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## Federalism and Nationalism: Time for a Détente?

Heather K. Gerken

*Yale Law School*, [heather.gerken@yale.edu](mailto:heather.gerken@yale.edu)

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## FEDERALISM AND NATIONALISM: TIME FOR A DÉTENTE?

HEATHER K. GERKEN\*

### INTRODUCTION

There has been a “merry war”<sup>1</sup>—or maybe just a war—between federalism’s stalwarts and traditional nationalists. I came to the debate late in the game, when it had reached that point that Robert McCloskey so vividly described in constitutional law—when everyone seems like aging boxing club members who have fought so long that they know each other’s moves and fight mostly to tire the other out.<sup>2</sup>

I want to propose a détente between those opposing camps. I actually want to propose dispensing with these camps altogether, but I’d be happy with enough of a suspension of hostilities to move federalism debates forward.<sup>3</sup> I’ll explain why the time is right for a détente, the benefits to be gained from it, and the concessions each side needs to make. My core claim is that the emergence of what I’ve called the “nationalist school of federalism”<sup>4</sup> has unsettled traditional federalism debates and created the conditions for a détente to occur. For ease of exposition, I’ll refer to the nationalist school as the “new nationalists,” just so you can distinguish them from the “traditional nationalists” when I’m describing the different schools of thought.

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\* J. Skelly Wright Professor of Law, Yale Law School. What follows is a lightly edited, lightly footnoted version of the Childress Lecture, which I delivered at St. Louis University School of Law. I am grateful to the faculty and the dean for inviting me to take part in such a wonderful lecture. It was a treat to have the opportunity to present this work to scholars I deeply admire. I was especially grateful to have Joel Goldstein as my host, as he puts the words *gentleman* and *scholar* in the phrase “gentleman scholar.” My thanks to a set of excellent (and speedy) readers, including Bruce Ackerman, Jessica Bulman-Pozen, Bridget Fahey, Dick Fallon, Abbe Gluck, Joel Goldstein, Alex Hemmer, Sundeep Iyer, Rebecca Lee, Daryl Levinson, David Louk, Erica Newland, and Daniel Rauch. Great research assistance was provided by Zach Arnold, Marguerite Colson, Sundeep Iyer, Noah Lindell, Erica Newland, Rosa Po, Daniel Rauch, Zayn Siddique, and David Simins.

1. WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING* act 1, sc. 1.
2. ROBERT G. MCCLOSKEY, *THE MODERN SUPREME COURT* 291 (1972).
3. I use the term “détente” deliberately. A détente implies a temporary and uneasy truce rather than a demand that each side abandon its principles.
4. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889, 1890 (2013).

I recognize the hubris in this. It's cheeky enough to announce a new school of federalism, let alone to insist that it should reorient a long-standing debate. But although this work has been building steadily for a long while, it still occupies an uneasy place in the debate. Thinking about why that is so has led to this Article. Be warned, however. It is intended as a provocation.

Here's the elevator pitch. The emergence of the nationalist school of federalism—the rise of the new nationalists—has unsettled traditional federalism debates for two reasons. The first is *analytic*. The new nationalists' work destabilizes the fundamental premise undergirding both camps—that decentralization furthers state-centered aims, and that centralization furthers nationalist ones. The new nationalists have shaken things up in a second way—one that goes to ends, not means. Their work has called into question the *empirical* and *normative* foundations of the federalism/nationalism divide by introducing a quite different picture of federal-state relations into the mix. This account relies not on sovereignty or autonomy, but on a competing vision of state power—a notion that one side doesn't associate with federalism and that mostly irks the other. The new nationalist account of federal-state relations is one in which form does not always follow function and federal power does not always track the exercise of federal jurisdiction, one in which politics and practice are important as rules and regulations. It is a picture of “Our Federalism” in which the states play a vibrant role even as the federal government regulates as it sees fit and in which the real obstacle to uniformity is politics, not law. *That* is a reality that neither camp anticipated<sup>5</sup> and that some continue to resist. But it is also a state of affairs that should offer a reasonably satisfying common ground for both camps or, at least, a new terrain on which to do battle.

If you accept the new nationalists' analytic and empirical claims—even if you believe that they hold at least some of the time—then the time is ripe for a *détente*. On the analytic side, the weapons the two camps have been wielding are too crude for their purposes. And on the empirical side, if we care about perfecting the democracy we actually have, many of the field's rumpuses are either beside the point or incorrectly framed. In the long run, the emergence of the new nationalists should reorient rivalries inside the federalism tent and help members of both camps fashion a “new process federalism” that is better suited for the current debates. There are fights to be had, to be sure. They just aren't the ones we've been having.

There's also a leitmotif to my Article. It's a story about the limits of law, or maybe the limits of law professors. The claims of the new nationalists are unsettling for disciplinary reasons as well as substantive ones. If anything, this

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5. Though some did, including one of the contributors to this symposium, Ed Rubin. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *ULCA L. REV.* 903 (1994).

work is designed to make law professors crazy—or crazier than they already are—given their penchant for formal categories, conceptual tidiness, and clear jurisdictional lines. The heavily descriptive work of the new nationalists shows a relationship that is negotiated, iterative, interactive, hard to categorize, and still harder to predict. It is premised on practice as well as presumptions; processes as well as principles; routines as well as regulations. That means that much of what is going on cannot be made legible with traditional legal materials. It's worse than that, actually, because once you accurately capture what's going on, that analysis may not lend itself to legal pronouncements of any sort. The new nationalists have used a lot of terms to describe federal-state relations—polyphonic, iterative, negotiated, interactive, uncooperative—but the most honest term is “messy.” And while we, good law professors all, have offered our prescriptive arguments about what must be done, at the end of the day much of “Our Federalism” requires little more than muddling through.

#### I. THE NEW NATIONALISTS AND THE RELATIONSHIP BETWEEN MEANS AND ENDS

If you haven't been reading the federalism literature of late, you might be asking yourself what the “nationalist school of federalism” is in the first place. Don't nationalists believe in centralization and federalism's stalwarts believe in devolution? How, then, can a *nationalist* believe in giving power to the states?

If you're thinking that a nationalist account of federalism is an oxymoron, don't worry. These common-sense questions reveal the core assumption that undergirds both camps and tee up my first analytic point.<sup>6</sup> Each side has made the same assumption about means and ends. They've assumed that devolution promotes state-centered ends and centralization promotes nationalist ones. Indeed, each side has fought passionately for devolution or centralization based on its faith in that simple hypothesis. The emergence of the *nationalist* school of federalism, however, has unsettled this long-standing premise of the nationalism/federalism divide.

##### A. *The Core Assumption Undergirding Federalism Debates*

The easy challenge, I suppose, would be to insist that there shouldn't be any camps at all in federalism debates. After all, both devolution and centralization are properly understood as means, not ends. The question is what end do they serve? And the most plausible answer is that devolution and

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6. Portions of this Part have been adapted from Gerken, *supra* note 4.

centralization are means to the same end: a well-functioning democracy,<sup>7</sup> perhaps even a well-functioning union.<sup>8</sup>

So why camps? It's not just that the end—a well-functioning democracy—is a complicated and delicate instrument. It's also that there are many, many sensible justifications for moving decisions up or down the governance hierarchy. If we were just quibbling about means, views on devolution ought to be highly contextual and fall along a broad continuum. If we were just quibbling about means, these questions could only be worked out on a case-by-case basis, and disagreements would concern matters of degree. We'd see the kinds of debates among law professors that we see among functionally oriented political scientists and economists, who dutifully work through arguments about externalities and economies of scale for every issue. What we see instead are clearly defined intellectual camps with firm commitments to a single institutional design strategy across policymaking spheres.

Part of the problem is that we aging boxing club members tend to move so quickly to the heart of our disagreement—*how* best to protect our democracy—that means sometimes bleed into ends during the discussion. Federalism stalwarts, for instance, often write as if the whole point of the doctrine is to protect state power, full stop, rather than to protect the right forms of state power in the right situations. They write as if we ought to have a one-way ratchet in favor of state power even if we all know they don't really believe that.<sup>9</sup> The traditional nationalists are just as guilty on this front. They are all but allergic to anything having to do with state and local power and often deploy a one-way ratchet of their own even if they, too, would acknowledge a role for the local when pressed.

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7. I take that premise to be implicit in federalism doctrine itself. If you carefully examine our working list of the basic purposes states are thought to serve, it is woefully incomplete but plainly depicts states in service of a well-functioning democracy. Indeed, you might well think that federalism has always served nationalist goals. The laboratories of democracy, for instance, plainly benefit national ends. So, too, the notion that states facilitate choice or serve as bulwarks of liberty is attractive to anyone aiming for a well-functioning national democracy.

8. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010).

9. I got a taste of it this last year when I presented a paper on the political safeguards of horizontal federalism. See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014). Many readers had trouble processing the idea that politics could safeguard interstate relations. Having consumed a fair amount of federalism scholarship, they took the purpose of the safeguards to be protecting state power (and thus couldn't see how safeguards could work at the horizontal level). A moment's thought makes clear that this position is muddleheaded, not to mention flatly inconsistent with the position of the leading scholars of process federalism, from Wechsler to Kramer to Young. *Id.* at 67–68. Nonetheless, the idea of a one-way ratchet is sufficiently dominant within the discourse that people typically equate favoring federalism with favoring state power.

At this point, every law professor is putting together the best case for clearly delineated camps and one-way ratchets. For those unfamiliar with academic habits, the go-to scholarly move is to insist on the three c's: context, complexity, and contingency. But academics are anything if not a fourth "c"—*contrarians*.

I should emphasize to the contrarians reading this Article that I'm not aiming for the easy target. I know there is a much more serious argument for camps than the crude means-bleeding-into-ends definitions of federalism and nationalism. The positions of the two camps are more nuanced and their arguments more serious. Proponents of federalism and nationalism don't just disagree about means; they disagree about ends—about what kind of democracy we want.

For federalism's stalwarts, the decentralization equation is straightforward. Their ideal is a state-centered democracy, one that emphasizes state power, state politics, and state polities. Given that end, they worry that the federal-state balance has tilted too far to the federal side. On this view, a one-way ratchet toward state power—or, at least, a camp—is appropriate because states have lost so much authority over the years that we need to shore them up wherever we can.

The traditional nationalists, of course, subscribe to a different vision of democracy: one that emphasizes national power, national politics, and a national polity. They are also skeptical of state and local power because they associate both with the dreaded "-isms" of these debates (cronyism, parochialism, and, worst of all, racism). That's why there's a nationalist camp.

I think that both camps have an outdated conception about the ends of federalism, something I'll discuss in the second half of this Article. But for now, I want to take on what both camps assume to be the *nondebatable* part of the analysis: the link between means and ends. For federalism stalwarts, the equation is simple: devolve power to the states, and you serve state-centered ends. For traditional nationalists, the argument is just as straightforward: centralize, and you serve nationalist ends.

#### *B. Why the New Nationalists Have Undermined the Core Assumption of the Federalism/Nationalism Debate*

Enter the new nationalists, who insist that devolution can further *nationalist* aims.<sup>10</sup> As I've written elsewhere, the new nationalists have shown

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10. Some have tried to show the converse—that centralization can serve state-centered interests by helping states overcome spillovers, take advantage of economies of scale, and the like. *See, e.g.*, ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* 1 (2008); David J. Barron, *A Localist Critique of the New Federalism*, 51 *DUKE L.J.* 377 (2001); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 *STAN. L. REV.* 115 (2010). Arguably, this debate dates back centuries,

that devolution can “improv[e] national politics, strengthen[] a national polity, better[] national policymaking, entrench[] national norms, consolidat[e] national policies, and increas[e] national power.”<sup>11</sup> If that’s the case, then we need to dispense with camps, or at least reorient the debate.<sup>12</sup>

So how *does* devolution further traditional nationalist aims? I can’t possibly cover the whole terrain, but let me give you some examples. Before turning to those examples, I should emphasize that the sort of “decentralization” nationalists are describing may be sheared of sovereignty, but it isn’t the sort of decentralization we associate with GM or McDonalds.<sup>13</sup> Instead, it’s one in which state and local officials serve two masters, not one. That’s because state officials rely on a separate power base, one that boasts a political makeup quite different from that of the center.

Much of the work of the new nationalists has focused on what I call “the discursive benefits of structure”<sup>14</sup>—the ways that structural arrangements help us work through normative disagreement, accommodate political competition, and tee up national debates. To grasp how this works, think about the debates over health care, abortion, immigration, voter ID, same-sex marriage, or

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as early Anti-Federalists favored commandeering in order to preserve local power and opportunities for local resistance. *See, e.g.,* LACROIX, *supra* note 8, at 7–8.

11. Gerken, *supra* note 4, at 1893.

12. I should offer a caveat. For several years, I have argued that it’s possible to be a nationalist who believes in federalism, and one can certainly spot such scholars in the academy. *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009). More recently, a few scholars have “outed” themselves as members of the nationalist school. *See* Feature Contents, *Federalism as the New Nationalism*, 123 YALE L.J. 1888 (2013); *see also* Gerken, *supra* note 40 (outlining the basic tenets of the school). But our work builds off the work of many, many people who have been writing for a good, long while. In this Article, then, I am roping these unsuspecting souls into our project even though none has characterized his or her work in this fashion and some would surely object. So when you read the phrase *new nationalists*, please remember that I’m talking both about those who have self-consciously identified themselves as such and those who have never put themselves forward in this fashion but whose work, in my view, fits within the framework I’m offering. Given Ed Rubin’s presence at the symposium, it’s worth noting that I include him in this group. Although his article with Malcolm Feeley jumpstarted a different debate than this one, it anticipates some of the arguments made by the new nationalists in a brief aside about the growth of national power. *See* Rubin & Feeley, *supra* note 5, at 923–33 (noting that the growth of the national government can “increase[] the diffusion of administrative power by adding a second decision-maker” to the state-dominated process and thereby “introduce new standards, subject old ones to debate, [and] increase popular awareness”). Rubin and Feeley also remarked upon the significance of the increasing number of cooperative federal regimes, *id.* at 933–34, although they did not pursue these questions as they had other fish to fry.

13. Rubin is correct when he notes in his contribution to this Symposium that I prefer to “honor [our] self-designation” as “federalism” rather than challenge it, Edward L. Rubin, *Federalism as a Problem of Governance, Not of Doctrinal Warfare*, 59 ST. LOUIS U. L.J. 1117, 1123 (2015), but what we are both describing are the virtues of a decentralized system.

14. Gerken, *supra* note 4, at 1894.

marijuana. The work on the discursive benefits of structure shows how, in Cristina Rodríguez's words, federalism "amplifies the polity's capacity for politics."<sup>15</sup>

My work, for instance, has looked to the benefits that federalism affords democracy's outliers—racial minorities and dissenters—by supplying them with a chance to turn the tables, wield the power of the majority, protect themselves rather than look to the courts for solace, and set the national agenda.<sup>16</sup> On this view, rights and structure have served as "interlocking gears" moving our democratic projects forward.<sup>17</sup> Jessica Bulman-Pozen has cast states as the "robust scaffolding" needed for national politics to flourish.<sup>18</sup> Cristina Rodríguez has depicted state and local governments as sites for working out disagreements that are too difficult to rehearse on a national stage.<sup>19</sup>

This and other works show how states and localities serve an integrative role, pulling outsiders into the system<sup>20</sup> and helping us manage cultural change and democratic conflict.<sup>21</sup> But note that this is decidedly a nation-centered account. Our work does not depict states as separate and independent regulatory arenas that allow us to settle our disagreement by retreating to our comfortable red and blue enclaves. Instead, the new nationalists imagine states and localities as sites for working out conflict and waging the fight over national values and national politics.

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15. Cristina M. Rodríguez, *Federalism and National Consensus* 4 (Oct. 2014) (unpublished manuscript) (on file with author).

16. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) [hereinafter Gerken, *Dissenting by Deciding*]; Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013) [hereinafter Gerken, *Exit, Voice, and Disloyalty*]; Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) [hereinafter Gerken, *Second Order Diversity*]; Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958 (2014) [hereinafter Gerken, *Loyal Opposition*]; Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) [hereinafter Gerken, *Federalism All the Way Down*].

17. Heather K. Gerken, *Windsor's Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 588 (2015).

18. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1081 (2014). For a different but related take on the relationship between federalism and political conflict, see David Brian Robertson, *Federalism and the Making of America* 1–3 (2011) (unpublished manuscript) (on file with author).

19. Rodríguez, *supra* note 15; see also Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014).

20. See Gerken, *Federalism All the Way Down*, *supra* note 16, at 47–48 (discussing federalism's centripetal effects).

21. Bulman-Pozen, *supra* note 18; Rodríguez, *supra* note 15. For an ambitious new book attempting to situate American federalism in the field of American political development and sounding many of these themes, see Robertson, *supra* note 18.



Devolution also serves a number of more technocratic aims for the new nationalists, as environmental federalism scholars have shown.<sup>22</sup> This scholarship moves well past the tired laboratories of democracy account to identify the policymaking benefits associated with devolution, including mutual learning, iterative regulation, helpful redundancy, and healthy competition.<sup>23</sup>

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22. This work dates as far back as Robert M. Cover's *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981), though it was made prominent by Robert Schapiro and environmental law scholars like Bill Buzbee and Erin Ryan. See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011) [hereinafter RYAN, *TUG OF WAR*]; David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1 (1997); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145 (2007); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Daniel C. Esty & Damien Geradin, *Regulatory Co-Opetition*, in *REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES* 30 (Daniel C. Esty & Damien Geradin eds., 2001); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2002); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) [hereinafter Ryan, *Negotiating Federalism*]; SCHAPIRO, *supra* note 12. This work displays deep continuities with the more technocratic threads of classic federalism theory, particularly the notion that the states are useful because they serve as laboratories of democracy. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

23. Dynamic federalism, iterative federalism, polyphonic federalism, negotiated federalism, relational federalism—all are terms designed to capture the ways in which state regulation improves federal regulation, and vice versa. See sources cited *supra* note 22; see also Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 U. KAN. L. REV. 1219 (1997); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011); Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567 (2011); Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715 (2010); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, in 34 CRIME & JUSTICE: A REVIEW OF RESEARCH 377 (Michael Tonry ed., 2006); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001). The new nationalists have even offered a friendly amendment to the laboratories argument, with Gluck showing that cooperative federal regimes can be the best catalysts of local experimentation, Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 996 (2014), and Jessica Bulman-Pozen, Charles Tyler, and I exploring its political dimensions. Heather K. Gerken & Charles Tyler, *The Myth of the Laboratories of Democracy* (2014) (unpublished manuscript) (on file with author); see also Bulman-Pozen, *supra* note 18, at 1124–29.

The new nationalists have also identified the benefits that accrue from the more combative regulatory role that states play in our system. This work provides a thicker and more realistic account of the role states play in checking federal overreach than conventional federalism's trope about states' serving as bulwarks of liberty. Federalism scholars haven't found much of a middle ground between the anodyne (states competing for the hearts and minds of their citizens) and the alarming (armed rebellion). The new nationalists, however, have shown how state implementation of federal schemes facilitates much more varied and useful forms of resistance. For instance, Jessica Bulman-Pozen and I have shown the ways in which cooperative federalism is paired with uncooperative federalism,<sup>24</sup> introducing dissent and debate inside the Fourth Branch and thereby promoting what we call the "federalist safeguards of administration."<sup>25</sup> Bulman-Pozen has taken the idea in an even more interesting direction, showing how administrative integration allows states to play a crucial role in defending congressional prerogatives, checking executive overreach, and safeguarding the separation of powers.<sup>26</sup> Here again, these are decidedly traditional nationalist concerns.

The new nationalists have even shown that devolution serves not just national interests writ large, but the self-interest of national actors—those concerned with their own political fates rather than the fate of the nation. Abbe Gluck has identified the counterintuitive ways in which devolution can entrench federal power rather than dilute it. When Congress uses states to implement federal law, state participation helps "entrench" the statutory regime and invests more political actors in its success.<sup>27</sup> Delegating power to state agencies even allows the federal government to engage in what Gluck terms "field claiming,"<sup>28</sup> easing federal entry into "a field of lawmaking traditionally governed by the states."<sup>29</sup> So, too, Rodríguez has demonstrated how federal lawmakers deliberately let the states move issues forward in circumstances in which national actors cannot. Self-interested national actors, for instance, have been delighted to have states doing the basic legwork on topics like same-sex marriage and marijuana legalization.<sup>30</sup>

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24. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

25. *Id.* at 1286.

26. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012).

27. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 538, 569, 572–74 (2011).

28. *Id.* at 543.

29. *Id.* at 565.

30. Rodríguez, *supra* note 15, at 30, 58.

Decentralization can even empower racial minorities and dissenters, the two groups whose fate is always invoked by traditional nationalists to justify centralization.<sup>31</sup> This fear of the local is outdated, an adjective I take some pleasure in using given how often the traditional nationalists have rebuked their federalism brethren for failing to keep up with the times. I understand taking a firm nationalist position during the Civil Rights movement, when federalism was a code word for letting racists be racists. But it's a mistake to continue to equate "Our Federalism" with our father's federalism. Federalism has empowered racial minorities and dissenters in a fashion that rights alone could never achieve.<sup>32</sup> Federalism thus compensates for the shortcomings of the First and Fourteenth Amendments.<sup>33</sup> And where federalism fails, rights often succeed. That's why federalism and rights have served as "interlocking gears," moving our grand democratic project forward.<sup>34</sup> Claims to a right and demands for equality are offered in the realm of politics and then instantiated in the realm of governance. Debate leads to organizing, which leads to policymaking, which in turn provides a rallying point for still more debate and organizing and policymaking. When the process of change involves both rights and governance, social movements include pragmatic insiders, forging bargains from within, and principled outsiders, demanding more and better from without. The key point to emphasize, however, is that federalism—far from being the enemy of rights—supplies the policymaking gears that are all but essential for any rights-based movement to move forward.

The gears of change don't always move forward on the rights<sup>35</sup> or the structural side of the Constitution. But that brings me to the second respect in which "Our Federalism" is not our father's federalism. If you're worried about those places where structural sites serve as gears to push us backwards, it's useful to remember that the Rehnquist Court's federalism revolution has been a failure. Despite many skirmishes and some genuine defeats—*Shelby County*<sup>36</sup> being the most gut-wrenching—the traditional nationalists are winning the war over constraints on federal power. The federal government can step in, one way or another, when the need arises.<sup>37</sup> That means we can use

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31. To be sure, protecting and empowering racial minorities and dissenters is not solely a traditional nationalist aim: I take it to be a concern for all of us. But the traditional nationalists have long invoked the dangers decentralization poses to democracy's outliers as a justification for their one-way ratchet.

32. I've written a lot about this question before and won't rehash it here. For a sampling, see sources cited *supra* note 16.

33. Gerken, *Loyal Opposition*, *supra* note 16; Gerken, *supra* note 17.

34. For development of this idea, see Gerken, *supra* note 17.

35. See just about all the Supreme Court race cases of the last twenty years.

36. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (striking down the coverage formula for section 5 of the Voting Rights Act on federalism grounds).

37. As I've written elsewhere:

decentralization to empower what I call our loyal opposition while checking our disloyal one.<sup>38</sup>

This is just a sampling of work that has already filled dozens and dozens of law reviews. But it shows why the new nationalists' work fits so uneasily with traditional federalism debates. All of this work gives the lie to the easy equation of decentralization with state-centered values and centralization with nationalist ones. To be sure, the new nationalists don't claim that decentralization *always* serves nationalist values. That would be a foolish claim. But the new nationalists have shown that it is just as foolish to think that decentralization always serves state-centered values. If devolution can further *both* state-centered ends and traditional nationalist ends, then the question to centralize is always a complicated, context-sensitive question even if you care only about national culture, national politics, and national citizenship. So, too, the simple equation of federalism's stalwarts—devolution furthers state-centered ends—isn't as linear as we have thought. The camps, in other words, have pitched their tents on shaky ground.

I should note that the work of the new nationalists doesn't just pose an analytic challenge for traditional federalism debates; it poses a methodological one as well. For years, scholars have written as if it were possible to balance the costs and benefits of decentralization on a scale and come up with a rule that should apply across different regulatory silos. That was a complex inquiry to be sure, but at least the causal arrow held constant. As I note in Part III, the new nationalists have introduced a new level of nuance and complexity to these debates by suggesting that the causal arrows move in both directions.

## II. A COMPROMISE ON ENDS?

But *still*, you might be thinking: maybe we have to be more careful about causal claims, maybe we should expand our list of the democratic ends states serve, maybe it's a mistake to think that decentralization serves only state-centered ends. But we are playing the long game here. We are worried about averages. You might still think that, on average, devolution serves states and centralization serves the national government. We will still divide into camps, then, because our ends will forever divide us. That's certainly what I thought at

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Congress has a ready-made workaround to bypass the anticommandeering doctrine, it can usually write in a jurisdictional element to satisfy *United States v. Lopez*, it can borrow a page from Justice O'Connor's 'drafting guide' to fit its regulations within the ambit of *Gonzales v. Raich*, it can turn to its taxing power when the Commerce Clause won't do, and it will presumably have no trouble evading the dictates of *NFIB* (unless the Court lends some oomph to its Spending Clause ruling).

Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 90–91 (2014).

38. Gerken, *Loyal Opposition*, *supra* note 16, at 1991–93.

first, but the work of the new nationalists has led me to question my own views.

Here, I come to my second claim about the new nationalists' place in federalism debates. It's an empirical and normative claim rather than an analytic one, and it goes to ends rather than means. The second reason that the work of the new nationalists should shift existing battle lines is that they have put forward a distinctive picture of federal-state relations, one that neither camp anticipated. The work has drawn attention to an important form of state power neglected by both camps, and it has offered a different vision of what constitutes a thriving national democracy. These claims are both descriptively convincing and normatively attractive—that sweet spot for legal scholarship—and should thus supply a common ground for members of both camps. If you buy these arguments, then it's clear we've been fighting our battles on the wrong terrain.

Let me dwell for just a moment on the point about descriptive accuracy. Even if academics have radically different normative visions of what our democracy is supposed to look like—so radically different that no compromise could possibly satisfy either side—I'm still not sure it's enough to justify the existence of camps. Imagine, for instance, that some of us want to return to the Articles of Confederation and some of us want to be France. Even so, federalism has always been a field—and law has always been a discipline—in which you can answer a normative question with an empirical answer. While our work is always inflected by the model of the democracy we *wish* we had, legal scholarship's bread-and-butter has been devoted to perfecting the democracy we *actually* have. And I have trouble imagining that any scholar of federalism—no matter what her affiliations—isn't interested in improving the democracy we actually have.

To be sure, the question of how to “perfect” our existing democracy might just reproduce the same debate over differing visions of democracy. But that would require a pretty robust confidence that decisions to devolve or centralize this or that program are going to effect a radical change in our system, overcoming long-standing regulatory trends, cultural and media forces, and, most importantly, the tides of politics. I simply don't share that confidence. The empirics matter here, then, even if you don't buy my normative gloss.

I can imagine the collective groan coming from the aging boxing club members at this point. You're thinking that we've had this debate, right? Traditional nationalists have long answered federalism supporters' normative pleas with an empirical answer, insisting that a state-centered vision of democracy is a fantasy, that we have national identities but not state ones, that ours is a homogenous political culture in which citizens' loyalties lie only with the nation. We've spent a fair amount of time battling over whether we are purple or red and blue, whether malls in every city look the same, and whether Texans' love of their state embodies a deep truth about identity or simply a

bout of collective insanity. The debate has been fueled by the same kind of provocation I offer today—one put forward by Ed Rubin and Malcolm Feeley<sup>39</sup>—and has generated some of the best titles in the field.<sup>40</sup> This empirical debate has been so heated and so thoroughly canvassed that it's not clear how much more there is to say.<sup>41</sup>

It's also not the empirical debate I'm interested in having. As long as we have lumpy residential patterns, interest-group competition will ensure that federalism achieves its aims whether or not locally concentrated interests affiliate with the governance sites they are using to push their agendas. The debate I'm interested in having, then, is not whether state identity is tied up with those political fights, but what federal-state relations look like today.

The vision of federal-state relations that undergirds the work of the new nationalists is one in which the states and federal government regulate cheek to jowl, sometimes leaning on one another and sometimes deliberately jostling each other. It's one in which the federal government can regulate where it sees fit and yet the states retain a vibrant and important role. It is one where the national government can and does regulate, and yet the states haven't been displaced—far from it. Function does not always follow form, and power does not always follow the exercise of jurisdiction. Even when the national government intervenes, it rarely displaces the states and regularly empowers them. As a result, the states play a vibrant and robust role in this regime not as separate or autonomous sovereigns, but as key parts of an integrated and interconnected regime.

Two major themes undergird the new nationalists' descriptive work. The first highlights a form of state power quite different from the sovereignty or autonomy accounts that have dominated the thinking of federalism's stalwarts. The second describes a thriving nationalist democracy in substantially different terms than traditional nationalists have deployed.

#### A. *A Different Account of State Power*

The new nationalists have drawn attention to a distinctive form of state power. Federalism scholars typically gravitate to one of two accounts of state power: sovereignty or autonomy. While the two are always depicted as competing accounts, my own view is that they are little different from one

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39. Rubin & Feeley, *supra* note 5.

40. *Compare, e.g.,* Ernest A. Young, The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System (Feb. 24, 2015) (unpublished manuscript) (on file with author), with Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (2001).

41. Though the always-interesting Bulman-Pozen has found something new to say, as is her wont. Bulman-Pozen, *supra* note 18, at 1109–22 (discussing the connection between partisan identity and state affiliation).

another.<sup>42</sup> An autonomy account is softer around the edges and does not demand formal judicial protections, which makes it easier for law professors to stomach it. At bottom, however, it rests on the same basic conception of state power, one in which states preside over their own empire and regulate free from federal interference.<sup>43</sup>

### 1. The Power of the Servant

The new nationalists have thoroughly documented a quite different form of state power, one that rests on neither sovereignty nor autonomy. I call it the “power of the servant”<sup>44</sup> to emphasize that it stems from what amounts, formally or informally, to a principal-agent relationship. I also use that term deliberately to provoke federalism’s stalwarts in the hope that they will shake loose the foolish notion that the states cannot be powerful unless they are presiding over their own empires. As I note in Part IV, I don’t intend the “power of the servant” to suggest that states lack any form of autonomy or discretion. Agents have long enjoyed some measure of autonomy and exercised some measure of discretion despite the presence of a principal, as fields ranging from corporate law to administrative law have made clear. That observation holds especially true where, as here, state agents serve two masters, not one.<sup>45</sup> States are powerful in large part because they are supported by a separate power base and answer to a state polity, not just a federal one.<sup>46</sup> But they are not wielding power as sovereigns, ruling separate and apart from the national government and able to regulate entirely as they see fit. Instead, they are embedded inside a larger, national regime in which they do not hold a regulatory trump card.

It is by now a trope in many fields that the state and federal governments govern shoulder-to-shoulder in a tight regulatory space. When one moves, the other moves with it. This work suggests that the old debates in federalism—the sovereignty/autonomy debate in particular, where the aging boxing club members are still out in full force—are fast becoming beside the point. Both the sovereignty and autonomy account depend on open regulatory space for the states to govern freely, and there’s not much of it left anymore. National regulations have washed across virtually all of the states’ shorelines.

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42. Gerken, *Federalism All the Way Down*, *supra* note 16, at 11–21.

43. *Id.*

44. Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633, 2635 (2006) [hereinafter Gerken, *of Sovereigns and Servants*]; see also Gerken, *Federalism All the Way Down*, *supra* note 16, at 11–21, 35–43.

45. Gerken, *Federalism All the Way Down*, *supra* note 16, at 40–44.

46. Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. (forthcoming 2015).

Before I lose federalism's stalwarts, let me hasten to add that none of this is to say—as a conventional traditional nationalist would have it—that the states are either irrelevant or swamped by the tides of federal power. Just the opposite is true. Scholars like Richard Epstein, who insist that the states have lost too much authority over the last few decades,<sup>47</sup> have overlooked the immense power states wield by virtue of being part of the federal system. It's odd that this vision of state power has been neglected by law professors for so long given that entire fields—administrative law, corporate law—worry incessantly about how much power the agent wields against the principal. Just think about how the welfare-to-work debate unfolded or how the Affordable Care Act has been implemented. Read just about anything written in environmental law these days. The states play a robust and crucial role in the regulatory process despite the ubiquity of national regulation. The states and federal government are regulating together, with the federal government often depending heavily on states to implement federal policy.<sup>48</sup>

Ours is thus a state of affairs that members of both camps failed to predict and that some continue to resist. Federalism's stalwarts have insisted that the states are losing power, but that's only because they refuse to recognize cooperative federalism as federalism at all.<sup>49</sup> And the traditional nationalists miss how powerful state agents can be in a principal-agent relationship.

Or maybe, as I've speculated elsewhere,<sup>50</sup> both camps have just been using the wrong metaphor. If you think of states as autonomous islands in a sea of federal regulation, you will fear that federal tides will swamp the states and want to build a levee to hold them back. If you think the ocean is all that matters, you miss how much life exists beneath its waves. We should imagine states not as isolated islands, but as reefs. There may be federal water, water everywhere, but the states still thrive. That's because states are sites of power. Just as ancient wrecks and scuttled ships attract all manner of ocean life, sites of power quickly attract all manner of political life. Political power attracts political interests, and a political ecosystem springs up around them. Federal power flows through these reefs, to be sure, but states continue to nurture worlds of their own.

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47. Richard A. Epstein & Mario Loyola, *Saving Federalism*, NAT'L AFFAIRS, Summer 2014, at 3; see also Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559 (2000).

48. See, e.g., Gluck, *supra* note 27.

49. See sources cited *supra* note 47.

50. This paragraph is adapted from Gerken, *supra* note 37, at 116.



## 2. Cooperative Federalism Without Its Formal Markers: Crime, Education, and Family Law

Thanks to the new nationalists, this is by now a familiar point in many arenas. But if anything, the new nationalists have been too circumspect in describing this reality. The vast majority of the work on this issue—mine included—has focused on areas where we can identify the formal markers of federal-state arrangements and trace its interactions through conventional legal sources. Cooperative federalism regimes are the most obvious example<sup>51</sup>—the places where, to use Gluck’s turn of phrase, federalism comes “by the grace of Congress”<sup>52</sup> and federal-state relations can be traced through federal statutes and regulations. With its many rules about abstention, comity, and the like, the relationship between state courts and federal courts is another area legible to law professors. Here, Schapiro has analyzed these issues in the greatest depth.<sup>53</sup>

The mistake we’ve made, then, is the law professor’s mistake. We haven’t looked closely enough at areas that lack the formal markers of federal-state cooperation, areas where we can’t trace federal-state interactions through traditional legal sources. When you begin to look at these areas, though, you realize that the new nationalists’ arguments apply even to areas of traditional state concern and to areas thought to belong to the federal government alone. If the new nationalists’ claims extend that far, the traditional debates over sovereignty and autonomy—which have dominated federalism debates—may matter for a small and increasingly irrelevant part of “Our Federalism.”

The most convincing way to make this point is to look to the “statist” of state arenas, those consistently defined by the Court as part of the states’ “police powers”: crime, family law, and education. Federalism’s stalwarts have been most eager to defend these traditional areas of state concern. Yet these

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51. There’s been a huge amount of work on environmental federalism. *See, e.g.*, sources cited *supra* note 23. Healthcare has also received a good deal of study, especially of late. *See, e.g.*, Nicole Huberfeld, *With Liberty and Access for Some: The ACA’s Disconnect for Women’s Health*, 40 *FORDHAM URB. L.J.* 1357 (2013); Theodore W. Ruger, *Health Policy Devolution and the Institutional Hydraulics of the Affordable Care Act*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 359 (Nathaniel Persily et al. eds., 2013); Gluck, *supra* note 48. We’ve also seen work on telecommunications, Weiser, *supra* note 23, and financial regulation. Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement Is a Model for Effective Economic Regulation*, 30 *NW. J. INT’L L. & BUS.* 285 (2010); *see also* Ahdieh, *supra* note 23.

52. Gluck, *supra* note 27, at 542.

53. *See, e.g.*, SCHAPIRO, *supra* note 12.

domains share many of the features of formal cooperative regimes that federalism's stalwarts either ignore or disparage.<sup>54</sup>

Crime is my favorite example. Policing is, of course, at the heart of the states "police powers."<sup>55</sup> But even here we see substantial federal-state overlap and intergovernmental cooperation. Criminal law isn't the exception that proves the rule about joint regulation. It is the rule.

Criminal law specialists haven't missed the fact that federal officials have thrust their fingers into the policing pie. Many have, in fact, mourned the so-called "federalization" of criminal law. Federal legislation, after all, has stretched so far into traditional state arenas that some of the field's top scholars believe that "the difference between the substantive reach of federal criminal law and that of state criminal law has virtually disappeared."<sup>56</sup>

But note, here again, the law professor's mistake. Those who have wrung their hands over this "federalization" of criminal law have missed something important. Function doesn't always follow form. Real power does not always follow its formal exercise. Enforcement does not always follow jurisdiction. It has been a mistake to assume that criminal law has been federalized merely because Congress has passed a lot of statutes.

If you look past the sources that are most legible to law professors—to practice rather than principle, convention rather than code—you will notice something important. Despite massive amounts of congressional legislation, states still play a central role in criminal law. State prosecutions have averaged around ninety-five percent of national criminal felony cases for over a century and held absolutely steady since the 1980s despite the wave of federal regulations washing across state shores.<sup>57</sup> The reason for this is simple. The feds don't have the resources to investigate and prosecute the activities they have criminalized. Federal dependence on the states is so pronounced that

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54. I don't mean to make the foolish claim that nothing changes when the federal government steps in. Federal regulations can obviously crowd out state law and the federal government can put something on state agendas that might not otherwise have appeared. All I mean to say is that the relationship between the fundamentals hasn't changed nearly as dramatically as law professors suggest when they mourn the "federalization" of a domain. To the contrary, the examples offered show that states retain an important role in administering not just state policy, but federal law.

55. *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.").

56. DANIEL C. RICHMAN ET AL., *DEFINING FEDERAL CRIMES* 8 (2014) (emphasis omitted).

57. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 *EMORY L.J.* 1, 36, 45 (2012).

three of the field's best scholars have classified criminal law as yet another example of cooperative federalism.<sup>58</sup>

The marijuana fight showcases the muscular role the states play in criminal law enforcement even in the presence of pervasive federal regulation. The federal government has the power to pass regulations; it just doesn't have the resources to enforce them.<sup>59</sup> The Constitution does not pose an obstacle to federal intervention or to the uniformity of federal drug policy;<sup>60</sup> it's politics and resources constraints that matter most.

Many academics have missed the fact that states retain their central role in criminal law enforcement even as the federal government extends its regulatory reach. That's because they assume that function follows form. Like good law professors, they look to formal instantiations of authority (like federal legislation) rather than informal evidence of power (like state prosecution statistics). They read the Supreme Court's decision in *Gonzalez v. Raich* rather than compare the budgets of state and federal prosecutors.

In many ways, this mistake coincides with the larger error made by scholars of federalism. Because they look only to formal markers of power, they miss what one might call the "hydraulics" of state power. Even as federal schemes intrude on what were once largely state domains, the states have found ways to assert their power informally through networks and informal relationships and mutual dependence. Our politics have become nationalized, and yet states still play a vibrant role in national politics.<sup>61</sup> The federal government has extended its statutory reach into traditional state domains like crime and healthcare, and yet states still find a way to exercise influence through channels that are less legible to law professors but no less important to policymakers.<sup>62</sup>

These broad points hold true in another traditional area of state concern: education. There has been a huge brouhaha over the "federalization"<sup>63</sup> of

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58. See Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 806–07 (2004); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2261 (2014); RICHMAN ET AL., *supra* note 56, at 8–12.

59. Because the federal government lacks the resources to enforce its own ban on marijuana, Rob Mikos argues the states are able to "ma[k]e medical marijuana de facto legal within their jurisdictions" simply by refusing to enforce the federal ban. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1425 (2009). For an astute take on the complex picture of federal-state relations that the legalization movement reveals, see Jessica Bulman-Pozen, *Unbundling Federalism: Colorado's Legalization of Marijuana and Federalism's Many Forms*, 85 U. COLO. L. REV. 1067 (2014).

60. *Gonzalez v. Raich*, 545 U.S. 1 (2005).

61. Bulman-Pozen, *supra* note 18.

62. Many thanks to Alex Hemmer and Bridget Fahey for pushing me on this point.

63. See, e.g., Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 126–27 (2006) ("[NCLB] represents a dramatic break from the federal government's

education policy due in large part to No Child Left Behind (NCLB)<sup>64</sup> and recent battles over the Common Core.<sup>65</sup> But the mistake made by those who mourn the “federalization” of education policy was to think that function would follow form. Despite the expanded reach of federal education policy, the states remain the dominant force in primary and secondary education. That’s because, notwithstanding the federal government’s formal exercise of authority, it has run up against just the sort of administrative and political obstacles that would be instantly recognizable to the new nationalists.

NCLB, for instance, unquestionably altered the administrative structures in which schools operated.<sup>66</sup> But states quickly took advantage of the discretion afforded to them in this cooperative federal regime to duck federal constraints by setting testing standards so low they were guaranteed to meet them.<sup>67</sup> In the wake of NCLB’s passage, the federal government attempted to put teeth into the Act’s regulations<sup>68</sup> only to encounter pragmatic resources barriers

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traditional posture regarding policymaking for the nation’s public elementary and secondary schools.”); *Id.* at 126 (“To remark upon NCLB’s ambitiousness is to remark upon the obvious.”); Patrick McGuinn, *The National Schoolmarm: No Child Left Behind and the New Educational Federalism*, 35 PUBLIUS 41, 57 (“The passage of No Child Left Behind fundamentally changed the ends and means of federal education policy from those put forward in the original ESEA legislation, and in so doing created a new policy regime. The old federal education policy regime was based on a policy paradigm that saw the central purpose of school reform as promoting equity and access for disadvantaged students. With NCLB, federal education policy has embraced the much broader goal of improving education for all students by significantly increasing accountability for school performance.”); Gail L. Sunderman & Gary Orfield, *Domesticating a Revolution: No Child Left Behind Reforms and State Administrative Response*, 76 HARV. EDUC. REV. 526, 526 (2006) (“The No Child Left Behind Act of 2001 . . . represents the most extraordinary expansion of federal power over public schools in American history.”).

64. No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

65. *Read the Standards*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/read-the-standards/> (last visited Feb. 24, 2015).

66. Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 101 (2012) (“[NCLB] dramatically altered the conditions under which federal K–12 education funding is made available to the states, adding significant performance and testing requirements.”).

67. *See, e.g.*, James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004); Kevin Carey, *Hot Air: How States Inflate Their Educational Progress Under NCLB*, EDUC. SECTOR (May 2006), [http://www.educationsector.org/usr\\_doc/Hot\\_Air\\_NCLB.pdf](http://www.educationsector.org/usr_doc/Hot_Air_NCLB.pdf). Alabama, for instance, lowered its standard every year in the wake of the Act’s passage. Kevin Carey, *The Pangloss Index: How States Game the No Child Left Behind Act*, EDUC. SECTOR (Nov. 2007), [http://www.educationsector.org/usr\\_doc/The\\_Pangloss\\_Index.pdf](http://www.educationsector.org/usr_doc/The_Pangloss_Index.pdf).

68. Gail L. Sunderman & James S. Kim, *The Expansion of Federal Power and the Politics of Implementing the No Child Left Behind Act*, 109 TCHRS. C. REC. 1057, 1068–69 (2007); Kenneth Wong & Gail Sunderman, *Education Accountability as a Presidential Priority: No Child Left Behind and the Bush Presidency*, 37 PUBLIUS 333, 344 (2007) (“[Early on] the Bush Administration strictly interpreted and enforced the federal requirements and rebuffed any attempt to introduce policies that would respond to state or local concerns raised about the law.”).

(specifically a lack of state capacity)<sup>69</sup> as well as massive state resistance.<sup>70</sup> Because the federal government provides only limited funding<sup>71</sup> and plays a circumscribed role in the education arena, it depended heavily on state and localities to carry out its policies. Unsurprisingly, then, state resistance and regulatory evasions eventually forced the Bush administration to give out so many waivers that it effectively gutted large swaths of NCLB.<sup>72</sup>

The Obama Administration has spent a fair amount of political capital pushing back against the pushback. It has been using a combination of federal

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69. In the words of one study, “the extent of the opposition to the NCLB” was “unprecedented in its scope and depth.” GAIL L. SUNDERMAN ET AL., *NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD* 14 (2005). See also Bryan Shelly, *Rebels and Their Causes: State Resistance to No Child Left Behind*, 38 PUBLIUS 444, 444–45 (2008) (noting the unusual level of state resistance for the NCLB); Sunderman & Orfield, *supra* note 63, at 534 (“The challenge of implementing the NCLB requirements produced angry reactions from state and local officials.”).

70. Interstate organizations—including the National Conference of State Legislatures and the National Governor’s Association—as well as individual state legislatures repeatedly attacked the law. See GAIL L. SUNDERMAN, *THE UNRAVELING OF NO CHILD LEFT BEHIND: HOW NEGOTIATED CHANGES TRANSFORM THE LAW* 22 (2006) [hereinafter SUNDERMAN, UNRAVELING], available at <http://files.eric.ed.gov/fulltext/ED490859.pdf>; Kristina P. Doan, *No Child Left Behind Waivers: A Lesson in Federal Flexibility or Regulatory Failure?*, 60 ADMIN. L. REV. 211, 215–16 (2008); Andrew Rudalevige, *The Politics of No Child Left Behind*, EDUC. NEXT, Fall 2003, at 63, available at [http://educationnext.org/files/ednext20034\\_62.pdf](http://educationnext.org/files/ednext20034_62.pdf). See also H.R.J. Res. 192, 2004 Sess. (Va. 2004), available at <https://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+HJ192E>; Tom Loveless, *The Peculiar Politics of No Child Left Behind*, in STANDARDS-BASED REFORM AND THE POVERTY GAP: LESSONS FOR NO CHILD LEFT BEHIND 253 (Adam Gamoran ed., 2007); SUNDERMAN ET AL., *supra* note 69, at 13 (quoting the National Governors Association statement). Some states even filed lawsuits challenging the law, although these suits were unsuccessful. *Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010); *Sch. Dist. of City of Pontiac v. Sec’y of U.S. Dep’t of Educ.*, 584 F.3d 253 (6th Cir. 2009); *Bd. of Ottawa Twp. v. U.S. Dep’t of Educ.*, No. 05 C 00655, 2007 WL 1017808 (N.D. Ill. Mar. 31, 2007); *Ctr. for Law & Educ. v. U.S. Dep’t of Educ.*, 315 F. Supp. 2d 15 (D.D.C. 2004).

71. In the early days of NCLB, for instance, federal funding fell well short of what the states thought was necessary to implement federal requirements. Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for A New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 463–64 (2012) (book review). See also William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, 80 PEABODY J. EDUC. 90 (2005); Sunderman & Kim, *supra* note 68, at 1072–77. Moreover, federal funding remains a small fraction of overall educational spending in states and localities. Joseph Strong, Note, “*The Grass Is Always Greener*”: *A Look at Educational Reform in the United States and Japan*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 277, 289 (2012).

72. In the words of one study, “[T]he U.S. Department of Education’s [sic] (ED) ha[d] made such extensive compromises in implementing the No Child Left Behind Act of 2001 (NCLB) that the law’s legitimacy [was] in serious question.” SUNDERMAN, UNRAVELING, *supra* note 70, at 9. See also Doan, *supra* note 70, at 216–18 (describing the expansion of the waiver process); Heise, *supra* note 63, at 127 (discussing the Bush Administration’s “defensive” use of a large number of waivers); Wong & Sunderman, *supra* note 68, at 345–46.

grants<sup>73</sup> and waivers<sup>74</sup> to move toward some modest level of standardization in states' education curricula through the Common Core Standards (a goal that today's political environment has prevented President Obama from achieving via formal legislation).<sup>75</sup> It's worth noting, however, that the Common Core Standards themselves emerged from a state-led process.<sup>76</sup> Moreover, even as the federal government spends some of the political capital necessary to extend its reach, the Common Core's day-to-day implementation is still being carried out by states and localities, and considerable state and local variation remains.<sup>77</sup> While it is too early to offer a final assessment of the success of the

73. RACE TO THE TOP: EXECUTIVE SUMMARY, U.S. DEP'T OF EDUC. 2 (Nov. 2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. See also Sam Dillon, *States Compete for Federal School Dollars*, N.Y. TIMES (Nov. 11, 2009), <http://www.nytimes.com/2009/11/11/education/11educ.html>.

74. Letter from Arne Duncan, Secretary, U.S. Dep't of Educ., to Chief State School Officers (Sept. 23, 2011), available at <http://www2.ed.gov/print/policy/gen/guid/secletter/110923.html>. See also Sam Bagenstos, *Federalism by Waiver After the Health Care Case*, in THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 227 (Nathan Persily et al. eds., 2013); Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. (forthcoming 2015); Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES, Aug. 8, 2011, at A12 (terming the waiver program "the most sweeping use of executive authority to rewrite federal education law since Washington expanded its involvement in education in the 1960s"); Metzger, *supra* note 66, at 114–15 ("Faced with tough performance requirements under NCLB that they could not meet, many states refused to comply and the Department of Education responded by granting them waivers. These waivers not only exempt states from core features of NCLB, but they also add new requirements—requirements that the Obama Administration previously made the basis for grants under the stimulus-funded Race to the Top program and that the Administration would like to have incorporated in new NCLB reauthorizing legislation . . . [T]he NCLB waiver program allowed states to signal their refusal to comply and wait for the political branches of the federal government to respond.").

75. See DEREK BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 953 (2013); Bagenstos, *supra* note 74.

76. Michele McNeil, *46 States Agree to Common Academic Standards Effort*, EDUC. WK., June 10, 2009, at 16, available at <http://www.edweek.org/ew/articles/2009/06/01/33standards.h28.html>; Memorandum of Agreement from the Council of Chief State Sch. Officers and the Nat'l Governors Ass'n Ctr. for Best Practices on Common Core Standards, available at <http://www.edweek.org/media/commonstandardsmoa.doc> (last visited Apr. 26, 2015). See also Dane Linn, *The Role of Governors*, in COMMON CORE MEETS EDUCATION REFORM 35, 35–44 (Frederick M. Hess & Michael Q. McShane eds., 2014) (discussing the role state governors played in the creation, development, and implementation of the Common Core Standards); Lorraine M. McDonnell & M. Stephen Weatherford, *Organized Interests and the Common Core*, 42 EDUC. RESEARCHER 488, 491 (2013) (discussing how the developers of the Common Core Standards sought to maintain distance from the White House, lest they politicize the process, including even urging President Obama *not* to condition Title I funding on state adoption of the standards).

77. See, e.g., PAUL WARREN & PATRICK MURPHY, PUB. POLICY INST. OF CAL., CALIFORNIA'S TRANSITION TO THE COMMON CORE STATE STANDARDS: THE STATE'S ROLE IN LOCAL CAPACITY BUILDING 6–12 (2014), available at <http://www.ppic.org/content/pubs/re>

Obama Administration's efforts to influence education policy, it is clear that states and localities retain their dominant role in education policy. Moreover, given that "[a]lmost everything that matters" about the Common Core "depends on what happens next—in other words, on implementation,"<sup>78</sup> it's hard to imagine that the states and localities implementing the program are going to lose their sway in the future. Implementation, after all, is precisely where the power of the servant is at its zenith.

Family law is another example where "federalization" has involved more bark than bite.<sup>79</sup> Justice Kennedy noted in *United States v. Windsor* that the "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States."<sup>80</sup> There is even a judicially invented "domestic relations exception" prohibiting federal courts from exercising jurisdiction over divorce, alimony, and custody decrees.<sup>81</sup> And yet federal law touches upon familial relations in many ways.<sup>82</sup> Even setting aside judicial decisions striking down state family laws on constitutional grounds (mostly in the area of substantive due process), family status is regulated through federal tax law, federal pension law, federal benefits laws, and immigration law.<sup>83</sup> Moreover, the federal government has passed legislation

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port/R\_414PMR.pdf (comparing California's implementation of the Common Core Standards to Kentucky, New York, and Tennessee in relation to professional development activities, the quality of and access to instructional materials, assessments of the success of the standards, and the funding provided for implementation). Indeed, studies have found variations even among individual schools *within* the same local school district. HEATHER GOLDSWORTHY ET AL., CONSORTIUM FOR POL'Y RES. IN EDUC., *THE LIVED EXPERIENCE OF STANDARDS IMPLEMENTATION IN NEW YORK CITY SCHOOLS 2011* (2013), available at [http://www.cpre.org/sites/default/files/researchreport/1496\\_nycreport.pdf](http://www.cpre.org/sites/default/files/researchreport/1496_nycreport.pdf) (studying the ways New York City schools substantially vary their implementations of the Common Core Standards).

78. Frederick M. Hess & Michael Q. McShane, *Introduction to COMMON CORE MEETS EDUCATION REFORM*, *supra* note 76, at 2.

79. I'm indebted to Katherine Silbaugh, Kris Collins, and Linda McClain for a very helpful discussion about family law during the time in which I was writing about this period.

80. 133 S. Ct. 2675, 2691 (2013) (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

81. *Marshall v. Marshall*, 547 U.S. 293, 305, 307–08 (2006).

82. In contrast to criminal law, very few people in the field of family law seem to mourn the federal government's intrusion, and some even see a larger role for federal intervention. *See, e.g.*, Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552 (1999).

83. *See* Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. REV. 1, 7–8 (2014). For a particularly perceptive work on the interactive relationship between family law and immigration law, see Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405 (2013).

governing child support,<sup>84</sup> family leave,<sup>85</sup> child abuse,<sup>86</sup> adoption,<sup>87</sup> juvenile care,<sup>88</sup> custody determinations,<sup>89</sup> abortion,<sup>90</sup> and maternal and child health,<sup>91</sup> to name just a few examples.<sup>92</sup> As a result, numerous scholars have debunked the myth of local exclusivity and written about federal intrusion into the domestic-relations sphere,<sup>93</sup> with some even showing that federal involvement dates

84. See, e.g., Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.); Child Support Enforcement Act, Pub. L. No. 93-647, 88 Stat. 2337 (1975) (codified as amended at 42 U.S.C. §§ 651–669 (2012)).

85. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 5 U.S.C. §§ 6381–6387 (2012); 29 U.S.C. §§ 2601–2654 (2012)).

86. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5116i (2012)).

87. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

88. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 18 U.S.C. §§ 4351–4353, 5038–5042 (2012); 42 U.S.C. §§ 5601–5784 (2012)).

89. Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568 (codified as amended at 28 U.S.C. § 1738A (2012); 42 U.S.C. § 663 (2012)).

90. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003) (codified as amended at 18 U.S.C. § 1531 (2012)).

91. The federal government offers grants to states to promote maternal and child health. 42 U.S.C. §§ 701–713 (2012). It also established the State Children’s Health Insurance Program through the Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 2101–2110, 4901, 111 Stat. 251 (codified as amended at 42 U.S.C. §§ 1397aa–1397mm (2012)), and passed the Temporary Assistance for Needy Families through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. §§ 101–16 (codified as amended at 42 U.S.C. §§ 601–619 (2012)).

92. For more in-depth review of these and other federal statutes, see, for example, Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267, 279–94 (2009). See also Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1379–82 (1998) [hereinafter Hasday, *Federalism and the Family Reconstructed*]; Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 879–81 (2004) [hereinafter Hasday, *The Canon of Family Law*]; Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL’Y 175, 211–20 (2000).

93. See, e.g., JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 17–66 (2014) [hereinafter HASDAY, FAMILY LAW REIMAGINED]; Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 211–31 (1999); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1111–15 (1994); Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761 (2005); Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787 (2015); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 644–46 (2001); Judith Resnik, *Reconstructing Equality: of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 415–16 (2002); Emily J. Sack, *The Burial of Family Law*, 61 SMU L. REV. 459, 474–76 (2008); Estin, *supra* note 92; Hasday, *Federalism and the Family Reconstructed*, *supra* note 92; Hasday, *The Canon of Family Law*, *supra* note 92, at 870–81; Law, *supra* note 92, at 178–85.



back more than a century.<sup>94</sup> While some of this work takes a fairly broad-gauged approach to what constitutes “family law,” it confirms that Congress has its fingers in the domestic-relations pie.

The lesson of criminal law and education law, however, holds true in family law as well. Despite the passage of numerous federal laws in this area, the bread-and-butter work of family law is still being carried out by states and localities. State courts and state agencies still do the bulk of work on domestic relations—marriages, divorce, alimony, custody, child support, etc.—with federal courts staying almost entirely out of the domestic relations game.<sup>95</sup> Many federal laws are, in fact, carried out by the states.<sup>96</sup> Some federal policies depend on state courts to succeed.<sup>97</sup> Others are implemented through cooperative federalism with state bureaucracies.<sup>98</sup> As Anne Estin has observed, while many of these programs are “highly centralized,” they are nonetheless “implemented by the states.”<sup>99</sup> As a result, writes Sylvia Law, while the federal

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94. See, e.g., Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1097–1115 (2009) (discussing family law adjudication as early as the nineteenth century); Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (discussing the relationship between the Nineteenth Amendment’s passage and state control over domestic relations); Estin, *supra* note 92, at 274–75 (discussing the regulation of family life in the late nineteenth and early twentieth centuries); Hasday, *Federalism and the Family Reconstructed*, *supra* note 92, at 1299 (discussing the development of family law during Reconstruction).

95. *Marshall v. Marshall*, 547 U.S. 293, 305, 307–08 (2006); Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 163 (2009) (noting that federal court reluctance to take on these cases is so pronounced that “the lower federal courts are drifting toward an expansion of the domestic relations exception to [even] include federal questions”).

96. The states, for instance, play a substantial role in administering federal welfare programs, Cashin, *supra* note 82, at 561–62, and federal child support programs, Elizabeth S. Saylor, *Federalism and the Family After Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 HARV. WOMEN’S L.J. 57, 82 n.145 (2002). This generalization does not hold true of all federal programs that touch upon family relations, however. The federal government, for instance, administers Social Security survivor benefits. See Collins, *supra* note 94, 1163–64; see also Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 5–24, 41 (1999) (discussing the treatment of marriage under the Social Security system).

97. See, e.g., Hasday, *Federalism and the Family Reconstructed*, *supra* note 92, at 1380–81 (discussing implementation of the Child Support Enforcement Act and the Adoption Assistance and Child Welfare Act).

98. See, e.g., Estin, *supra* note 92, at 281–94 (discussing TANF, the Child Abuse Prevention and Treatment Act, the Adoption and Safe Families Act, the Juvenile Justice and Delinquency Prevention Act of 1974, the Maternal and Child Health Bureau grant program, and the SCHIP program); see also Anne Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 542, 583–86 (1998) (discussing the eligibility for and implementation of TANF).

99. Estin, *supra* note 92, at 294.

government has the power to intervene “and often has done,” the states retain “primary responsibility for the regulation of families.”<sup>100</sup> So, too, after canvassing the evidence of federal regulation of family law mustered by Jill Hasday in her new book,<sup>101</sup> Joanna Grossman’s illuminating review nonetheless concludes that “[d]espite . . . various forms of federal family law, it is still by and large true that family law and family status are controlled by the states.”<sup>102</sup> Similarly, Kris Collins describes the “far messier, textured, interesting reality of the past and present regulation of family law,” one that defies “neat and tidy jurisdictional lines” between state and federal authority.<sup>103</sup>

We can play the game in the federal government’s end zone as well. To be sure, there are some areas where the federal government governs solo. But even in areas where the federal government is supposed to exercise exclusive control, states and localities are actively regulating. Cristina Rodríguez’s work on immigration federalism gives the lie to the notion of federal exclusivity.<sup>104</sup> Benjamin Sachs’s analysis of the role local and state officials play in labor law makes clear that, despite the clear dictates of the NLRA and exceedingly broad preemption doctrine, labor law does not lie solely within the federal government’s province.<sup>105</sup> Robert Ahdieh has shown what he terms a “dialectical regulation” between federal and state officials in the area of securities regulation.<sup>106</sup> Scholars have even claimed that states and localities play a robust role in national security regulation<sup>107</sup> and foreign policy.<sup>108</sup> All of this work looks past the case law on exclusivity, preemption, and the allocation of authority—the law professors’ traditional sources of information—to examine what’s actually taking place on the ground.

The descriptive point that has long been made by scholars of environmental law and other cooperative regimes, then, is an even bigger and more powerful point. It holds true in the traditional domains of state power and the “exclusive” domains of federal power. Federal-state interactions plainly

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100. Law, *supra* note 92, at 184.

101. HASDAY, *FAMILY LAW REIMAGINED*, *supra* note 93, at 18–19, 39.

102. Joanna L. Grossman, *Family Law’s Loose Canon*, 93 TEX. L. REV. 681, 690 (2015) (book review).

103. Kris Collins, *Federalism, Marriage, and Heather Gerken’s Mad Genius*, 95 B.U. L. REV. 615, 627 (2015).

104. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

105. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011).

106. Ahdieh, *supra* note 23, at 868.

107. Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012); Rascoff, *supra* note 23.

108. See, e.g., Judith Resnik et al., *Kyoto at the Local Level: Federalism and Translocal Organizations of Government Actors (TOGAS)*, 40 ENVTL. L. REP. 10768 (2010).

take different forms in these arenas. But these interactions exist along a continuum, and the underlying pattern is roughly the same. It's a pattern in which function doesn't always follow form, in which the federal government regulates freely and yet states retain a robust and important role. It's one in which the power of the servant is more important than the power of the sovereign, where integration matters more than autonomy, where the insider's influence matters more than the outsider's independence. It's also one in which the central obstacle to uniformity—or even the successful implementation of federal policy—is politics, not law.

Given law professors' proclivities, it's not surprising that the new nationalists' work on state power has taken so long to take root. The sovereignty and autonomy accounts have dominated debates at least in part because they are easier to trace, easier to theorize, and easier to imagine instantiating. They rest on independence and separation, not cooperation and overlap. They involve clear lines of authority and clear jurisdictional divides. They resonate deeply with a traditional conception of power, one that involves a principal controlling its agents. Power may be hard to measure for these accounts, but at least it can be delineated. And these accounts lend themselves to manageable doctrinal tests, if only because enough is held constant in the decentralization equation that it's possible to think through the problem of how to augment sovereignty and autonomy using traditional legal tools.

The power of the servant, in sharp contrast, is hard to trace, harder to theorize, and still harder to imagine instantiating. It rests on informal influence as much as formal power, on the inner workings of a regulatory system as much as the outer shell of regulations that bind it. And it is a form of power designed to please neither federalism's stalwarts nor traditional nationalists. One side has trouble seeing it as a form of power at all, and it just irks the other. Needless to say, doctrinal manageability is not its long suit.<sup>109</sup>

What the "power of the servant" does have going for it is its ubiquity. The new nationalists have depicted "the power of the servant" as a rival to the sovereignty and autonomy accounts,<sup>110</sup> but we may have reached the point where the sovereignty/autonomy debate is little more than an academic sideshow.

### 3. A Different Account of a Thriving National Democracy

If the new nationalists' descriptive work has highlighted an underappreciated form of state power, it has also painted a different picture of what constitutes a thriving national democracy. Here, too, the work runs

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109. With apologies to John Hart Ely.

110. See, e.g., Gerken, *Exit, Voice, and Disloyalty*, *supra* note 16, at 1365–67; Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1557 (2012) [hereinafter Gerken, *Our Federalism(s)*].

against the grain of conventional legal analysis. The traditional nationalists' view of democratic ends is inflected by a sovereignty account as well, after all. It's concerned with the ability of the national government to regulate without interference and places a high premium on uniformity. It's a hierarchical account that assumes the principal should be able to control its agent and thus eschews the idea that power can be shared, partial, and contingent. It's a vision of national power that leads to the moniker "cooperative federalism" for a complex set of arrangements that generates numerous opportunities for *uncooperative* federalism.<sup>111</sup> The traditional nationalist account often crowds out a role for the states and sometimes condemns them as enclaves used to retreat from national values.

The picture put forward by the new nationalists is quite different. It's one in which the federal government can regulate without interference as a formal matter, but its success depends as much on politics as decrees as a functional one. Technically the federal government can preside over its own empire, but practically it relies heavily on the states and thus takes on all of the fractiousness and messiness associated with that reliance. As noted above,<sup>112</sup> it's a form of decentralization in which state and local officials serve two masters, not one, and draw their power from a different power base than the center does.<sup>113</sup> This fact makes resistance more likely and successful resistance more probable. The federal government may be at the helm, but the regulatory ship is guaranteed to be buffeted by political headwinds.

The new nationalists' account thus suggests that the primary obstacle to uniformity isn't law; it's politics. When the national government fails to achieve uniformity, it's rarely because it lacks legal authority. Instead, the federal government lacks either the political capital or the political will to guarantee consistency. Or maybe because—contrary to the conventional traditional nationalist vision—national leaders believe that disuniformity has its role to play in a pluralist system like our own.<sup>114</sup>

Finally, the new nationalists don't depict states as separate and autonomous enclaves that facilitate a retreat from national norms. Instead, states and localities are at the center of the fight over what our national norms

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111. Bulman-Pozen, *supra* note 18.

112. See *supra* text accompanying notes 12–14, 45–46.

113. To the extent that citizens identify with the states and localities in which they live—or are at least shaped by the local culture—the dynamic becomes all the more powerful. See, e.g., Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. 1133 (2014); Young, *supra* note 46; David Fontana, *Government by Location* 10 (Dec. 15, 2013) (unpublished manuscript) (on file with author).

114. For a defense of this notion from the perspective of a social engineer, see Gerken, *Federalism All the Way Down*, *supra* note 16. For a defense of this notion from the perspective of Congress, see Gluck, *supra* note 23, at 2014, 2019–20 (cataloging the reasons members of Congress might prefer the “disuniform implementation of national law”).

should be. As with a conventional traditional nationalist account, the federal government still holds the national supremacy trump card. But the federal government must be circumspect about playing it. If an issue matters for national values, that fight can be had, and it can be won. The states can be shoved aside or brought to heel or bribed. But the federal government must work to do so.

Here again, this vision of federal-state relations isn't all that congenial to law professors. Legal academics generally believe that the principal should control the agent. Moreover, the limits placed on national power are also far less legible to us. An endless number of law professors jumped into the fray over *NFIB*, waxing eloquent about the Tax Power or the Commerce Clause or conditional spending—all issues that could be briefed and debated using traditional constitutional sources. But very few professors have kept an eye on where the real power struggle is today: the battle over waivers and implementation.<sup>115</sup> These types of fights are hard for the law to describe and even harder for the law to control.

#### 4. Is The Game Worth the Candle?

There are two benefits associated with the new nationalists' descriptive work, both of which undermine the intellectual terrain on which the camps are built. First, it happens to be convincing. Indeed, as I argued in Section II.A, it may even be true of a much wider swath of "Our Federalism" than even those writing in this area have claimed. That should matter for those who care about improving the democracy we actually have. If the world has changed, federalism debates ought to change with it.

It's not just the descriptive accuracy of this work that makes me skeptical that pragmatically oriented scholars will remain divided into camps (even if some of us want to return to the Articles of Confederation and some of us want to be France). The second reason this work should shift the debate is that it presents a normatively attractive account of federal-state relations. The democracy we have—the democracy the new nationalists have described—represents a reasonably satisfying compromise for both sides. It may be a different reality than either camp desired, but it is also a different reality than either camp feared.

Members of the new nationalists have been pretty cagey about their normative commitments, and I count myself among the worst offenders. Even

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115. The handful of scholars who defy the rule include David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013); Heather Gerken & Ted Ruger, *Real State Power Means Getting in the Obamacare Game*, HARV. BUS. REV. (Apr. 2, 2013), <https://hbr.org/2013/04/real-state-power-means-getting>; Bagenstos, *supra* note 74; Gluck, *supra* note 27; and Ruger, *supra* note 51. Gillian Metzger similarly drew attention to the practice of waivers in an early piece assessing *NFIB*'s significance. Metzger, *supra* note 66, at 112–16.

when our work has been normatively inflected, we've repeatedly declined to endorse the system as a whole but instead insisted that we're simply exposing this or that underappreciated feature of "Our Federalism" and leaving the balancing test for others to apply. While it's perfectly natural for a new school to spend time laying the descriptive groundwork before moving to a normative claim, it's probably time for each of us to put her money where her mouth is. It would be impossible to build a normative case in a few articles, let alone a few paragraphs. Nonetheless, in order to start putting my money where my mouth is, let me at least sketch why I think that the democracy we have is also a democracy we should want.<sup>116</sup>

If you care about state power, the states are still powerful. While states can't block the federal government from invading their turf, they are also licensed to invade the federal terrain. They may not preside over their own empires, but they hold sway over large swaths of the federal empire. That means that states play an important role in shaping not just state law, but federal law. It means that state and local officials don't just engage in cooperative federalism, but uncooperative federalism. They aren't outsiders to the behemoth we call the Fourth Branch, but powerful insiders. Their status as critical parts of federal administration enables them to be critics of the federal administration. They are *still* checking the national Leviathan, albeit in entirely different fashion than traditional federalism scholars have contemplated. States these days may not look as powerful to the law professor who focuses unduly on the formal exercise of jurisdiction and unthinkingly assumes that the principal can always command the agent. But if you focus on conditions on the ground, you'll see that states retain their preeminent role. Real power comes not just from formal legal authority, but from money and manpower, politics and practice.

The state's democratic role is just as important as its regulatory one. To be sure, states may not constitute independent mini-polities, resolving their own questions entirely as they see fit. But they aren't just convenient polling places for national debates, either. Instead, states are the front lines for national debates, the key sites where we work out our disagreements before taking them to a national stage. States aren't pushed aside by national politics; instead, they "*fuel*" it.<sup>117</sup>

If you care about national power and national politics, in contrast, it's worth remembering that states retain this important role even as the courts have permitted Congress to regulate with close to a free hand. The courts haven't just left most cooperative federal regimes alone; they've also permitted

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116. At least in term of federal-state relations. I'm not going to claim that hyperpolarization, the partisan administration of elections, and a deregulated campaign-finance system are all to the good.

117. Bulman-Pozen, *supra* note 18, at 1128–29.

the “federalization” of traditional areas of state concern, including crime, family law, and education.<sup>118</sup> Nationalists have never begrudged efforts at decentralization provided that the national government gets to make the call about when to decentralize. And in almost every instance nowadays, the federal government gets to make that call.

To be sure, while the national government remains at the top of the hierarchy, it presides over a Tocquevillian bureaucracy, not a Weberian one. As a result, the national government must often spend political capital to get its way even when the law poses no obstacle. The federal government must also learn how to deal with dissenters; it must even learn how to cut deals with dissenters. If nationalists are unhappy with that state of affairs, their quarrel isn’t with our law; it’s with our politics.

Moreover, balanced against those regulatory costs are the benefits we accrue from structuring our national democracy in this fashion. We benefit when our Fourth Branch gains a powerful and useful source of dissent in the states—agents that can provide both a bureaucratic and political reality check. We benefit from having the states serving as what Jessica Bulman-Pozen terms a “robust scaffolding” for political competition.<sup>119</sup> We benefit from a system in which structure and rights serve as “interlocking gears,” moving the projects of debate and integration forward.<sup>120</sup> We benefit from the democratic churn that states and localities provided, from the outlets for pluralism that a decentralized structure allows.<sup>121</sup> Because we have a robust federal system, we aren’t forced to debate issues on an impossibly large national scale but can instead begin those conversations in a myriad of sites, all with different political arrangements and different preconditions for compromise.<sup>122</sup> We aren’t fighting every fight on a national stage, with the winner taking all. Instead, we’re rehearsing those battles on a smaller scale in an iterative fashion and in a myriad of political contexts. Our politics may take on greater complexity, but they aren’t flattened by uniformity, either.

Better yet, we’re not just having those fights in the airy and abstract realm of political speech, where ideologues and intellectual purity hold sway. We’re having those fights through sites of governance, where pragmatists dominate, where accommodation is necessary, where everyone must “pull, haul, and

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118. To be sure, the Court occasionally imposes limits on federal power in these areas. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598 (2000) (family law); *United States v. Lopez*, 514 U.S. 549 (1995) (criminal law). But the Court has also supplied ready-made workarounds to avoid those limits. Gerken, *supra* note 37.

119. Bulman-Pozen, *supra* note 18, at 1081.

120. Gerken, *Loyal Opposition*, *supra* note 16, at 1991; Gerken, *supra* note 17.

121. Gerken, *supra* note 17.

122. Gerken, *Second-Order Diversity*, *supra* note 16, at 1148–52, 1171–80; Rodríguez, *supra* note 15.

trade,” to borrow Justice Souter’s phrase.<sup>123</sup> That picture of a national democracy loses some of the efficiency and neatness of a centralized system, but it gains quite a bit in return.

And here’s a fact both camps should remember, one that gets missed by law professors who look to formal structures, legal guarantees, and constitutional doctrine to assess how federal-state relations work. What’s happened in so many of these regulatory arenas is that the states and federal government have done what they do pretty well: work it out. Tussle and campaign and negotiate and compromise. Federal-state relationships are forged in the crucible of politics. And the result has been a robust system in which states continue to play a crucial role. But states do so as agents and partners in an interconnected regime rather than as emperors presiding over their own terrains.

That may not be the stuff of which traditional nationalist or federalist dreams are made. But it is a reasonable compromise, and a realistic one to boot. If you are focused on improving the democracy we have, it ought to supply ample common ground on which to build.

### III. THE TERMS AND BENEFITS OF THE DÉTENTE

In sum, the work of the new nationalists pushes toward a détente in two ways. First, as an analytic matter, it unsettles the grounds on which the existing camps are built by suggesting that the relationship between means and ends isn’t as clean or as linear as many have assumed. Second, as a normative and empirical matter, it points up a plausible common ground for the two sides—an account of the democracy we have *and* an account of a democracy we should want. It has thus created the conditions in which a détente is possible between the two camps.

#### A. *The Terms of the Détente*

Given what I’ve said, it’s probably not hard to guess at what I think the terms of the détente ought to be. Traditional nationalists need to start wondering whether they are the ones behind the times and recognize that states can further rather than undermine nationalist aims. They need to acknowledge the crucial role that states and localities can and should play in a thriving national democracy. They need to concede that disuniformity has a role to play in forging and maintaining a robust union and a well-functioning administrative state.

If traditional nationalists need to acknowledge that the power states wield in our integrated regime is a good thing, federalism’s stalwarts need to acknowledge that it’s a form of power in the first place. Rather than cling to

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123. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).



the idea that states need to preside over their own empires to be powerful, it's time for federalism scholars to recognize that the principal-agent "problem" is a feature, not a bug, for anyone who cares about state power. And they must see states not as enclaves that facilitate a retreat from national norms, but sites for forging national norms.

Notice, by the way, how the work of the new nationalists would reorient current debates. For starters, even if we disagree—as I think we will continue to disagree—about striking the right balance between state and federal power, at the very least we ought to agree that the simple notions like devolution and centralization are too crude for current debates.

I suspect this work will also lead champions of sovereignty and autonomy to think of themselves as allies rather than opponents. As I've noted elsewhere,<sup>124</sup> their visions of state power display deep continuities with one another—both depend on the presence of open regulatory space and the ability of states to preside over their own empires. They both depend, in other words, on a sovereignty account despite the efforts of autonomy's proponents to distinguish them.

The real challenge to this vision of state power, then, comes from the new nationalists. They have shown that the most important form of state power does not involve states' presiding over their own empires, but administering the federal one. And they have suggested there isn't much exclusive regulatory space out there anymore. Going forward, then, the *real* battle will be between the power of the sovereign and the power of the servant.

#### B. *The Benefits of a Détente: A New Process Federalism*

And what is to be gained from a détente?<sup>125</sup> Quite a bit. We have all spent a lot of time winding the same normative arguments around whatever case the Supreme Court has kicked out to us, be it *Printz* or *Raich* or *NFIB*. But there are more pressing problems to be resolved, and they'd all benefit from our collective wisdom. Much of the new nationalists' work, after all, has been descriptive. That's not surprising given that it's orienting the field around a different picture of federal-state relations and undermining the core analytic claim undergirding today's debates. But the work has come up short when it

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124. Gerken, *Federalism All the Way Down*, *supra* note 16.

125. Jessica Bulman-Pozen, as well as three of my brightest RA's—Sundeep Iyer, Rosa Po, and Zayn Siddique—pressed me on whether camps serve a role even under the circumstances I describe. Perhaps our collective thinking benefits from having advocates from the far ends of the spectrum pushing clearly delineated positions. I don't disagree with this point, but I'm not worried about it, if only because law professors are stubborn old dogs. While I'd like to see members of both camps pull up their stakes, I'd be stunned if a fair number of professors didn't hammer the stakes of their tents in still deeper.

comes to what Robert Schapiro calls the “rules of engagement”<sup>126</sup>—the doctrinal constraints on federal-state relations that have always been at the center of federalism debates.

Process federalism provides an apt example. It’s one of the most storied debates in federalism, and it has absolutely dominated the discussion during the last few decades. But we need a *new process federalism*, one tailored to the evolving nature of state power and the role states play in a thriving national democracy. The work of the new nationalists confirms that it makes perfect sense to look primarily to politics to safeguard healthy federal-state relations. But we’ve focused on safeguarding far too narrow a conception of state power.

As to the first, the discussion above confirms the core insight of the political process schools: federal-state relations are profoundly shaped by political forces no matter what formal bounds the Constitution places on state and federal power. As a formal matter, the national government can regulate where it sees fit these days, and yet the states retain a powerful place in the American system. Federal power is more constrained by politics and practice than by Constitutions and codes.

The problem is that those interested in the political safeguards to protect state power have not been thinking about the most important form of state power. Indeed, as far as I am aware, *all* of the process federalists imagine politics safeguarding state autonomy, and *all* of process federalism’s opponents have focused on the need to protect state sovereignty. Both accounts depend on the federal government and states regulating independently and presiding over their own empires. If the autonomy/sovereignty debate is becoming a sideshow, however, it makes little sense to fight these fights. If you recognize how state power functions in this day and age, it can’t be that the purpose of the political safeguards is to help the states and federal government engage in the governance equivalent of parallel play. In a world where regulatory overlap is the rule, then, neither side in that debate has focused on the right question.<sup>127</sup>

There are a fair number of traditional nationalists who endorse process federalism, of course, but their account has not kept up with the times either. The traditional nationalists’ preferred version of the safeguards account is one in which the courts *never* step in. That is an utterly unrealistic goal given the

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126. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005).

127. Jessica Bulman-Pozen’s work suggests that this should have been obvious to the process federalists from the start. As she points out, some of the best work on this issue is aimed at leveraging political and administrative integration in the service of state autonomy and separateness. But, as Bulman-Pozen has astutely observed, the odds are that “integration yields integration.” Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics*, 123 YALE L.J. 1920, 1922 (2014).

pervasiveness of federal-state overlap. As Abbe Gluck has shown, the states have become so deeply intertwined with federal administrative law that courts must have “rules of engagement” just to carry out their quotidian duties.<sup>128</sup> Judicial supervision of federal-state relations is going to occur no matter what. We can’t expect the judiciary to stop refereeing this game, but we should insist that it will understand how the game is being played.

I thus assume that the “new” process federalism is going to look more like Rick Hills’s<sup>129</sup> or Ernie Young’s<sup>130</sup> preferred variant, in which courts don’t police federal-state boundaries but play an Elyian role<sup>131</sup> in ensuring that the right conditions of federal-state bargaining obtain. But the new process federalism should be shorn of the idea that dominates both of their work—that the point of process federalism is to safeguard state autonomy. Our focus should be second-order policing of federal-state bargaining,<sup>132</sup> not first-order policing of federal-state boundaries. In this sense, *NFIB*’s much-maligned Spending Clause ruling may be a harbinger of the future.<sup>133</sup> For all its many demerits, it represents an effort by the Court to come to grips with the reality of ongoing federal-state interactions and to set some rules about how they should unfold over time. But, consistent with the insights of the old process federalism, judges must be cognizant of the fact that politics will constrain federal authority far more effectively than judicial decisions.

Note that this “new process federalism” draws upon the wisdom of both camps. One side has been wrong in thinking that the point of process federalism is to shore up state autonomy, but it’s been right to think that the courts have a role to play. The other side has been right to think it’s a mistake for the Court to engage in first-order policing of federal-state boundaries, but it is wrong to think that the courts should vacate the field.<sup>134</sup>

Needless to say, the new process federalism cannot be a one-size-fits-all account. As I noted earlier, while federal-state relations take a roughly similar form in many parts of “Our Federalism,” they still fall along a broad continuum. Family law looks different from environmental law. The enforcement of criminal law isn’t the same as the administration of the ACA. Much of the work on these subjects has been confined to doctrinal silos. What

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128. Gluck, *supra* note 23.

129. 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 (1998).

130. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001).

131. The term comes from Ernie Young. *Id.* at 1395.

132. Erin Ryan frames it differently, but I take her project to be aimed at just this form of second-order policing. *See, e.g.*, RYAN, TUG OF WAR, *supra* note 22; Ryan, *Negotiating Federalism*, *supra* note 22, at 102.

133. For an intelligent discussion on the strengths and weaknesses of Justice Roberts’s effort to wrestle with the problem of second-order policing, see Metzger, *supra* note 66.

134. Thanks to Sundeep Iyer for pushing me on this point.

we need now is an effort to schematize these regulatory arenas so we can trace their continuities while acknowledging their differences.

Moreover, the new process federalism will necessarily implicate multidimensional problems involving resource allocation, governance, and politics. Federalism debates were hard enough when we imagined federalism battles as one-off problems involving a small number of institutional actors and the causal arrows pointed in only one direction. But the new process federalists must figure out how to take these complexities into account—especially the fact that decentralization can serve nationalist ends—without losing sight of the core problem.

There are other ways in which process federalism must adapt to the times. Process federalism has largely focused on the moment when legislation is passed. To the extent that the timeline was expanded, it's because sovereignty types looked to the court battle that followed the passage of legislation, or because the "soft" process federalism advocates looked to what courts could do *ex ante* to shape legislative fights.<sup>135</sup> If you imagine federal-state relations as ongoing and iterative, not one-off battles, then it's clear that new process federalism's timeline must be extended. Just think, for instance, how much has occurred in the wake of the ACA's passage. A process account must focus not only on the moment a statute is passed, but what happens when it is administered—on what Jessica Bulman-Pozen and I have described as the "ex ante safeguards of federalism."<sup>136</sup>

So too, if you imagine federal-state relation taking place not just on the Hill or in a court, but in bureaucracies throughout the country, it's clear that the new process federalism's lens must be widened. Given the pronounced administrative features of federal-state relations these days, it's not surprising that some of the best work in the field of late has focused on the administrative dimensions of federalism.<sup>137</sup> As Gillian Metzger astutely observes, administrative law's "nonconstitutional and generic character" makes it "particularly well suited for addressing the central challenge of contemporary

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135. See, e.g., Hills, *supra* note 129.

136. Bulman-Pozen & Gerken, *supra* note 24, at 1292.

137. See, e.g., Stuart M. Benjamin & Ernest A. Young, *Tennis With the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009). Miriam Seifter, a bright newcomer to the field, has written a series of articles on the topic. See, e.g., Miriam Seifter, *Federalism at Step Zero*, 83 FORDHAM L. REV. 633 (2014); Miriam Seifter, *State, Agencies, and Legitimacy*, 67 VAND. L. REV. 443 (2014); Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014).

federalism: ensuring the continued relevance of states as regulatory entities in contexts marked by concurrent federal-state authority and an extensive national administrative state.”<sup>138</sup> While much of that work hews too closely to an autonomy account for my tastes, it has nonetheless begun to ask some of the key questions the new process federalism school must answer.<sup>139</sup>

The task seems daunting, so it might be helpful to offer a few examples of what the “new process federalism” would look like. Some of it will resemble Rick Hills’s brilliant piece recasting the anti-commandeering rule as an effort to ensure the right conditions obtain for federal-state bargaining.<sup>140</sup> While Hills is, in my view, unduly focused on an autonomy account, he models how to do a deep dive into the economic and political incentives that shape federal-state bargaining and determine how conditional spending works. Some of it will resemble Sam Bagenstos’s piece on “federalism by waiver.”<sup>141</sup> There he shows how politics and other forces transformed waivers from interstitial devices to powerful tools for executive policymaking. Bagenstos’s analysis of the relationship between *NFIB*’s spending clause ruling and the president’s waiver practice shows how complex and fluid federal-state negotiations can be. But Bagenstos also *systematizes* the process and identifies its key variables (which range from the president’s policymaking position to the affinity felt between state and federal bureaucrats working inside the same system). He thus manages to think rigorously about how an “iterative, negotiated process, in which the state holds a number of important cards” will play out in the wake of *NFIB*.<sup>142</sup> Some of it will look like Erin Ryan’s work, which draws upon bargaining theory and catalogs federal-state negotiations along a variety of dimensions.<sup>143</sup> Some of it will answer Abbe Gluck’s list of fifteen doctrinal questions that take place at the intersection of federalism and administrative law.<sup>144</sup> This and other work gives me faith that it’s possible to systematize and theorize the complexity that the new nationalists have documented.

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138. Metzger, *supra* note 137, at 2090.

139. And note what happens when scholars start thinking about federalism’s administrative dimensions. They begin to see states as part of an integrated national system, which is why some of this work has carried us to state courts and state agencies, see, for example, Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 *YALE L.J.* 1898 (2011). Some have looked toward the horizontal distribution of power, Bulman-Pozen, *supra* note 26, and some have started to think through “federalism by waiver,” see sources cited *supra* note 115. These, too, seem like the natural outgrowths of a new process federalism.

140. Hills, *supra* note 129.

141. Bagenstos, *supra* note 74, at 228.

142. *Id.* at 231.

143. See RYAN, TUG OF WAR, *supra* note 22, at 265–367; Ryan, *Negotiating Federalism*, *supra* note 22.

144. Gluck, *supra* note 23, at 2022–43.

## IV. A BRIEF RESPONSE TO THE COMMENTATORS

I'll close simply by offering a few observations about the comments, all of which managed to be both gracious and critically engaged. I learned an immense amount from each one, and they have all helped me think more deeply—and, in some instances, differently—about the claims I made at the Lecture. To have a group of this caliber engaged with one's work is a gift, plain and simple. I am intensely grateful and thus sorely tempted to respond to each one in depth. But that would turn this Essay into a book, something that seems like poor thanks to the exceptionally courteous and highly competent editors of the law review. Secure in the knowledge that we will all be in conversation with one another for many years to come,<sup>145</sup> I'll try to be thematic and respond only to the common threads in the comments.

A. *Too Little on Nationalism?*

One theme that runs through many of the comments is a demand for a more fully elaborated theory of nationalism.<sup>146</sup> That seems exactly right and entirely fair. Nationalism already comes in many flavors, as Jessica Bulman-Pozen points out in her piece.<sup>147</sup> Indeed, Bulman-Pozen's categories map neatly onto the main debates we've had about the scope of national power. For example, Bulman-Pozen argues that some equate "nationalism" with the power of the center,<sup>148</sup> an account that likely traces back to debates over federal power in the wake of the New Deal. What Bulman-Pozen describes as the "unified American polity" account<sup>149</sup> likely has roots in the federalism fights that arose during the Civil Rights Era, when nationalists insisted on the importance of national norms. And then there's the school of thought that has long associated nationalism with uniformity, which may simply be rooted in our lawyerly penchant for consistency. None of these ideas is capacious

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145. There are costs to this approach. First, one ends up neglecting the grace notes in the comments. For example, Jessica Bulman-Pozen's observation that "[c]ries for states to secede from the union or to nullify federal law do not reflect the separation of state and national, but rather their deep integration," was, standing alone, worth the price of admission. Jessica Bulman-Pozen, *The Rites of Dissent: Notes on Nationalist Federalism*, 59 ST. LOUIS U. L.J. 1133, 1143 (2015). Second, I'm going to say less about those comments with which I largely agree, like Ed Rubin's beautifully crafted and even more beautifully written essay. Edward L. Rubin, *Federalism as a Problem of Governance, Not of Doctrinal Warfare*, 59 ST. LOUIS U. L.J. 1117 (2015). It's a stroke of good luck to have a scholar as highly respected and sure-footed as Rubin situate one's work in the field, and I'm nothing but grateful for it.

146. Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 ST. LOUIS U. L.J. 1045, 1045 (2015); Bulman-Pozen, *supra* note 145, at 1134.

147. Bulman-Pozen, *supra* note 145, at 1135–36.

148. *Id.* at 1136–38.

149. *Id.* at 1135.

enough to capture what the nationalist school has been describing, but the new nationalists—myself included—have not been sufficiently explicit about precisely what we mean by the term *nationalism*. There's plainly work to be done here.

If I were to offer my own view, it would be very much like what Bulman-Pozen describes in her characteristically nuanced and thoughtful fashion: a democratically inflected, pluralist account.<sup>150</sup> I should place special emphasis on the notion of pluralism here. Many of federalism's proponents view nationalism with suspicion precisely because they appreciate the benefits of what I've termed "second-order diversity."<sup>151</sup> And nationalists—at least those of the lawyering varietal—don't help on this front because so many value uniformity and consistency for reasons that have more to do with their intellectual proclivities and professional commitments than a fully developed account of how democracy should work. In my view, however, a nationalist account should leave plenty of room for disuniformity: indeed, it should celebrate it.

Gluck—a blazing star in the field and a colleague whom I adore—has her doubts about the last claim. Indeed, she offers three worries about the relationship between uniformity and national ends in my work. First, she reads me as a "uniformist" seeking "an ideal national (i.e., single) policy decision."<sup>152</sup>

While I certainly believe that one benefit of state-based dissent is that it can tee up the fight that changes national norms, I've long celebrated the virtues of second-order diversity<sup>153</sup> and uncooperative federalism,<sup>154</sup> separate and apart from the role they play in forging new national norms. Indeed, I've rebuked my fellow nationalists for their failure to celebrate our Tocquevillian bureaucracy. As I wrote in *Federalism All the Way Down*:

Even as I side with the nationalists in thinking that it is perfectly acceptable for national majorities to play the Supremacy Clause card, I argue that a national system can withstand more division and dissent than typically imagined. My account elides the principal-agent distinction, privileges messy overlap over clear jurisdictional lines, and depicts power as fluid, contingent, and contested . . . . A democratic defense of federalism-all-the-way-down suggests that we

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150. Bulman-Pozen is one of the young scholars I most admire, so I'm tempted to invoke her allegiance to this view as proof positive that it's the right one.

151. Gerken, *Second-Order Diversity*, *supra* note 16.

152. Gluck, *supra* note 146, at 1057.

153. See Gerken, *Federalism All the Way Down*, *supra* note 16; Gerken, *Second-Order Diversity*, *supra* note 16.

154. Bulman-Pozen & Gerken, *supra* note 24.

miss half the story when we view conflict, resistance, and parochialism with such suspicion.<sup>155</sup>

I similarly argued that it is a mistake to celebrate “the idiosyncratic dissenter, the nobility of resistance, the glory in getting things wrong, the wild patchwork of views that make up the polity” in the private realm but mourn it in the public one.<sup>156</sup>

What’s true of my work seems equally true of the work of the nationalist school as a whole. As Bulman-Pozen observes, “[n]ationalist federalism takes from classic accounts of federalism an insistence on irrepressible diversity and dissent, but instead of mapping contestation onto state-federal relations as such, it regards diversity and dissent as national phenomena involving various state and federal actors in shifting configurations.”<sup>157</sup>

Gluck nonetheless still worries that when push comes to shove, I’m a uniformist at heart. Because I believe that the national government should set the bounds on disuniformity, she’s concerned that my account still involves a “single nationally chosen (preemptive) policy outcome, just one that endorses disuniformity.”<sup>158</sup>

The characterization undergirding Gluck’s second worry seems correct, but not the concern. As I’ve written elsewhere, a well-functioning national democracy should not punt hard democratic decisions to the states, where policy-making is easier simply because we’ve sorted ourselves so neatly into red and blue enclaves.<sup>159</sup> It’s all too easy for national elites—it’s all too easy for us—to relegate tough questions to local decision-makers rather than forge a compromise at the national level. Just as it was once too easy to let states in the Jim Crow South resolve questions of racial equality for themselves, today it’s too easy to let states navigate the hard questions raised by gun rights, gay rights, and abortion. Red and blue silos are not the products of a well-functioning democracy.

For these reasons, I’m not worried about what one might call “second-order preemption.” Democracy means hashing things out. It’s perfectly fine if, at the end of the day, we as a nation decide that the states can pursue different paths. A well-functioning national democracy doesn’t require rigid uniformity; it requires us to deliberate about which departures from national policy are consistent with our norms and which are outside the bounds. Too often these days, we aren’t deliberating; we’re just punting. We can’t even have a

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155. Gerken, *Federalism All the Way Down*, *supra* note 16, at 71, 73.

156. *Id.* at 74.

157. Bulman-Pozen, *supra* note 145, at 1141.

158. Gluck, *supra* note 146, at 1057. I still puzzle a bit over how this is different from federalism “by the grace of Congress,” which similarly involves a national decision about whether and how far states can vary in their implementation of federal law. *Id.* at 1061.

159. This account is drawn from Gerken & Holtzblatt, *supra* note 9.



conversation about national norms in the first place, let alone make a collective decision about when and how they should matter. What Gluck casts as second-order preemption, then, is what I would characterize as a well-functioning national democracy.<sup>160</sup> I should note, however, that none of this takes away from Gluck's core worry that the nationalists haven't yet offered a fully developed account of what nationalism is.

Gluck's third worry also goes to the relationship between state disuniformity and national ends. She worries that the new nationalist account is "[i]ndistinguishable from [s]tates as [l]aboratories [f]ederalism."<sup>161</sup> Here I think Gluck casts her critique at too high a level of generality.<sup>162</sup> To be sure, both the states-as-laboratories narrative and the new nationalists' account of the "discursive benefits of structure" depend on states being sites where diverse norms are forged and different policies are enacted. But if that's enough to equate the two theories, then virtually all of the reasons conventionally offered in federalism's favor collapse into a single claim. After all, states can only facilitate choice or compete for the hearts and minds of citizens because they can promote different norms and enact different policies. So, too, states can only serve as bulwarks of liberty because they can pursue different paths than the federal government. Like the labs account, the new nationalist story depends on diversity within state policymaking arenas. But the new nationalists have a much less technocratic, much more wide-ranging account of the discursive benefits this diversity promotes. Some of us have explored the expressive and constitutive benefits associated with what I call "dissenting by deciding."<sup>163</sup> Some have focused on the importance of states as sites of political competition.<sup>164</sup> Some have lauded the benefits associated with playing out political conflicts in different settings with different power dynamics.<sup>165</sup> Still others have limned more technocratic themes having to do with regulatory overlap and redundancy.<sup>166</sup> Many of these ideas have little or nothing to do with the states' role as laboratories of experimentation, and

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160. Moreover, I'd note that even those who endorse a robust sovereignty account subscribe to this basic view. The Fourteenth and Fifteenth Amendments, for instance, could be characterized as a form of second-order preemption, as they prevent states from departing from certain national norms even under a sovereignty account.

161. Gluck, *supra* note 146, at 1059.

162. Or perhaps Gluck simply has a more capacious mind than the rest of us and has thus associated these values with the laboratories account even when others hadn't. Elsewhere Gluck asks whether federalism could always be understood as serving national ends. I think the answer is yes, as I note above, *supra* note 7, but that's not how federalism's stalwarts have traditionally understood their project.

163. Gerken, *Dissenting by Deciding*, *supra* note 16.

164. Bulman-Pozen, *supra* note 18.

165. Rodríguez, *supra* note 15; *see also* Gerken, *Second-Order Diversity*, *supra* note 16, at 1148–52, 1171–80.

166. *See, e.g.*, SCHAPIRO, *supra* note 12.

others involve claims far richer than the narrow notion that national policymakers can learn from state experiments.

*B. Too Much Emphasis on the Power of the Servant?*

A second, main theme emerged from the comments. Several commentators pressed on my claims about what I cast as the three competing models of federal-state relations: sovereignty, autonomy, and agency (which I also term “the power of the servant”).<sup>167</sup> Some thought I underplayed the importance of the “power of the servant” vis-à-vis sovereignty and autonomy. Others thought that federal-state relations inside cooperative federal regimes are too variegated to be cast as a principal-agent relationship.

1. The Continued Salience of the Sovereignty/Autonomy Model?

One set of scholars pressed on my claim that “we may have reached the point where the sovereignty/autonomy debate is little more than an academic sideshow.”<sup>168</sup> Gillian Metzger insists that the “state autonomy and state sovereignty are an important part of why running national programs through the states adds value.”<sup>169</sup> And Abbe Gluck wonders whether she needs to get out of the “nationalist school” car given her own commitments to a sovereignty model.<sup>170</sup> (I find the latter especially amusing not just because it’s so witty, but because I’ve always thought Abbe was the one pressing the accelerator.<sup>171</sup>) Interestingly enough, I find myself in more agreement with Metzger than Gluck, even though I’ve always thought of Gluck as a fellow traveler. But Metzger’s comment is decidedly that of a nationalist, albeit a different sort of nationalist than I am, whereas Gluck’s emphasis on state power for its own

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167. Gerken, *Of Sovereigns and Servants*, *supra* note 44.

168. *See supra* text accompanying note 110.

169. Gillian Metzger, *Edited Remarks: The States as National Agents*, 59 ST. LOUIS U. L.J. 1071, 1073 (2015) [hereinafter Metzger, *The States as National Agents*]. I take that rebuke quite seriously, especially coming from Metzger. One of the hallmarks of Metzger’s work is that she’s usually one of the first-movers in the field. She was, for instance, one of the first scholars to think hard about the administrative dimensions of federalism, Metzger, *supra* note 137, and her work on horizontal federalism remains both one of the earliest and most important pieces in that field. Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007). If Metzger tells you that you’ve gotten ahead of yourself, it’s wise to pay attention.

170. Gluck, *supra* note 146, at 1045.

171. In earlier work, I’d always cast “the power of the servant” as one of three competing and complementary models of state power. *See, e.g.*, Gerken, *Exit, Voice, and Disloyalty*, *supra* note 16, at 1367–68; Gerken, *Our Federalism(s)*, *supra* note 110, at 1556–60. But Gluck’s work on the pervasiveness of federal statutes has led me to think that the sovereignty and autonomy models were even less relevant than I’d thought. *E.g.*, Gluck, *supra* note 23, at 1998 (“[F]ederalism now comes from federal statutes.”); *id.* at 1999 (“[F]ederalism leaves state power to the grace of Congress.”); *id.* at 1998 (“Federalism today is something that mostly comes—and goes—at Congress’s pleasure.”).

sake sounds more conventional federalism themes than I'm willing to endorse.<sup>172</sup>

To be sure, it may be ours is as much a semantic disagreement as a substantive one. It wouldn't be surprising if the semantics were getting in the way of this discussion. Sovereignty, as I've written elsewhere, is not clearly defined in the literature.<sup>173</sup> It's usually invoked to describe the power of states to preside over their own empire. That notion, however, contains two distinct threads. The first suggests that states regulate separate and apart from the federal government. Neither Metzger nor Gluck mean to invoke this outdated notion of "separate spheres." But both emphasize the second thread associated with the sovereignty model—the idea that states wield general lawmaking authority. Metzger notes that states matter because "they are formally independent levels of government: they have distinct electoral bases, and they have a claim to representative legitimacy."<sup>174</sup> Gluck insists on the importance of states' "sovereign lawmaking apparatus."<sup>175</sup>

It certainly matters that states possess a sizeable "lawmaking apparatus." It's plainly the reason that states play such a crucial role in "Our Federalism," and Metzger is correct that the history and tradition of state sovereignty confer greater salience upon that apparatus.<sup>176</sup> Metzger is also right to say that it matters both that states have "distinct electoral bases" and "representative legitimacy."<sup>177</sup> I nonetheless think that it would be a mistake for the new nationalists to hew to a sovereignty model. After all, cities and school boards and juries all come with a salient history and tradition, they all have distinct electoral bases, and they all possess some variant of democratic legitimacy. More importantly for my purposes, they all can play similar, if not identical, roles in "Our Federalism."<sup>178</sup> And yet none of these institutions possesses sovereignty.

So what's doing the work here? Metzger observes that states "are governments, and that relates closely to the idea of states as sovereignty."<sup>179</sup> But I think she phrases that point in her characteristically careful fashion precisely because the ideas relate to one another but aren't necessary to one

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172. I nonetheless think that Gluck clearly should be along for the ride. There's plenty of room for a range of aspirations in this car, as Abbe suggests there ought to be. Gluck, *supra* note 146, at 1051 (asking whether "the school is capacious enough to include a more state-centered account and a true continuum across the categories"). Besides, who would want to take a road trip without Abbe?

173. Gerken, *Federalism All the Way Down*, *supra* note 16, at 11–14.

174. Metzger, *The States as National Agents*, *supra* note 169, at 1072.

175. Gluck, *supra* note 146, at 1054.

176. Metzger, *The States as National Agents*, *supra* note 169, at 1073.

177. *Id.* at 1072.

178. Gerken, *Federalism All the Way Down*, *supra* note 16, at 21–33.

179. Metzger, *The States as National Agents*, *supra* note 169, at 1072.

another. Even if state power is currently tied up with a sovereignty account, it need not be. Cities, for instance, play an outsized role in “Our Federalism,” and no one would conflate their power with that of a sovereign. So, too, juries and school districts and zoning commissions and the myriad of sub-state and sub-local institutions constitute important players in what I’ve termed “Federalism all the Way Down.”<sup>180</sup> What matters here is regulatory power and an independent democratic base, not sovereignty.

I don’t want to overstate the case. Metzger is plainly right that the notion of sovereignty has vaulted states to their coveted spot on the governance hierarchy. It’s therefore theoretically possible that as we leave the sovereignty account behind, states’ power will decline and they will no longer be able to serve the myriad roles that the nationalists have identified. But the death of sovereignty was announced more than sixty years ago,<sup>181</sup> and today states nonetheless wield power largely without the benefit of sovereignty (and with increasingly small opportunities for autonomous lawmaking). The form of power that states wield has changed, but it’s not clear to me their power has diminished. Moreover, powerful, partisan-aligned interests will have every incentive to maintain the states’ salience going forward as they compete in the national political arena.<sup>182</sup> As long as these basic conditions hold—as long as states continue to make law and answer to different constituencies than the federal government’s—they should continue playing the productive role that the nationalists have identified. For that reason, I’m hesitant to stick with an account of state power that no longer gives us traction on the problems of the day.

Gluck has a quite different take on the salience of sovereignty to this debate. While Metzger wonders whether sovereignty is necessary for the states to serve the ends the new nationalists have identified, Gluck sees state power as an “end worth achieving itself.”<sup>183</sup> I must confess I’ve struggled with this idea ever since the Lecture, largely because I understand both decentralization and centralization to be means to an end.<sup>184</sup> I would understand if Gluck thought that our end ought to be a state-centered democracy. But state power “as an end worth achieving itself?”<sup>185</sup> As I noted earlier, that strikes me as a means bleeding into an end.<sup>186</sup> Or maybe Gluck and I are just addressing different questions when we talk about sovereignty. Sovereignty may not be necessary for a nationalist account of federalism. But if you, like Gluck, were

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180. Gerken, *Federalism All the Way Down*, *supra* note 16, at 21–33.

181. See, e.g., Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

182. Bulman-Pozen, *supra* note 18, at 1079, 1145.

183. Gluck, *supra* note 146, at 1050 (emphasis omitted).

184. *Supra* text accompanying notes 6–10.

185. Gluck, *supra* note 146, at 1050.

186. *Supra* text accompanying notes 8–9.

concerned that the increase in national power would diminish the role of the states, it wouldn't be a surprise if sovereignty took on a different valence in your analysis.

That being said, I admire Gluck's evocative effort to cast *Nationalism as the New Federalism*,<sup>187</sup> whether or not it's a complementary or a competing account to *Federalism as the New Nationalism*. That's not because I agree with Gluck that we should empower the states for their own sake (as "states qua states")<sup>188</sup> absent a convincing explanation as to why we ought to valorize states over all the other institutions that serve the same, useful roles in our system. But I certainly agree with Gluck that the states wield more power over a federal program when they are what Jessica Bulman-Pozen and I have termed "connected critics" working inside the system rather than autonomous sovereigns laboring outside of it.<sup>189</sup>

Happily, the new nationalist tent is plainly capacious enough for both Gluck's account and mine, which may indirectly confirm Ryan's and Rosen's observations that these labels are losing their analytic force over time.<sup>190</sup> I've been using terms like nationalism and federalism because that's how the debate is currently cast.<sup>191</sup> But our task, at bottom, is to figure out how to make this democracy work well, which means that at some point we may all find ourselves discarding these terms and focusing entirely on what Rosen terms "governancism."<sup>192</sup> I suspect that there will still be a divide among scholars as to whether scholars prefer a state-centered or nation-centered democracy. But no matter which we support, we will not—as nationalists and federalism supporters do now—equate decentralization with one and centralization with the other.

## 2. The Limits of the Agency Model?

Just as one set of scholars worried about my analysis of the sovereignty and autonomy models, another set wondered about whether the model I've put forth—the agency model, which casts states power as the "power of the servant"—adequately captures all cooperative federal regimes. Neither insists that my descriptor cover every cooperative regime, be it formal or informal. But Rosen suggests that the language of agency serves little purpose given that these regimes involve such a diverse range of relationships, from "directed

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187. Gluck, *supra* note 146, at 1046.

188. *Id.* at 1046 (emphasis omitted).

189. Bulman-Pozen & Gerken, *supra* note 24, at 1288–89. *See also* Gerken, *Federalism All the Way Down*, *supra* note 16, at 33–43.

190. Mark Rosen, *The New Governancism*, 59 ST. LOUIS U. L.J. 1079 (2015); Erin Ryan, *Response to Heather Gerken's Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 1147 (2015).

191. As Ryan graciously acknowledges. Ryan, *supra* note 190, at 1162.

192. Rosen, *supra* note 190, at 1083.

agents” to “trusted delegates” to “partnerships.”<sup>193</sup> Ryan goes so far as to suggest that sometimes the *federal government* is the servant of the state.<sup>194</sup>

I agree with Rosen and Ryan that federal-state relations within cooperative federal regimes are fluid and contextual and feature markedly different power dynamics. In my view, however, *all* principal-agent relationships are fluid and contextual and feature markedly different power dynamics. This variegation, however, shouldn’t disable us from describing each of these relationships as principal-agent regimes. I’m all for eschewing formalism, as must be clear from this Lecture. But a bit of formalism has always guided our assessments of these relationships, and with good reason. A principal-agent relationship exists when a principal is formally entitled to command the agent but cannot always do so in practice (administrative law and corporate law have long been preoccupied with this disjuncture). That’s the idea I’m trying to capture. In the regimes I’m describing, the national government is formally entitled to play the supremacy clause trump card, even if that card doesn’t always end up being a trump in practice. Nor do I believe my terminology is idiosyncratic. Rosen, for example, analogizes federal-state relations to the relationship between Congress and federal agencies,<sup>195</sup> but I think that example makes my point. Despite the “partnership” that exists between Congress and federal agencies, scholars “consistently cast agencies as agents, never principals.”<sup>196</sup> That’s also why Ryan’s examples—federal regulations that incorporate state law, federal programs that require state approval to move forward, etc.—haven’t changed my mind.<sup>197</sup> In almost all of her examples, the *federal government* has decided to interact with the states in the fashion she describes. I have trouble seeing why the federal government’s decision to pay these courtesies to the states converts it into an agent of the states.

Setting aside this semantic quibble, though, I was fascinated by Rosen’s and Ryan’s efforts to map out these differing relationships. It’s clearly one of the many tasks on the nationalists’ school’s “to do” list, and there are few people better able to do it than Ryan and Rosen. Ryan was one of the first scholars to map these relationships in her important work on “negotiated federalism,” and Rosen’s work in this area is noteworthy for its care and subtlety. The tradeoff between context and concept is always a challenge for law professors, and that is especially true here, where the new nationalists’ thick descriptive analysis may have changed some minds but hasn’t yet moved us to the conceptual clarity I associate with conventional federalism arguments.

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193. *Id.* at 1098.

194. Ryan, *supra* note 190, at 1165.

195. Rosen, *supra* note 190, at 1099.

196. Brigham Daniels, Précis, *Agency as Principal*, 48 GA. L. REV. 335 (2014).

197. Ryan, *supra* note 190, at 1164–65.

C. *Too Little on Democracy?*

One of the most provocative and engaging pieces in the symposium came from the astute Sam Jordan, who asked whether I've paid enough attention to the democratic dimensions of federalism.<sup>198</sup> As an elections scholar who accidentally wandered into the federalism arena, I was secretly delighted by the challenge. I take Jordan's worries about the democratic limits of federalism quite seriously. My account of federalism, for instance, would have been a non-starter before the Civil Rights movement, when the idea of empowering racial minorities through governance would have seemed like a sick joke given the vicious conditions that existed in the Jim Crow South. And Jordan is certainly right that we must always be attentive to the limits of federalism when democracy isn't working properly. Moreover, as someone who believes in the national supremacy trump card, I have an easier time answering questions about Ferguson than traditional federalism scholars, who typically resist federal encroachment on state and local powers. In my view, if local democracy has faltered, it is perfectly acceptable for the federal government to step in and help her get back on her feet.

Nonetheless, I view Ferguson largely as an election law problem rather than a federalism problem. The problem of off-year election cycles and low turnout among poor people is commonplace in the field of election law, and it's worth remembering just how high African-American turnout rates have been in recent presidential election cycles nationwide. Moreover, even where democracy has broken down, as in Ferguson, it's worth asking the "as opposed to what?" question. Where there is what Jordan describes as a "mismatch between demographics and electoral outcomes,"<sup>199</sup> is it better for racial minorities to enjoy a substantial population majority at a local level or to have that population constitute an electoral minority within some larger electorate? The first at least allows for the possibility of change. The latter, however, seems only to guarantee permanent submergence. Low turnout groups are always at risk in a democracy, but that risk seems all the greater when they constitute minorities in the electoral pool rather than (potential) majorities.

D. *Not Enough on the Rules of Engagement?*

The "rules of engagement" was much on the mind of the commentators, just as it has been on mine. Gluck was the most provocative on this front, rebuking the new nationalists for their efforts thus far,<sup>200</sup> so I'll focus my response on her trenchant critique.

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198. Samuel P. Jordan, *Federalism, Democracy, and the Challenge of Ferguson*, 59 ST. LOUIS U. L.J. 1103 (2015).

199. *Id.* at 1115.

200. Gluck, *supra* note 146, at 1051–69.

I share Gluck's worry that the nationalist school will always struggle to provide the hard and fast doctrinal rules that have come so easily to traditional federalism scholars, and I very much credit her with pushing this point from the beginning. I do think, however, that Gluck underestimates how hard this is. Gluck suggests the nationalist school "apparently intentionally"<sup>201</sup> has failed to offer up doctrinal rules and that I "embrace" the fact that we may end up having to "muddl[e] through" these controversies.<sup>202</sup>

This is obviously a failure of exposition on my part. What Gluck takes to be a sign of hubris, I meant as a sign of humility. Gluck is right to distinguish between the federalism questions with which she is preoccupied (those involving statutory interpretation) and those about which most of the new nationalists write (those involving constitutional interpretation and democratic design).<sup>203</sup> The former lends itself more easily to the sorts of legal pronouncement Gluck craves. That's because a legislation approach holds so much constant in the analytic equation. Gluck wants to figure out "what exactly Congress intended the role of states to be when it includes states in a federal statutory scheme that all agree is legitimate."<sup>204</sup> That is a challenging inquiry, but at least it's a familiar one.

The prior question, however, is even more complex. Those of us interested in constitutional interpretation and democratic design—in what Congress should do rather than what Congress did—must grapple with many more factors in our equation. Ed Rubin describes this problem far more elegantly than I have, with his comparison between the study of federal-state interactions and the Mandelbrot set.<sup>205</sup> Perhaps this is why Rubin joins me in wondering whether the judiciary can ever be the ultimate arbiter of these questions.<sup>206</sup>

If you want to get a sense of how hard these questions are, take a look at Rubin's deeply engaging analysis of these puzzles, or read Gillian Metzger's initial effort to analyze the downsides of the new nationalist account.<sup>207</sup> Or turn to Rosen and Ryan's schematics,<sup>208</sup> which show just how complex and

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201. *Id.* at 1045.

202. *Id.* at 1064.

203. *Id.* at 1054.

204. *Id.* at 1052.

205. Rubin, *supra* note 145, at 1117–18.

206. *Id.* at 1118.

207. Metzger is right that the new nationalists tend to be pretty sunny about their views. Metzger, *The Status as National Agents*, *supra* note 169, at 1074. I've always thought it appropriate to dwell on the affirmative account because the costs associated with this approach are so obvious (and already well-documented in the literature). But Metzger demonstrates just how fine a scholar she is in this part of her essay. Rather than trotting out the usual worries associated with localism, she dwells on a set of risks that are internal to the new nationalist account itself and that threaten to undermine it from within. *Id.* at 1074–76.

208. Rosen, *supra* note 190, at 1082–83, 1092, 1098, 1101; Ryan, *supra* note 190, at 1155–59.



variegated federal-state relations are. Or heed the observation of Ryan, who has been—like Gluck—a pioneer in identifying rules of engagement for federal-state relations. “[F]iguring out how to work through all this tension,” she writes, “can be really, really hard.”<sup>209</sup>

None of this is intended to downplay the importance of the statutory questions. Whatever one thinks Congress *should* do on the federalism front, it *is* in fact setting the terms of federal-state relations in one policymaking arena after another. That’s the lesson Gluck’s work teaches us all, and it’s impossible not to be convinced by it.

#### CONCLUSION

While federalism scholars have long been divided into neatly delineated camps it is time to declare a *détente*. As the work of the new nationalists makes clear, proponents of both nationalism and federalism have pitched their tents on unstable ground. First, the new nationalists have shown that the central premise of the federalism/nationalism divide—that centralization favors national interests and decentralization favors state interests—is false. Second, the new nationalists have shown that the democracy we have should represent a reasonably satisfying compromise for both sides. It is a different reality than either camp desired, but it is also a different reality than either camp feared. This work has thus unsettled the existing terrain and mapped new territory going forward: common ground on which to build . . . or new terrain on which to battle.

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209. Ryan, *supra* note 190, at 1157.