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Response: Means, Ends, and Institutions

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I. INTRODUCTION

Professor Brooke Coleman's article, *Civil-izing Federalism*,[1] is an important and thoughtful contribution to what is sure to be a burgeoning literature on the United States Supreme Court in the ten years that John Roberts has served as the Chief Justice. More importantly, Coleman's article is a wide-ranging and ambitious attempt to provide both a description and interpretation of the Roberts Court's willingness to override its ordinary solicitude for state governments where state litigation is concerned. Coleman highlights the extent to which the "conservative" and "liberal" wings of the Supreme Court have "switched" roles when it comes to the Court's protection of state litigation, with conservatives in favor of greater incursions on state authority and liberals in favor of protecting state litigation against federal incursions.[2] Ranging across areas of litigation as broad as personal jurisdiction, preemption, arbitration, and *Erie* conflicts, Coleman identifies three themes in the Roberts Court's "civil procedure" jurisprudence that explain its differential treatment of states where access to litigation is concerned: (1) conservative distrust of state courts, state juries, and state law; (2) conservative distrust of certain substantive claims, such as discrimination and products liability

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1. Brooke D. Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307 (2014).

2. Coleman is not the first to challenge the Supreme Court conservatives' lack of fidelity to the principles of federalism in some doctrinal areas. *See, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004).

claims; and (3) conservative distrust of litigation, particularly class action litigation, as a form of dispute resolution.

This response will not waste limited space providing a further overview of Coleman's argument. Nor will I quibble with Coleman's reading of particular cases, because I think that she makes a compelling case for her primary assertions. This does not mean that there is nothing to quibble with in Coleman's article, but I would rather expand those things toward which the article gestures. If there is a criticism with Coleman's undertaking, it is not so much in what she says, but in what is left unsaid. Coleman's project is, I suspect, bigger than even her ambitious article suggests. That is, she has a normative agenda. Yet the contours and justifications for the agenda remain in the background. My response will attempt to foreground the normative aspirations behind her article and highlight issues that will require Coleman's attention as she moves forward in this endeavor. Needless to say, I think it is a worthy one, and she a worthy advocate.

In broad outline, what follows is my challenge to Coleman's invitation to incredulity as to the Roberts Court's inconsistency in relation to state litigation and other dimensions of its state-regarding jurisprudence. Specifically, I question whether it ought to be regarded as disrespect for state institutions where federal incursions on state authority are premised on a determination that state institutions—here, state courts—are unworthy of trust and deference. Rather than being concerned about federalism as such, Coleman appears to be worried about something far more substantive, and it is the gesture toward the substantive that takes up the remainder of this Response. Here, I argue that Coleman is committed to the vindication of individual claims of injury through litigation, either in single or combined form, as a mechanism for risk regulation. I argue that once this normative value is faced squarely, we can move on to the important project of challenging the value that underwrites the Court's distrust of state institutions *and*, more importantly, defend litigation as disruptive of monopolization of the market for risk regulation and rights vindication.[3]

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3. A recent discussion of federalism makes an important case for thinking about the substantive dimension of federalism in the present political age of "ideologically coherent" and "polarized" political parties. Jessica Bulman-Pozen argues, "Democratic and Republican, not state and national, are today's political identities." Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014). As such, substantive battles—like the appropriate amount of deterrence for corporate activity—are fought within the federalism framework.

II. THINKING ABOUT FEDERALISM AS A MERE MEANS

One of the most important themes in Coleman's article is the centrality of conservative distrust in state institutions in incursions on state litigation. It is clear that Coleman thinks that this assessment is not entirely correct as an empirical matter. What is less clear is whether she thinks it is problematic as an analytical exercise. As stated above, Coleman draws our attention to the Roberts Court's repeated assertions of the failures of state adjudicative institutions, but it is not altogether clear what she wants us to draw from the scene. Perhaps unfairly, I will assume that Coleman wants us to be bothered by the fact of the Court's distrust, but distrust of state capacity and willingness are at the heart of our most important constitutional grants of authority to the national government. The Framers of our Constitution based the grant to federal courts of adjudicative authority over suits involving citizens of different states on concerns about actual or perceived self-dealing on the part of state courts in relation to the claims and defenses of out-of-state litigants.[4] In an effort to preserve good relations among the several states, the federal courts were empowered to entertain these disputes in an era when allegiance to one's state exceeded allegiance to the larger collective.[5] Beyond the adjudicative context, scholars have pointed to Article I's grant of substantive regulatory authority to the national legislature as based, in part, on the assumption of state incapacity to resolve certain kinds of collective action problems.[6] As such, distrust of state institutions and subsequent incursions on their authority are not new or strange in our constitutional-political history.

Within federal courts law, federal decisions to enjoin state court proceedings were premised on a determination of the trustworthiness of state institutions and state law to provide effective vindication of federal rights claims.[7] Finally, the Court's jurisprudence of the adequacy of state decisions on state law grounds has been premised on determinations of the trustworthiness of the state institutions, which might have had reason to shield their decisions from Supreme Court review.[8] Coleman's reasonable limitation of the sphere of her analysis

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4. U.S. CONST. art. III, § 2.

5. *See* THE FEDERALIST No. 80 (Alexander Hamilton).

6. U.S. CONST. art. I, § 8.

7. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); *Ex parte* Young, 209 U.S. 123 (1908).

8. *See, e.g.*, NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); Williams v. Georgia, 349 U.S. 375 (1955).

to private litigation would not likely disclose the extent to which incursions by federal courts into state adjudicative process are regularly based upon the assessment of state institutions.

The fact that trustworthiness is a common theme in federal-state relations is not inconsistent with Coleman's larger point: the Roberts Court has a substantive vision when it deems state adjudicative institutions to be untrustworthy. Again, this in itself should not be surprising. Federalism is clearly only as good as the values it makes possible. When speaking positively of the functions of federalism, we speak of the extent to which the federal structure of government makes policy experimentation possible at lower system costs. Examples include reforms in public assistance a generation ago or how federalism allows for differentiation in deeply contested areas—marriage equality might have been understood to fall within this category until recently. We usually do not add to that list the extent to which federalism provided a structure of protection for racial supremacy throughout much of U.S. history.[9] What is a bit shadowy in Coleman's account is whether the Court has picked the correct substantive value by which to assess the trustworthiness of state institutions.

Even if one thinks that the Roberts Court is analytically correct in basing its decisions to interfere with state judicial institutions on its determination of their trustworthiness, the Court can be rightly criticized for its attempts to protect interests that remain in political contestation—namely the thwarting of individual tort litigation as an avenue of risk regulation and effective redress of injury. For example, when federal courts interfere with state judicial process in the name of fair criminal process or even racial egalitarian substantive policies, these have been understood to be within the realm of authorized bases of interference, even where they have engendered controversy. Drawing upon Coleman's insightful analysis, it becomes apparent that the Roberts Court's interference with state adjudication is based upon a substantive commitment to the deregulation of U.S. business, which is thought to suffer under the weight of overzealous litigation. Coleman suggests that it is problematic that the courts might "use procedure"

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9. *See, e.g.*, Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (discussing the "strained" relationship between federalism and equal protection); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (book review) (writing favorably about federalism as a structure, yet directly addressing federalism's complicity with the tyranny of the local majority over the rights of minorities at the state level in American history).

for substantive ends,[10] namely to curtail access to employment discrimination and product liability claims, to name two. However, it is not altogether clear that this is not the sort of use to which procedural rules ought to be put. If we accept that federalism (understood as state-decisional autonomy) is a value that might be overcome under certain conditions and for certain ends, then it seems that it would be correct to override federalism upon a certain showing (failure of the state institutions) to protect certain other overriding values (equality and fair process). The central question that Coleman's project raises is whether the values that the Court attempts to protect are the appropriate values.[11]

My comments should be understood as challenging the extent to which Coleman posits a conception of federalism that can be divorced from its ends. If we accept the proposition that assessments of the trustworthiness of state institutions are present in our constitutional culture and have become a regular part of our Constitution's life across time in several jurisprudential spheres, then we should not be troubled by what the Roberts Court says about state courts, at least as an analytical matter. Moreover, if we concede that trustworthiness assessments are not foreign to "our federalism," then it is reasonable to ask whether the assessments are driven by attempts to protect substantive interests. This, too, has often been the case. So what, then, do we make of Coleman's federalism problem? I contend that Coleman's federalism problem is not really a federalism problem, at least not in the procedural, nonsubstantive sense. Rather, it is about something more. And it is to that which I now turn.

III. THINKING ABOUT MEANS AND ENDS

Though Coleman might be read to argue that federalism concerns should play no role in procedural cases, she clearly believes that state litigation plays an important regulatory role that should be

10. Coleman, *supra* note 1, at 334.

11. If one thinks about statutory enactments as evidence of public value commitments, see, for example, WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010), one might argue that the passage of the Class Action Fairness Act of 2005 (CAFA) at the dawn of the Roberts Court suggests that there is a national consensus that distrusts the capacity of state judicial institutions (particularly in the class action context) in disputes that involve significant risk to corporate defendants. I do not argue that CAFA is path-breaking legislation in a league with the National Labor Relations Act or the Civil Rights Act of 1964, but it might be understood by the Court as Congress' invitation to act to solve what it takes to be a significant challenge to national economic productivity.

accommodated. Relying on normative accounts of federalism's function, Coleman argues that the traditional accounts of federalism apply in large part to the private litigation context. Taken together, these suggest that the state's interest in protecting its citizens ought to be taken into account in procedural cases having some federalism impact. Coleman writes that taking seriously states' interest in civil adjudication means that the Court "should give their interests" due consideration.[12] However, it is unclear how Coleman proposes to guide the Court's analysis of whether and when state law should yield in the face of a conflict with a national adjudicative or regulatory regime. Coleman's declaration that federalism ought to count in the Court's analytical frameworks regarding procedure does not provide a clear picture of why state interest ought to count, or the way such counting might affect the outcome of the cases that she describes for us. This is evidenced when Coleman suggests that federalism is of value to the extent that it ensures the division of political power and the protection of liberty. It is not until nearly the end of the article that Coleman asserts that the Court's deference to state adjudicative processes generally furthers the ambition of ensuring access to justice. In this account, federalism and private litigation are potential accomplices because each has the potential to disrupt the monopolization of both the methods (litigation or regulation) and means (national agencies and courts or state courts) by which policy around risk regulation and rights vindication is set. It is here that Coleman appears to posit the most explicit normative case for access to litigation as a tool for reforming the behavior of corporate actors.

Although its presentation is somewhat muted, Coleman clearly believes that protecting private litigants' ability to bring claims for rights violations serves the function of protecting liberty.[13] Coleman writes against much scholarship that appears not to value litigation as contributing to the adversarial culture of the United States.[14] Like other scholars who laud litigation's capacity to deliver knowledge of injury to the public and to hold actors accountable for the harms they cause, Coleman, although in a bit of a whisper, celebrates litigation's capacity to affect behavior broadly.

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12. Coleman, *supra* note 1, at 360.

13. Coleman is clearly not alone in this regard. *See, e.g.*, CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW (2001).

14. *See, e.g.*, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

Thus, Coleman's call for a jurisprudence that takes state interests into account does not arise out of an abstract commitment to state dignity or sovereignty, but rather is grounded in the substantive assertion that state adjudicative institutions increase the likelihood that individual citizens will have the ability to challenge powerful interests whose decisions and actions cause harm. Understood in this way, Coleman's federalism is not nearly as "neutral" as she initially presents. Federalism here is about multiplicity and fractionation, but multiplicity and fractionation at the service of the substantive end of litigant access. But litigation does more, and though Coleman gestures at this "more," the next Part will attempt to draw out the institutional dimension of litigation.[15]

IV. THINKING ABOUT MEANS AND ENDS AND INSTITUTIONS

Lingering in the background of Coleman's article is the verdict that the liberal Justices render in favor of litigation at the state level—that bureaucratic institutions are often unable or unwilling to respond to the rights violations that threaten safety and health. Even less explicit is the assertion that such agencies need adjudicative justice to better perform their jobs. This final Part attempts to foreground the institutional dimension of Coleman's article, which rests, at least in part, on the assertion that both litigation and federalism offer the possibility of disrupting institutional monopolization of policy around risk regulation and the compensation of victims for injuries sustained by the actions and decisions of market actors. This discussion will draw on cases in the preemption context that pit litigation against the calibrated policy choices of the bureaucratic sphere and paint litigation as disruptive of those institutions and their hard-fought policy objectives. It will also briefly draw on literature about private litigation's interaction with, and impact on, other institutions. Lastly, it will draw on the impact that institutional competition has on litigation.

Despite Coleman's focus on the Roberts Court, my discussion of the institutional dimension of the preemption jurisprudence focuses on cases from the Rehnquist Court Era. This discussion addresses the extent to which the roots of the Rehnquist Court's preemption jurisprudence lay in the asserted fear of the disruption and intrusion upon the settlements reached by the national political process by

15. For an important discussion of the institutional dimension of litigation, including decisions to create rights of private enforcement, see SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010).

individually initiated litigation and state regulatory regimes.[16] The cases discussed below embody the Court's fear of disruption of the national balance that underwrites its preemption jurisprudence beyond contexts of explicit congressional authorization or conflict.

One of the best examples of the Court's expansive turn in preemption jurisprudence is *Geier v. American Honda Motor Co.*, in which the Court was willing to preempt state common law claims where there was neither explicit congressional authorization nor a clear conflict between state and federal law.[17] The case involved a determination of whether a state tort action was preempted by the National Traffic and Motor Vehicle Safety Act of 1966 (Motor Vehicle Safety Act). The plaintiff, Alexis Geier, brought suit against Honda Motor Company as a result of injuries she sustained because of her car striking a tree. She alleged that Honda was liable for defective manufacture of the vehicle because it was equipped only with seat belts and not with airbags or other passive restraint devices. The Court held that her action against Honda was preempted despite the presence of a savings clause in the Motor Vehicle Safety Act. It based its conclusion on its determination that the "no airbag" suit was incompatible with the achievements of the federal motor vehicle safety standards.

The Court explicitly held that the Motor Vehicle Safety Act's savings clause undermined any argument that the statute expressly preempted the state tort claim brought by Geier. Nevertheless, the Court declared that it would not "give broad effect to [the] saving clause[] where doing so would upset the careful regulatory scheme established by federal law."[18] The Court concluded that state "no airbag" suits are in conflict with the federal safety standard. According to the majority, the 1984 version of Safety Standard 208, which governed the production of Geier's 1987 Honda, required some portion of manufactured automobiles to include passive restraints, i.e., airbags or automatic seatbelts. The Court described Safety Standard 208 as allowing vehicle manufacturers to decide between installing

16. The conception of disruption that I use throughout this response is based on a conception that increased institutional players complicate the policy-making process. It also rests on an assertion that different institutions might allow different groups to access the levers of policy making in different ways. For a thoughtful articulation of the basis for this, see SEAN D. EHRLICH, ACCESS POINTS: AN INSTITUTIONAL THEORY OF POLICY BIAS AND POLICY COMPLEXITY 5-24 (2011).

17. 529 U.S. 861 (2000).

18. *Id.* at 870 (quoting United States v. Locke, 529 U.S. 89, 106 (2000)) (internal quotation marks omitted).

airbags or automatic seatbelts. The Court recognized that the allowance of alternative approaches would provide the United States Department of Transportation (DOT) with data on the comparative effectiveness of the alternate safety mechanisms, allow the auto industry time to incorporate airbags safely and cost-effectively into their automobile design, and allow for the development of cheaper, alternative passive restraints. The Court, with Justice Stephen Breyer writing for the majority, emphasized the passive restraint rule's procedural and substantive history (familiar to all administrative law students), which involved several factors related to the relationship between passive restraints and automobile injuries. In short, the Court emphasized the extent to which the development of Safety Standard 208 involved input from different institutional actors—Congress, the courts, and the agencies—over a period of almost twenty years. Further, the Court emphasized the different, and competing, factors that went into the DOT's promulgation of Safety Standard 208. Each of these established the Court's conclusion that Safety Standard 208 "embodies the Secretary's policy judgment" about the most appropriate way to ensure increased auto safety.[19] The Court described the safety standard as the product of learning and policy judgment that weighed and balanced competing alternatives in an uncertain and evolving policy environment.

The Court's depiction of state policy as a threat to carefully calibrated national policy has not been limited to contexts of individually initiated suits under state tort law. In *Crosby v. National Foreign Trade Council*, the Court preempted a Massachusetts statute that prohibited the state from doing business with companies doing business with Burma.[20] The basis of the Court's preemption holding was that the state statute posed an obstacle to the fulfillment of congressional purpose in a federal statute imposing mandatory and conditional sanctions on Burma. The Court concluded that the Massachusetts statute undermined three aspects of the federal sanctions statute in that it infringed on the delegation of discretion to the President to manage the sanctions imposed on Burma, it expanded sanctions to include actors not covered in the federal sanctions statute, and it interfered with the President's development of a

19. *Id.* at 881 (quoting Brief for the United States as Amicus Curiae Supporting Affirmance at 25, *Geier*, 529 U.S. 861 (No. 98-1811)) (internal quotation marks omitted).

20. 530 U.S. 363 (2000).

"comprehensive, multilateral strategy toward Burma," which would involve diplomacy with other nations.[21]

The Court described the federal sanctions regime as having delegated to the President "flexible and effective authority over economic sanctions against Burma."[22] The flexibility allowed the President to unilaterally terminate any and all sanctions if he determined that there was progress in Burma's record on democracy and human rights protections. The Court held that the authority to terminate the sanctions imposed in the federal legislation would be undermined by the Massachusetts statute that imposed economic sanctions outside of this regime. By contrast, the Court described the Massachusetts statute as imposing an inflexible sanctions regime because its sanctions had immediate effect and had no termination provision. Explaining its conclusion that this posed an obstacle for the President's authority, the Court wrote:

> This unyielding application undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.[23]

The Court described the President's diplomatic exercise of authority as bargaining with the Burmese regime for improvement in its record on both democracy and human rights. The President's bargaining with the Burmese regime is described as requiring the President to have full recourse to all of the "bargaining chips" that the American economy represents. Any parallel attempt at the state level to regulate the domain within the President's portfolio "reduces the value of the chips created by the federal [sanctions] statute."[24] The federal sanctions regime is further depicted in terms that suggest that Congress provided the President with a tool kit with which he was to apply pressure on the Burmese regime in an effort to change its conduct and ultimately its political system. It represents Congress's "calibration of [the] force" required in the President's diplomatic

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21. *Id.* at 373-74.
22. *Id.* at 374.
23. *Id.* at 377.
24. *Id.*

arsenal. To the extent that the Massachusetts statute augments that force, it undermines the specific calibration that Congress had reached. Like the regulatory regime depicted in *Geier*, the federal sanctions regime in *Crosby* represented the resting point of Congress's deliberations about what would be necessary to bring about change in Burma.

In addition to the state statute's undermining of the President's arsenal of "chips" in his bargaining with Burma, the Court held that the state statute interfered with the President's larger diplomatic functions with other nations in establishing a "comprehensive, multilateral strategy to bring democracy to and improve human rights practices . . . in Burma."[25] The Court declared that the development of an international effort with respect to Burma was undermined because the President's voice is "obscured" by any action outside of the Executive's. The Court concluded that the Massachusetts statute "threaten[ed] to complicate discussions [with other nations]" and impaired the President's ability to "speak for the Nation with one voice in dealing with other governments."[26] In comparison to the calibration and consideration that underwrite the President's exercise of authority under the national sanctions regime, the Court declared that "enclaves fenced off willy-nilly by inconsistent political tactics" at the state and local level threated incoherence in the President's international bargaining posture. Though this case might be read as *sui generis* in that it involves a confrontation with a state directly, foreign affairs considerations have been important in deciding cases involving solely private actors. Specifically, federal courts have preempted state law suits between Holocaust victims and insurance companies for their actions during the Nazi occupation of Europe on similar grounds.[27]

It is also important to consider again the institutional dimension of the Roberts Court's distrust of state adjudicative institutions. It is premised upon the Roberts Court's assertions that state courts are sites dependent upon ignorant juries to litigate complex disputes, whereas the regulatory agencies are sympathetically seen as experts in the specific areas of regulatory policy. Coleman deftly deploys the way in which state court process is juxtaposed against administrative expertise and found wanting by the Roberts Court. Moreover, Coleman's

25. *Id.* at 380 (quoting Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166) (internal quotation marks omitted).

26. *Id.* at 381.

27. *See, e.g.*, *In re* Assicurazioni Generali, S.P.A., 592 F.3d 113, 118 (2d Cir. 2010).

portrayal of the Court's negative attitude toward substantive claims and procedural forms (that is, class action litigation) describes arguments that tend to demonstrate the untrustworthiness of state adjudicative process. Specifically, state litigation is rendered as the domain of unscrupulous plaintiffs' attorneys, who have captured state adjudicative institutions. Moreover, class actions introduce irrationality into the litigation process by raising the risk of outsized jury awards, which disconnects the decision to settle or litigate disputes from the merits of the underlying claim, thereby encouraging more "frivolous" litigation. It is this narrative of administrative competence versus litigation's irrationality that underwrites the Court's case law.

But those arguing against preemption have fought back against these conclusions, arguing against the relative competencies of agencies that are in the grips of the industries they regulate.[28] For example, coverage of the General Motors (GM) ignition failure tragedy has pointed to the laxity of the National Highway Traffic Safety Administration in identifying the problem and forcing GM to respond with appropriate changes.[29] In other eras, scholars have acknowledged the information asymmetry that exists between drug manufacturers and the Food and Drug Administration about the negative effects of drugs that have been approved. Others have pointed out the resource deficits that make it difficult for agency actors to overcome such information deficiencies even where the political will is present. But there is also the assertion that agencies and industry involve a revolving door that includes professionals who have spent much of their careers defending industry actors against bureaucratic and adjudicative regulation and who are not being empowered to "guard the henhouse." These institutional dynamics are clearly present in Coleman's discussion, but foregrounding them draws our attention to another issue that is less explicit but perhaps more important in thinking about how litigation and federalism work together.

Litigation disrupts the monopolization of risk regulation. It rejects the belief that industries can, without outside pressure, police themselves. It also rejects the contention that "experts" are the only source of regulatory control. Indeed, litigation is no less a pessimist

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28. *See, e.g.*, THOMAS O. MCGARITY, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES (2008).

29. Hilary Stout & Aaron M. Kessler, *Senators Take Auto Agency To Task over G.M. Recall*, N.Y. TIMES (Sept. 16, 2014), http:///www.nytimes.com/2014/09/17/business/senate-hearing-on-nhtsa-and-recalls.html?_r=0.

about the capacity of these institutions to adequately deter actions that threaten safety and well-being than is the Roberts Court. Calls for litigation rest on assertions of institutional incompetence and capture no less than the Roberts Court. Scholars of adversarial culture have argued in examination of particular areas that litigation plays an important role in shaking bureaucratic and professional cultures out of their comfort with their capacity to regulate risk. Political science scholar Charles Epp has argued that litigation empowers outside agitators with a formal mechanism that intrudes upon cloistered cultures that seek to resolve problems of risk through the monopolization of access to information and the attention of the dominant actors. Epp writes:

> All administrative systems, whether of the insulated professionalism or the legal oversight variety, are human systems shaped by patterns of socially based cognition and communication. All therefore are subject to substantial variation in their processes and behaviors based on variations in socially based models of knowledge and norms. All human systems seek to minimize embarrassment based on shared public norms. But systems of insulated professionalism have richly developed mechanisms for *protecting* members of the organization from embarrassment in the eyes of the public .... The decentralized, court-centered system of oversight in the United States, by contrast, imposes the constant possibility of a fully public airing of individual complaints through the mechanism of the lawsuit, creating a powerful incentive for reform.[30]

Federalism, which offers the possibility of variation in substantive norm articulation, provides the mechanism by which litigation is able to serve its intrusive, disruptive, and reforming potential. Understood in this way, we might shift from the burden of defending abstract conceptions of federalism to arguing in favor of the ways in which federalism, at least in some areas, allows for the contestation over the ways in which a democratic polity will respond to the need to deter behavior that threatens the safety and well-being of the population. Coleman has provided us with a useful and important place to begin this conversation. Indeed, it gestures away from procedure as merely procedural. One can only hope that Coleman, and those like her, accept the invitation that she has extended in this worthy contribution.

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30. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 228 (2009).