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The Federalist Safeguards of Progressive Taxation

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This essay considers the distributional consequences of the Supreme Court's federalism jurisprudence over the past quarter century, focusing specifically on the anti-commandeering, anti-coercion, and state sovereign immunity doctrines. The first of these doctrines prevents Congress from compelling the states to administer federal programs; the second prevents Congress from achieving the same result through offers that for practical purposes the states cannot refuse; the third prohibits Congress from abrogating state sovereign immunity outside a limited class of cases. These doctrines vest the states with valuable entitlements and allow the states to sell those entitlements back to Congress for a price. In this respect, the doctrines have an intergovernmental distributional effect, shifting wealth from the federal government to the states.

The distributional consequences of the anti-commandeering, anti-coercion, and state sovereign immunity doctrines are not purely intergovernmental, however. The doctrines also have potential implications for the distribution of wealth across individuals and households. By forcing Congress to bear a larger share of the costs of federal programs, and by shifting some of the costs of liability-imposing statutes from the states to Congress, these doctrines allow the states to raise less revenue and compel Congress to raise more. For a number of historical as well as structural reasons, the federal tax system is dramatically more progressive than even the most progressive state tax systems, and so the reallocation of fiscal responsibility resulting from these federalism doctrines causes more revenue-raising to occur via the more progressive system. The likely net effect is a shift in wealth from higher-income households (who bear a larger share of the federal tax burden) to lower- and middle-income households (who would have borne a larger share of the burden of state taxes).

This conclusion comes with a number of caveats. The distributional consequences of the Supreme Court's federalism doctrines may be moderated—or magnified—by differences in federal and state spending priorities. Moreover, the doctrines may affect the size of government as well as the allocation of fiscal responsibility across levels of government (though the net effect on government size is ambiguous). And the doctrines may have distributional consequences that are not only interpersonal, but also intergenerational. What seems clear from the analysis in this essay is that federalism doctrines affect the distribution of income and wealth in subtle and sometimes unexpected ways, and that a comprehensive understanding of wealth inequality in the United States requires careful attention to key features of our fiscal constitution.

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Introduction

The anti-commandeering doctrine and its close cousin, the anti-coercion rule, have taken on new life in the age of Trump. The first of these, the anti-commandeering doctrine, holds that the federal government cannot compel states to pass particular laws or implement particular programs. While the anti-commandeering doctrine still allows the federal government to pay (one might say "bribe") the states to carry out federal policies, the anti-coercion rule places a limit on that power: "the financial inducement offered by Congress" cannot be "so coercive as to pass the point at which pressure turns into compulsion."[1] Both of these doctrines historically have had a particular ideological valence: Noah Feldman describes them as doctrines "developed by conservative justices to thwart progressive results."[2] Both of these doctrines assume very different roles with President Trump in power: they (potentially) prevent President Trump from forcing "sanctuary cities" to aid in the deportation of undocumented immigrants.[3]

Or so goes the conventional wisdom among commentators writing in the wake of Trump's November 2016 electoral victory. And for the most part, the conventional wisdom goes unchallenged here. It is true that the anti-commandeering rule was crystallized in the case of *Printz v. United States*,[4] where it was used to strike down provisions of the Brady Handgun Violence Prevention Act that required state and local law enforcement officers to run background checks on prospective handgun purchasers. It is also true that *Printz* was a 5-4 decision pitting the Court's more conservative members against its more liberal faction, with Justice Scalia writing the majority opinion. The anti-commandeering doctrine is now being wielded as a shield by opponents of President Trump's bid to withhold federal funds from state and local governments that decline to cooperate with federal efforts to deport undocumented immigrants.[5] And so it is quite reasonable to conclude that "Antonin Scalia might have saved sanctuary cities."[6]

Likewise, it is true that the anti-coercion rule was first invoked to invalidate federal legislation in *National Federation of Independent Business v. Sebelius*, the 2012 case in which the Supreme Court upheld some elements of the Affordable Care Act and struck down others. Specifically, Chief Justice Roberts's opinion in *NFIB* concluded that Congress could not require

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[1] Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J.) (internal quotation marks omitted).

[2] Noah Feldman, Sanctuary Cities Are Safe, Thanks to Conservatives, Bloomberg View (Nov. 29, 2016), https://www.bloomberg.com/view/articles/2016-11-29/sanctuary-cities-are-safe-thanks-to-conservatives.

[3] The City of San Francisco relies heavily on anti-commandeering and anti-coercion principles in its ongoing challenge to President Trump's January 25, 2017 executive order on sanctuary cities. See Complaint, City & County of San Francisco v. Trump, No. 17-485 (N.D. Cal. filed Jan. 31, 2017). For Trump's sanctuary cities order, see Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

[4] 521 U.S. 898 (1997).

[5] See, e.g., Ilya Somin, Why Trump's Executive Order on Sanctuary Cities Is Unconstitutional, Wash. Post: Volokh Conspiracy (Jan. 26, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.ded911f57192.

[6] Eric Levitz, Antonin Scalia Might Have Saved Sanctuary Cities, N.Y. Mag.: Daily Intelligencer (Nov. 29, 2016), http://nymag.com/daily/intelligencer/2016/11/antonin-scalia-might-have-saved-sanctuary-cities.html.

states receiving federal Medicaid funding to extend coverage to adults with incomes below 133 percent of the poverty level: the "financial inducement" offered by the Affordable Care Act—expand coverage or else lose all Medicaid funding—was, according to Chief Justice Roberts, "a gun to the head."[7] The effect of that holding was to block an important element of President Obama's signature legislative achievement: ultimately, 19 states would opt out of the Affordable Care Act's Medicaid expansion after *NFIB*.[8] And while this part of the Chief Justice's opinion was joined by two Democratic appointees, Justices Stephen Breyer and Elena Kagan, their votes were branded as "defections" from the liberal camp.[9] Now, however, the same anti-coercion rule stands in President Trump's way if and as he tries to deny federal funds to sanctuary cities. As Professor Feldman puts it: "Behold the revenge of conservative federalism: Judge-made doctrines developed to protect states' rights against progressive legislation can also be used to protect cities against Trump's conservative policies. Ain't constitutional law grand?"[10]

Yet even before President Trump came to power, the "conservative federalism" doctrines to which Feldman refers may have been advancing progressive objectives in more subtle ways. This essay argues that the anti-commandeering and anti-coercion doctrines plus a third one—the state sovereign immunity doctrine—play an underappreciated role as safeguards of progressive taxation. The "revenge of conservative federalism," I suggest, was raging from the start, long before Donald Trump was in the White House or even on reality TV.

Such a claim may seem surprising at first blush: after all, federalism generally entails a shift of power toward the states, and state-level taxation is (as discussed in more detail below) significantly *less* progressive than federal taxation. And like most first impressions, this first impression is half-right: state-level taxation is indeed much less progressive than federal taxation. But the effect of federalism doctrines (and specifically, the anti-commandeering, anti-coercion, and state sovereign immunity doctrines) is not to increase our reliance on relatively regressive state-level taxes. Quite the opposite: federalism doctrines, this essay argues, shift revenue-raising toward the more progressive federal system.

The argument proceeds as follows: I begin by highlighting the stark contrast between the ways that Congress and the states structure their tax systems. Effective federal tax rates rise steadily over the income distribution. The opposite is true at the state level: state taxes (and taxes imposed by local governments—instrumentalities of the state) are generally flat or regressive over the income distribution in effective-rate terms. This contrast can be attributed to a number of factors: the fear that a state's richest residents will leave if the state imposes highly progressive taxes; the corollary fear that low-income individuals and families will flow in if a state adopts too generous a redistributive scheme; and the constraint imposed by state constitutions that place

[7] NFIB, 132 S. Ct. at 2604.
[8] See Status of State Action on the Medicaid Expansion Decision, Henry J. Kaiser Family Found. (Jan. 1, 2017), http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act.
[9] Dahlia Lithwick, Where Is the Liberal Outrage?, Slate (July 6, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/while_conservatives_are_furious_about_john_roberts_health_care_decision_liberals_are_silent_about_the_defections_from_the_supreme_court_s_liberal_justices_.html.
[10] See Somin, supra note 2.

limits on progressive income taxation. The gap between the federal and state systems is so wide that even the most progressive state tax systems are significantly less progressive than their federal counterpart.

I then go on to explain how the Supreme Court's federalism decisions—particularly in the anti-commandeering, anti-coercion, and sovereign immunity contexts—vest the states with valuable entitlements protected by a "property rule" (to borrow a phrase from Guido Calabresi and Douglas Melamed[11]). In the anti-commandeering and anti-coercion contexts, the relevant entitlement is the states' control over their own legislative processes and administrative capabilities. In the sovereign immunity context, the relevant entitlement is the states' control over whether they can be sued by private citizens. There are, to be sure, limits on the latter entitlement: Congress can abrogate state sovereign immunity pursuant to the Reconstruction Amendments in certain contexts,[12] and can also do so pursuant to the Constitution's Bankruptcy Clause.[13] Yet in the mine-run of cases, the states—not Congress—get to decide whether states can be sued by private citizens in state and federal court.

Importantly, the entitlements allocated to the states by federalism doctrines are tradeable entitlements: the states can sell these entitlements to Congress, though Congress cannot seize the entitlements outside of a voluntary exchange. (This is what it means for the entitlement to be protected by a property rule rather than a liability rule or an inalienability rule.) And as Aziz Huq observes, these federalism doctrines "leave open the possibility that states can engage in mutually beneficial trading with Congress."[14] When members of Congress believe that the benefits of having the states enact or administer a particular program are greater than the costs to the states of enacting or administering the program, Congress can purchase the states' entitlement for a price. Such exchanges are indeed quite common, with Congress effectively hiring the states to administer Medicaid, the SNAP/Food Stamp Program, and the Federal-State Unemployment Insurance Program (among countless others), and effectively paying the states to enact measures such as a minimum legal drinking age of 21.[15] Likewise, when members of Congress believe that the benefits of having the states waive sovereign immunity in a particular context are greater than the costs to the states of liability, Congress can effectively buy such waivers.[16] The anti-coercion principle acts as something of an "unconscionability doctrine" regulating such exchanges—the bargain cannot be on terms too lopsided. But for the most part, tradeability is the norm and judicial intervention the exception.

Yet the possibility of bargaining between Congress and the states does not make the initial allocation of entitlements irrelevant. By assigning valuable entitlements to the states rather than the federal government, these federal doctrines generate potentially significant distributive effects.

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[11] See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1092 (1972).
[12] See Jesse H. Choper & John C. Yoo, Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings, 106 Colum. L. Rev. 213, 239-47 (2006).
[13] See Cent. Va. Comm. Coll. v. Katz, 546 U.S. 356 (2006).
[14] Aziz Huq, The Negotiated Structural Constitution, 114 Colum. L. Rev. 1595, 1635 (2014).
[15] See South Dakota v. Dole, 483 U.S. 203 (1987).
[16] See Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448 (5th Cir. 2005) (§ 504 of the Rehabilitation Act); Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999) (Title IX).

Per the Coase theorem, whether a court assigns the property right over a particular plot to the farmer or the rancher will not—in the absence of transaction costs—affect whether the farmer plants crops or the cattle-raiser allows his cows to graze on the plot; the court's allocation of the entitlement will, however, affect whether the farmer pays the rancher (or vice versa).[17] So too in the intergovernmental context: The initial allocation of entitlements between Congress and the states will not necessarily determine who administers federal programs or whether states can be sued by private citizens. The allocation of entitlements will, however, very much affect the intergovernmental flow of funds, even if states and the federal government can engage in municipally beneficial trading ex post.

More precisely, the allocation of entitlements to states rather than to Congress enriches the states relative to the federal government: now the states can sell their entitlements when they want to and never have to buy them. In this respect, federalism doctrines yield an intergovernmental distributive effect much like the interpersonal distributive effect in Coase's classic example. The anti-commandeering doctrine does not necessarily mean that states will stop administering federal programs, nor does the state sovereign immunity doctrine mean that states will no longer be subject to suit by private citizens. These doctrines do mean, though, that the states need not relinquish these entitlements unless they get paid (and, per the anti-coercion rule, the bargain must be more than a holdup).

But why should the intergovernmental distributional consequences of the Supreme Court's federalism doctrines affect the interpersonal distribution of wealth? Here, the contrast between federal-level progressivity and state-level regressivity returns to the analysis. The allocation of valuable entitlements to the states rather than the federal government allows the states to tax less and forces the federal government to tax more. And so to a first approximation, federalism doctrines that allocate valuable entitlements to the states cause more revenue-raising to occur through the more progressive federal tax system, with the consequence that the rich pay a larger share.

This claim must be accompanied by a number of qualifications. First, the progressivity of the federal and state tax systems may depend in part on the amount of revenue-raising that occurs through federal and state channels. Second, redistribution of resources across levels of government may alter the composition of federal and state spending in ways that affect the interpersonal distribution of wealth. Third, the anti-commandeering, anti-coercion, and state sovereign immunity doctrines may affect not only the allocation of revenue-raising responsibilities but also the overall size of government (though the direction of the effect is, as discussed below, theoretically and empirically ambiguous). Fourth, the distribution of revenue-raising responsibilities across levels of government may also affect the distribution of revenue-raising burdens across generations, as the federal government generally has greater leeway to finance current spending through debt (and thus to shift the burden of revenue raising to future taxpayers). Fifth, and finally, the federalism doctrines upon which this essay focuses may operate alongside the "political safeguards of federalism" to which this essay's title alludes.[18] These qualifications are all explained and explored in greater detail below. Ultimately, however, none

[17] See R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).
[18] Herbert Wechsler, The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).

of these qualifications should lead us to disregard the top-line conclusion that federalism's allocation of valuable entitlements to state governments pushes in a progressive distributional direction.

The rest of the essay proceeds as follows. Part I provides relevant background on redistribution at the federal and state level. It explains why state and local governments are widely thought to be less capable than the federal government of shifting wealth from rich to poor. Part II introduces the anti-commandeering, anti-coercion, and state sovereign immunity doctrines, and explains how these doctrines allocate entitlements across levels of government. Part III presents a rudimentary model of federal and state taxing and spending, and shows how reallocations of valuable entitlements across levels of government may affect individual tax burdens. Part IV considers complications and qualifications, including the effect of federalism doctrines on the structure of state and federal tax systems, the composition of spending, the overall size of government, and the allocation of fiscal burdens across generations. Part IV also discusses the relationship between federalism's judicial and political safeguards. I conclude by situating the present analysis within broader debates about inequalities of income and wealth.

I. Redistribution at the Federal and State Level

Despite news stories about billionaires paying nothing in federal income taxes[19] (or paying a lower effective rate than their secretaries[20]), the fact of the matter is that the federal tax system is steeply progressive. By virtually any measure, effective federal tax rates (i.e., taxes as a percentage of income) rise over the income distribution, with the rich paying more than the poor. The opposite is true at the state level: by virtually any measure, effective state and local tax rates decline over the income distribution, with the poor paying higher rates than the rich. Section I.A illustrates the stark contrast between federal-level progressivity and state-level regressivity. Sections I.B and I.C discuss structural and institutional explanations for the divergence.

A. Data

Figure 1 compares effective federal and state tax rates across the income distribution. I rely on two sources for estimates of effective federal rates: the Urban-Brookings Tax Policy Center's Microsimulation Model[21] and the Institute on Taxation and Economic Policy (ITEP) Tax Model.[22] Figure 1 also shows the Urban-Brookings Tax Policy Center's projection of effective federal tax rates across the income distribution under the tax plan proposed by then-candidate Trump during the 2016 campaign, as well as ITEP's estimate of effective state tax rates across the income distribution. (Unfortunately, the Urban-Brookings model does not

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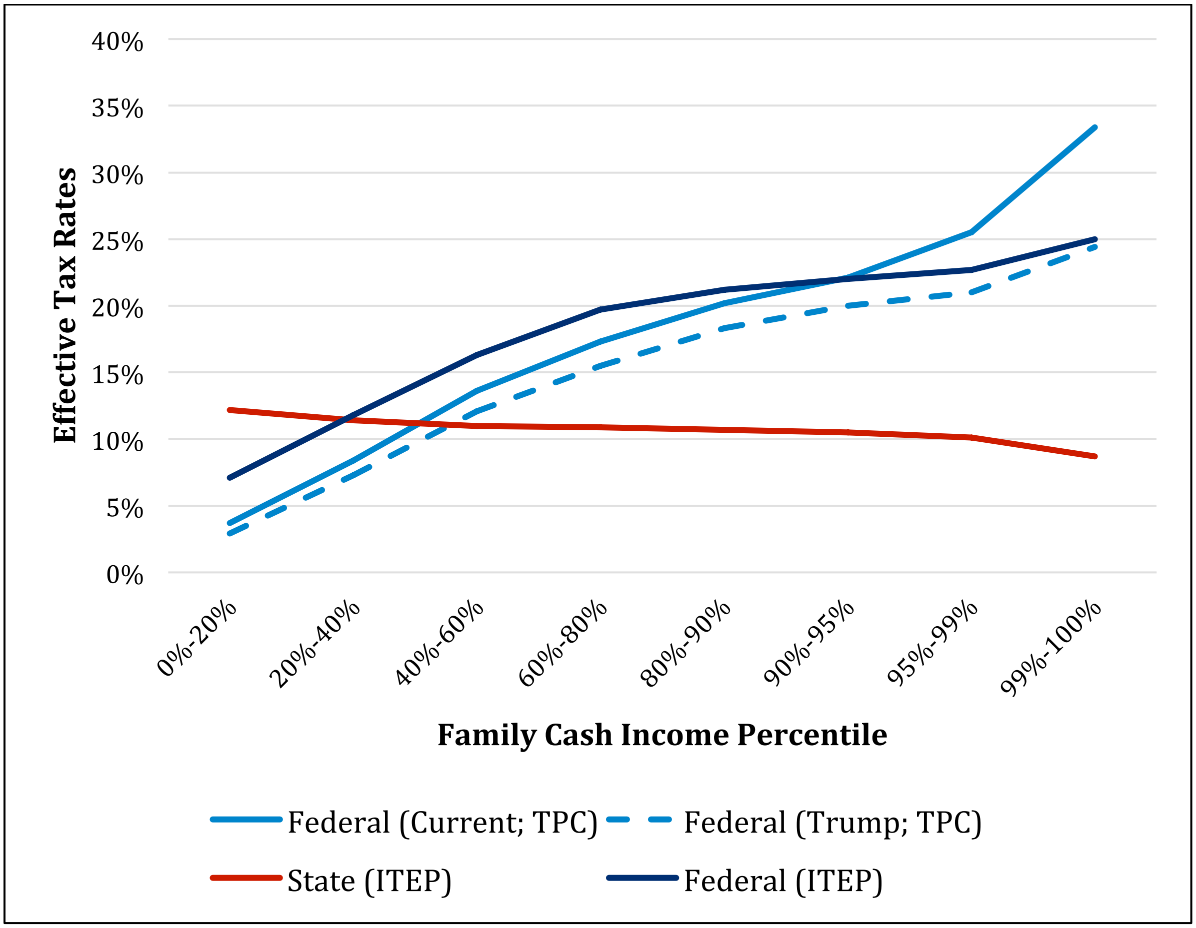
[19] See Steve Eder & Megan Twohey, Donald Trump Acknowledges Not Paying Federal Income Taxex for Years, N.Y. Times, Oct. 10, 2016, http://www.nytimes.com/2016/10/10/us/politics/donald-trump-taxes.html.
[20] See Chris Isidore, Buffett Says He's Still Paying Lower Tax Rate Than His Secretary, CNN Money (Mar. 4, 2013), http://money.cnn.com/2013/03/04/news/economy/buffett-secretary-taxes.
[21] Jim Nunns et al., Tax Policy Ctr., An Analysis of Donald Trump's Revised Tax Plan 10 tbl.4 (Oct. 18, 2016).
[22] See Citizens for Tax Justice, Who Pays Taxes in America 2016? (Apr. 12, 2016), http://ctj.org/ctjreports/taxday2016.pdf.

include a state tax component, and ITEP has not produced its own projection of the Trump plan.)

Figure 1. Effective Tax Rates at Federal and State Level, by Income Group (Current Law and Trump Plan)[23]



[23] Details in text.

An important caveat is that any calculation of effective tax rates will require a number of debatable assumptions about the distribution of tax burdens across households.[24] However, the basic contrast between federal and state effective rates remains robust to a number of alternative specifications.[25] The claim that the federal tax system is significantly more progressive than all state tax systems cannot be seriously disputed. Indeed, the difference between federal and state rates is so stark that even if Congress enacted the tax plan proposed by Trump without modification, the federal system would remain significantly more progressive than its state counterparts.

Concededly, the comparison between the progressivity of the federal system and the regressivity of state systems masks the considerable variation across different states. The state ranked by ITEP as the most regressive, Washington, has effective rates that decline sharply across the income distribution, with the bottom quintile paying an effective rate of 16.8% and the top percentile paying an effective rate of only 2.8%. The state ranked by ITEP as the most progressive in terms of its tax system, Delaware, has a roughly flat tax structure, with families in the bottom quintile paying rates slightly lower than families in the top percentile (5.5% versus 6.4%).[26] Note that even the most progressive state tax system is significantly less progressive than the federal system—and would remain so even if the Trump campaign plan were implemented in full.

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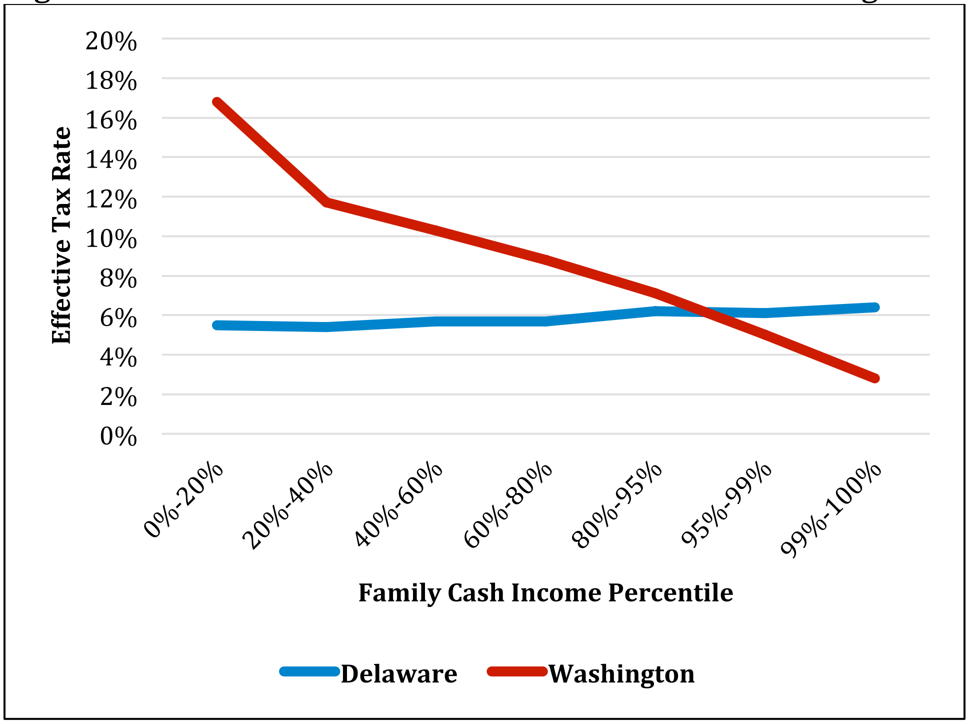
[24] The difficulty arises from the fact that who pays a tax and who bears the burden of the tax are not necessarily the same. For example, the federal government imposes a 15.3% payroll tax, with half the tax (7.65%) technically paid by employers and the other half technically paid by employees. See Ctr. on Budget and Policy Priorities, Policy Basics: Federal Payroll Taxes (Mar. 3, 2016), http://www.cbpp.org/research/federal-tax/policy-basics-federal-payroll-taxes. There is little reason to believe, though, that the technical half-and-half split has anything to do with the actual burden of the payroll tax. (Indeed, the general view is that most or all of the burden of the payroll tax falls on labor, at least in the short run. See Deborah A. Geier, Integrating the Tax Burdens of the Federal Income and Payroll Taxes on Labor Income, 22 Va. Tax. Rev. 1, 17 & n.47 (2002) (compiling sources).) Determining the burden of the corporate income tax is even more challenging: some portion of the tax potentially falls on labor rather than shareholders, but no one knows precisely how much. See Julie Anne Cronin et al., Distributing the Corporate Income Tax: Revised U.S. Treasury Methodology, 66 Nat'l Tax J. 239 (2013).

[25] For example, the Tax Foundation's calculations would suggest that state and local tax systems are slightly less regressive than the ITEP model indicates. See, e.g., Liz Malm, Comments on "Who Pays? A Distributional Analysis of the Tax Systems in All 50 States," Tax Found. (Feb. 20, 2013), https://taxfoundation.org/comments-who-pays-distributional-analysis-tax-systems-all-50-states. But even under the Tax Foundation's methodology, effective rates at the state and local level decline modestly as income increases, while effective rates at the federal level rise sharply as income increases. See id.; Tax Found., Facts & Figures: How Does Your State Compare? tbl. 10 (2015), https://files.taxfoundation.org/legacy/docs/Fact%26Figures_15_web_9_2.pdf.

[26] These statistics and the data in Figure 2 are drawn from Inst. on Taxation & Econ. Policy, Who Pays? A Distributional Analysis of the Tax Systems in All 50 States (5th ed. 2015), http://www.itep.org/pdf/whopaysreport.pdf. The percentages in text and in Figure 3 are "without federal offset": i.e., they reflect taxes paid to state and local governments, without an adjustment for the fact that state and local tax payments generate a valuable federal income tax deduction for some taxpayers. Adding in federal offsets makes the state systems appear to be even more regressive, because higher-income taxpayers benefit disproportionately from itemized deductions. Note that the 2015 ITEP report only includes taxpayers under age 65. For an explanation of the reasons why ITEP excludes older taxpayers, see Inst. on Taxation & Econ. Policy, supra, at 19.

Figure 2. Effective State Tax Rates in Most and Least Progressive States (2015)



Another way of illustrating the difference between the federal and state tax systems is by focusing on the percentage of taxes paid by each income group. In other words: For each $1 of tax revenues raised by federal (state) governments, what percentage comes from taxpayers in the bottom quintile, what percentage from taxpayers in the next quintile, and so on? Figure 3 shows these percentage shares using the ITEP model. As Figure 3 illustrates, taxpayers in the bottom four quintiles pay a larger share of state taxes than of federal taxes; taxpayers in the top decile pay a larger share of federal taxes than of state taxes; and taxpayers in the 80th to 90th percentiles pay approximately the same share of federal taxes as of state taxes.

Figure 3. Share of Federal and State Taxes, by Income Group (2016)

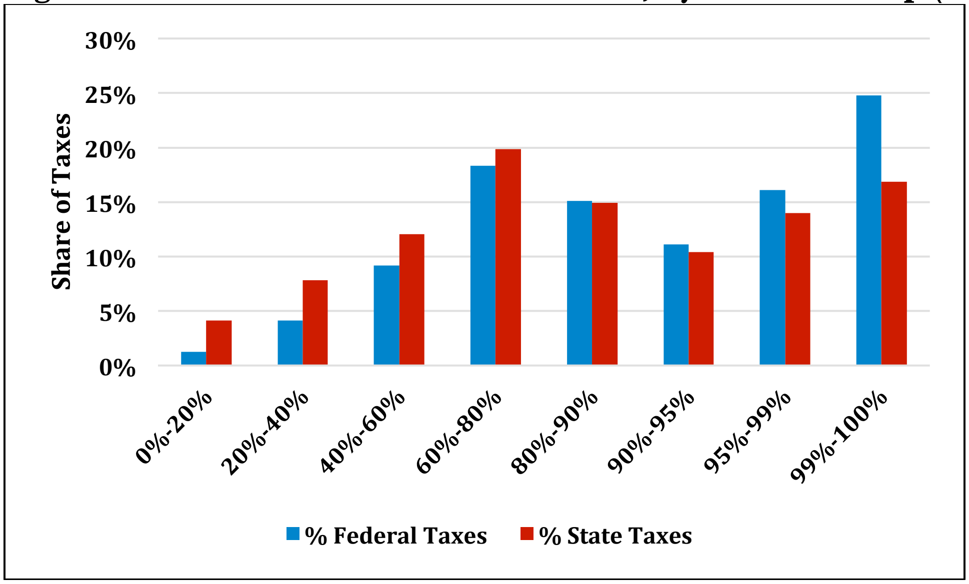


Table 1 reproduces Figure 3 in textual format, along with two additional columns. For purposes of the analysis in this essay, the last two columns are key. Shifting an additional $1 of revenue raising from the state systems to the federal system will, all else equal, mean that families in the top percentile pay an additional 7.9 cents in total taxes while families in the bottom quintile pay 3.7 cents less in total taxes. Note that the federal government transferred approximately $666.7 billion to states and their subdivisions in fiscal year 2016.[27] The final column in Table 1 shows what a difference it would make to families in each income group if that $666.7 billion had been raised through state tax systems instead. Holding the structure of federal and state tax systems constant, such a shift would mean that families in the bottom quintile would see their after-tax incomes decline by 4.1% of cash income, while families in the top percentile would see their after-tax incomes rise by 2.0% of cash income.[28] On this view, the fact that $666.7 billion is raised through the federal tax systems rather than state tax systems has a significant impact on the after-tax distribution of wealth in the United States.

[27] See Christopher Chantrill, Government Spending Details, usgovernmentspending.com (last visited Feb. 25, 2017). Chantrill's site reproduces data from federal sources in an easy-to-use format.

[28] U.S. Dep't of the Treasury, Office of Tax Analysis, Distribution Table 2016 001: Distribution of Families, Cash Income, and Federal Taxes Under 2016 Current Law (July 23, 2015).

Table 1. Difference in Federal and State Tax Shares

Income Group	% Federal Taxes (2016)	% State Taxes (2016)	Difference (% Federal – % State)	Difference x Transfer as % of Cash Income
0%-20%	1.2%	4.1%	-2.9%	-4.1%
20%-40%	4.2%	7.8%	-3.7%	-2.5%
40%-60%	9.1%	12.1%	-2.9%	-1.1%
60%-80%	18.4%	19.8%	-1.5%	-0.3%
80%-90%	15.1%	14.9%	+0.2%	+0.1%
90%-95%	11.1%	10.4%	+0.8%	+0.3%
95%-99%	16.1%	14.0%	+2.1%	+0.7%
99%-100%	24.8%	16.8%	+7.9%	+2.0%

The story told by these figures and statistics is in one sense clear and in another quite puzzling. It is clear that the federal tax system is much more progressive than state tax systems, and that shifting revenue-raising responsibility from the federal system to state systems would (holding all else equal) result in a significant regressive redistribution of wealth. What is less clear is: why do the same voters choose federal-level lawmakers who implement progressive taxes and state-level lawmakers who implement flat or regressive systems? Sections I.B and I.C take up that question.

B. Federal Progressivity, State Regressivity: Structural Explanations

What accounts for the stark contrast between federal and state tax systems? One important factor is the sales tax at the state level (and the relative insignificance of sales taxes at the federal level). States derive about a third of their revenue, on average, from sales taxes,[29] while federal excises and customs duties account for less than 5% of federal tax revenues.[30] Sales and excise taxes scale over consumption rather than income, and consumption is likely to be a larger share of income for families lower down the income ladder (who are likely to save less). Moreover, sales and excise taxes are generally flat (although a progressive consumption tax is certainly conceivable).[31]

Yet the explanation in the previous paragraph is incomplete in two respects. First, four states (Delaware, Montana, Oregon, and New Hampshire) have no sales tax, and the tax systems of these states are still regressive relative to the federal system.[32] Second, and more fundamentally, the sales tax explanation simply restates the question. The puzzle is why the federal tax system is so much more progressive than state tax systems. It is no answer to say that the federal tax system is more progressive because the federal government relies on progressive taxes.

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[29] See Inst. on Taxation & Econ. Policy, supra note 26, at 1.
[30] See U.S. Dep't of the Treasury, Office of Tax Analysis, supra note 28.
[31] See, e.g., Michael J. Graetz, Implementing a Progressive Consumption Tax, 92 Harv. L. Rev. 1575 (1979).
[32] Alaska has no state-level sales tax, but municipalities can (and many do) impose a retail-level tax. See Jeremy Bowman, The 5 States With No Sales Tax, The Motley Fool (Aug. 16, 2014), http://www.fool.com/personal-finance/taxes/2014/08/16/the-5-states-with-no-sales-tax.aspx.

A potentially more persuasive explanation for the contrast between federal and state tax systems is that the marginal cost of redistribution is higher at the state level than at the federal level. This proposition is a "classical theoretical result" of the literature on fiscal federalism[33]—and an intuitive one at that. In a nutshell: States that redistribute from the rich to the poor will see their richer residents migrate elsewhere and poorer residents from other states flood in. The outflow of wealthy individuals will mean that states with highly progressive tax systems will see their tax bases shrink. The inflow of low-income individuals will mean that states with generous redistributive policies will see the costs of social welfare programs rise.[34] Economists Martin Feldstein and Marian Vaillant Wrobel offer perhaps the strongest version of the theory: they assert that "[s]tates and other local governments *cannot* redistribute income if individuals can migrate among political jurisdictions."[35]

Of course, the same concern about redistribution resulting in the outmigration of high-income individuals and the inflow of low-income individuals applies to national-level redistribution as well, as the concern about Facebook co-founder Eduardo Saverin's renunciation of his U.S. citizenship in 2012 serves to illustrate.[36] But for an individual or for a firm, it is almost always easier to move across state lines in response to redistributive tax policies than to move across national boundaries. And so we might expect that cost of redistribution—both in terms of the negative effect on the tax base from an outflow of high-income taxpayers and in terms of the increased burden on social welfare programs due to an inflow of low-income individuals—will be higher when redistribution is pursued at a lower level of government.

This argument gets us part of the way toward understanding the puzzling contrast between federal and state tax systems—but not all the way. The classical theoretical result of the fiscal federalism literature—that taxpayer mobility restricts the redistributive capacity of state and

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[33] John R. Brooks II, Fiscal Federalism as Risk-Sharing: The Insurance Role of Redistributive Taxation, 68 Tax L. Rev. 89, 111 (2014).

[34] The fiscal federalism literature on the relative costs of national-level and subnational-level redistribution is extensive. For an overview, see Brooks, supra note 33, at 89 & n.1; and Kirk J. Stark, Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution, 51 UCLA L. Rev. 1389, 1408 & nn.71-73 (2004).

[35] Martin Feldstein & Marian Vaillant Wrobel, Can State Taxes Redistribute Income, 68 J. Pol. Econ. 369, 370 (1998). This is not to say that state and local governments never *try* to redistribute income. But according to Feldstein and Wrobel:

> Although state tax structures may appear to be redistributive, real pretax wages must adjust in the long run to make each individual's after-tax real income (or, more precisely, utility level) the same in all jurisdictions. If the after-tax real income available to an individual were higher in one state than in another, individuals would locate in states where real net incomes were more favorable. In response to differences in the progressivity of tax rates, migration would raise pretax real incomes of high income individuals in states where such individuals were taxed more heavily and lower pretax incomes of lower income individuals in such states. In equilibrium, the real after tax incomes would be independent of the state tax structure.

Id.

[36] See Laura Sanders, So How Much Did He Save?, Wall St. J., May 18, 2012, https://www.wsj.com/articles/SB10001424052702303360504577410571011995562.

local governments—garners surprisingly weak empirical support. A comprehensive review of the econometric literature on the wage and migration effects of state-level taxation lies beyond the scope of this essay, but two studies in particular merit mention. The first, by Andrew Leigh, examines taxes, wages, and migration across U.S. states between 1977 and 2002. Leigh finds that "more redistributive state taxes do not appear to have a substantial impact on the composition or volume of interstate migration."[37] More recently, Cristobal Young and collaborators find that "millionaire migration is indeed responsive to top [state] income tax rates," but "the magnitude of the migration response is small and has little effect on the millionaire tax base."[38] Young and his coauthors also find that the optimal state tax rate on millionaires from a revenue-maximization perspective is far above the actual rate in any state,[39] suggesting that the constraint imposed by millionaire migration cannot completely explain the relative regressivity of state tax systems.[40]

Importantly, the tax changes that Leigh and Young et al. observe are not applied at random: states self-select into taxation of the rich. The states that do so may be the ones that expect high-income households to stay, and the states that did not adopt millionaire taxes may have had a different experience if they did. For example, California might have known that adopting a millionaire tax in 2005 would not lead the studios in Hollywood to pack up or the high-tech companies in Silicon Valley to flee, whereas a state such as Maryland might have been more worried that a millionaire tax would cause high-income households to cross the border to Virginia. The fact that relatively few millionaires left California after its 2005 tax increase does not mean that relatively few millionaires would have left Maryland if the same tax had been applied there.

An analogy to the private market serves to illustrate. Imagine that we are trying to determine whether price increases affect demand for meals served at restaurants. Imagine, moreover, that we observe that restaurants do not experience a drop in sales volume after adjusting their prices upward. Would these findings suggest that the normal laws of supply and demand do not apply to restaurants? Not necessarily. It could be that restaurants raise their prices after receiving a Michelin star[41]: sales might go up because of the Michelin star, notwithstanding the price increase, but a comparable price increase might well have led to lower demand at a restaurant that did not receive the Michelin star. Analogously, California might raise its taxes (i.e., its prices) when "demand for California" rises (e.g., because of tech sector growth). And yet we should not infer that the laws of supply and demand do not apply to states just as they do to restaurants.[42]

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[37] Andrew Leigh, Do Redistributive State Taxes Reduce Inequality?, 61 Nat'l Tax J. 81, 100 (2008).
[38] Cristobal Young et al., Millionaire Migration and Taxation of the Elite: Evidence from Administrative Data, 81 Am. Sociological Rev. 421, 423 (2016).
[39] Id. at 434.
[40] Young et al. explain these findings by positing that "[e]lites are embedded in the regions where they achieve success," and so "have limited interest in moving to procure tax advantages." Id. at 423.
[41] On Michelin stars and restaurant prices, see Oliver Gergaud, Karl Storchmann, and Vincenzo Verardi, Expert Opinion and Quality Perception of Consumers: Evidence from New York City Restaurants, 53 Econ. Inq. 812 (2015).
[42] Mobility effects can constrain state-level redistribution even if individuals do not move across state lines. The possibility that high-income workers will leave high-tax states may lead to an adjustment in wage rates: high-tax states must pay more to prevent high-income workers from exiting. Likewise, the possibility

Recall also that cross-state mobility limits the efficacy of state-level redistribution not just because the rich potentially will leave high-tax states, but also because the poor potentially will move to states with more progressive tax-and-transfer systems. Here, the empirical support for the predictions of fiscal federalism theory appears to be stronger: lower-income households are indeed more likely to move to states with more generous welfare benefits.[43] Yet as above, endogeneity problems plague almost any effort to assess the magnitude of the mobility responses to a further increase in state-level redistribution. States may adopt more progressive tax systems when they have reason to believe that low-income households are less likely to move in (e.g., because of high real estate prices or limited employment opportunities for low-wage workers).

To sum up so far: we have strong theoretical reasons to believe that cross-state mobility limits the efficacy of state-level redistribution. By contrast, cross-country mobility is much more limited, and so we might expect national-level redistribution to be more effective. This helps to explain why we see greater tax progressivity at the federal level than at the state level. The structural explanation might be more persuasive if it enjoyed more robust empirical support, but the relative paucity of empirical evidence can be explained in part by the endogeneity problems described in the previous paragraphs.

C. Federal Progressivity, State Regressivity: Institutional Explanations

Institutional factors shed further light on the difference between federal and state taxation. Seven states—Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming—have no income tax at all, and in most of those states the state constitution explicitly or effectively prohibits income taxation.[44] The constitutions of New Hampshire and Tennessee prohibit the taxation of earned income (though not dividends and interest).[45] The constitutions of five other states—Colorado, Illinois, Massachusetts, Michigan, and Pennsylvania—require that any income tax be at a flat rate,[46] while the constitution of Georgia imposes a 6% cap on the individual income tax rate.[47] Sixteen states (including six of those previously mentioned) require

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that lower-income workers will flock to states with generous redistributive schemes may lead to a wage rate adjustment in the opposite direction: firms in states with generous redistributive programs may pay low-skilled workers less than firms in states with less generous programs pay to low-skilled workers. See Feldstein & Wrobel, supra note 35, at 370. A rise in wage inequality could thus undo the redistributive effects of state tax changes even if everyone remains in place. Note, though, that Leigh finds "little evidence that—in the aggregate—more redistributive state taxes lead to a more unequal distribution of pre-tax hourly wages." Leigh, supra note 37, at 100.

[43] See, e.g., Paul E. Peterson & Mark Rom, American Federalism, Welfare Policy, and Residential Choices, 83 Am. Pol. Sci. Rev. 711 (1989).

[44] See Timothy D. Hogan, Arizona's Income Taxes: A Comparison with Other States and a Policy Discussion of Potential Tax Reforms—A Report from the Office of the University Economist 1 (July 2016), https://wpcarey.asu.edu/sites/default/files/incometax07-16.pdf.

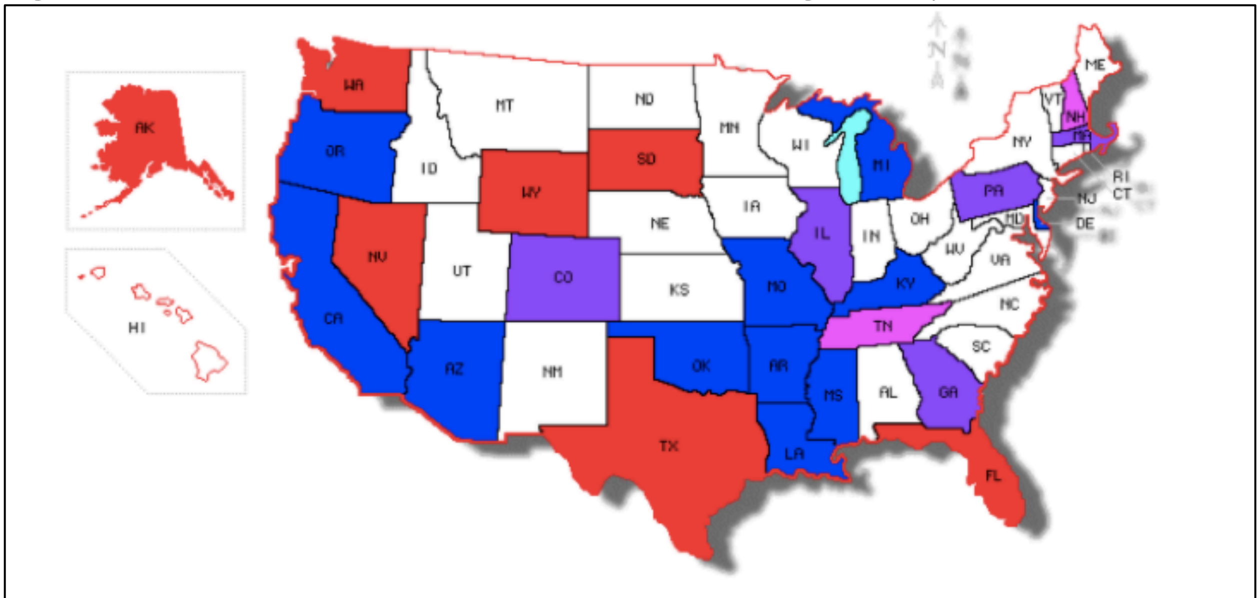
[45] See Marcus Hurn, State Constitutional Limits on New Hampshire's Taxing Power: Historical Development and Modern State, 3 Pierce L. Rev. 251 (2008).

[46] See Personal Income Tax Systems in the United States: Presentation to the Joint Task Force on Income Tax Reform, Arizona State Legislature (Sept. 4, 2013), http://www.azleg.gov/jlbc/jtfitr-090413.pdf.

[47] See Liz Farmer, Georgia Becomes First State To Cap Income Taxes, Governing (Nov. 4, 2014), http://www.governing.com/topics/elections/gov-georgia-caps-income-tax-rate.html.

legislative supermajorities for some or all tax increases.[48] All in all, half of all states either have no general income tax, have a flat-tax requirement or rate cap, or have a legislative supermajority requirement that applies to income tax increases.[49]

Figure 4. Institutional Constraints on State-Level Progressivity



The institutional explanation for the relative regressivity of state taxes is still not fully satisfying, for two reasons. First, it remains the case that half of all states *do* have an income tax, do *not* have a flat-tax requirement or a rate cap, and do *not* have legislative supermajority requirements for tax increases. And yet even the most progressive states among the remaining half of states have relatively flat tax systems. Second, the observation that half of the states face institutional barriers to progressive taxation does not explain why those institutional barriers exist in the first place.

Arguably, the institutional explanation for state-level regressivity is simply a feature of the structural story: constitutional limits on progressive income taxation function as a commitment device so that states can persuade high-income households to move in and dissuade low-income

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[48] In Arkansas and Oklahoma, a three-fourths vote of the legislature is required for a tax increase (Arkansas allows an exception for increases to sales and alcohol taxes). A two-thirds requirement applies in Arizona, California, Colorado, Louisiana, Missouri, Nevada, South Dakota, and Washington. A three-fifths vote is required in Delaware, Kentucky, Mississippi, and Oregon. A three-fourths requirement applies to property tax increases in Michigan. A three-fifths requirement applies to corporate income tax increases in Florida. See Tax Policy Ctr., States with Legislative Supermajority Requirements To Increase Taxes, 2010 (Apr. 5, 2013), http://www.taxpolicycenter.org/sites/default/files/legacy/taxfacts/content/PDF/state_supermajority.pdf.

[49] Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming.

households from doing the same. In any event, these institutional variables give us further reason to expect that state tax systems will retain their regressive structure for the time being. To be sure, supermajority thresholds are not insuperable, and states can change their constitutions to eliminate income tax bans, caps, or flat-rate requirements. Yet the assertion here is not that state-level regressivity is a permanent feature of fiscal federalism; the more modest assertion is that state tax systems will remain relatively regressive for the foreseeable future.

II. Federalism Doctrines and the Allocation of Entitlements

At this point, the essay shifts from public finance to constitutional law—and, in particular, to three constitutional law doctrines that set the stage for the argument in Part III: the anti-commandeering doctrine, the anti-coercion doctrine, and the state sovereign immunity doctrine. The following sections provide background on these doctrines.

A. The Anti-Commandeering Doctrine

The landmark decisions laying out the anti-commandeering rule are *New York v. United States* and *Printz v. United States*. This section provides a brief overview of both decisions and the doctrine for which they have come to stand.

1. New York v. United States

The factual background of *New York v. United States* is, in Justice O'Connor's words, "intricate."[50] For the purposes of this discussion, the key fact is that the statute at issue—the Low-Level Radioactive Waste Policy Amendments Act (LLRWPAA) of 1985[51]—included a so-called "take title provision" requiring states to either (a) establish a waste disposal program consistent with congressional standards or (b) assume ownership over (and thus, liability for) waste generated in-state.[52] Congress offered monetary incentives to states if they met certain statutory time targets for setting up their waste disposal arrangements, but it did not allow them to opt out of the LLRWPAA regime entirely.[53]

Five years after LLRWPAA was passed, the State of New York challenged the validity of the Act on various constitutional grounds.[54] The case took two more years to wind its way to the Supreme Court, where New York found a receptive audience. By a 6-3 margin, the Court

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[50] New York, 505 U.S. at 151.
[51] Pub. L. 99-240, 99 Stat. 1842 (codified as amended at 42 U. S. C. § 2021b et seq.).
[52] Id. § 5(d)(2)(C), 99 Stat. at 1851 ("If a State . . . is unable to provide for the disposal of all [low-level radioactive] waste generated within such State . . . by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure to the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.").
[53] New York, 505 U.S. at 152-53.
[54] New York initially argued that the Act was "inconsistent with the Tenth and Eleventh Amendments to the Constitution, with the Due Process Clause of the Fifth Amendment, and with the Guarantee Clause of Article IV of the Constitution." Id. at 154.

concluded: "Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution."[55] Justice O'Connor, writing for the majority, elaborated:

> Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. . . . Either way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program . . . .[56]

In Justice O'Connor's (and the Court's) view, congressional commandeering of state legislatures poses a threat to democratic processes. In situations "where the Federal Government directs the States to regulate," voters may not know whether federal elected officials or state elected officials deserve the credit—or blame—for the policy.[57] Justice O'Connor and her colleagues feared that commandeering would allow members of Congress and their state counterparts to pass the hot potato of political accountability back and forth, leaving voters uncertain as to which officials are responsible.[58]

My focus here is not at all on Justice O'Connor's reasoning, but rather on the consequences of the rule she sets forth. As Roderick Hills puts it, "*New York* provides a particular kind of entitlement to state governments that is protected by a property rule."[59] That is, it gives states a property right in their own legislative processes.[60] At the same time, the *New York* rule does not prevent Congress from purchasing legislation from states in an "intergovernmental marketplace."[61] The constitutional infirmity in LLRWPAA lay in the fact that Congress had seized this entitlement from the states rather than acquiring it through voluntary exchange.

2. **Printz v. United States**

The story of *Printz* begins with the Brady Handgun Violence Prevention Act in 1993,[62] which established a new system of background checks for potential purchasers of firearms.[63] It required gun dealers to collect statements ("Brady Forms") from potential purchasers and to transmit the contents of those Brady Forms (including the potential purchaser's name, address,

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55 Id. at 177.
56 Id. at 176 (internal quotation marks omitted).
57 Id. at 168-69.
58 Id. at 168-69.
59 Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich. L. Rev. 813, 822 (1998).
60 Id.
61 Id. at 819.
62 Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. §§ 921-22 (2006)).
63 Arguably, the story begins much earlier—in March 1981, when White House Press Secretary James Brady was shot in the head by John Hinckley, Jr. After his near-death experience, Brady became a leading figure in the gun control, and when Congress ultimately enacted comprehensive federal gun-control legislation, it honored his efforts by titling the statute in his name.

and date of birth) to the chief law enforcement officer (CLEO) of the potential purchaser's home jurisdiction. The Act also required the CLEO to make a "reasonable effort" to determine—within five business days—whether the potential purchaser was a convicted felon, an illegal alien, or otherwise prohibited from acquiring a firearm. If the background check came out clean, the CLEO had to destroy records of the Brady Form and the transaction.[64] CLEOs would only be exempt from these requirements if their states instituted instant background-check systems.[65]

Shortly after the Brady Act took effect, Jay Printz, the sheriff (and thus the CLEO) of Ravalli County, Montana, brought a lawsuit challenging the constitutionality of the background-check system.[66] Printz "object[ed] to being pressed into federal service, and contend[ed] that congressional action compelling state officers to execute federal laws is unconstitutional."[67] Five Justices agreed. While *New York* held that Congress cannot "commandeer[] the legislative processes of the States,"[68] *Printz* made clear that the same anti-commandeering rule applied to state administrative resources.[69] Justice Scalia, writing for the majority, concluded that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[70]

Importantly, *Printz* still allows state executive officials to be *contracted* into the service of Congress. Justice O'Connor's concurrence in *Printz* makes it quite clear that "Congress is . . . free to amend the [background check] program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs."[71] Again, the constitutional infirmity lay in the fact that Congress had taken this entitlement from the states rather than buying it.

B. The Anti-Coercion Rule

Since *New York* and *Printz*, the Supreme Court has not struck down another federal statute on anti-commandeering grounds (perhaps because the *New York/Printz* rule is clear enough that Congress knows not to violate it). The Roberts Court's 2012 decision in *National Federation of Independent Business v. Sebelius*,[72] however, breathes new life into a related doctrine that serves to supplement the anti-commandeering rule. The facts will be familiar to most readers, and so I will not belabor them here. In brief: The Affordable Care Act of 2010 required states receiving

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[64] Printz v. United States, 521 U.S. 898, 902-04 (1997).
[65] Id. at 903. An individual purchaser would be exempt if she or he "possesse[d] a state handgun permit issued after a background check," id. at 903, but unless every potential purchaser who was a resident of a jurisdiction possessed a state permit, the CLEO would still have to comply with Brady Act requirements in some circumstances.
[66] Id. at 904 (citing Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994)). His case was consolidated with another action brought by the CLEO of Graham County, Arizona. See id. (citing Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994)).
[67] Id. at 905.
[68] New York, 505 U.S. at 176 (internal quotation marks omitted).
[69] Printz, 521 U.S. at 935.
[70] Id.
[71] Printz, 521 U.S. at 936.
[72] 132 S. Ct. 2566 (2012).

Medicaid funding (which is to say, every state) to expand eligibility to all citizens whose family income is up to 133% of the federal poverty line.[73] This was, of course, in addition to the much more prominent and also-litigated "individual mandate" requiring most Americans to maintain a minimum level of health insurance. The federal government would pay all of the costs of covering newly eligible individuals through 2016 and at least 90% thereafter.[74] Twenty-six states challenged the individual mandate as well as the Medicaid expansion requirement. By a 5-4 vote the Court upheld the individual mandate as an exercise of Congress's taxing power, but by a 7-2 vote, it struck down the Medicaid expansion requirement. As Chief Justice Roberts wrote, the Affordable Care Act put "a gun to the head" of state governments: expand Medicaid to new groups or else lose all federal Medicaid funding (which for most states would mean more than 10% of their budget).[75] According to Chief Justice Reports, the Affordable Care Act thus crossed the line from "financial inducement" to unconstitutional "coercion."[76]

The *NFIB* decision leaves the outer contours of this anti-coercion doctrine unclear (indeed, intentionally so).[77] It is thus too early to say for sure how the anti-coercion doctrine interacts with the property rule established by *New York* and *Printz*, but one way to frame it might be as follows: The anti-commandeering doctrine vests states with control over their legislative processes and administrative capabilities, although it allows the states to transfer their entitlement to Congress in a voluntary exchange. And the anti-coercion rule ensures that once Congress and the states enter into such an exchange, Congress cannot use its leverage to radically change the terms. In this way, the anti-coercion rule serves as something like a public law analogue to the private law doctrines of duress and unconscionability.

C. State Sovereign Immunity

The third doctrine under focus here is the state sovereign immunity doctrine. In *Pennsylvania v. Union Gas Co.*, a four-Justice plurality held that Congress can abrogate the sovereign immunity of states pursuant to its power under the Constitution's Commerce Clause.[78] In short order, the Supreme Court overruled that holding. In *Seminole Tribe of Florida v. Florida*[79] and then

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[73] Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).
[74] Id. § 1396d(y)(1).
[75] NFIB, 132 S. Ct. at 2604.
[76] Id. at 2604-05 (internal quotation marks omitted).
[77] In the Chief Justice's words:

> The Court in Steward Machine [Co. v. Davis, 301 U.S. 548 (1937)] did not attempt to fix the outermost line where persuasion gives way to coercion. The Court found it enough for present purposes that wherever the line may be, this statute is within it. We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply conscript state agencies into the national bureaucratic army, and that is what it is attempting to do with the Medicaid expansion.

Id. at 2606-07 (alterations, citations, and internal quotation marks omitted).
[78] See Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989) (plurality op.) ("Congress has the power to abrogate immunity when exercising its plenary authority to regulate interstate commerce.").
[79] 517 U.S. 44 (1996).

in *Alden v. Maine*,[80] the Court established that Commerce Clause does not empower Congress to abrogate states' immunity from suit—either in federal court or in their own courts. This section summarizes those cases and explains the allocation of entitlements following from those decisions.

1. Seminole Tribe of Florida v. Florida

In 1988, Congress passed the Indian Gaming Regulatory Act, which provided that Indian tribes can conduct specified gaming activities only pursuant to a compact with the state in which the activities occur.[81] The Act also required states to negotiate with tribes "in good faith" to enter into such a compact,[82] and allowed tribes to sue states in federal court to compel states to comply with the good-faith negotiation mandate.[83] In 1991, the Seminole Tribe of Florida sued the State of Florida and its governor, seeking to compel the state to negotiate a gaming compact in good faith.[84] The case reached the Supreme Court and provided the Justices with an opportunity to reconsider—and potentially overrule—*Union Gas*.

A five-Justice majority seized that opportunity. As Chief Justice Rehnquist wrote for the Court, "*Union Gas* was wrongly decided and . . . should be, and now is, overruled."[85] He elaborated: "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[86]

Note the second-to-last word in the previous paragraph: *Seminole Tribe* held that Congress cannot abrogate the sovereign immunity of "unconsenting" states. It did not prohibit states from trading their sovereign immunity to the federal government as part of a voluntary exchange. In this respect, the state sovereign immunity doctrine resembles the anti-commandeering doctrine: it assigns the states an entitlement protected by a property rule, but not an inalienable entitlement. States still can sell that entitlement if Congress's price is right. (Note as well that *Seminole Tribe* does not prevent Congress from abrogating state sovereign immunity pursuant to the Reconstruction Amendments.[87] The holding in *Seminole Tribe* only prevents Congress from abrogating state sovereign immunity pursuant to its powers under Article I.[88])

2. Alden v. Maine

Seminole Tribe "made it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the *federal* courts."[89] The holding rested on the Eleventh Amendment, which by its terms does not apply to suits in *state*

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80 527 U.S. 706 (1999).
81 102 Stat. 2475, __ (1988) (codified at 25 U.S.C. § 2710(d)(1)(C)).
82 Id. at __ (codified at § 2710(d)(3)(A)).
83 Id. at __ (codified at § 2710(d)(7)).
84 Seminole Tribe, 517 U.S. at 51.
85 Id. at 66.
86 Id. 72.
87 Id. at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976)).
88 See id. at 73 ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction").
89 Alden, 527 U.S. at 712 (emphasis added).

courts.[90] *Alden v. Maine* presented the Justices with an opportunity to decide whether Congress—pursuant to its Commerce Clause power—can abrogate state sovereign immunity in state court.

In *Alden*, a group of probation officers sued their employer, the State of Maine, in state court for violating the overtime pay provisions of the federal Fair Labor Standards Act. The same five-Justice majority from *Seminole Tribe* held that the probation officers could not proceed with their suit. As Justice Kennedy wrote for the slender majority: "In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."[91]

Alden was not the Court's last word on state sovereign immunity. In *Central Virginia Community College v. Katz*, the Court carved out an exception to the *Seminole Tribe/Alden* rule for cases involving the federal bankruptcy laws.[92] So in the bankruptcy context as well as the Reconstruction Amendments, the power to decide whether states are immune from private citizen suits lies with Congress, not with the states. But outside those (relatively limited) contexts, states possess an entitlement to sovereign immunity that Congress cannot take away.

III. The Court, the Coase Theorem, and the Distribution of Wealth

Part II explained that the anti-commandeering and state sovereign immunity doctrines vest the states with valuable entitlements: in the anti-commandeering case, an entitlement to control over their own legislative processes and administrative resources; in the sovereign immunity case, an entitlement to freedom from monetary liability in federal or state court. The anti-coercion rule then acts as something like an unconscionability or duress doctrine protecting states' end of the bargain in intergovernmental exchanges. Yet beyond the (as yet ill-defined) limits on federal-state exchanges imposed by the anti-coercion doctrine, the states are generally free to sell their entitlements in the intergovernmental market. This part considers the distributional implications of federalism doctrines given the possibility of intergovernmental bargaining. Section III.A discusses the implications of these doctrines for the intergovernmental distribution of wealth. Section III.B provides a preliminary analysis of the relationship between intergovernmental and interpersonal wealth distribution, while also identifying a number of complications that will be explored at greater length in Part IV.

A. Fiscal Federalism Meets the Coase Theorem

The analysis begins with a provocative essay written in the wake of *Seminole Tribe* by Daniel Farber. The essay is three pages in full, and the heart of the argument is as easily excerpted as summarized. Farber writes:

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[90] See U.S. Const. amendment XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"). Nor does the Eleventh Amendment by its terms apply to suits by citizens against their own states in federal court, although the Court extended the Eleventh Amendment to bar such suits long ago. See Hans v. Louisiana, 134 U.S. 1 (1890).
[91] Alden, 527 U.S. at 754.
[92] 546 U.S. 356, 379 (2006).

> The Coase Theorem simply states that, assuming that transaction costs don't prevent contracting around legal rules, the legal rules don't matter—or more precisely, that the parties will always bargain their way to an economically efficient outcome, regardless of the legal rule. Bargaining washes away legal rules, in other words. If the Eleventh Amendment immunity were inalienable, the Coase Theorem would not apply, since it would be impossible to bargain. But one of the few things that is really clear about the Eleventh Amendment is that it is subject to waiver: the Constitution does not paternalistically force states to retain their immunities against their wills. In addition, Congress seems to be free to offer incentives for waiver. . . . So bargaining is possible. It follows from the Coase Theorem that, if Congress wants to eliminate immunity more than the state wants to keep it, then it will be eliminated—regardless of whether the Constitution recognizes sovereign immunity or gives Congress the power to abrogate immunity. So, to a first approximation, the Eleventh Amendment doesn't matter.[93]

In other words, the Coase theorem would lead us to believe that absent transaction costs, Congress will purchase entitlements from states where Congress assigns a higher value to the entitlements than the states do. Congress will pay the states to administer federal programs where the states can do so more efficiently than federal agencies can. So too, Congress will pay the states to waive their sovereign immunity when such waivers advance federal objectives more than they burden states.

Some readers might pause at this point and ask whether the intergovernmental market is even plausibly Coasean. The fact that many of these intergovernmental deals are embodied in federal statutes no doubt introduces rigidities to the bargaining process, making it more difficult for Congress and the states to adjust prices and other contract terms. But this point ought not be overemphasized. Congress often offers different deals to different states implementing federal programs. For example, the federal government matches Massachusetts's Medicaid expenditures dollar for dollar, but contributes \$3.11 for every dollar that Mississippi spends on Medicaid.[94] Many other pieces of legislation contain different deals for different states: the unique role for California with respect to tailpipe pollution standards under the Clean Air Act is illustrative.[95] Among the most famous (or infamous) provisions of this sort is the "Cornhusker Kickback," a commitment of additional Medicaid funds to Nebraska added to the Affordable Care Act in order to win the vote of that state's senator, Ben Nelson. (While the Cornhusker Kickback did not make it into the ultimate law,[96] a special Medicaid funding provision for Louisiana did.[97])

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[93] Daniel A. Farber, The Coase Theorem and the Eleventh Amendment, 13 Const. Comment. 141, 142 (1996) (footnotes and paragraph breaks omitted).

[94] 81 Fed. Reg. 80,078, 80,079-80 (Nov. 15, 2016). On Medicaid matching, see generally Kirk J. Stark, Rich States, Poor States: Assessing the Design and Effect of a U.S. Fiscal Equalization Regime, 63 Tax L. Rev. 957, 991-94 (2010).

[95] See Robinson Meyer, The Coming Clean-Air War Between Trump and California, The Atlantic (Mar. 6, 2017), https://www.theatlantic.com/science/archive/2017/03/trump-california-clean-air-act-waiver-climate-change/518649.

[96] See David Weigel, Does Antonin Scalia Know What's in the Affordable Care Law?, Slate (Mar. 28, 2012), http://www.slate.com/blogs/weigel/2012/03/28/does_antonin_scalia_know_what_s_in_the_affordable_care_law_.html.

And even after a bill becomes law, there are ample opportunities for state-specific deals executed through waiver provisions. For example, the Department of Education under President Obama reached waiver agreements with dozens of states receiving federal funding under the No Child Left Behind Act.[98] Renegotiation of terms between the Department of Health and Human Services and the 50 states is very much a feature of Medicaid implementation as well.[99]

Importantly, Coasean analysis on its own does not give us a reason to favor one initial allocation of entitlements over the other. After all, the same logic would suggest that if the Court had allocated the relevant entitlements to Congress rather than the states, then the states would purchase the entitlements back from the federal government when the states assign a higher value to the entitlements that Congress does. If Congress commandeered the states to administer a particular program but the cost to a state of administering the program exceeded the cost to the federal government, then the state would purchase the services of the appropriate federal agency. And likewise, if Congress made the states liable to lawsuits of a particular sort but the cost of liability to a state exceeded the value that Congress ascribed to state liability, then the state would purchase immunity from the federal government.

One might doubt the premise that states would ever purchase services or immunity from Congress if the entitlement allocation were the opposite of what it is today. But perhaps that doubt is misplaced. Indeed, one might think of *New York v. United States* as exactly such a case of states buying entitlements from the federal government. Under the LLRWPAA, states either had to establish the capacity to dispose of low level radioactive waste generated within their borders by January 1, 1993 or else to forfeit certain funds to the Secretary of Energy.[100] In effect, the LLRWPAA said to the states: "Administer or pay." Moreover, the LLRWPAA decreed that states would be liable for all damages incurred by generators or owners of low level radioactive waste unless the state provided for the disposal of such waste by January 1, 1996.[101] In other words, Congress abrogated the immunity of states from claims by waste generators/owners but then offered to sell that immunity back to the states in exchange for a particular form of consideration (here, the state taking over the disposal process).

Outside the LLRWPAA context, it is not unheard-of for states to purchase administrative services from federal agencies. During the October 2013 federal government shutdown, several states paid the U.S. Department of the Interior to continue to operate national parks and

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[97] See Avik S.A. Roy, The New Louisiana Purchase: Obamacare's $4.3 Billion Boondoggle, The Atlantic (Mar. 6, 2012), https://www.theatlantic.com/business/archive/2012/03/the-new-louisiana-purchase-obamacares-43-billion-boondoggle/254003. A similar state-specific provision, "the Buffalo Buyout," appeared in the failed American Health Care Act that House Republicans sought to pass in early 2017. See Daniel Hemel, Is the Buffalo Buyout Constitutional?, Whatever Source Derived (Mar. 23, 2017), bit.ly/2oj0X7W.
[98] See David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 Colum. L. Rev. 265, 280-81 (2013).
[99] See Michael S. Greve, Our Polarized, Presidential Federalism, in Parchment Barriers: Political Polarization and the Limits of Constitutional Order (Zachary C. Courser, Eric A. Helland & Kenneth P. Miller, eds., forthcoming 2017) (manuscript at 7).
[100] See New York, 505 U.S. at 152-53.
[101] See id. at 153-54.

monuments within those states.[102] One might think of this as the states and the Department of the Interior engaging in a voluntary exchange where the value that the states ascribe to federal administration is greater than the cost to the relevant federal agency. A similar phenomenon emerges in the procurement context, with state and local governments effectively purchasing procurement services from the federal General Services Administration.[103]

In any event, the argument in the next section will not rest on the premise that if *New York* and *Printz* had gone the other way, states would pay the federal government not to commandeer state legislative and executive functions. Nor will the argument depend on the premise that if *Seminole Tribe* and *Alden* had gone the other way, states would purchase back their immunity entitlement from Congress under certain circumstances. Rather, the argument is that the Rehnquist Court's initial assignment of entitlements to the states causes Congress to pay the states more than it would if the initial assignment of entitlements had turned out differently. States' right of refusal allows them to extract more resources from Congress in intergovernmental bargaining. The Coase theorem serves to illustrate this, but the assumption of zero transaction costs and two-way tradeability embedded in the Coase theorem are not necessary components of the analysis.

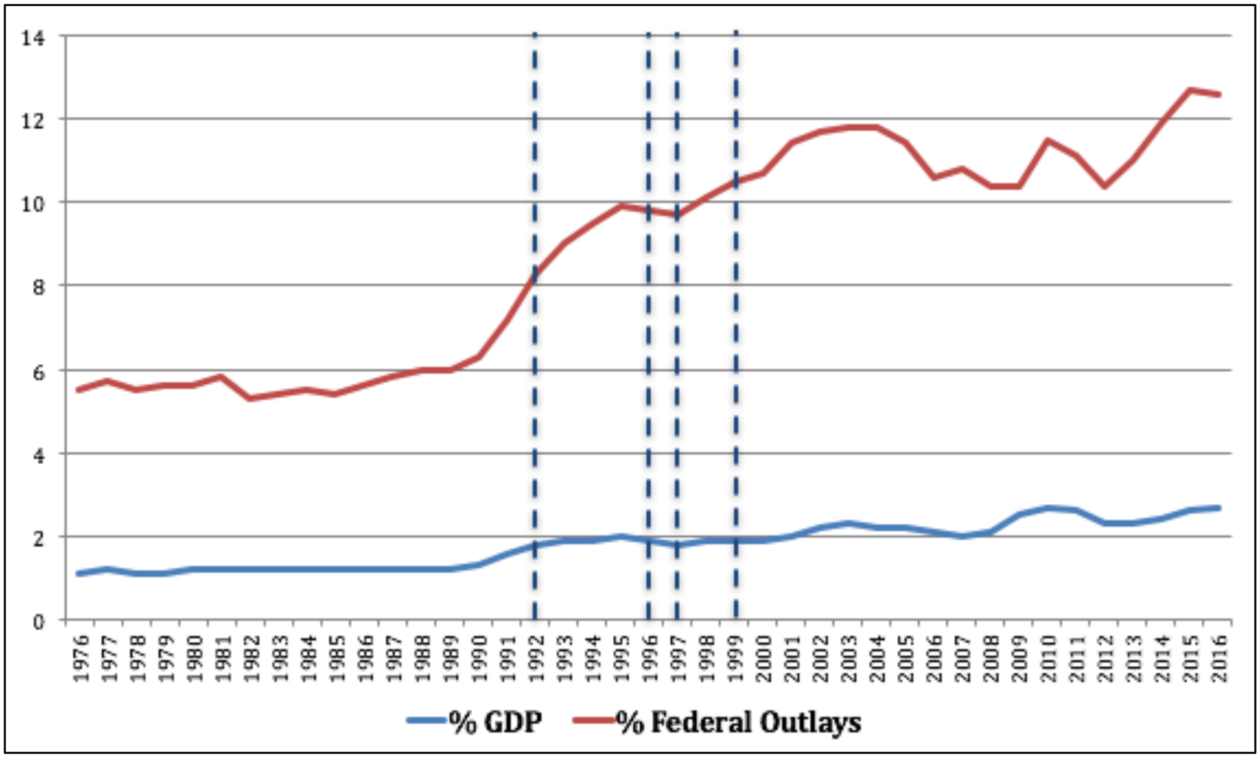
Even on its own terms, however, Farber's application of the Coase theorem to fiscal federalism misses an important element of the Coase theorem. Coase never said that the legal allocation of entitlements "doesn't matter," as Farber asserts. Rather, Coase acknowledges that the allocation of entitlements will affect "the distribution of income and wealth as between the cattle-raiser and the farmer."[104] Neil Siegel has noted this oversight in Farber's analysis, and has done so quite succinctly. He illustrates the point with a straightforward example:

> Suppose that in enacting particular legislation, Congress would be willing to pay $10 million to render the state of California susceptible to suit in federal court for its violations of that statute. Suppose further that California is opposed to being vulnerable to such suits, and would be willing to pay $5 million for a substantive immunity. The cost-benefit efficient solution in this case is for California to be susceptible to suit in federal court for violations of the statute, since the benefit to Congress of $10 million exceeds the cost to California of $5 million . . . . Assuming no transaction costs, this outcome will be achieved regardless of the controlling constitutional law of state sovereign immunity . . . . Nevertheless, the distributive consequences associated with the alternative legal regimes under examination are far from irrelevant. Under *Union Gas*, Congress ends up with a benefit of $10 million and California incurs a cost of $5 million. Under *Seminole*, Congress obtains a net benefit of $2.5 million (a $10 million benefit from California's waiver less the purchase price of $7.5 million), and California nets $ 2.5 million (receipt of a $7.5 million payment less the $5 million cost of waiver). Thus, although the law does not matter from the aggregate standpoint of efficiency, it matters a whole lot to each of these competing sovereigns.

[102] See Howard Berkes, Some States Allowed To Reopen National Parks—And Foot the Bill, NPR (Oct. 11, 2013), http://www.npr.org/sections/thetwo-way/2013/10/11/232090272/utah-allowed-to-re-open-national-parks-and-foot-the-bill.
[103] See, e.g., 81 Fed. Reg. 36,425 (July 6, 2016).
[104] See Coase, supra note 17, at 5.

If Siegel's analysis is right, then we might expect to see an increase in federal-to-state transfers after decisions such as *New York*, *Seminole Tribe*, *Printz*, and *Alden* that allocate valuable entitlements to the states. And to some extent, we do. As a share of gross domestic product and as a share of federal outlays, federal-to-state transfers rose significantly over the course of the 1990s. Figure 5 so illustrates, with dotted lines marking the years in which *New York*, *Seminole Tribe*, *Printz*, and *Alden* were handed down (1992, 1996, 1997, and 1999).

Figure 5. Federal-to-State Transfers as Percent of GDP and of Federal Outlays, 1976—2016[105]



To be sure, the increase illustrated in Figure 5 cannot be attributed entirely to the Supreme Court. For one thing, the upward trend starts several years before *New York* (though as Justice O'Connor's opinion in *New York* contends, several decisions over the course of the 1980s may have anticipated the *New York* holding).[106] And second, the rise in federal-to-state transfers in the 1990s coincided with a number of other significant events, including the end of the Cold

[105] The data for Figure 5 is drawn from Office of Mgmt. & Budget, Budget of the United States Government—Fiscal Year 2017, Historical Tables, tbl. 12.1 (2016).

[106] See New York, 505 U.S. at 161-62; cf. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981) (indicating that a statute survives Tenth Amendment scrutiny where it does not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); FERC v. Mississippi, 456 U.S. 742, 765 (1982) (statute survives scrutiny where it does not "directly compel[] the States to enact a legislative program" (internal quotation marks omitted)); South Carolina v. Baker, 485 U.S. 505, 513 (1988) (noting that "the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests").

War in 1991 and the Gingrich Revolution in 1994. Any claim that the Supreme Court was the *sole* cause of the rise in federal-to-state transfers in the 1990s would be subject to ridicule.

Moreover, even if federalism doctrines play some role in the rise of federal-to-state transfers in the 1990s, the fact remains that federal-to-state transfers were significant in size long before *New York*, *Printz*, *Seminole Tribe*, and *Alden*.[107] This fact lends itself to a pair of possible interpretations. One is that *New York* and the follow-on cases are manifestations of a long-understood norm in American political culture: Congress cannot tell the states what to do (though it may pay them to do what Congress wants).[108] Another (not incompatible) view is that federalism norms in American political culture began to break down in the 1990s, and that the Rehnquist Court intervened to protect these principles long immanent in America's (written or unwritten) fiscal constitution.

Whether the allocation of these valuable entitlements to states rather than the federal government started with *New York* or long before, we have strong theoretical and some empirical grounds for believing that this allocation of entitlements makes the states richer and the federal government poorer. But that is not, I will argue, the end of the matter. The next section turns to the interpersonal distributional consequences of these intergovernmental entitlement allocations—and, in particular, the ways in which these entitlement allocations differentially affect taxpayers of various incomes.

B. A Toy Model of Federal and State Taxing and Spending

To recapitulate: The anti-commandeering and state sovereign immunity doctrines each assign to the states a valuable entitlement that the states can sell back to Congress on the intergovernmental market. If intergovernmental bargaining is Coasean, then the initial entitlement allocation will not determine whether the states ultimately enact and enforce federal programs or whether the states ultimately enjoy immunity from lawsuits in their own and federal courts: Congress will purchase the entitlement from the states if Congress assigns a higher value to the entitlement than states do. Yet even under Coasean conditions, the initial allocation of entitlements does have a distributive effect: it enriches the party to whom the entitlement is allocated.

A toy model will allow us to begin to explore the interpersonal distributive effects of the intergovernmental allocation of entitlements. Imagine that Congress's entire budget is devoted to national defense, and that State's entire budget is devoted to schools. Imagine, moreover, that society is composed of two groups: the Riches and the Rest. Consistent with breakdown between the top decile and the bottom nine deciles in Table 1, we will assume that the Riches (the top decile) bear 50% of the federal tax burden and 40% of the state tax burden, with the remainder

[107] On the history of federal-to-state transfers, see John Joseph Wallis & Wallace E. Oates, The Impact of the New Deal on American Federalism, in The Great Depression and the American Economy in the Twentiety Century 155 (Michael E. Bordo et al. eds., 1998).
[108] See Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861) ("[T]he Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."). On the early history of the anticommandeering doctrine, see generally Wesley J. Campbell, Commandeering and Constitutional Change, 122 Yale L.J. 1104 (2013).

falling to the Rest. Let's assume, moreover, that the federal government and the states each start out with budgets of $100. Thus, the Riches pay $50 of federal taxes and $40 of state taxes for a total of $90, while the Rest pay $50 of federal taxes and $60 of state taxes for a total of $110. The first column of Table 2 reflects the status quo.

Now imagine that members of Congress decide to create a new health care program (we'll call it Medicaid). Assume, moreover, that *New York* and *Printz* have come out the other way: Congress has the power to commandeer state legislative processes and administrative resources pursuant to the Commerce Clause. Also assume that members of Congress would prefer, all else equal, *not* to raise federal taxes. Finally, assume that the states can administer Medicaid at a cost of $10, while it would cost some amount more than $10 for the federal government to do the same.

In our non-*Printz* world, we might expect Congress to commandeer the states and compel them to administer the Medicaid program. Moreover, and most importantly for our purposes, we might expect Congress to saddle states with the entire cost of Medicaid. The states will then have to find an additional $10 to pay for Medicaid. If they do so by raising taxes while maintaining their existing tax structure, then the result will be an additional $4 in taxes paid by the Rich and $6 in taxes paid by the Rest. The Rich now pay a total of $94 in federal and state taxes, and the Rest now pay a total of $116. The second column of Table 2 reflects this non-*Printz* scenario.

Now, imagine that the Supreme Court rules for the states in *Printz*. Instead of Congress foisting the cost of Medicaid onto the states, the states now have the entitlement to their own legislative processes and administrative resources, and so they can hold out until Congress makes an offer at least sweet enough to offset the cost of administering Medicaid. We will assume for the sake of simplicity that Congress captures all of the contractual surplus (i.e., the federal government pays an amount equal to the states' cost of administering Medicaid, rather than an amount equal to the federal government's higher cost of administering Medicaid). The federal government now has to raise an additional $10 in revenues, which it does by imposing an additional tax of $5 on the Rich and $5 on the Rest. The Rich now pay a total of $95 in federal plus state taxes, while the Rest pay a total of $115. The third column of Table 2 illustrates.

Table 2. Toy Model—All Adjustments on Tax Side

	(1) Starting Position	(2) Commandeering	(3) *Printz*
Federal			
Defense Spending	$100	$100	$100
Medicaid Spending	—	—	$10
Taxes	$100	$100	$110
Rich	$50	$50	$55
Rest	$50	$50	$55
State			
School Spending	$100	$100	$100
Medicaid Spending	—	$10	—
Taxes	$100	$110	$100
Rich	$40	$44	$40
Rest	$60	$66	$60
Total Spending	$200	$210	$210
Total Taxes	$200	$210	$210
Rich	$90	$94	$95
Rest	$110	$116	$115

In this initial version of the toy model, *Printz* results in a transfer of $1 from the Rich to the Rest. The cause of this transfer is easy to see: *Printz* leads to more revenue being raised through the more progressive federal tax system, and correspondingly less revenue being raised through the more regressive state tax systems. There are, however, several reasons to wonder whether reality will work out this neatly. For example, the shift in wealth from state to federal governments effected by *Printz* might lead the federal tax system to become less progressive or state systems to become more so. Moreover, the states might respond to a Medicaid mandate under *Printz* by cutting school spending rather than raising taxes; so too, the federal government might respond to the costs imposed by *Printz* through defense spending cuts. Also, transaction costs might stand in the way of federal-state exchanges, such that the consequence of *Printz* is less spending overall rather than more federal taxation and less state-level revenue-raising. Furthermore, the federal government and/or the states might export present-period costs to future generations through public debt. And finally, the possibilities limned here might not be mutually exclusive: we might see a bit of each in reality. The next part turns to the question of which—if any—of these outcomes might be most plausible.

IV. Complications and Qualifications

The last section laid out the basic intuition underlying the claim that federalism doctrines allocating valuable entitlements to states rather than the federal government generate progressive redistributive effects at the individual/household level. The goal of this part is to stress-test that claim: to question each of the underlying assumptions so as to determine just how robust the basic intuition is. Section IV.A considers the possibility that adjustments to the progressivity of federal and state tax systems will offset the interpersonal redistributive effects of a federal-to-state wealth shift. Section IV.B considers the potential for spending-side adjustments. Section IV.C addresses the potential for federalism doctrines to affect the overall size of government. Section

IV.D considers the possibility of borrowing by either federal or state governments, with potential implications for the distribution of income and wealth across generations. Section IV.E assesses the relevance of federalism doctrines given the political safeguards of federalism that (arguably) exist as a backdrop.

A. Adjustments to the Progressivity of Federal and State Tax Systems

The basic model illustrated in Table 2 assumed that in all scenarios, the Rich would pay 50% of federal taxes and 40% of state taxes. The analysis in Sections I.A and I.B pointed toward reasons why it might be difficult for states to adjust the progressivity of their tax systems. Yet those structural and institutional constraints at the state level do not preclude the possibility of a federal-side adjustment. Imagine that Congress responds to the shift from a pro-commandeering rule to *Printz* still by raising $110 but now also adjusting the split of federal taxes so that the rich pay only 49.1% of federal taxes, or $54.0. The result would be that the Rich would pay the same amount in total taxes as before. This outcome would be consistent with what Lee Fennell and Richard McAdams refer to as the "distributive invariance hypothesis": "that the same distributive result will be achieved regardless of how legal rules are configured or how entitlements to resources are assigned."[109]

Table 3. Toy Model—Adjustments to Progressivity

	(2) Commandeering	**(3) *Printz***	**(4) *Printz* Plus Adjustment**
Federal			
Defense Spending	$100	$100	$100
Medicaid Spending	—	$10	$10
Taxes	$100	$110	$110
Rich	$50	$55	$54
Rest	$50	$55	$56
% of Taxes Paid by Rich	50%	50%	49.1%
State			
School Spending	$100	$100	$100
Medicaid Spending	$10	—	—
Taxes	$110	$100	$100
Rich	$44	$40	$40
Rest	$66	$60	$60
Total Spending	$210	$210	$210
Total Taxes	$210	$210	$210
Rich	$94	$95	$94
Rest	$116	$115	$116

109 Lee Anne Fennell & Richard H. McAdams, The Distributive Deficit in Law and Economics, 100 Minn. L. Rev. 1051, 1055 (2016).

Yet the distributive invariance hypothesis is not an iron law; indeed, as Fennell and McAdams argue, it holds rarely if ever.[110] And there are strong reasons to believe that distributive invariance is violated here as well. This section considers two reasons why the invariance hypothesis might not hold and one reason why it might. The analysis is necessarily speculative and so the conclusions are necessarily tentative. The theme throughout is that distributive invariance is perhaps possible but far from inevitable in this context.

1. Different State Preferences for Progressivity. As an initial matter, we know that voters in different states have different distributive preferences[111] and face different constraints on their ability to raise revenues via progressive taxation.[112] We might expect, then, that if states bear more of the revenue-raising burden of federal taxation, some states will place more of that burden on the Rich and others will place more on the Rest. Imagine two types of states—Blue and Red—with preferences for progressive redistribution stronger in the former. Imagine, moreover, that the anti-commandeering doctrine is discarded and so Congress can export revenue-raising responsibilities to the states, each of which allocates that burden differently (with the Rest bearing a larger share of the burden in Red than in Blue). Any effort to offset state-level tax changes through a federal-level tax change would be overcompensatory in Blue and undercompensatory in Red. The result would be to introduce a horizontal inequity between low-income households in Blue (who now pay less than under the anti-commandeering status quo) and low-income households in Red (who now pay more).[113] Note, moreover, that lower-income states tend to be redder (i.e., more conservative) ones as well.[114] Millions of low-income households would thus be left in states that allocate larger shares of the tax burden to the poor.

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[110] Id. at 1056. For a general critique of the invariance hypothesis across contexts, see id. at 1079-1109.

[111] See David Rueda & Daniel Stegmueller, Preferences That Matter: Inequality, Redistribution and Voting (Mar. 9, 2016) (unpublished manuscript), http://users.ox.ac.uk/~polf0050/RuedaStegmueller_PreferencesMatter.pdf.

[112] On the latter point, see text following note 39.

[113] We might perhaps imagine a federal intervention along the lines of the "progressive state tax credit" proposed by Eric Kades. See Eric Kades, Giving Credit Where Credit Is Due: Reducing Inequality with a Progressive State Tax Credit, 77 La. L. Rev. 359 (2016). The goal of such an intervention would be to provide greater relief to low-income households in states with more progressive tax systems. As Kades notes, an intervention along these lines would be vulnerable to an argument that it violates the Constitution's Uniformity Clause, though Kades ultimately concludes that the Uniformity Clause concerns are nonfatal. See Kades, supra, at 408-14; cf. U.S. Const. art. I, § 8, cl. 1 ("[A]ll duties, imposts and excises shall be uniform throughout the United States").

How plausible is it that Congress will respond to a reversal of the anti-commandeering, anti-coercion, and state sovereign immunity doctrines with an intervention along the lines contemplated by Kades? As emphasized in text, the result depends in part on the reasons why progressive taxation emerges. If federal-level progressivity is a direct response to voter preferences for redistribution, then Kades's proposal might seem more plausible. If federal-level progressivity is a function of different marginal costs of raising revenue from different income groups, then we might expect a shift in revenue-raising responsibilities to result in an interpersonal wealth shift as well.

[114] See Andrew Gelman et al., Rich State, Poor State, Red State, Blue State: What's the Matter with Connecticut?, 2 Q. J. Pol. Sci. 345 (2007).

2. Different Marginal Costs of Taxation. The plausibility of the invariance hypothesis also depends on why we think federal-level progressivity and state-level regressivity emerge in the first place. When federal and state lawmakers raise revenue via taxation, they reap political benefits from additional spending and bear political costs from voters who feel the brunt of those taxes. As a first approximation, lawmakers support spending up to the point that the marginal political benefits of an additional $1 of spending equal the marginal political costs of an additional $1 of taxation. Meanwhile, on the tax side, lawmakers allocate revenue-raising burdens across income groups. We might expect that lawmakers will allocate burdens across the Rich and the Rest such that the marginal political cost of raising an additional $1 of revenue from each group is the same. (Otherwise, lawmakers could achieve political gains by tilting the tax system more toward the Rich or toward the Rest.) Ceteris paribus, we might expect—for reasons explored in Section I.B—that raising revenues from the Rich will be costlier for state lawmakers than for federal lawmakers. Thus we might expect that federal and state lawmakers will allocate tax burdens differently, as indeed they do. Since the marginal cost of taxing the Rich relative to the Rest is lower for federal than for state lawmakers, we might anticipate differences between federal and state systems to endure even when revenue-raising responsibilities are shifted. Indeed, we might be surprised to see otherwise: if the costs of taxing the rich at the state level are higher than at the federal level, then why would we ever expect the states to match the allocation of federal tax burdens across income groups?

3. Counterargument: Lump-Sum Taxation and Redistribution Distinguished. The intuitions in the previous paragraphs are not invulnerable to counterargument. We might instead imagine a model along the following lines: The cost of public goods is $10 per household, and voters desire redistribution of $5 from each household in the Rich to the Rest. (For expositional ease, we will assume for present purposes that the number of households among the Rich and the Rest is the same.) We might imagine two ways in which revenue-raising and redistribution could occur:

> **Scenario A.** All revenue-raising and redistribution occurs through the federal system. The federal government imposes a tax of $15 on households in the Rich and $5 on households in households in the Rest. Each household is paying its pro rata share of the cost of public goods ($10), and the Rich are paying an extra $5 which is going to reduce the tax bill of the Rest by $5.
>
> **Scenario B.** All revenue-raising to pay for public goods occurs through the state systems, but redistribution occurs through the federal system. States impose a lump-sum tax of $10 on each household, while the federal government imposes a tax of $5 on each household in the Rich and a tax of −$5 on each household in the Rest (i.e., a subsidy of $5). Each household is paying its pro rata share of public goods ($10), and the Rich are paying an extra $5 which is then transferred to the Rest.

Scenario A would be consistent with a world in which the Supreme Court disallows commandeering and congressional abrogation of state sovereign immunity; Scenario B would be consistent with a world in which Congress is unconstrained by the anti-commandeering and state sovereign immunity doctrines. The only effect of federalism doctrines in these scenarios is to determine whether the lump-sum component of revenue-raising occurs at the federal level or the state level.

Embedded in this argument is a strong assumption about redistributive politics: If members of Congress would impose a \$15 tax on the Rich and a \$5 tax on the Rest when revenue-raising responsibilities lie with the federal government, then members of Congress also would impose a \$5 tax on the Rich and a -\$5 tax on the Rest when revenue-raising responsibilities lie with the states. Put differently, the argument assumes away the magic of zero. By that, I mean that the argument assumes a political equivalence between reductions to tax and negative taxes. But the significance of zero can be discarded so easily.

To elaborate: Scenario A and Scenario B both involved redistribution of \$5 from each household in the Rich to each household among the Rest. The difference was that in Scenario A, \$5 was added to the federal tax bill of the Rich and subtracted from the tax bill of the Rest, while in Scenario B, only the Rich paid federal taxes and the Rest received what might be characterized as a "handout" of \$5. As more revenue-raising occurs through the state systems, any effort to hold the total level of redistribution constant will require more such "handouts" from the federal government. If handouts to lower-income households elicit more backlash than tax breaks for lower-income households, then federalism doctrines that assign revenue-raising responsibilities to the states or the federal government will indeed affect the political costs of redistribution.

Research in the lab by Edward McCaffery and Jonathan Baron suggests that zero matters quite a lot—at least to voters. Across multiple studies, McCaffery and Baron find that "negative tax brackets in one tax to offset positive brackets in others . . . are salient and disfavored."[115] The details of their studies are quite complicated (and lie beyond the scope of this essay); moreover, the external validity of their laboratory findings is (of course) unclear. What we can say is this: evidence from the lab gives us reason to doubt that tax rates will adjust seamlessly to a shift in revenue-raising responsibilities across levels of government, especially where adjustment might entail a below-zero rate of federal taxation for some.

B. Adjustments to Federal and State Spending

A second possibility is that federal and state governments will respond to the reallocation of valuable entitlements by holding their tax systems constant and adjusting the amount of spending. Table 3 illustrates such an adjustment. Under commandeering, when the federal government imposes a cost of \$10 on the states, states respond by reducing their spending on schools by \$10, with no changes to their tax system. Under *Printz*, when that \$10 cost is shifted to the federal government, Congress responds by cutting defense spending commensurately—again, with no tax system changes. On this view, the only effect of federalism doctrines is to determine the composition of government spending.

[115] Edward J. McCaffery & Jonathan Baron, The Political Psychology of Redistribution, 52 UCLA L. Rev. 1745, 1768 (2005); see also id. at 1771-72.

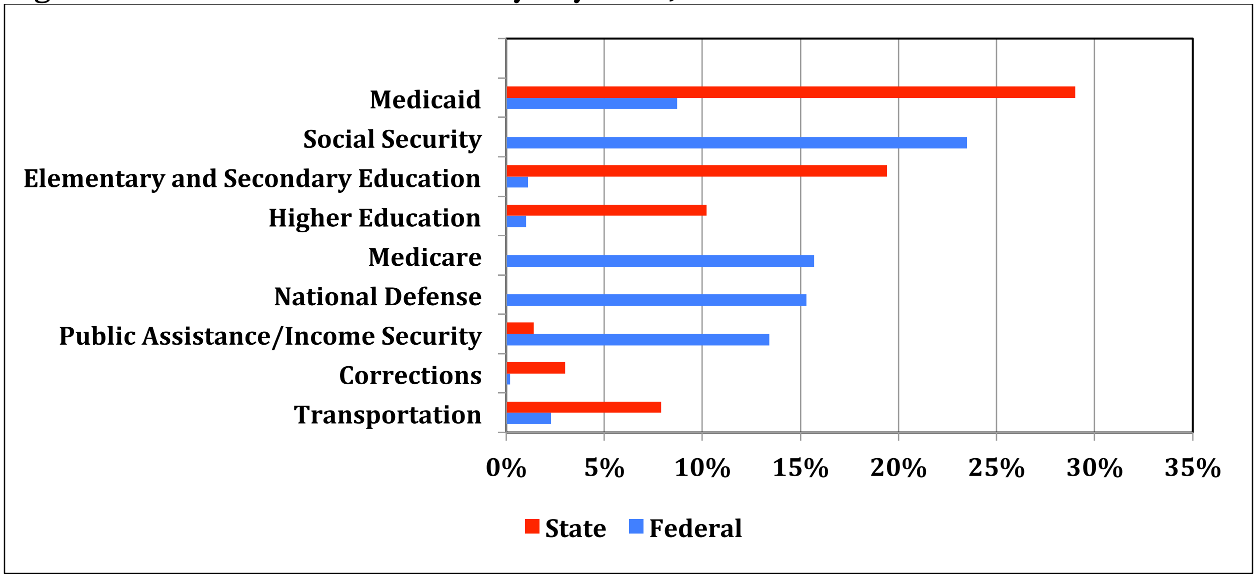
Table 4. Toy Model—All Adjustments on Spending Side

	(2) Commandeering	(3) *Printz*
Federal		
Defense Spending	\$100	\$90
Medicaid Spending	—	\$10
Taxes	\$100	\$100
Rich	\$50	\$50
Rest	\$50	\$50
State		
School Spending	\$90	\$100
Medicaid Spending	\$10	—
Taxes	\$100	\$100
Rich	\$40	\$40
Rest	\$60	\$60
Total Spending	\$200	\$200
Total Taxes	\$200	\$200
Rich	\$90	\$90
Rest	\$110	\$110

How plausible are the adjustments imagined in Table 4? If federal and state governments are responsive to voter desires, and if the federal and state governments already providing voters with the amount of defense and school spending that they desire, then the answer is: quite implausible. Why would we expect voter demand for national defense or school spending to depend on whether revenue-raising for Medicaid occurs through the state or federal system? On the other hand, if members of Congress incur a marginal political cost from each additional \$1 of federal (but not state) taxation, and if the marginal political cost of taxation is increasing, then federalism doctrines may indeed affect the quantity of federal and state spending: under *Printz*, each \$1 of spending is more costly to Congress and less so for state lawmakers. In that event, the distributional consequences of federalism doctrines will depend in part on whether a shift in spending from the federal government to the states redounds to the benefit of the rich or the poor.

We do know that federal and state governments spend their dollars in very different ways. Figure 6 shows the percentage of federal and state outlays by area for fiscal year 2016. Several similarities as well as dramatic differences spring forward. Federal and state governments both spend heavily on health care, with Medicare a larger share of the federal budget and Medicaid a larger share of state budgets. Social Security and national defense are federal-only items; elementary, secondary, and higher education compose a much larger share of state budgets. These generalities will not be hugely surprising to most readers.

Figure 6. Federal and State Outlays by Area, Fiscal Year 2016[116]



If federal and state governments respond to entitlement reallocations by adjusting their levels of spending, what would that mean for the distribution of income and wealth across individuals? This is a maddeningly complex question with no easy answer. Would the federal government spend more on national defense if not for *Printz*? And if so, who benefits from defense spending? (The answer—to be glib—depends on whether the invaders want just to loot us or to enslave us.) Insofar as federalism doctrines make the states richer, do the states spend more money on schools? And if so, who benefits from that?[117]

One common approach is to treat all spending as lump-sum redistribution allocated on a per-capita basis;[118] on this view, shifts from federal to state spending would have no effect on interpersonal distribution beyond the effects from corresponding tax-burden shifts. An alternative approach would be to try to determine who benefits from federal spending and who benefits from state spending; and yet such an exercise—fraught in its own right—tells us very little about who benefits from the marginal dollar of federal/state spending.[119] I will not seek to resolve that question here, except to note that spending-side changes potentially magnify and potentially

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[116] The data for Figure 6 are drawn from Office of Mgmt. & Budget, supra note 105, tbl. 3.2, and from Nat'l Ass'n of State Budget Officers, State Expenditure Report: Examining Fiscal 2014-2016 State Spending 10-11 tbl. 3 (2016).
[117] Edward Wolff and Ajit Zacharias find that education spending benefits lower-income households much more—in percentage-of-income terms—than higher-income households. See Edward N. Wolff & Ajit Zacharias, The Distributional Consequences of Government Spending and Taxation in the U.S., 1989 and 2000, 53 Rev. Income & Wealth 692, 711 (2007).
[118] See, e.g., Allan H. Meltzer & Scott F. Richard, A Rational Theory of the Size of Government, 89 J. Pol. Econ. 914, 917 (1981); Jason S. Oh, Are the Rich Responsible for Progressive Tax Rates? (unpublished manuscript).
[119] See, e.g., Gerald Prante & Andrew Chamberlain, Tax Found., Who Pays Taxes and Who Receives Government Spending? An Analysis of Federal, State and Local Tax and Spending Distributions, 1991-2004 (2014), https://tax.network/gprante/who-pays-taxes-and-who-receives-government-spending-an-analysis-of-federal-state-and-local-tax-and-spending-distributions-1991-2004.

moderate the redistributive effects of federalism doctrines. If the marginal $1 of state spending is more likely than the marginal $1 of federal spending to flow to the Rest rather than the Rich, then spending-side adjustments magnify the distributional consequences of state-to-federal tax burden shifts. If the opposite, then spending-side adjustments offset some of the distributional effects of federalism-induced tax changes.

C. Effects on the Overall Size of Government

So far, the analysis in this essay has proceeded on the assumption that bargaining between Congress and the states is Coasean (i.e., that transaction costs are zero). That assumption is obviously counterfactual (or, at the very least, implausible). Insofar as the transfer of entitlements requires legislation at either level, drafting costs and logrolling may get in the way of mutually beneficial exchanges. And even if state and federal agencies can negotiate the necessary transfer, such exchanges will inevitably involve transaction costs as well: no complex organization operates friction-free, and certainly not a state or federal bureaucracy.

Transaction costs may alter the analysis above in two ways. First, in a world with positive transaction costs, federalism doctrines that allocate valuable entitlements to the states rather than the federal government may discourage Congress from pursuing new programs. Imagine, as above, that the states can implement Medicaid at a cost of $10, but now add three more elements to the hypothetical: (1) members of Congress assign a value of $11 to the Medicaid program; (2) it would cost $12 for the federal government to implement the program on its own; and (3) Congress and the states will incur transaction costs of $2 if Congress tries to purchase the states' services. These transaction costs may take a number of forms, including—as in the case of the ACA's Medicaid expansion—political costs and/or personal disutility incurred by governors who simply do not want to strike a deal with an administration they oppose.[120]

Under these assumptions, the program will be implemented if commandeering is allowed but not if *Printz* is the law of the land. If Congress can compel the states to administer the program, Congress will do so—and the states will not "counter-commandeer" by paying the federal government to lay off (costs to the states of $10 < benefit to Congress of $11). But if $2 of costs are incurred in the transactional process, then no deal will occur (costs to the states $10 + transaction costs of $2 > benefit to Congress of $11). And Congress will not implement the program through the federal bureaucracy because the cost of doing so is higher than the benefit that members perceive ($12 cost of federal implementation > benefit to Congress of $11).

We therefore might expect the anti-commandeering doctrine to affect which programs get implemented as well as who pays. And likewise, we might expect the state sovereign immunity doctrine to affect when states waive their immunity as well as whether they are compensated for the cost. But we might also expect federalism doctrines to affect the size of government in the opposite direction—assuming, again, positive transaction costs. Put yourself in the position of a governor or state lawmaker in a world in which *New York*, *Printz*, *Seminole Tribe*, and *Alden* all went the other way. You are deciding whether to invest resources in building up a state bureaucracy. You know, however, that at any point Congress can swoop in and either

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[120] See Kimberly Leonard, Opposing Medicaid Expansion, U.S. News & World Report, Dec. 4, 2015, https://www.usnews.com/news/the-report/articles/2015/12/04/opposing-medicaid-expansion.

commandeer your bureaucracy for its own ends or subject you to liability with respect to your activities. Might this knowledge influence your decision whether or not to proceed?

This latter argument aligns with the conventional economic wisdom supporting the just compensation requirement for government takings of private property. The intuition there is that if individuals and firms fear the government seizing their property without compensation at any moment, they will refrain from investing capital in productive enterprises.[121] The just compensation requirement serves to encourage individuals and firms to make capital outlays notwithstanding the risk of a taking. So too, the anti-commandeering and state sovereign immunity doctrines encourage states to invest in their own governments.[122]

The analogy is admittedly imperfect. An entitlement is protected by a "liability rule" when "someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it," even if the original entitlement holder refuses to sell for that price.[123] An entitlement is protected by a "property rule" when "someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."[124] The just compensation requirement operates as a liability rule. By contrast, the anti-commandeering and state sovereign immunity doctrines operate as property rules.[125]

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[121] For an overview and analysis of the law and economics literature on just compensation, see William A. Fischel & Perry Shapiro, Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law, 17 J. Legal Stud. 269 (1988).

[122] For this reason, Congress might have an incentive to pre-commit to an anti-commandeering rule even if the Court did not force it to. The logic for doing so would be the same logic that would lead a government to bind itself to a just compensation requirement in the takings context: Given a choice between (a) being able to commandeer state administrative capabilities and (b) having to pay for the states' services, Congress would prefer (a). But given a choice between (b) having to pay for the states' services and (c) not being able to procure state services at any price, Congress would choose (b). If commandeering is unfettered, then states will be reluctant to build up their own administrative capabilities, leaving Congress in the land of option (c). And so Congress is better off it can credibly commit *not* to commandeer the states.

The Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, might be interpreted as a pre-commitment mechanism of this sort. Under the 1995 Act, House and Senate members may raise a point of order against a direct mandate in legislation that imposes a cost exceeding $50 million on state or local governments. See Robert Jay Dilger & Richard S. Beth, Cong. Research Serv., CRS 7-5700 Unfunded Mandates Reform Act: History, Impact, and Issues 3-4 (2013). But points of order under the Unfunded Mandates Reform Act can be waived by majority vote, and the Act does not apply to potentially coercive conditions in grant-in-aid programs. See id. at 9, 18. The Act has thus proven not to be a self-imposed straitjacket, but instead a relatively loose constraint on Congress's ability to externalize costs downward to states and localities. See Theresa Gullo, History and Evolution of the Unfunded Mandates Reform Act, 57 Nat'l Tax J. 559 (2004).

[123] Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1092 (1972).

[124] Id.

[125] The anti-coercion doctrine arguably operates as an inalienability rule layered on top of the property rules established by the anti-commandeering and state sovereign immunity doctrines. I say "arguably" because insofar as the anti-coercion doctrine serves as a public law analogue to the private law doctrines of duress and unconscionability, then one might describe the anti-coercion doctrine as defining consent

One can imagine a liability rule in this context taking the following form: States have an entitlement to their own legislative and executive processes, and to immunity from suit by private citizens in state and federal court. Congress cannot take that entitlement away from states without paying. But Congress can exercise a power of eminent domain over the states and seize the relevant entitlement for itself, provided that it pays just compensation. And if state and federal officials cannot settle the matter themselves, courts will adjudicate the question of how much compensation is just.[126] On this view, the federal government could have required states to expand Medicaid to all citizens with incomes up to 133% of the poverty line, and could have required states to establish health insurance exchanges under the Affordable Care Act. If a state failed to reach an agreement with the federal government regarding funding, then the state would have the right to sue the federal government for just compensation. A court (presumably a federal court) would then determine how much the federal government must transfer to the state in order to compensate the state fully for the cost of administering the relevant program. The court's role would be much the same as the Court of Federal Claims in the federal eminent domain context.

Something like this was suggested by Justice Souter in his dissent in *Printz*.[127] Justice Scalia responded wryly that Justice Souter's suggestion "would create a constitutional jurisprudence (for determining when the compensation was adequate) that would make takings cases appear clear and simple."[128] Justice Scalia's response carries considerable force.[129] To illustrate the difficulty of the valuation exercise, imagine that the federal government commandeers state officials to implement a controversial deportation policy. Should the states be compensated only for the administrative costs of implementing the deportation policy, or should states in which the overwhelming majority of voters oppose the federal government's deportation policy also be compensated for the disutility of having their own state administrative resources used in the service of a policy they deplore? If the former, then the risk that state administrative resources will be commandeered to implement a policy that the state's voters oppose may operate as a disincentive against the state building up its own administrative capacity. If the latter, the valuation exercise becomes unmoored from any dollar figure that is ascertainable in the real world.

One can also imagine a counterfactual in which the relevant entitlements allocated to states might be protected by an inalienability rule[130]: states would not be able to sell their services

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rather than prohibiting exchanges for which there is mutual consent. On the relationship between the unconscionability doctrine and the Calabresi-Melamed framework, see generally Richard Craswell, Property Rules and Liability Rules in Unconscionability and Related Doctrines, 60 U. Chi. L. Rev. 1 (1993).

[126] See Hills, supra note 59, at 823.

[127] See Printz, 521 U.S. 898, 975-76 (1997) (Souter, J., dissenting) (suggesting that Congress cannot "require administrative support without an obligation to pay fair value for it").

[128] Id. at 914 n.7 (Scalia, J.).

[129] Accord Hills, supra note 59, at 935-36 ("Souter is wrong. Justice Scalia is perfectly correct to note that such a rule would be completely impractical.").

[130] Erin Ryan has suggested that *New York v. United States* in fact established an inalienability rule. Erin Ryan, Federalism at the *Cathedral*: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure, 81 U. Colo. L. Rev. 1 (2010). She notes that public officials representing New

to the federal government, nor would they be allowed to waive their sovereign immunity in exchange for federal cash. That is, states would not be able to alienate their entitlements to their own administrative resources and their sovereign immunity. Ilya Somin has argued in this vein for a "categorical ban" on federal-to-state transfers, which would effectively shut down the now-vibrant intergovernmental market.[131] A consequence of such a ban would be to preclude Congress from enlisting the states to carry out federal programs even when states are the least-cost administrators. While in some cases the federal government might implement the program on its own, in other cases the cost to the federal government of acquiring the administrative capacity necessary to implement the program might well prove prohibitive.

The analysis here of liability and inalienability alternatives is necessarily speculative and concededly cursory. The conclusions can be summarized as follows: First, just as the allocation of entitlements to private property owners in the eminent domain context might encourage private-sector investment, the rule in *New York*, *Printz*, *Seminole Tribe*, and *Alden* plausibly encourages investment by states in their own administrative capacity. Second, switching from a property rule to a liability rule might make it easier for Congress to take advantage of state administrative capabilities, and would reduce the risk of transaction costs getting in the way. On the other hand, the uncertainty of valuation under a liability rule might discourage states from building up administrative capabilities in the first place. Third, moving in the opposite direction from a property rule to an inalienability rule would raise the cost of new federal programs, because it would preclude Congress from enlisting the states when the states are the least-cost administrators. All in all, the allocation of the relevant entitlements and the decision to protect those entitlements with a property rule rather than a liability rule have ambiguous consequences for the combined size of federal and state governments, while an inalienability rule would unambiguously reduce the combined size of federal and state governments.

D. Borrowing by Federal and State Governments

York supported the Low-Level Radioactive Waste Policy Amendments Act of 1985, the statute that supposedly commandeered the state. See id. at 36 & n.142. And she draws attention to an enigmatic line in Justice O'Connor's opinion: "Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." New York v. United States, 505 U.S. 144, 182 (1992) (quoted at Ryan, supra, at 40).

Yet whatever Justice O'Connor might have meant, it is clear that state officials *can* consent to exchanges with Congress in which the states agree to administer federal programs. See NFIB v. Sebelius, 132 S. Ct. 2566, 2601-02 (2012) ("We have long recognized that Congress ma use [its Spending Clause] power to grant federal funds to the States, and may condition such a grant upon the States taking certain actions that Congress could not require them to take." (internal quotation marks omitted)); Printz, 521 U.S. at 936 (O'Connor, J., concurring) (noting that state officials "may voluntarily continue to participate in the federal [background check] program," and that "Congress is also free to amend the [background check] program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs"). The fact that state officials consent to compliance with a congressional mandate certainly can serve as "ratifi[cation]," notwithstanding Justice O'Connor's suggestion to the contrary in *New York*.

[131] Ilya Somin, Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments, 90 Geo. L.J. 461, 495 (2002).

So far the analysis in this essay has assumed that if a new cost is imposed on the federal government or on the states, the bearer of the cost must respond by either (a) raising taxes or (b) cutting spending. But there is of course a third option: borrowing. Or, more precisely, borrowing is a live option for the federal government: the states, by contrast, labor under balanced budget requirements that severely constrain their ability to borrow in response to a negative revenue shock.[132]

Constraints on state borrowing are not ironclad: states can export costs to future taxpayers by—inter alia—failing to fund public employee pensions and retiree health care. If we focus on debt to bondholders, however, state debt is tiny relative to federal debt: approximately 3.7% of personal income across all states in 2013, while in the same year U.S. Treasury debt stood at more than 114% of personal income.[133] These figures provide at least some indication that legal constraints on state borrowing have bite. Outside the pension and retirement context, states largely live by Polonius's counsel to Laertes.[134]

Congress faces much looser restrictions on borrowing, and so much more leeway to shift costs to future taxpayers.[135] To a first approximation, we might expect to see Congress borrowing up to the point that the marginal political cost of an additional $1 of debt equals the marginal political cost of an additional $1 of taxes. If marginal costs were unequal, then members of Congress could capture political gains by borrowing more or borrowing less. We might likewise expect that when additional fiscal burdens are shifted to the federal government, Congress will allocate some of those burdens to future taxpayers and some to taxpayers in the present period. In other words, we might expect that federalism doctrines allocating valuable entitlements to the states induce the federal government to borrow somewhat more than it otherwise would.

What are the distributional consequences of federal borrowing? The answer turns on several factors. First, we might expect that higher public debt levels will lead to higher inflation,[136] which in turn will lead to redistribution from net creditor households (who tend to be

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132 See David Gamage, Preventing State Budget Crises: Managing the Fiscal Volatility Problem, 98 Cal. L. Rev. 749, 755 (2010) ("Forty-nine of the U.S. states have some form of balanced-budget requirements. And even the one state that does not—Vermont—has generally acted as though so bound." (footnote omitted)).

133 For state figure, see Pew Charitable Trusts, Fiscal 50: State Trends and Analysis (May 17, 2016), http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/fiscal-50. For federal figure, see News Release, Bureau of Econ. Analysis, U.S. Dep't of Commerce, State Personal Income 2013 (Mar. 25, 2014), https://www.bea.gov/newsreleases/regional/spi/2014/pdf/spi0314.pdf; and U.S. Dep't of the Treasury, Historical Debt Outstanding—Annual 2000-2015, https://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo5.htm (last visited Feb. 28, 2017).

134 See William Shakespeare, Hamlet act I, scene iii, line 74, at 196 (Ann Thompson & Neil Taylor, eds., Arden Shakespeare: Third Series, 2006) ("Neither a borrower nor a lender, boy . . . .").

135 On the efficacy of federal balanced budget rules, see generally Alan J. Auerbach, Federal Budget Rules: The US Experience, 15 Swed. Econ. Pol'y Rev. 57 (2008).

136 Carmen Reinhart and Kenneth Rogoff find that the United States is unusual among advanced economies in that it indeed exhibits a debt-inflation link. See Carmen M. Reinhart & Kenneth S. Rogoff, Growth in a Time of Debt, 100 Am. Econ. Rev: Papers & Proc. 573 (2010).

wealthier) toward net borrowers (who tend to be poorer).[137] Second, the distributional consequences of deficit spending depend in part on whether future governments finance interest and principal payments through spending cuts or tax hikes. Insofar as debt today leads to spending cuts tomorrow, then the burden of borrowing falls on the beneficiaries of future government spending. Insofar as debt today leads to higher taxes tomorrow, then the burden of borrowing falls to tomorrow's taxpayers. If tomorrow's federal tax system looks like today's, then the brunt of that cost is borne by higher-income earners. Alternatively, if today's rich reduce their consumption and increase their bequests to their children (presumably tomorrow's rich) in order to offset their children's future tax liabilities, then the burden of borrowing falls on more or less the same people who bear the brunt of present-period taxation.

Adding dimensions of intergenerational equity to the mix complicates the analysis considerably. If future generations are better off than the current generation, might we want to redistribute from tomorrow to today? Michael Doran and Daniel Shaviro have considered this question at length and in depth, and I will not reproduce their thoughtful analyses here.[138] The important point for present purposes is that the allocation of entitlements across levels of government may affect the allocation of fiscal burdens across generations because the federal government is more prone to (and capable of) borrowing than the states.

E. Federalist Safeguards of Progressivity and Political Safeguards of Federalism

So far this essay has operated under the assumption that the judicial allocation of entitlements across levels of government actually matters to the intergovernmental distribution of wealth. Some scholars of federalism might dispute that assumption on the ground that ultimately, it's politics up and down. The most famous articulation of this viewpoint is Herbert Wechsler's 1954 article "The Political Safeguards of Federalism," in which Wechsler argues that states have wholly adequate mechanisms for defending their own interests without judicial intervention. In Wechsler's view, Senators defend the interests of their states; state legislatures influence their House delegations by drawing districts and controlling voter qualifications, and the Electoral College requires presidential candidates to be responsive to state interests.[139] Judicial doctrines do not protect state entitlements because political processes already accomplish that same end.

In a more recent updating of Wechsler's thesis, Larry Kramer argues that party politics play the safeguarding role that Wechsler attributes to the formal institutions. Kramer posits that federal and state elected officials are mutually dependent on "decentralized" political parties that serve to link their electoral fortunes and thus align their interests. Kramer's theory would suggest that members of Congress do not look to export fiscal burdens to the states where possible,

[137] See, e.g., Edward N. Wolff, The Distributional Effects of the 1969-75 Inflation on Holdings of Household Wealth in the United States, 25 Rev. Income & Wealth 195 (1979).

[138] See Michael Doran, Intergenerational Equity in Fiscal Policy Reform, 61 Tax L. Rev. 241 (2008); Daniel Shaviro, Do Deficits Matter (1997); Daniel Shaviro, The Long-Term U.S. Fiscal Gap: Is the Main Problem Generational Inequity?, 77 Geo. Wash. L. Rev. 1298 (2009).

[139] Wechsler, supra note 18, at 546-57.

because members of Congress and state lawmakers are on the same team (or the same two teams, Team Red and Team Blue).[140]

On this view, federal grants to state and local governments are not payments to states for services rendered or for relinquishment of sovereign immunity. The strings attached to federal grants are in fact ribbons wrapped around gratuitous transfers. The federal government has an advantage vis-à-vis the states when it comes to revenue-raising, and federal elected officials generously use the federal tax system to muster funds for their own projects as well as their state-level teammates. Litigation is an aberration. Cases like *New York*, *Printz*, *Seminole Tribe*, and *Alden* are exceptions and federal-state amity is the norm.

The idea of parties as the power centers of American politics may have taken a beating in the 2016 election, in which a candidate entirely independent from his political party ascended to the nomination and then the White House.[141] And the idea that members of Congress are looking out for their co-partisans in the state houses stands at odds with models of political behavior that emphasize reelection or rent extraction as a lawmaker's maximand.[142] Moreover, party politics can have cross-cutting consequences for federal-state relations. On the one hand, partisan considerations may make federal officials more willing to bear revenue-raising responsibilities themselves and to share that revenue with their co-partisans at the state level. On the other hand, partisan considerations may serve to exacerbate federal-state tensions when federal and state governments are controlled by different parties. The conflict between Republican governors and the Obama administration regarding Medicaid expansion under the Affordable Care Act serves as a case in point,[143] as does the conflict between Democratic mayors and the Trump administration regarding the participation of local law enforcement officials in deportation efforts.[144]

My goal here is not to adjudicate the debate between scholars such as Kramer, who view federal-state relations as fundamentally cooperative, and others who see federal-state interactions as competitive to the core.[145] My objective is to explain how the intergovernmental distribution of wealth can affect the interpersonal distribution of wealth. If one believes that federal-to-state transfers spring from political rather than judicial origins, then it is the political safeguards of

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[140] See Larry D. Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 278-285 (2000).
[141] On the implications of the 2016 election for party-centric theories of American politics, see Danielle Kurtzleben, Celebrities, Lies And Outsiders: How This Election Surprised One Political Scientist, NPR (June 21, 2016), http://www.npr.org/2016/06/21/482357936/celebrities-lies-and-outsiders-how-this-election-surprised-one-political-scienti.
[142] See, e.g., David R. Mayhew, Congress: The Electoral Connection (1974); Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101 (1987).
[143] See Where the States Stand on Medicaid Expansion, Advisory Board (Mar. 28, 2017), https://www.advisory.com/daily-briefing/resources/primers/medicaidmap.
[144] See Jessica Taylor, Attorney General Orders Crackdown On 'Sanctuary Cities,' Threatens Holding Funds, NPR (Mar. 27, 2017), http://www.npr.org/2017/03/27/521680263/attorney-general-orders-crackdown-on-sanctuary-cities-threatens-holding-funds.
[145] See, e.g., Lynn A. Baker, Putting the Safeguards Back Into the Political Safeguards of Federalism, 46 Villanova L. Rev. 951 (2001); Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 Sup. Ct. Rev. 1, 26.

federalism that serve as safeguards of progressive taxation. Whether rooted in doctrine or in norms, however, the allocation of revenue-raising responsibilities to the federal government rather than the states still has a significant effect on the interpersonal allocation of resources.

Conclusion

The central argument of this essay is that federalism doctrines that allocate valuable entitlements to the states rather than the federal government can generate interpersonal as well as intergovernmental effects. Specifically, the allocation of valuable entitlements to states rather than to the federal government pushes more revenue-raising toward the federal tax system rather than state tax systems. Since the federal tax system is quite a bit more progressive than even the most progressive state tax systems, the likely net result of these entitlement allocations is to shift resources in a progressive direction.

The magnitude of the shift described above is difficult to estimate. If the $666.7 billion raised by the federal government and transferred to the states in fiscal year 2016 had been raised through the state systems instead, then—holding the progressivity of the federal and state systems constant, and relying on the figures in Table 1—we would expect the after-tax income of the top 1% to rise by $53 billion (or 2.0% of cash income), and the after-tax income of the bottom quintile to fall by $19 billion (or 4.1% of cash income).[146] These effects are not insignificant by any measure. But they should not be treated as lower or upper bounds. These projections may be too high if (as contemplated in Section IV.A) more state-level revenue-raising resulted in more progressive state tax structures. Conversely, these estimates may be too low if Congress—in the absence of an anti-commandeering doctrine—shifted responsibility for what are currently federal programs to the states. That is, the sum of federal-to-state transfers under the status quo is not necessarily a cap on the intergovernmental wealth effect of federalism doctrines, because there may be programs that the federal government administers itself today but that it would foist upon the states if it could.

While caution should be exercised in deriving dollar figures from the analysis above, caution should also be exercised in drawing doctrinal conclusions. Distribution is not the only consideration relevant to constitutional law. Conservatives who support federalism doctrines but also favor flatter tax rates should not necessarily reconsider their embrace of the former. Views regarding federalism doctrines will in most cases be motivated by nondistributional arguments that this essay does not question. The analysis here focuses on the consequences of—and not the justifications for—federalism's allocation of entitlements to the states.

If there is an insight that progressives and conservatives alike can draw from the analysis in this essay, it is—I hope—the following: The distribution of wealth across levels of government is inextricably intertwined with questions of interpersonal distribution. Accordingly, understanding the structure of inequality in the United States requires an understanding of our fiscal constitution. The relationship between federalism doctrines and wealth inequality is complex, but one conclusion seems to emerge clearly: the allocation of rights and responsibilities across levels of government has the potential to shape the allocation of resources across individuals, across households, and across generations.

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[146] See supra Table 1.