogous transaction cost advantage of corporate form for shareholders); Overton, supra note 21, at 1290–93 (relative costs of fundraising).
\textsuperscript{243}Issacharoff & Karlan, supra note 9, at 137–38.
candidates’ incentives to seek campaign support outside their states or districts. These risks are most pronounced in congressional and state elections, where candidates and parties spend less per race so that outside groups can have a significant impact with relatively small sums. Several 2012 congressional races become magnets for outside spending—Virginia’s U.S. Senate race involved roughly $51 million in outside spending—$17 million more than all candidates’ primary and general election spending combined. Outside group involvement on one side of a congressional race has forced the other candidate to seek outside help to remain competitive.

Even ignoring distortion of Wechsler’s mechanism, there are reasons to think that Super-PAC politics will intensify officials’ incentives to pursue policies inconsistent with state interests at the urging of private interests. Empirically, a majority of political influence organizations represent business interests. The factors creating corporations’ comparative advantage in rent-seeking—wealth, established institutional structures and discipline, and long-term relationships with federal officials—likely confer similar advantages on megadonors funding Super PACs and nonprofits. Such interests tend to favor deregulation and other free market policies that often conflict with states’ institutional interests. Take, for example, federal preemption of state law. Industries


248 McConnell, 540 U.S. at 146–53; KAY LEHMAN SCHOLZMAN & JOHN TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 65–70 (1986) (concluding that 70 percent of interest groups active in federal policymaking were business oriented); WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 88–97 (2d ed. 2006) (noting that business interests dominate the lobbying community).


250 McGARTY, supra note 253, at 57 (observing that business interests “generally prefer limited government” because “they would rather go about their business without worrying about ‘intrusive’ governmental regulations and ‘abusive’ lawsuits”). See generally JOSEPH Zimmerman, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER (1992); JEFFREY BERRY, LOBBYING FOR PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS (1977) (observing that interest groups generally push for centralized solutions to even localized problems).
have straightforward financial incentives to seek federal preemption where they face multiple regulatory regimes or otherwise high transaction costs.\footnote{See, e.g., Baker & Young, supra note 19, at 109–10; Young, supra note 21, at 76–77; Thomas O. McGarity, The Preemption War: When Federal Bureaucracies Trump Local Jurisdictions 56–59, 111–145 (2008); Roderick M. Hills, Jr., Against Preemption: How Federalism Can Improve the National Legislative Process, 82 N.Y.U. L. Rev. 1, 19–20 (2007); Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 225–26 (2000).} Cost-reducing centralization or deregulation are most efficiently accomplished by preemptive federal legislation—a single initiative in Congress can accomplish what would otherwise require action by each statehouse; states have little recourse against federal preemption; and industries are less likely to encounter opposition from influential public or state interest groups.\footnote{See generally McGarity, supra note 251, at 111–51; Hills, supra note 251, at 19–20.} Thus, powerful industries—pharmaceuticals, autos, tobacco, etc.—have sought deregulatory federal legislation and broad judicial interpretations of federal preemption in their sectors.\footnote{See, e.g., Young, Two Federalisms, supra note 21, at 140–45.} Importantly, federalism scholars agree that federal preemption of state law and regulatory authority is a significant threat; wiping out entire categories of state authority hampers states’ capacity to supply the regulatory deliverables that sustain citizen loyalty, which in turn endangers states’ influence in the larger political system.\footnote{See Sunlight Foundation, Fundraising and Spending by Political Leaning, 2011–12, at http://reporting.sunlightfoundation.com/outside-spending/by-affiliation/ (last viewed Jan. 31, 2013).}

Aside from the financial motives, some Super-PAC donors appear ideologically motivated to either disregard or oppose state interests. Roughly seventy percent of Super PAC spending supporting Republicans; an account of the ideological commitments of those groups might give us a rough picture of what the majority of “megadonors” seek.\footnote{See Olson, Groups, supra note 124, at 21–24 (arguing that generalized interests rarely mobilize political pressure groups because “socially heterogeneous groups …are less likely to agree on the exact nature of the collective good at issue or on how much of it is worth buying”).} With the usual caveats for assessing multi-member institutions’ common goals, it seems fair to say that one important commitment of many of the wealthiest and most active Super PACs is to decrease government activity generally, with a rhetorical focus on the federal government.\footnote{For example, Americans for Tax Freedom’s Grover Norquist famously pledged to shrink the federal government enough to “drown it in a bathtub,” Times Topics: Grover Norquist, New York Times, Nov. 20, 2012, at http://topics.nytimes.com/topics/reference/timemaps/people/n/grover_g__norquist/index.html (last viewed Feb. 20, 2013).} There is not, however, a corresponding commitment to increasing state government power—instead, the main common interest seems to be in generally deregulating certain economic sectors.\footnote{Cf. Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2315–16 (2001); (arguing that Republican administrations use federalism rhetoric to advance a generally deregulatory agenda); Michele E. Gilman, Presidents, Preemption, and the States, 26 Const. Comm. 339, 349–55 (2010) (similar).}

Of course, there will be some interest convergence: Private interests might favor devolving authority to states (perhaps as a second-best alternative to deregulation); or want to block federal action that states also oppose.\footnote{See, e.g., Hills, supra note 253, at 38 (arguing that groups like the ABA may prefer state-level regulatory variation to protect markets). This is sometimes called the “Baptists and Bootleggers” phenomenon. Bruce Yandle, Bootleggers and Baptists: The Education of a Regulatory Economist, 7} There might also be instances in
which Super PACs or other business-backed outside groups advocate states’ interests out of concern for federalism as such.  But most often, federalism rhetoric is insincere, providing political cover other substantive aims: “Few with influence in the political process care about promoting state power as an end in itself” and “[t]he willingness of lawmakers and interest groups to manipulate federalism in order to secure preferred substantive policies is the rule,” a rule that “dates back to the Framers.” Industry groups seem frequently to invoke federalism because the allocation of government power often overlaps issues of government power vis a vis private actors; but such pro-federalism rhetoric most often masks a deregulatory agenda. Industry group talk about preserving “states’ rights” may also cloak a preference for retaining weaker state regimes rather than face new federal regulation. Because interest groups have incentives to hide their motives, it is difficult here to separate the genuine from the strategic. Pro-regulation groups also use federalism arguments instrumentally, as a neutral-sounding way to pursue restrictions on industry. However, most groups that oppose industry are no friends to federalism—perhaps because states have historically served as the final holdouts of anti-progressive policies on race, labor, health care, immigration, and so forth.

To summarize: The wealthy interests that became exponentially more powerful after *Citizens United* are most likely to ignore state interests; feign concern for federalism to advance unrelated substantive goals; or seek deregulatory federal action that directly constricts state autonomy. Their new, unlimited capacity to support federal candidates suggests that their preferences will often trump those of ordinary constituents or states qua states for officials interested in reelection. Wechsler’s representational safeguard would be decimated.

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259 The early Tea Party may have been an example. *See generally Zietlow, supra, note 81.*


261 Hills, *supra* note 253, at 36.

262 Devins, *supra* note 81, at 134.

263 *See McGarity, supra* note 253, at 57.

264 *See, e.g., McGarity, supra* note 253, at 57; Rena I. Steinzor, *Unfunded Environmental Mandates and the “New (New) Federalism”: Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 113–14 (1996) (arguing that Reagan’s new federalist” rhetoric also disguised a far more complicated agenda that had as one of its primary goals radical deregulation”); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 598 & n.8 (2001) (Stevens, J., concurring in part and dissenting in part) (calling the Court’s “federalism revival” a partisan, deregulatory agenda).


267 *See Ernest A. Young, Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277 (2004) (noting this, but also that states recently have been more progressive on issues like marriage equality).

268 Public choice theory does not involve a *causal* claim that officials are actually single-minded reelection-seekers—the better descriptive account is that officials “pursue a variety of ends simultaneously, trading goals off against one another and giving no goal overriding priority.” Elizabeth Garrett & Adrian.
A related concern is that clientalism incentivizes expanding and adding complexity to federal programs so that officials can bury their service to interest-group backers beyond public scrutiny. And, of course, federalism theorists have long argued that all federal expansion diminishes state autonomy somewhat by diminishing the space in which states may act without worry about conflicting federal enactments.

However, it is also possible that the currently high visibility of Super PACs in the ongoing public debate about the effects of *Citizens United* may have sparked voter backlash that partially explains the failures of conservative-leaning Super PACs in 2012. Voters may regard Super PAC funding as a proxy for candidates’ willingness to pander to special interests. That may decrease outside-group influence or increase candidates’ focus on actual constituents but it also may heighten incentives for officials to add legislative complexity to better hide their service to outside backers—either way, it will take several cycles to know whether these are real and durable phenomena. Regardless, as national outside-groups grows, so grows the risk that they will persuade state-protective groups to nationalize their priorities. In 2010 and 2012, Super PACs and other outside groups poured millions of dollars into state races. Even if state-interest advocates maintain some measure of influence over national candidates, Wechsler’s mechanism is nevertheless undermined if *state-level* stakeholders stop prioritizing the institutional interests of state governments.

**B. Political Parties**

On Kramer’s account, political parties are an important non-judicial safeguard for federalism—they serve as conduits through which federal and state officials form durable relationships of interdependence that benefit states in the federal policymaking process. Although the parties had to adapt to a changing campaign finance environment—particularly BCRA’s soft-money ban—they grew stronger between *Buckley* and *Citizens United*. *Citizens United* and its progeny, however, pose a

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270 See, e.g., *Young, supra* note 47, at 1465.


273 See *Young, supra* note 21, at 84–85.

274 E.g., Hirschkorn & Cordes, *supra* note 244; Kroll, *supra* note 244.

275 See *infra*, notes 342–344 and accompanying text.

276 Kramer, *supra* note 22, at 276–87; *supra* notes 84–87 and accompanying text.

277 Briffault, *supra* note 120, at 626–27;
multifaceted threat to this party-based model of political federalism. Super-PACs’ and other outside-groups’ growing influence in federal elections positions them to compete with the major political parties for influence over candidates, elected officials, and thus government action. Such groups are sufficiently different from parties that they will not serve state interests in the same way. Perhaps more important, the growth of outside spending after Citizens United has already begun to undermine state party committees—crucial communicators of state interests in larger party networks. Super-PACs politics threatens to disrupt parties’ pro-federalism functions by diminishing both federal candidates’ dependence on parties and state officials influence within party networks.

A robust literature characterizes parties as important mediating institutions in pluralistic polities—among other things, parties mobilize voters, build coalitions among constituencies with varying priorities, connect candidates with officeholders and elites, and refine policy ideas through a process of internal deliberation. Cultivating the variety of interests needed to form a winning coalition forces parties toward moderate policy commitments. Strong parties are arguably important for democratic accountability because, “in order to hold the government accountable, voters need to face clear, programmatic choices” of the kind that parties, with unifying policy programs and ideological agendas, are well-situated to provide across various elections in a multi-level system. And parties are undoubtedly significant campaign finance institutions, providing candidates with substantial campaign resources and, in particular, aiding challengers in overcoming incumbents’ advantages. These effects and the discipline strong parties impose on their members make parties, in principle, “a counterweight to the many special interests that may chip away at the public good behind legislation.”

278 The connection between campaign finance and parties federalism function is rarely examined. See, e.g., Frymer & Yoon, supra note 19; A.E. Dick Howard, Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles, 19 GEORGIA LAW REVIEW 789, 793 (1985) (“[T]here has been a palpable decline in the ‘political’ safeguards [of federalism] …[p]olitical parties, especially at the state level, no longer are the force they once were”).

279 See Kramer, supra note 22, at 282; Kramer, supra note 77, at 1538. See also John Chubb, Federalism and the Bias for Centralization, in THE NEW DIRECTION OF AMERICAN POLITICS (John Chubb & Paul Peterson, eds. 1985); MORTON GRODZINS, THE AMERICAN SYSTEM (1966) (emphasizing state parties’ role).


284 See Ansolabehere & Snyder, supra note 282, at 609.
Before FECA, the major parties had lost much of their influence—some viewed the condition of state parties in particular as dangerous for federalism. Between FECA and *Citizens United*, however, parties grew stronger and gained certain competitive advantages over outside groups. Parties still can collect larger contributions than can candidates or PACs—although they are capped, unlike donations to Super PAC. Only parties can make both unlimited independent expenditures and large hard-money expenditures in coordination with federal candidates’ campaigns. Before BCRA, parties could use soft money to “hire staff, acquire office space, develop direct mail capability, run polling and issue research operations, acquire data processing equipment, and create and improve facilities for mass media communications”—in short, to develop the infrastructure required to function as sophisticated electoral players. Soft money increased coordination between national and state party organizations—state parties could use more soft money than could national committees for activities benefiting both state and federal campaigns—and provided state parties with enormous resources to improve their infrastructures. While large soft-money donors did seek special access and influence, expanding party resources, including soft money, also created stronger, more disciplined parties—and history suggests that, on balance, “the influence of money on policy is diminished when candidates and parties have ample access to fundraising.” Importantly, soft money had to flow through the parties, giving them control over most resources that wealthy donors wanted to funnel to candidates and thus interposing their moderating influence on those donors’ demands.

The soft-money ban, by contrast, generated competition for parties as large donors had to spend their political money, if at all, independently or through intermediaries like 527s. Contrary to some predictions, however, the parties adapted to maintain their resources and influence by dramatically increasing their hard-money fundraising.
also moved parties away from over-reliance on large donors, reducing the extent to which they served as conduits for special-interest influence. But political money flows to the least regulated channel, and although large donors had incentives to give soft money to parties rather than outside groups permitted only independent expenditures; BCRA redirected much of that money to non-party entities. After Citizens United, Super PACs are the primary beneficiaries of the soft-money ban, and this deluge of resources increases outside groups’ capacity to support candidates financially and thus compete with parties for candidate loyalty. This dynamic does not necessarily reduce party resources if their hard-money fundraising remains strong, but it might eventually if the resource pool is finite. Either effect—increased competition or decreased resources—may undermine traditional party characteristics with implications for political federalism.

If resources shift away from parties as well as toward Super PACs, then parties’ relative influence declines, undermining their capacity to foster electoral competition and accountability, policy discipline, etc.; all to states’ political disadvantage. Party support for challengers, for example, can negate some of the advantages of incumbency and thus foster the electoral competition that reinforces democratic accountability. Private interest groups, by contrast, tend to support incumbents “as an investment in politics, with some expectation of a return on their donation”—incumbents therefore need less party money than challengers. Decreased support for challengers likely means more incumbent victories and the corresponding reinforcement of special interest influence. Resource loss also may damage party cohesiveness—with less electoral support to spread around—and thus parties’ capacity to shepherd initiatives through the federal policymaking process. This could undermine the states’ party-based influence—especially if party discipline is replaced by special-interest influence favoring agendas


See Ansolabehere & Snyder, supra note 282, at 600–01; McConnell, 540 U.S. at 150–51 (concerns about large soft-money donors); but see John M. de Figueiredo & Elizabeth Garrett, Paying for Politics, 78 S. CAL. L. REV. 591, 615–17 (2006) (noting parties’ new hard-money “ bundling” practices might increase special-interest influence).


See Briffault, 527s, supra note 196, at 962–66; Richard L. Hasen, Super Soft Money, SLATE, Oct. 11, 2011, at http://www.slate.com/articles/news_and_politics/jurisprudence/2011/10/citizens_united_how_justice_kennedy_has_paved_the_way_for_the_re.html (last viewed Feb. 21, 2013); see also Issacharoff & Karlan, supra note 9, at 1715–16 (political money finds least regulated channel).

Briffault, supra note 296, at 212.

301 See Ansolabehere & Snyder, supra note 282, at 607–08.

302 Ansolabehere & Snyder, supra note 282, at 610; see id. at 609–610.

indifferent to state interests. These effects exacerbate two federalism problems: First, the odds are good that the empowered interest groups will press for centralizing or generally deregulatory federal action. Second, incumbents may be systematically biased against state preferences—retaining federal office often will require federal aggrandizement, and incumbents will have mastered aspects of that process.

Even if party resources remain constant, outside groups’ growing capacity to function as alternatives to parties is problematic in itself—if candidates perceive no disadvantage in switching their loyalties from parties to Super PACs, then parties, and their federalism benefits, still may be eroded. Some will argue that the 2012 election shows that parties have already adapted to Super PACs. But the Super PAC threat is evolving as well. Super PACs “run by party regulars [are beginning to] . . . look, smell, and act a lot like political party organizations.” Former party officials working within Super PACs may act as conduits for some party control over their activities. Super PACs’ dependence on megadonors, however, makes it more likely that those donors’ narrower agendas will take priority. The 2012 Republican primaries suggest that Super PACs coordinated, if at all, with donors and candidates—not parties. As Super-PAC support for candidates increases, candidates will increasingly have incentives to prioritize Super-PAC agendas over party objectives.

Party structure can only affect the federal policy process as long as parties wield significant political influence. Outside spending entities are rapidly gaining on parties financially, in part because they can more easily court large donors; party leaders must

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304 See Ansolabehere & Snyder, supra note 282, at 607–08.
305 Frymer & Yoon, supra note 19, at 1013 (private interests “predominantly corporate and free market” oriented). See David Durenberger, View From the Commission, in American Council of Intergovernmental Relations, The Status of State Political Parties, 10 INTERGOVERNMENTAL PERSPECTIVE 1 (1984) (“Lobbies . . .would find it immeasurably more difficult to press their categorical agendas under a truly decentralized federal system . . .[and thus would] exert strong opposition to new decentralizing schemes.”).
306 Incumbent federalism-hawks also might be entrenched by a rollback of party resources, but there are few such officials. On the whole this seems net-negative.
310 See sources cited supra, notes 212–215.
311 See sources cited supra note 2.
adopt moderate positions and exercise agenda-control to unite the many diffuse constituencies needed to elect large slates of candidates.\textsuperscript{313} For now, outside groups’ issue profiles can be narrowly tailored to the preferences of major donors. If outside groups can provide full financial support for a winning federal campaign, they eliminate financial disincentives that might otherwise motivate candidates to stay loyal to parties. Of course candidates will for the foreseeable future still need to be affiliated with a major party; but Kramer’s safeguard requires their dependence on and substantial participation in party networks, and “both national and state parties remain marginal in relation to the candidates who raise money independently.”\textsuperscript{314} Candidates nominally affiliated with but minimally dependent on parties seem less likely to take seriously the suggestions of state-minded party members.

Outside groups are also developing the capacity to provide party-like services aside from financial support. Parties offer candidates access to peer networks and established federal officials for information and endorsements;\textsuperscript{315} state and local volunteers and organizations for voter outreach and campaign events; successful strategists and pollsters; and public signaling benefits of party brands.\textsuperscript{316} American Crossroads, for example, provided some “ground-game” support for its candidates in 2012; outside groups are also using their financial advantage to recruit top political professionals.\textsuperscript{317} Super PACs and nonprofits are expanding their slates: American Crossroads and Crossroads GPS spent on 31 federal races in 2012; and the U.S. Chamber of Commerce spent on at least 39 races; to cite just two examples.\textsuperscript{318} Large majorities of Republican congressional

\footnotesize{\textsuperscript{313} See sources cited supra, note 281.}
\footnotesize{\textsuperscript{314} Frymer & Yoon, supra note 19, at 995.}
candidates have endorsed Americans for Tax Reform’s anti-tax pledge; which in turn shaped recent fiscal debates in Congress. As their candidate slates expand, they will offer greater networking opportunities and eventually, with their narrower agendas and smaller constituencies, programmatic discipline to help candidates claim reelection—ensuring policy victories at discounted transaction costs. These dynamics are interdependent: As outside groups become more party-like, they will attract more candidates.

State party organizations were considered central to federalism even before Kramer wrote: “Strong and vigorous state parties historically have provided an important channel of intergovernmental communication and state influence in Washington.” Even as state parties respond to the nationalization of voters’ interests by increasing their focus on national matters, and correspondingly de-prioritize state and local issues, they remain central to the party safeguards mechanism: First, they provide forums for those invested in state issues to form relationships and collaborate; and during federal elections, state parties connect these state-focused networks to the national parties’ parallel networks of candidates, operatives, and officials. Second, state parties still provide federal candidates with staff and volunteers with local expertise for voter outreach and mobilization, and deliver state and local officials to endorse, raise money, provide information about voters’ localized concerns, and otherwise increase federal candidates’ appeal to the sub-national electorates they must turn out to win. These “blood and muscle” resources—which national campaigns would have difficulty replicating without state parties’ established organizations—are important regardless voters’ substantive concerns and contribute to the dependency of federal party operators on state officials that undergirds Kramer’s safeguard.

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320 See infra notes 318–319 and accompanying text.

321 Conlon et al., supra note 307, at 6.


323 Kramer, supra note 22, at 278–83.


325 Contrary to one critique—see Frymer & Yoon, supra note 19, at 1013–16—Kramer’s account does not require that state officials exercise control over national-party operations. It requires networks that transmit

State parties, with their national counterparts, declined before FECA; but while FECA treated them as equivalent to PACs, state parties nevertheless grew stronger and increased their coordination with national parties in its wake.\textsuperscript{326} The soft-money ban dealt a blow to this burgeoning coordination and diminished state parties’ autonomous fundraising capacity.\textsuperscript{327} To maintain freedom to focus on sub-national issues, state parties need to generate resources on their own; just as they need strong organizations providing services for federal candidates to generate clout and leverage in party networks.\textsuperscript{328} But the BCRA functionally barred state parties from using soft money in ways useful to national parties.\textsuperscript{329} This reduced both coordination and fundraising—it made hard money more precious, diminishing national-party incentives to fund state party-building activities; and it increased regulatory barriers to state-party contributions to federal campaigns.\textsuperscript{330} The nationalization of politics and voter interests has also hampered state-party fundraising.\textsuperscript{331} State-party fundraising recovered somewhat in the years after BCRA and, contrary to some claims, issue nationalization has not turned state parties into mere arms of their national counterparts.\textsuperscript{332}

Nevertheless, national parties still have incentives to coordinate with state parties: Some state laws allow state parties to tap funds not open to national parties for use in state voter outreach and mobilization.\textsuperscript{333} Building an effective nationwide organization “requires either an immense amount of money or the support from many state leaders who can assist by offering the aid of their existing party organizations.”\textsuperscript{334} Banning soft money created some incentives for national parties coping with their own resource


\textsuperscript{327} See LaRaja, supra note 281.

\textsuperscript{328} See Conlon et al., supra note 307, at 7–8.

\textsuperscript{329} See supra, notes 166–170 and accompanying text. BCRA exempts from soft-money prohibitions donations from individuals to state or local party committees, up to $10,000 per year, for party-building activity without specific federal-candidate identification. 2 U.S.C. § 441i(b)(2)(2006).

\textsuperscript{330} See LaRaja, supra note 281, at 272; Briffault, supra note 120, at 629; McConnell, 540 U.S. at 122–26 (soft money); Nathaniel Persily, Soft Money and Slippery Slopes, 1 ELECTION L.J. 401 (2002).

\textsuperscript{331} See, e.g., Frymer & Yoon, supra note 19, at 991–92.

\textsuperscript{332} Compare Frymer & Yoon, supra note 19, at 991; with Morehouse & Jewel, supra note 324, at 626–30.


\textsuperscript{334} Frymer & Yoon, supra note 19, at 993.
shortfalls to seek state-party organizational assistance, and at the same time placed local organizations more squarely under state-party control.335

State parties—with their blood-and-muscle resources—are best situated to conduct these important ground-game operations. Building quality organizations requires familiarity with local players and priorities. This is particularly important in our system of front-loaded presidential primaries, which “privilege[ ] candidates who have large campaigns that are organized in many different states at once;” candidates who succeed do so “in no small part due to the efforts of state leaders around the country.”336 And in 2012, much state-party spending was dedicated to organizing, outreach, and turnout activities.337 National parties thus still have incentives to provide deliverables that matter to state party officials in exchange for ground-game assistance.

These and all other party mechanisms are directly threatened by the growth of Super PACs and similar entities. National candidates now have access to unlimited resources, so they are no longer necessarily dependent on state party organizations. Super PACs are beginning to replicate state parties’ organizational achievements—indeed, 527 organizations ran some voter turnout operations as early as 2004.338 The widespread view that the ground game was critical to President Obama’s victory will motivate Super PACs to intensify efforts to develop capacity to provide these services.339 Candidates also may, with unlimited outside funding and the longstanding belief that television ads are the most effective electioneering tools, to opt for spending on air wars—a Super PAC specialty—rather than ground games. Both dynamics diminish state-party incentives to invest in organizations, and eventually might give Super PACs a competitive advantage. State parties, because of their smaller resource pools, lower visibility, and financial vulnerability after BCRA, have worried about competition from non-party groups since the advent of PACs.340 Super PACs of course have still greater capacity to provide donors and candidates with attractive alternatives to state parties. If they develop the capacity to compete on the services state parties are structured to offer as their best products, there is no obvious way for state parties to adapt and maintain their relevance in federal elections. Increased Super-PAC competition in federal elections also motivates

335 See Frymer & Yoon, supra note 19, at 993–96 (BCRA increased state-party autonomy).
336 Frymer & Yoon, supra note 19, at 993.
337 See, e.g., Blumenthal, supra note 342. These and other electoral functions that preserve state-party significance—e.g., presidential primaries—are increasingly swing-state focused. Frymer & Yoon, supra note 19, at 992. This may create another federalism problem by skewing party networks in favor of powerful states. Inequality of state influence in national politics may undermine federalism’s durability. Baker & Young, supra note 19; Gardner & Abad I Ninet, supra note 83. These “swing-state federalism” problems are largely unexplored and I will return to them in future work.
338 Briffault, supra note 199, at 954–55.
340 E.g., David Durenberger, View From the Commission, in American Council of Intergovernmental Relations, The Status of State Political Parties, 10 INTERGOVERNMENTAL PERSPECTIVE 1, 31 (1984); Conlon et al., supra note 307, at 23 (both emphasizing state parties’ problems with outside-group competition).
national parties to further centralize—to compete, national parties need more of the hard money they might otherwise send to state parties and further “nationalize and professionalize their ranks,” pushing state operators out of party networks. 341 State-party fundraising is down significantly since Citizens United. 342

Finally, Super PACs have begun intervening in state and local elections, where they can get significantly more value for every dollar and readily outmatch opposing candidates and supra-national party organizations. 343 Super-PAC competition with state parties in state races—either for candidate clients or donors—exacerbates the incentive problems that arose from the soft-money ban. Their status as unregulated alternatives to state parties gives candidates and donors a reason to shift their allegiance. Resulting decreases in state party resources reduce state-party services, driving candidates away and further discouraging national-party collaboration and resource transfers. State parties will have to expend more resources on state contests, diminishing their capacity to participate in federal elections and thus to earn consideration of state interests within party networks.

There are reasons to doubt, however, that Super PACs will become moderating entities. Candidates and parties increasingly depend on Super PACs to remain competitive in elections; Super PACs’ capacity to deploy unlimited resources in support of a candidate makes them more valuable than other, smaller-scale contributors that may form part of the candidate’s or party’s coalition. 344 Super PACs’ capacity to replace any small-donor support candidates lose by taking certain policy positions and their greater incremental value as allies suggest that the smaller donors’ preferences will be jettisoned in favor of those of the Super-PAC donors. And, Super PACs are overwhelmingly dependent on wealthy individual donors 345 who may give in larger amounts to outside groups than they do to candidates or parties because they want to press an ideological

341 See Frymer & Yoon, supra note 19, at 988–89, 997–1000 (noting this effect of PAC and interest group competition with parties in the pre-BCRA era).
345 See Illinois PIRG, supra note 2 (discussing megadonors).
position. Super PACs’ financial incentives to fulfill their ideological commitments suggest that they will remain polarizing forces. The same incentives should prevent Super PACs that expand to incorporate state and local ground-game operations and staff from becoming functional conduits for the transmission of state-government preferences—large donors’ desires, often for centralization or deregulation, will take priority. While a Super-PAC with an ideological commitment to federalism might reinforce the political safeguards, no such organization presently exists and, even if it did, federalism rhetoric is most often insincerely deployed to further substantive policy objectives that may actually conflict with state interests. This creates the worst of both worlds: Strong, broad-based organizations with sufficiently large delegations of “client officials” to enact controversial legislation but with sufficiently strong ideological discipline to forestall the moderation of conventional parties. Reproduction of state-protective mechanisms within Super PACs therefore seems unlikely—certainly so in the short term.

C. The Intergovernmental Lobby

The intergovernmental lobby is composed of multiple organizations—the National Governors Association, National Conference of State Legislators, National League of Cities, National Association of Attorneys General and U.S. Conference of Mayors are the most prominent, but there are many others. The perceived failure of traditional political safeguards and federal-government expansion were among the reasons for their formation. Beyond their primary function—lobbying federal officials on behalf of state governments—these groups facilitate an exchange of ideas among states and with federal officials, disseminate information on federalism issues; and, like political parties, link the fates of state and federal officials. The NGA often is a lead group for the others; and while groups’ interests sometimes diverge—on water issues, for example, which disproportionately affect western states, or oil and gas policy that affects primarily petrochemical producing states, etc.—they have reached consensuses when federal action threatened universal state interests such as avoiding broad preemption or preserving

346 Cf. Briffault, supra note 196, at 964–65 (suggesting that wealthy individual donors to outside political groups are more likely to be motivated by ideology than corporations).
347 See Devins, supra note 81, at [PP].
348 Peabody & Nugent, supra note 58, at 50 n.184; NUGENT, supra note 102, at 132.
grants-in-aid.\textsuperscript{353} Most federal action that impacts states prompts intervention by at least some groups.\textsuperscript{354} We need not resolve the academic debate over lobbyists’ actual influence on legislative outcomes—here, assume that intergovernmental lobby groups can effectively safeguard federalism in some instances.\textsuperscript{355} And they do succeed, at least in part, fairly frequently.\textsuperscript{356}

Comparing intergovernmental lobby organizations with private lobbies helps highlight problems that Super PACs create in this context: One obvious difference is that Super PACs and their donors spend enormous amounts of money to support candidates for election while intergovernmental groups do not participate appreciably in campaign finance. Additionally, Super PACs have significantly earlier access to officials—when they first become candidates—and may “lock up” loyalties before intergovernmental groups have a chance to press their interests, forcing intergovernmental groups into a weaker, reactive position.

The resource disparity is the most obvious problem. Lobbyists have long, sometimes infamously,\textsuperscript{357} used campaign finance for persuasion; successful lobbyists “have become prolific fundraisers and bundlers of campaign contributions for key legislators and party leaders.”\textsuperscript{358} Large Super PAC donors often already have a lobbying presence in Washington.\textsuperscript{359} Prominent Super PACs are branching out into lobbying; prominent lobbying groups like the National Association of Realtors are forming Super PACs to increase their influence;\textsuperscript{360} and significant informal connections, like staff crossovers, facilitate link Super PACs to lobbying groups.\textsuperscript{361} And the deregulation of independent

\textsuperscript{353} See Nugent, supra note 102, at 29–36 (categorizing state interests); id. at 129–33 (diverging interests), 152–53 (highlighting grants).
\textsuperscript{354} Peabody & Nugent, supra note 58, at 52–53 (noting that IG lobby “involvement …is the norm when …Congress considers legislation with implications for state governments”). Cf. Nugent, supra note 102, at 130–31 (describing IG-lobby monitoring of all federal activity).
\textsuperscript{356} Peabody & Nugent, supra note 58, at 52; see Nugent, supra note 58, at 126–66; Cammissa, supra note 351, at 124–27 (describing successes).
expenditures means that lobbyists representing major Super PACs, their donors, or those donors’ industries can offer limitless electoral support to candidates. Limitless private electoral spending in the new regime fosters strong patron-client relationships. Direct campaign contributions by lobbyists are restricted—for example, they cannot act as conduits for third-party contributions. The new capacity of Super PACs to spend without limit on independent electioneering provides a workaround. Private lobbies also enjoy a competitive advantage because of their capacity to operate a “revolving door” between governmental service and the lucrative private lobbying job often waiting for cooperative officials when they leave office. Officials will know the identities and interests of their major donors, not least because Super PAC ads can identify specific candidates and informal connections—former staffers, shared consultants, etc.—link Super PACs to campaigns. And, Super PACs employ professional strategists to maximize returns on electoral spending; thus the officials they sponsor should be well positioned to serve their donors and are certain targets for those donors’ lobbyists. If it is clear to officials that a lobbyist represents Super PAC donors or otherwise has access to Super PAC resources, the lobbyist’s message becomes substantially more persuasive and failure to act on the lobbyist’s request becomes substantially more threatening.

Intergovernmental lobby groups cannot generate comparable financial influence over candidates. They do not invest appreciably in campaign finance. As is characteristic

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363 See Issacharoff, supra note 14, at 119–120.


365 McConnell, 540 U.S. at 205.

366 See Hasen, supra note 355, at 224.

367 See, e.g., Posner, supra note 5 (noting that candidates have incentives to discover who funds supportive Super PACs); Briffault, supra note 7 (similar); see supra, note 216–219 and accompanying text (cross-staffing).


370 A search of Internet-based compilations of campaign finance reports shows no contributions or expenditures falling within FEC reporting requirements for the NGA, NCSL, NAAG, or NCSG since 1991. Influence Explorer, http://influenceexplorer.com (last visited Dec. 20, 2012; searches conducted Dec. 20,
of groups representing diffuse interests, the intergovernmental lobby’s resources already are thinner than those of lobbyists for narrower private interests with unlimited financial backing. Their staffs are small and overloaded with monitoring, research, and other duties.\textsuperscript{371} Intergovernmental-lobby member officials can offer other forms of electoral support, including endorsements and access to local organizations—indeed, federal candidates often are former state officials likely familiar with these groups.\textsuperscript{372} While this may substitute for some monetary support—indeed may be necessary regardless of a candidate’s financial position—the expense of campaigns, and especially television ads, along with Super PACs’ increasing capacity to provide ground-level organizational support suggests that candidates will value Super-PAC support more than that of the intergovernmental groups.\textsuperscript{373} Of course, money is not lobbyists’ only path to influence: Direct cash-for-votes exchanges are rare;\textsuperscript{374} instead, lobbyists use campaign money to “reinforce established connections” and cement “long-term relationships and friendships”


\textsuperscript{372} See \text{supra}, notes 315–320 and accompanying text.


\textsuperscript{374} \text{Hasen, supra note 355}, at 217–18.
that will serve clients’ interests over time. Connections may be more important to persuasion than other lobbying tools (e.g., providing support for officials’ existing positions); and intergovernmental organizations, composed of well-connected state officials, have an advantage in this regard. But private interests’ new freedom to commit limitless resources to forming early, strong patron-client relationships seems destined to diminish this advantage and increase the cost of influence for opposition groups.

This is problematic if Super PACs’ interests conflict with those of intergovernmental lobby groups. Interest convergence is possible, but these groups’ core objectives are incompatible in many cases. Private interests and state governments will clash over some federal policies—for example, as I mentioned, private-interest requests for centralization or deregulation may conflict with states’ interest in continuing regulatory power even where the states want direct federal regulation of a subject replaced by collaborative regimes or increased state regulatory discretion.

Intergovernmental-lobby influence declined in the 1980s in part because “the Reagan Administration tried to radically reorient the federal domestic role” by shrinking it—an objective shared by many contemporary Super-PAC mega-donors. Administration officials viewed intergovernmental groups as “self-serving supplicants and the public trough, driving up federal costs in order to enhance their own influence;” and thus cut their funding and access as part of a general strategy to roll back federal activity. The relevant interests have not changed much; interests pushing centralizing or deregulatory agendas may be hostile to intergovernmental lobbying groups today.

While it is rarely zero-sum, interest groups may displace one another. Officials do not have unlimited capacity to respond to requests—“given finite quantities of elected officials’ and staff’s time; there is a declining marginal utility of lobbying[.]” There is also a finite number of proposals on which a legislator, say, will vote and only two possible actions each—“yes” or “no”. Where opposing interest groups have invested in access to the legislator, and she cannot serve them all through compromise, she must to


376 See Hasen, supra note 355, at 224 (arguing that, in lobbying, “who you know is more important than what you know”).

377 Cf. NUGENT, supra note 102, at 144–45 (noting that IG lobby groups’ stature comes in part from members who are elected state officials).

378 See supra, Part III(A); NUGENT, supra note 102, at 36–40 (states share “legalistic” interests in “be[ing] recognized as the authoritative decision-makers …without the threat” of preemption).

379 Hays, supra note 350, at 1081.


381 Hays, supra note 350, at 1081–82.

382 Hasen, supra note 358, at 229 (arguing that lobbying wastes resources).
choose which interests to satisfy.\footnote{Cf. Hasen, \textit{supra} note 358, at 229 (noting the “finite quantities of elected officials’ and staff’s time” as a limit on the potential efficacy of lobbying).} Public choice theory suggests that she will favor the group that can do more to affect her chances of reelection;\footnote{\textit{See generally} sources cited \textit{supra}, notes 124, 269.} the lobbying literature suggests that the most successful lobbyists are those who channel the best information and most significant campaign resources to officials.\footnote{\textit{See generally} Hasen, \textit{supra} note 358, at 216–225; Richard L. Hall & Alan V. Deardoff, \textit{Lobbying as Legislative Subsidy}, 100 AM. POL. SCI. REV. 69 (2006); Gene M. Grossman & Elhanan Helpman, \textit{Special Interest Politics} 10–15 (2001).} When interest groups clash, then, Super PACs and their lobbyists are on the right side of an expanding resource gap—“those who help out the most are likely to get the greatest access. It is a natural instinct to help someone who has helped you.”\footnote{Hasen, \textit{supra} note 355 at 221.}

Super PACs also enjoy a timing advantage. Their campaign finance activities can begin cultivating influence early in campaigns; thus Super PACs may attempt to “lock up” candidates before they are elected by forming, or beginning to form, long-term patron-client relationships that can be exploited later by lobbyists.\footnote{\textit{See Issacharoff, supra} note 14, at 119–27.} Super PAC resources make such an objective plausible. Such relationships make it difficult for opposing interests to persuade officials later on to vote against early patrons’ interests. And, Super PACs and their donors profit from the capacity to contact officials through Super PACs during campaigns and again through lobbyists later—repeated contacts enhance influence. Thus, Congress has recognized the increased risk of corruption arising from campaign contributions from government contractors and lobbyists—groups that already have frequent post-election contacts with officials.\footnote{\textit{See HATCH ACT AMENDMENTS OF 1940, PUB. L. NO. 76-753, S.19, }§ 5(a), 54 Stat. 767, 772 (precluding contractor contributions). FECA permits PAC contributions but retains the rest of the HATCH ACT’s prohibition. \textit{See 2 U.S.C. }§441c(b) (2008).} Substantial early financial influence empowers Super PACs to shape candidates’ policy agendas, which are often formed early in campaigns and made “sticky” by the costs of breaking campaign promises.\footnote{\textit{See William H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislators, 74 VA. L. REV. 373 (1988) (importance of agenda-setting); see also Yasushi Asako, Partially Binding Platforms: The Effects of Campaign Promises in Political Competition (2011) (last viewed Feb. 19, 2013) (modeling post election policy choices on the assumption that breaking campaign promises is costly).} Agenda change after election, when intergovernmental groups have their greatest access, may impose costs that conflict with officials’ interest in reelection.\footnote{\textit{Cf.} Yasushi Asako, \textit{Partially Binding Platforms and the Advantages of Being an Extreme Candidate} (2009), available at https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=FEMES09&paper_id=242 (last viewed Feb. 19, 2013) (modeling post election policy choices on the assumption that breaking campaign promises is costly), at 2; \textit{See Riker & Weingast, supra} note 389, at 389–94.}

This is a powerful advantage. Legislative inertia makes it difficult to force action on issues other than those already on a legislator’s or the public’s agenda; controlling agendas helps interest groups either overcome that inertia or bury proposals that they oppose.\footnote{\textit{See Riker & Weingast, supra} note 389, at 389–94.} Moreover, political advertising—a Super-PAC specialty—can raise an issue’s
public salience to the point that viable candidates must take a position on it.\textsuperscript{392} And, Super PACs may capture agenda setters—committee chairs, the congressional leadership, legislators positioned at key vetogates, etc.—who can control Congress’s agenda by, among other things, sequencing proposals or otherwise leveraging vote cycles and strategic voting to maximize their preferences.\textsuperscript{393} The intergovernmental lobby has at times shaped the national agenda—placing UMRA on Congress’s agenda and shaping Welfare reform in 1995, for example—but agenda space is limited and will be more difficult to secure when competing with Super PACs and their lobbyists.\textsuperscript{394} Moreover, the intergovernmental lobby has succeeded in this regard primarily by issuing \textit{bipartisan} proposals that were already possible under only limited circumstances.\textsuperscript{395} Super PACs’ tendency to increase polarization may exacerbate this and other collective action problems that the intergovernmental lobby and other public interest groups face.\textsuperscript{396}

These dynamics are problematic: lobbyists rarely convince officials to change their pre-existing views but instead succeed by supporting officials’ existing positions or by persuading them on issues of low public salience about which the officials are unlikely to have a firm position.\textsuperscript{397} Federalism one such issue,\textsuperscript{398} and that is doubly damaging here—it makes it easier for private interests to shape candidates’ views and for the candidate, once elected, to service those interests without political cost.\textsuperscript{399} Interests with early access to the candidate and significant influence over his or her agenda, then, have the best opportunity to shape his or her views on federalism. Accordingly, groups with interests in centralization or deregulation may persuade a candidate to adopt a position contrary to state autonomy on many subjects.\textsuperscript{400} That view is what intergovernmental lobbyists must try to change—a task at which lobbyists often fail.\textsuperscript{401} While the low public salience of federalism increases their likelihood of success, it does not necessarily favor particular interest groups. Intergovernmental lobbyists’ resource disadvantages make these contests uneven.

A third concern is that the increasing involvement of powerful private interests in state elections might result in the capture of state officials that give intergovernmental organizations their influence in Washington.\textsuperscript{402} In addition to their incentives to seek


\textsuperscript{396} See supra, note 371 and accompanying text.

\textsuperscript{397} See Hasen, supra note 379, at 220 & n.172.

\textsuperscript{398} See generally Devins, supra note 81.

\textsuperscript{399} See sources cited supra, note 269.

\textsuperscript{400} See supra, Part III(A).

\textsuperscript{401} Hasen, supra note 358, at 227–28.

\textsuperscript{402} See NUGENT, supra note 102, at 136 (state officials are influential lobbyists).
Super PAC support for state campaigns; state officials also may have incentives to avoid alienating potential backers for future federal campaigns if they have federal aspirations.403 This dynamic magnifies the growing concern that state officials increasingly prioritize national issues over their states’ institutional interests, perhaps in part due to the general nationalization of politics and public agendas.404 This, of course, undermines any political safeguard that depends on state officials’ tendency to prioritize and thus fight for state interests.

Several other problems for intergovernmental groups are created or exacerbated by Citizens United. First, captured officials have incentives to increase governmental complexity to camouflage their patron service; this is problematic insofar as all political safeguards depend on a degree of transparency in federal policymaking sufficient to alert state-interest advocates when to act.405 It particularly complicates the intergovernmental lobby’s already difficult and costly task of monitoring government activity for incursions on state autonomy.406 Second, intergovernmental organizations “are long-term, repeat players in the legislative process” with incentives to sustain influence over federal offices regardless of their occupants’ party or views;407 thus they lack outside groups’ freedom to punish federal officials who act against their interests.408 States may threaten to withhold implementation resources, but federal officials likely will perceive threats of shifting Super-PAC support as more immediate and consequential.409 Third, increasing private lobbying power reinforces the status-quo bias in federal policymaking: Lobbyists fare best at resisting new legislation, which merely requires persuading a few members controlling a vetogate and not a majority.410 This may coincidentally favor federalism where it stalls preemptive proposals and the like; but it will also favor wealthy interests defending a centralized or deregulated status quo and frustrate states seeking augmented regulatory authority through devolution or new cooperative regimes.411 Finally, the growth of Super PACs may sharpen the self-reinforcing selection effects of campaign finance doctrine—Super PACs may decide which candidates to support based on their

403 Thus it would not be surprising to see some governors resist taking a position, through the NGA, on proposals with serious federalism implications that also touch on controversial issues like gun control, gay marriage, physician assisted suicide, and others that might alienate Super PAC donors. Cf. Young, supra note 267 (noting the federalism implications of public policy debates in these and other controversial areas).

404 See Young, supra note 21, at 84–85; cf. Roderick M. Hills, The Eleventh Amendment as Curb on Bureaucratic Power, 53 STAN. L. REV. 1225, 1227 (2001) (noting tendency of state bureaucrats in cooperative regimes to identify with their federal analogues more readily than state elected counterparts).

405 Olson, Nations, supra note 124, at 70.

406 Peabody & Nugent, supra note 58, at 54; Nugent, supra note 102, at 126–31.

407 Peabody & Nugent, supra note 102, at 54. Some private interests and professional lobbyists are also repeat-players. Hasen, supra note 355, at 219. Bald campaign finance threats are more likely from ideological Super PACs than established lobbying firms.

408 Corporations are similar: They gave large soft-money donations to both parties to secure access to whoever was elected, but have avoided political spending through partisan outside groups. McConnell, 540 U.S. at 124–25; Briffault, supra note 196, at 963. See also Illinois PIRG, supra note 2 (corporate spending major in 2012).

409 See sources cited supra, notes 361–362.

410 See Eskridge ET AL., supra note 248, at 66 (describing vetogates).

411 Hasen, supra note 355 at 227 & n.215 (“[A] status quo bias favors wealthy interests, who have already won in the past.”).
appeal to outside groups. If mega-donors select candidates committed to centralization or deregulation and, thus, perhaps hostile to continuing state regulatory power; they will further impede intergovernmental-lobby efforts to win departures from the status quo. In the longer run, outside groups will select candidates with narrow commitments compatible with the group’s objectives. Further expansion of outside-group power, therefore, may eventually force states and their advocates to face a generally unreceptive federal government.

These harms may be reduced if states and their lobbyists have a form of influence over federal policy qualitatively different from that of private interests. The states’ role in implementing federal policy—the “power of the servant,” often crucial because of limited federal resources—may give states exactly that. States frequently leverage this influence to secure concessions from federal regulators concerning the implementation of existing programs; they also have used it at the legislative phase—state resistance to the federal REAL ID Act, for example, which would require significant state implementation, has stalled the legislation and may force changes to the basic program. But this power is not limitless: States are not always free to walk away from the bargaining table. State implementation is often a condition of federal funding, and in some instances the money proves an irresistible carrot. That states rarely decline federal funds suggests that Congress has become skilled at making “correct estimate[s] of the nonfederal governments’ opportunity costs of providing the requested services[;]” so, too, scholars and now the Court have recognized that spending conditions may be coercive in view of states’ budgetary circumstances. But not every state needs every federal dollar so much that states may never credibly threaten to withhold implementation resources. Intergovernmental lobby groups are often the vehicle for this form of state influence; thus, to the extent that the post-Citizens-United landscape diminishes the power of groups like the NGA, states’ “power of the servant” may correspondingly decline.

\[414 \] See generally Gerken, supra note 28.
\[418 \] See Hills, supra note 417, at 861–863.
\[419 \] NUGENT, supra note 102, at 134; Hills, supra note 417, at 866.
CONCLUSION

The states have adapted to changing political environments by developing various channels of influence in Congress, federal agencies, political parties, and ad hoc negotiations. The sophistication of state governments as political operators seems a crucial feature of the system of non-judicial federalism safeguards. However, states’ influence is threatened by the rise of equally sophisticated, better funded, and—because of their capacity for unlimited spending—more powerful political vehicles for private interest-group influence. These interests will have most of the political power but will hardly ever advocate federalism for its own sake. When they do fight for state autonomy it will most likely be to advance their substantive policy goals which, if suddenly better served by nationalization or deregulation, will dictate abandoning federalism. And often they will have strong incentives to straightforwardly oppose state governments’ attempts to maintain or increase their regulatory autonomy. Because they are interconnected and all depend to some degree on state influence, this affects every form of non-judicial safeguard. For example, weakening the parties enables easier private-interest capture of officials which, in turn, pushes states’ interests down the list of priorities, hamstringing intergovernmental lobbying efforts and other forms of state bargaining.

Not all federalism safeguards are directly undermined by Super PACs—Clark’s inertia and Gerken’s “power of the servant” may survive relatively intact. But there are reasons to worry: Ideologically extreme interest groups that command large slates of officials—including, perhaps, important veto-holders—may successfully push measures that could not pass under normal circumstances. A narrow ideological agenda makes it easier to discipline officials; and discipline is one solution to congressional inertia. As for the power of the servant; states’ leverage as federal policy implementers may not be directly diminished by Super PAC politics. But the system’s safeguards are interconnected—if states rely on intergovernmental lobbying groups to assert their implementation leverage, then the practical value of that leverage will diminish with the influence of those groups. And the power’s value for state autonomy necessarily shrinks when decoupled from mechanisms through which states shape, ex ante, the federal programs that they will implement. Both inertia and the power of the servant are ex post safeguards—if the ex ante mechanisms stop working, states will meet federal intrusion primarily from a reactive posture—running interference in Congress or negotiating with federal agencies over implementation of a regime they had little hand in shaping—that seems on balance less promising for protecting state prerogatives. Moreover, as outside groups increasingly turn their attention to state elections, there is also increasing risk that state governments themselves may be captured and turned

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421 See Robert A. Schapiro, Review: John D. Nugent, Safeguarding Federalism: How States Protect Their Interests in National Policymaking (2009), 7 Perspectives on Politics 968, 969 (2009) (noting adaptations, including lobbying). See also Ryan, Negotiating, supra note 33, at 7, 8–9 (across contexts “public actors work bilaterally across state-federal lines to safeguard federalism by negotiating the terms of governance”); Issacharoff & Karlan, supra note 9, at 1704–05 (emphasizing political actors’ adaptability); Bednar, supra note 33 (federalism as complex adaptive system).

422 See supra, notes 115–119 and accompanying text (interconnections).

423 See Clark, supra note 29; Gerken, supra note 28.

424 See supra, notes 315–347 and accompanying text.
against their own institutional interests. The post-*Citizens United* system, then, seems on balance less protective of state autonomy.

The loss of state influence across political contexts will affect constitutional construction. Excluding states from this process runs counter to the idea of federalism—which suggests continuing state government influence on at least non-mandatory structural developments—by diminishing the extent to which the negotiated set of constructive federalism norms is a product of state, as well as federal, inputs. Constitutional construction also has instrumental significance insofar as it creates guidelines for future government interactions that increase the stability and predictability of the structure by precluding large deviations from established practice. Excluding the states from parts of this constructive process diminishes their capacity for self-defense in a broad sense.

We need new federalism theory and doctrine that accounts for these new political realities to recalibrate federalism theory’s normative programs. More judicial intervention on behalf of states may be necessary, but other remedies are worth considering. We might, for example, fold federalism considerations into campaign finance jurisprudence—not necessarily as decisive, all-trumping constitutional requirements, but perhaps as defeasible reasons for decision. Conventional justifications for campaign finance restrictions were increasingly criticized even before the Supreme Court rejected most of them in *Citizens United*. Alternative justifications—from preventing long-term incumbent clientalism, increasing voter and small-donor participation, and increasing the strength of political parties—have been floated. Highlighting the extent to which doctrinal devices like the contribution/expenditure distinction work to undermine federalism, perhaps alone or coupled with standard anti-corruption interests, should justify a more balanced constitutional standard—one that, perhaps, would reinforce federalism’s political safeguards by permitting some new limitations on outside spending, greater latitude for candidates and parties on small-donor development, a more exacting test for candidate coordination with outside groups, new limits on competition with political parties, or something else. Such doctrinal change would not be incoherent—reinforcing federalism advances many of the same basic democratic values that undergird campaign finance doctrine. Legislative initiatives that strengthen parties—particularly state parties—or that level the playing field for intergovernmental lobby groups all would help to offset the power of unregulated outside spending.

Understanding the shape of the problem is crucial to formulating workable solutions. Campaign finance scholarship has long focused on a narrow set of values to the exclusion of other considerations that could broaden its normative scope. And federalism theory has for too long relied upon an idealized model of the political process that bears little

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426 See, e.g., Krasno & Sorauf, *supra* note 269, at 130–39 (arguing that “corruption” is too malleable to support regulation); Isaacharof & Karlan, *supra* note 9 (arguing that money is hydraulic and that reformers really seek to alter voters’ political choices).


resemblance to reality. It is obvious already that *Citizens United* and its progeny have caused a tectonic shift in our political system. The full consequences remain to be seen, but they are materializing with surprising speed. Super PACs collected and spent nearly $2 billion within *the first two election cycles* after their legalization. But the dramatic rate of change must not distract us from the longer view—and the long term consequences of unregulated outside electoral spending for the fundamental constitutional structure have not, so far, been the focus. I draw attention to them here not only to ensure that they are not missed in the frenzy to emphasize the straightforward money-in-politics effects on democratic values; but also to emphasize the significance of these subtler but potentially more significant dynamics. To more fully address persistent normative puzzles—why states persist despite weak judicial protection, how courts can improve federalism doctrine, how federalism benefits society, how the Constitution entrenches the structure of government, and so forth; we must incorporate complex and often messy truths about states’ political circumstances into our theories.