Red State, Blue State: Federalism for All
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Introduction: Of Brandeis and the Democratic Deficit in National Politics

In the early part of the 20th century Louis Brandeis, a great progressive crusader and one of the first "public interest" lawyers in our nation's history, argued in favor of allowing the different states to serve as laboratories of experimentation in economic regulation.[2] And he implemented this attitude in decisions, as a Supreme Court justice, rejecting challenges to state laws restricting economic competition and regulating commercial activity.[3]

The virtues of smaller communities as sites of decision-making were obscured by "states rights" rhetoric of the mid-20th century anti-race equality movement, a movement that still casts a long shadow over a number of southern states. But in light of developments since the mid-20th century's ugly invocation of states rights to protect the racial caste system expressed in segregation, our thinking about constitutional federalism needs to be reconsidered, as both political liberals and conservatives explore the value of degrees of autonomous decision-making at the state and local level.

Such renewed thinking about federalism also needs to take into account the changes in the representative character of the state legislatures as a result of the

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[1] With thanks to Robert Taylor, Michael Taylor, Martha Minow, John Manning, Dick Fallon… for helpful conversations.

[2] See New State Ice Co. v. Liebman, 285 U.S. 262, ---(1932 (Brandeis, J., dissenting). So far as I am aware, he did not have in mind "experiments" in such basic rights as those protected by the Fourth Amendment or First Amendment (though as Jeff Rosen says, neither was he a crusader for racial equality). But in economic matters, Brandeis was a fan of smallness, where people could learn facts and participate in making decisions.

[3] See generally Phillipa Strum; Jeff Rosen [biographies of Brandeis].

Warren Court's reapportionment decisions and the Voting Rights Act.[4] In contrast to prevailing images in the early 1960s of state legislatures as reflecting malapportioned, frequently racially exclusionary electorates, state legislatures and governors now may have a somewhat stronger representative democratic character –in representing the people of their jurisdiction – than does the Congress in representing all the people of the United States.[5]

As Chief Justice Earl Warren wrote in *Reynolds v. Sims*, "Full and effective participation by all citizens in state government requires ... *that each citizen have an equally effective voice* in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less."[6] Although by the 1950s a number of the state legislatures were severely malapportioned, and state governments subject to massive critique as ineffective

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[4] See Vicki C. Jackson, *The Warren Court and the Post World War II Model of Constitutional Federalism*, in EARL WARREN AND THE WARREN COURT (Harry Schieber ed. 2006). Until the Voting Rights Act was fully implemented, there were states in which so high a proportion of a discrete racial minority were not voting that the democratic legitimacy of the state government could be questioned. Today that is less true.

[5] Assumptions or questions that require further checking before paper is finalized: I assume that prior to the Voting Rights Act, African Americans living in parts of the country outside the South were not as systematically excluded from voting as they were in the South, and thus the House of Representatives - -to the extent it reflected voting by a more inclusive electorate in some of the states – may have had greater democratic legitimacy than the legislatures in states that systematically suppressed African American voting. A start on this research is at http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/ (showing that there were some African American representatives in the Congress between 1871 and 1901; and then **none** until 1929, when an African American from Illinois is elected to the House; in 1945 both Illinois and New York had one African American member of the House; in 1955 a third, and in 1957, a fourth, from Pennsylvania and Michigan became members; in 1967 there were seven African Americans in the Congress, all from northern states or California). Another question to check is the effects of district size in the representativeness of state legislatures, as compared to the House of Representatives, with respect to partisan affiliation. I assume but need to check that the states all use first past the post winner take all voting for their state legislatures.

[6] Reynolds v Sims, 377 U.S. at 565 (1964) (emphasis added).

and out of touch with current needs,[7] this began to change in the late 1960s, after the Warren Court's one-person, one-vote decisions. As a result of these decisions, state legislatures must be apportioned by population, in both their upper and lower houses.[8] Improvement in the quality of state government seemed to follow.[9] That the reapportionment decisions would have revitalizing effect on state governments was anticipated by some prescient scholars at the time.[10] Indeed, levels of trust in state governments vis-a-vis the federal government -- began to rise in the late 1960s;[11] today, one sees greater confidence expressed in the state governments than in the federal government.[12] (Moreover, all state governors today are directly elected; in the early 19th century many were appointed by legislatures.[13])

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[7] See e.g. ROBERT MCKAY REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 36-40 (1965) (describing governance failures in the states).
[8] Reynolds v. Sims (1964); Lucas v. 44th General Assembly of Colorado (1964).
[9] See Vicki C. Jackson, *The Warren Court and the Post world War II Model of Constitutional Federalism*, in EARL WARREN AND THE WARREN COURT 159-60 (Harry Schieber ed, 2006) (arguing that the Warren Court, contrary to the arguments of some scholars, was good for the states and for federalism); see also Ferguson, *Introduction to State Executives*, infra note 13 (noting effect of reaportionment, promoted by the court, in giving state governments new enery).
[10] See, e.g. ALPHEUS MASON, THE SUPREME COURT FROM TAFT TO WARREN 262-63 (1964) (arguing that reapportionment "may better equip the states to meet twentieth century needs, revitalizing rather than disabling these essential units of local government").
[11] *See* M. Kent Jennings, *Political Trust and the Roots of Devolution*, in TRUST AND GOVERNANCE 218, 239 (Valerie Braithwaite & Margaret Levi eds. 1998); see also WARREN E MILLLER & SANTA TRAUGOTT, AMERICAN NATIONAL ELECTION STUDIES DATA SOURCEBOOK 1952-1986, at 256 (1989) (finding that confidence levels in state governments begin to rise between 1968 and 1972, while confidence in the federal government does not begin to fall until after 1972).
[12] Gallup, Trust in Government (showing in September 2016, higher levels (63%) who had a fair or great amount of confidence in their state government than in federal government (44% on domestic issues, 49% on international issues); in September 1972, there were higher levels of confidence in the federal government (70% on domestic, 75% on international) rather than in state governments (63%)) http://www.gallup.com/poll/5392/trust-government.aspx
[13] At the founding this was not the case. See Margaret Ferguson, *Introduction to State Executives*, Eagleton Institue of Politics, Rutgers Center on the American Governor, at http://governors.rutgers.edu/on-governors/us-

The Congress, by contrast, is constitutionally malapportioned, with Wyoming and its 584,000 people having two Senators while California, with its 38.8 million people has the same two Senators. At this writing, there are 52 Republican Senators in the U.S. Senate, a 48 Democrats (actually 46 Democrats and 2 independents, who generally caucus with the Democrats). Based on state populations in the 2010 Census,[14] the 52 Republicans represent 136 million Americans. The 48 Democrats represent roughly 172 million.[15] So we have a countermajoritarian Senate at the present time.[16] Although the "equal suffrage" for states rule of the senate was malapportioned from the beginning, the degree of malapportionment has increased dramatically over time.[17] And the equal suffrage provision faces an even more difficult amending procedure than other amendments to the U.S. constitution , which is, in turn, far more difficult to amend than state constitutions.

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governors/introduction-to-governors/introduction-to-governors-chapter-1/ (explaining that governors, at the Founding, were quite weak and in some states were appointed by the legislature rather than being directly elected; following Andrew Jackson's election in 1828, many states began to switch from appointed to elected governors).

[14] For states with two Democratic Senators, or two Republican Senators, all of the state population is attributed to that party in my calculations. In states with one Senator from each party the state population was split in half and allocated accordingly. See note [15] below for treatment of the two Independent Senators.

[15] The two independents are from Vermont and Maine. If the numbers represented by these independents are subtracted from the total represented by the 46 registered democrats, those 46 still represent 171 million.

[16] The Senate has been malapportioned from the beginning of our country's history, of course. However, the degree of malapportionment between the representation of the smallest, and largest, states has increased by a factor of about five. See infra note 75 (largest to smallest population states had ration of 13:1 in 1790, and 67:1 in 2010). Moreover, the most pressing considerations that drove the compromise that led to the allocation of senators in the Senate have long since disappeared, as slavery has been abolished, see Henry Monaghan, *We the People[s], Original Understanding and Constitutional Amendment*, 96 Colum. L. Rev. 121, 145 (1996) (describing concern for, inter alia, protecting slave states undergirding provisions of Article V), and major regional differences diminished, see Feeley & Rubin, *Federalism as a National Neurosis*, [cite], though not disappeared.

[17] See infra note 75.

The President is elected through the Electoral College, which has the effect of disproportionately weighing votes in small population states. This aspect of the Electoral College has been highly significant: Twice in the last sixteen years presidents have been chosen who lost the popular vote nationwide. The malapportionment of the presidential election system also means that U.S. Presidents do not have the same degree of electoral legitimacy (vis-a-vis their constituents) from a representative democracy perspective, as do state governors. The current President lost the popular vote but won the Electoral College vote.

It is the Congress and the President who are the lawmaking institutions of the national governments.[18] There is now a greater risk at the national level that legislation will be enacted and executive action taken that is inconsistent with the views of the people of the United States than there is that, in any given state, legislation will be enacted inconsistent with the views of the people of that state.[19] There is, in other words, a significant structural "democratic deficit" in our national lawmaking processes vis-a-vis those of the states. [20]

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[18] As shown in text, the Presidency and the Senate are presently countermajoritarian institution, measured by the votes of the constituencies they represent. With respect to the House of Representatives: According to Ballotpedia, in House elections in 2016, Democrats received 61.7 million votes, and Republicans received 63.1 million, while more than 3 million votes were cast for Independent candidates. With 49% of the vote Republicans controlled 55% of the House seats; the Democrats, who won 48% of the vote, held 44% of the House seats. See https://ballotpedia.org/United_States_House_of_Representatives_elections,_2016

[19] The distorting effects of the two senators rule on national decisionmaking has long been observed. See e.g. Gillian Metzger, St Louis Univ, at 1075 n 14 2015 citing sources.

[20] I do not mean to suggest that democratic representative legitimacy on a per capita basis is the only form of democratic legitimacy that is important or the only legitimate value promoted by the Constitution's structure. Some degree of population-based disproportion in representation in the upper house is not uncommon in federal systems, in order to assure that particular interests of less populous regions are not neglected. But I am aware of no federal system in a working constitutional democracy that has the degree of disproportion that the U.S. Senate represents. And as to other values, having staggered terms for members of the national legislature, as exists in the Senate, has the benefit of helping to prevent rapid swings based on single elections – a stability benefit also important to

How might this shift towards greater democratic legitimacy of state governments affect thinking about constitutional federalism? In this time in which members of both traditional political parties are being challenged by nontraditional movements and candidates, one of whom has become the President, perhaps liberals and conservatives, red state and blue state law professors, informed by awareness of the the relative democratic representativeness of state governments vis-a-vis the federal, can find some common ground about the benefits of federalism, if not of the strategies for achieving those benefits or the particular substantive goals towards which those strategies are used.

This paper aims to assist this re-evalution by describing, in capacious terms, three different types of approaches to thinking about the possibilities and challenges of U.S. federalism. First, I briefly discuss a set of doctrinal constraints on national power articulated by the courts. Second, I consider "new nationalism" theories, including those of "disruptive" or "uncooperative" federalism approaches. Third, I consider political forms of federal reconstitution or reconstruction. The discussion is an effort to lay out these approaches as a positive matter; normative arguments will, for the most part, need to await another paper.

I. Existing Doctrine

The "federalism revival" in the Supreme Court's jurisprudence can be dated to a statutory decision, *Gregory v. Ashcroft*, in 1991. [21] The issue was whether the Age Discrimination in Employment Act applied to state court judges, who were subject to a state law age limit on their service. The court held as a statutory matter that the ADEA did not apply to such high government officials. The interpretation of the ADEA was informed from the outset of the opinion by constitutional considerations, as Justice O'Connor explained the historical reasons for and benefits

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legitimate government. But it also means that the members of the Senate, at any given moment, may not match in their party affiliations the mood of the most recent elections for the House.

[21] 501 U.S. 452 (1991).

of constitutional federalism, including a capacity for innovation, increased opportunities for participation in democratic politics, and greater responsiveness of the states to the different needs of citizens.[22]

In the years since *Gregory v Ashcroft*, statutory canons of interpretation have been inconsistently deployed in federalism-related cases.[23] The significance of *Gregory* is its foreshadowing of shifts in constitutional jurisprudence that have made a significant difference in the formal scope of federal power.

A. Anti-Commandeering doctrine as a limit on Congress

The first clear doctrinal signal of the Court's willingness to revive judicially enforceable limits to protect federalism was its decision in New York v United States,[24] holding that one element of a federal statute was invalid in that it imposed a coercive liability on a state to require it to take the kind of action ordinarily requiring legislation. This anti-commandeering rule was said to be supported both by principles of accountability and by a historical decision to abandon the power the central government had in the Articles of Confederation to compel states to act. Soon thereafter, the anti-commandeering principle was extended to a doctrine barring federal requirements that executive officials of state or local governments

[22] *Id.* at 458 ("This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.)

[23] As an illustration of the lack of consistency of interpretive presumptions in favor of state authority, compare Medellin v Texas, 552 U.S. 491 (2008) (President's memorandum implementing ICJ decision against the United States arising out of Texas' officials failure to comply with Consular Convention has no effect on state criminal procedure law) with American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003) (finding that executive memorandum with Germany concerning foundation mechanism to resolve Holocaust period insurance claims preempts state insurance law).

[24] 505 U.S. 144 (199x)

enforce federal laws against others.[25] This doctrine is likely to remain a stable limit on federal power since, though originally propounded by more conservative scholars and members of the Court, it has now been embraced by liberal or progressive scholars as a means to insulate state and local government officials from carrying out federal mandates viewed as regressive or discriminatory, as in immigration. [26]

B. Limits on Congress' Powers under the Commerce Clause and other Clauses in Article I

In *United States v Lopez*,[27] the Court invalidated a federal law prohibiting possession of guns near school zones. Although a plausible connection to interstate commerce was articulated by the government lawyers in its defense, it required multiple steps in a form of analysis that would support far reaching federal legislation into many areas of life. Moreover, the fact that the prohibited area was defined by proximity to schools seemed to suggest an effort or purpose to regulate education, a matter the Court viewed as traditionally one for the states. Although the case occasioned significant criticism, and was clearly viewed as a departure from the line of caselaw on the scope of the federal commerce power since 1937, it was arguably justifiable if understood not as a categorical bar, but rather as responding to a particular rule of law problem insofar as Congress itself had failed to take seriously the need to show how it was connected to interstate commerce or why a federal law was needed.[28]

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[25] In earlier work, I disagreed with the absolutist approach of these decisions as to executive officials, but was generally supportive of the decision as to legislatures. For executive officials, there is much that is attractive about the idea of a presumptive rule, allowing for exceptions under special circumstances, e.g., for a draft, or other time-sensitive need of the national government. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*? , 111 Harv L. Rev., 2180 (1998)

[26] See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) ("[T]he federal government cannot command the government agencies of the states to imprison persons of interest to federal officials.")

[27] cite

[28] See Jackson, *Printz and Principle*?, at 2234 & n 238, 2238-39.

Subsequent cases developed *Lopez*'s rule into a more categorical one, prohibiting reliance on the commerce power to regulate, on an aggregated basis, activity that the Court identifies as not "economic in character." In *United States v Morrison*[29] the Court held unconstitutional a private civil rights remedy in the Violence Against Women Act; for Commerce Clause purposes the Court treated the activity being regulated as private violence against persons (largely women) because of their gender, rather than seeing protection from violence as a necessary aspect of full participation in the (federally regulatable) economy.[30] Yet in *Gonzales v Raich*,[31] the Court upheld a ban on possession of marijuana (even as applied to medical marijuana) because of the relationship of such possession to an unlawful interstate market. (Determining what possessory actions the Court will find not economic in character remains somewhat uncertain.)

In *NFIB v Sebelius*,[32] the Court identified another substantive limit on Congress' commerce power: that the Congress cannot compel persons to engage in commercial activities. It thus held that the Commerce Clause did not support a congressional mandate that people purchase or otherwise obtain health insurance (though the provisions were upheld under the taxing power). Determining the line between compelling action and regulating commercial action already undertaken may pose interpretive challenges in the future.

I have argued in the past against rigid *a priori* substantive limitations on the substantive scope of federal power; I have also suggested that the rule of law requires showing a plausible chain of connection between legislation and a federal source of power. In light of my more recent reflections on the degree to which – as a

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[29] cite

[30] I was a coauthor of an amicus brief in the *Morrison* case, arguing, as I still believe to be correct, that the connection to commerce was substantial, and well-documented in the legislative record, since fear of violence substantially limited women's ability to participate in the economy on terms of equality with men, in ways analogous to the effects of private discrimination on the ability of African Americans to travel, in *Heart of Atlanta Motel* [cite].

[31] 545 U.S. 1 (2005

[32] 132 S Ct 2566 (2012).

result of actions by the federal courts and Congress -- states now have a stronger claim to democratic legitimacy than national lawmakers, I wonder whether judicial approaches to reviewing federalism-based challenges to national action ought to be developed that consider the degree to which such national legislation sufficiently reflects the interests of the people at the national level to warrant deference across the board. I wonder whether courts should take a more careful look at asserted bases of national power and grounds for acting before upholding federal legislation or rule making that would cut off lawmaking in the states – at least in the absence of reason to believe that the legislation was needed because states were engaged in discrimination or inequitable treatment of disadvantaged minority groups not able to protect themselves in the state political process or that there was a need for federal action because the states separately could not regulate well or some states were imposing serious externalities on interstate commerce or other subjects within Congress' regulatory powers.

C. Limits on Congress's powers under the Fourteenth Amendment:

In *Katzenbach v Morgan,*[33] the Court upheld provisions of the Voting Rights Act prohibiting discrimination based on English literacy for those who were literate in Spanish by virtue of being educated in Puerto Rico. The Court had rejected a challenge, five years earlier, to an English literacy requirement in North Carolina, concluding that it bore a sufficient relationship to the legitimate aim of promoting an informed electorate that it was not unconstitutional. In *Morgan*, however, the Court upheld the law both on the grounds that Congress has power, under the Fourteenth Amendment, to conclude that acts claimed to violate equality norms , which have not been struck down by the Court, nonetheless do violate the Fourteenth Amendment, or alternatively, that providing access to the vote was a means to enable Spanish speakers to prevent unlawful discrimination in other areas.

[33] 384 U.S. 641 (1966).

In *City of Boerne v Flores*,[34] the Court held unconstitutional a statute, the Religious Freedom Restoration Act, designed to overcome the effects of its decision in *Smith v Employment Division*.[35] In *Smith* the Court had held that states generally need not accommodate genuine religious objections to a generally applicable laws, distinguishing a line of cases seemingly so holding as involving both religion and other claims. The RFRA passed overwhelmingly and required that when a practice was challenged as intruding on religious freedom states had to justify it under the standards of strict scrutiny. The Court held that Congress did not have power under the Fourteenth Amendment to so provide. Disagreeing with at least one of the theories of *Morgan*, it held, Congress could only enact legislation aimed at preventing or remedying conduct that the Court would agree violates the Constitution. While Congress could adopt prophylactic measures, those measures needed to be congruent and proportionate to the constitutional violation to be sustained.

Since then, the Court has rejected a Fourteenth Amendment basis for the Violence Against Women Act civil rights remedy because it permitted suits against non-state actors, even though this remedy was targeted at state failures to fulfill their responsibility of equal protection under the law.[36] Similarly, the preclearance provision of the Voting Rights Act – which had been an essential tool for increasing and maintaining voter registration among poor and black voters –- were invalidated in Shelby County v Holder (2013), because , the Court believed, the factual basis that once supported the legislation no longer existed. Ignoring the record on which Congress acted and Congress's conclusion otherwise, the provision was found unconstitutional, as not meeting the standards of proportionality and congruence.

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[34] cite

[35] cite

[36] *Morrison*, at __. The Court, inter alia, misrepresented the state of the record, in suggesting that fewer than half of the states had problems, when the evidence before Congress was that in at least 21 states there were state sponsored gender bias task force reports that had identified bias in the prosecution of violence against women, and every reason to think that similar problems existed in most if not all of the other states. Compare id at __ with id at __ (Breyer, J., dissenting).

The Fourteenth Amendment was not intended to abolish the states as semi-autonomous parts of the United States, nor to give Congress general legislative authority to enact laws for the general welfare. Too capacious an understanding of the Fourteenth Amendment might lead in this direction. So it is perhaps understandable why the court did not adopt the capacious approach of *McCulloch v Maryland*, which interpreted the Necessary and Proper Clause to allow Congress ample choice of means to fulfill its legislative powers, as long as they were appropriate to the end and not otherwise prohibited.

But where there has been a history of state persecution of minorities and suppression of their voting, considerable deference to the national legislature's efforts to remediate and prevent recurrences is in order. There was nothing unclear about the compelling factual basis for the Voting Rights Act's initial enactment, and Congress' decision to renew would seem to be well within the legislative judgment as to how long the remedy was needed. In this respect the case is unlike *City of Boerne v Flores*, where the existence of massive constitutional violations was doubtful under judicially-controlling standards.[37]

Boerne v. Flores and its progeny will enable the Court to monitor more closely pretextual uses of the Fourteenth Amendment power, should they arise. Arguments in cases like *Florida Prepaid v College Savings Bank*,[38] that Congress enacted changes to the patent laws because of concern about constitutional rights violations, were to some degree pretextual; the motivation of the legislation could reasonably have been regarded as primarily concerned with advancing the purposes of the patent and trademark laws. By contrast, *Shelby County* (the Voting Rights Act Case), or *Morrison*, reflected Congress' serious attention to constitutional rights of equality

[37] The decision in *Shelby County* gave the appearance of judicial over-reach in concluding, contrary to Congress, that the time for needing the pre-clearance remedy has passed. If, as the plurality wrote in *Coleman v Miller*, 307 U.S. 433 (1939), the question of how long is reasonable to ratify a constitutional amendment is nonjusticiable, then the question of the duration of a remedy that was at one time constitutional would seem to be one where very broad deference to Congress is appropriate.

[38] 527 U.S. 627 (1999)

and right to vote; these decisions were viewed by a number of scholars as involving judicial overreach in reviewing congressional action, essentially because of an ideological hostility to the substance of the legislation. The Court's Fourteenth Amendment doctrine thus holds both promise and pitfalls for the overall well-functioning of the democratic system.

D. Limitations on Congress's Spending Clause Powers to Impose Conditions on Receipt of Federal funds

As Allison LaCroix has argued, constitutional federalism in the United States does not have fixed boundaries, as illustrated by her study of the spending power in the period before the Civil War. [39] Specifically she argued that early nineteenth century constitutional thought conceived of the spending power as requiring structured forms of cooperation, in order to prevent federal dominance.[40] Without suggesting that 19th century notions of federal-state power be as such revived, the notion that an unbounded spending power would make the idea of a limited federal government very difficult to sustain remains true.

The resurgence of the Spending Clause as a limitation, as well as a grant, of power to Congress arrived in the 21st century in *NFIB v Sebelius*.[41] In this recent decision, the Court insisted on and relied on a distinction between coercive regulation and consensual limitations agreed to by recipients of federal funding. The Court invalidated a condition on federal spending that in effect require states in the Medicaid program to expand its eligible recipients. Even though the federal government would have paid all of the direct new costs, states objected to the administrative burdens they would need to assume, and argued they could not realistically turn down the new requirement because the statute would penalize them by withdrawing all federal funding for all existing Medicaid programs. The Court wrote: "Congress may use its spending power to create incentives for States to

[39] Allison LaCroix, *The Interbellum Constitution*, -- Stan L Rev -- (2015)
[40] *Id* at 401
[41] 132 S Ct at 2304

act in accordance with federal policies. But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism."[42]

This part of the Court's decision captures something important: Unbounded authority to condition federal grants on the observance of positive or negative requirements has too much coercive potential -- for state and local governments, and for universities.[43] Both of these groups are among the major, ongoing recipients of such conditional federal spending grants. And both local and state governments, on the one hand, and colleges and universities, on the other, play important constitutional functions: first, as checks on abusive use of national power and second, as sources of innovation that would benefit the polity overall. The effort to rely on the existing program (consent to which required consent to changes that might in the future be made), went too far, in the Court's view. As Heather Gerken out it, "the Spending Clause analysis is … the most deeply intuitive portion of the opinion … rest[ing] on a simple premise: Congress can't pull the rug out from under the states by radically altering the duties associated with a cooperative federal regime."[44]

E. Limitations, derived from the Eleventh Amendment and Principle of Sovereign Immunity, on Congress's power to subject states to private suits.

In 1996 the Court overturned its earlier decision in *Union Gas*, which had upheld Congress power, when it spoke clearly, to subject states to private suits in legislation enacted under the commerce power. In *Seminole Tribe* the Court held that Congress lacked power to subject states to privates suits in legislation enacted under Article I, although the United States retained the ability to itself sue states for damages under federal statutes. The Court was and remains closely divided on the issue of state sovereign immunity.

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[42] NFIB v Sibelius, at __2602 (quoting Steward Machine)
[43] Cf. e.g. Rumsfeld v FAIR, 546 U.S. 47 (2006) (rejecting constitutional challenge to federal law conditioning receipt of federal funds on universities allowing military to recruit even if military's policy violated anti-dsiscrimination norms).
[44] Gerken, 2014 HLR at __.

As I have explained in earlier writing,[45] the Court has been mistaken in giving this broad reading to sovereign immunity. But unless there is a significant change in membership on the Court, this doctrine is likely to be stable. This doctrine does not constrain Congress' substantive lawmaking but only limits the remedies available to enfore such laws. As such I think it unlikely to play much of a role in upcoming federalism debates.

II. "Uncooperative" Federalism, Disruption, The "New Nationalism," Federalism All the Way Down, and the Like

Another set of scholarly approaches, including that of Heather Gerken, the Dean-elect of Yale Law School, challenges conceptions of federalism based on the idea of sovereignty. They instead emphasize descriptive accounts of how the formal doctrine concerning sovereignty, the allocation of powers and even supremacy of federal law do not reflect the reality of influences going in multiple directions.[46] Emphasizing voice over exit, Gerken argues that "federalism without sovereignty" embraces a system of vertical checks and balances through situations of interdependence in law enforcement, implementation, interpretation. [47] She offers a more descriptive political account of how the federal government shapes state agendas and how states shape federal agendas even after law is enacted.[48] No doubt these observations are true, and it is important to see how political impact of federalism works; but it is not clear how "federalism all the way down" in this respect differs from decentralization.

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[45] Jackson, 1988, Yale; Jackson 1997 or so, NYU

[46] See, e.g. Heather Gerken, *The Supreme Court, 2009 Term, Foreword -- Federalism All the Way Down*, 124 Harv L. Rev. 4 (2010); see also, e.g., Gillian Metzger[Administrative Federalism, cite}; Federalism under Obama, cite]; arguing that federal regulation is not a zero sum game at the expense of state power, which surfaces in important ways in the administration of federal schemes).

[47] See Gerken, supra, at 10 ("the energy of outliers serves as a catalyst for the center"); id at 33-44 (exploring the "power of the servant").

[48] See also Abbe Gluck, *Our [national] federalism*, Yale 2014 (arguing that Congress is the primary source of our federalism).

The argument advanced by Professor Gerken and others is that governmental processes in our federal system afford many opportunities for both levels of government to exercise influence on the other, with the implication that accordingly, doctrine enforceable by courts based on the idea of sovereignty may be inappropriate or unnecessary. I am not sure, though, that the normative conclusion follows from the description, nor that Professor Gerken's approach offers sufficient guidance as to federalism as law, except in one direction. Professor Gerken clearly intends to preserve the supremacy of national law as a matter of judicially enforceable constitutional law, a point on which I am in agreement[49] However, explaining that her account is supplementary to others,[50] her work suggests that she may not believe in any judicially enforceable substantive federalism-based constraints on national power.[51]

She makes a persuasive and powerful normative argument for an approach of allowing experimentation at state and local levels, subject to correction by national legislation. Indeed, she argues, "division and discord are useful components" of the federal system,[52] and suggests, along with Jessica Bulman-Pozen,[53] that the "uncooperative" and disruptive features of federalism have considerable normative value.[54] These accounts lend normative force to the

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[49] Id. (insisting that the "center can play the national supremacy card").
[50] See id at 10-11.
[51] Here I draw inferences from works she cites. See e.g. id. at 12-14 and nn. 13-20. See also id at 16-18 (discussing debate between "process" theorists and and "federalists" over state power and identity and asking, why "we bother to have it"); id at 28. In other work Gerken appears to endorse clear statement requirements, as procedural constraints.
[52] Id. at 10.
[53] Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism,* 118 Yale L J 1256 (2009).
[54] Id. at 20 (arguing that this uncooperative dimension allows "minority rule" in states and local governments to shape identity, promote democracy, and diffuse powers). See also id at 24 "("When state bureacrats refuse to implement a federal program, properly or hijack the program for their own ends, they send a message to Washington .. .about the future of federal law"); id at 40 (value of "dissent and resistance"). She urges attention to cities, zoning boards, school boards, juries and

requirement that if national legislation intends to disempower such state and loca initiatives it needs to speak clearly in doing so.[55] They also even more strongly support arguments against executive or administrative power to preempt state laws.[56] Given the benefits of state experimentation and diversity, her work strongly suggests, a considered decision by the most representative federal decision-maker – the Congress – should be required before those benefits are disrupted.

Some of the legal components of Gerken's approach, though framed under the rubric of federalism, might instead be understood as arguing for a more expansive concept of constitutional equality than exists under current doctrine. For example, she would allow room for a more diverse concept of the constitutional role of diversity, e.g., allowing racial majorities in some areas to favor their own, as ethnic immigrant groups did before them. This appears to envision a reinterpretation of the equal protection clause. If so, questions would arise whether current U.S. law has sufficient tools to distinguish situation of disadvantaged racial minority or immigrant groups from situation of those who feel subjectively disadvantaged by equal treatment for minorities/women.

In law, descriptive and normative claims are often blended; the thrust of this scholarship feels normative even though it claims at times simply to be descriptive. It is in part a useful effort to disrupt lawyers' focus on categories and courts, and in

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other "special purposes institutions" of local governance, id at 24-33, but without explicitly connecting them to constitutional federalism indeed, drawing on scholarship noting the strength of mayors in a unitary system. Id. at 42 (citing . Cf. Vicki C Jackson, Citizenship, Gender and Federalism, in ___ (noting school boards and other institutions of local government as locations for "acts of public citizenship" and questioning whether the density of local government structures is or is not related to federalism).

[55] Cf Gerken, *Slipping the Bonds of Federalism* , 128 Harv L Rev 85, 92, 109, 122 (2014)(celebrating clear statement approach to interpreting federal legislation, stating, inter alia, that "If you worry about Congress inadvertently reading on state power in implementing treaties, it makes perfect sense to impose a clear statement rule.")

[56] See Bulman-Bozen, 102 Va L rev 953, 1024 (2016) (suggesting greater Chevron deference if federal agency decides state law is not preempted than if it decides that it is preempted).

part an effort to shift meanings/understandings of categories like diversity. It suggests that some defiant or uncooperative behavior may be necessary to advance legal development. History shows the truth of this, sometimes.

But there are rule of law concerns for approaches that rest too much on disobedience and disruption.[57] Bearing in mind *Cooper v Aaron*,[58] an approach giving normative weight to defiance by state and local officials raises concerns about the incentives for those who disagree with a law, or a ruling, to comply. There is clearly an argument that defiance of statutes, for purposes of testing their constitutionality, is legitimate (even if not always prudent), and thus perhaps one could distinguish that from defiance of a final court judgment on a legal point. Another concern is the question of whether such an approach is presumed to carry a one way ratchet. Would those who celebrate state laws permitting marijuana use or, prior to *Windsor* or *Obergefell*, the granting of marriage licenses in defiance of existing statutory law, equally celebrate defiance of gun control laws, or by opponents of state university affirmative action plans to procure by referendum a ban on such plans?[59] Is there an argument for a one way ratchet in favor of defiances on some but not all issues– and if so, what are the arguments for this normative position? Is it necessary to civilized society to grant those we disagree with similar rights of "defiant" or "disruptive" federalism? Is there a risk that arguments for "disruptive" federalism may detract from rule of law values reqiring compliance with unpopular but important norms (e.g., of criminal procedure rights for defendants)?

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[57] See also Gillian Metzger, *The States as National Agents*, St Louis UNiv (arguing that Gerken's account gives too little weight to state autonomy and the respect due states as constituent parts of the government).

[58] 358 U.S. 1 (1958).

[59] See California Prop. 209. How would the theory apply to issues decided by a Supreme Court decision, but by a narrowly divided Court? Cf. Mark Joeph Stern, *Is Same-Sex Marriage Safe*?, Slate (March 1 2017) (describing Texas Supreme Court's hearing of a case challenging expenditure of public funds to provide benefits to same-sex couples).

To return to the implications for law of the "new nationalism" approaches: Such approaches, focusing as they do on the actual degree to which states, local governments and the national government are interdependent in carrying out many aspects of federal law, support doctrines that promote good processes for establishing such frameworks. Stronger and more consistently applied presumptions against preemption, and especially against preemption by executive or administrative action alone, would be consistent with the normative argument implicit in the new nationalism. Clear statement rules, as well, might help promote actual congressional consideration of effect son state and local governments. Clear statements in legislation may also provide notice to state and local governments – if they come up early enough in the legislative process to do so. But it is unlikely that such a procedural timing rule would be judicially enforced; despite rejecting nonjusticiability arguments concerning Origination Clause challenges, the Supreme Court has been otherwise unwilling to monitor the fairness and regularity of legislative processes of the Congress.[60]

III. Reconstituting Political Communit(y)(ies) Through Local Action

Federalism might be thought to offer opportunities not only to influence substantive policies but also to address problems of polarization, inaction, and failures of representation at national level. By this I mean at least two kinds of failures of national politics: failures to represent majorities and failures to give appropriate consideration to minorities. In both, part of Congress's failure of responsibility has been a simple failure to take action that is needed – legislative and oversight. Part of the failure has been an inattention to considering minority views and the effects on minorities of proposed courses of action. What are the possibilities presented by federalism for improving quality of politics?

A. How we live: Physical movements of populations?

[60] See [19th century case conclusively presuming that if record says that enough votes were recorded they were].

It is unclear the extent to which state populations are more politically polarized now than in the past but there is some reason to think that living patterns today reflect much greater political polarization than in the past. Some data suggest that at the level of the county, more people are living in counties that are overwhelmingly partisan in one direction or another (i.e. more than 20% margins for presidential candidate in recent elections).[61] This accords with data showing an increase, between 1994 and 2014, of "ideological silos" of social circles, that is, that the percentages of liberal, and conservative, voters who are close friends primarily with politically like-minded people are increasing.[62] It is also consistent with data reflecting that there is a significant urban-rural divide in partisan and ideological identification.[63]

This polarized distribution of voters by partisanship may reflect some sort of Tieboutian sorting. But while this might be thought a benign development in terms of maximizing preferences, what is lost in such analysis is the ways in which preferences are not stable but depend in part on social interactions. Not only are preferences constituted, in part, by their social contexts, but satisfying some preferences may impose externalities on others -- and the trends in these demographic distributions impose severe externalities on political processes.

The more we spend time only with people who think like us, the less practice we have in having conversations and friendships with those who think differently.

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[61] Bill Bishop and Robert Cushing, *The Big Sort: Migration, Economy and Politics in the United States of 'Those people,"* 'https://web.archive.org/web/20080624204202/http://www.aei.org/docLib/20080229_BillBishop.pdf

[62] Carroll Doherty, *7 Things to know about polarization in America* (Pew Research Center June 12, 2014).

[63] See Thomas Schaller, Growing Urban-Rural Split Provides Republicans With Down-Ballot Advantages (June 2, 2016), http://www.centerforpolitics.org/crystalball/articles/growing-urban-rural-split-provides-republicans-with-down-ballot-advantages/; Josh Kron, "Red State, Blue City: How the Urban-Rural Divide is Splitting America," The Atlantic, https://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/

The more polarized and homogenous our ideological communities, the greater the risk of less and less bridgeable differences arising. Whether there are appropriate and non-coercive ways to incentivize people to move into (and create) more rather than less ideologically diverse communities is an interesting question,[64] as is whether as a normative and practical matter any such approaches should be pursued.

B. New politically adopted rules to encourage considering minority views and increase tendencies toward moderation.

Is it possible to persuade people in existing locations to adopt new political rules that will empower minorities and increase tendencies towards moderation?

This may be more likely to happen in smaller communities, where there is a greater possibility for one-on-one conversation on the merits to have an impact, or in larger jurisdictions in which political partisanship is relatively evenly balanced, so that both sides might think each has a chance to benefit, or to minimize their risks). Reform is not impossible. Arizona adopted a nonpartisan commission to reapportion, in a move that was upheld by the Supreme Court.[65] One of President Obama's last speeches suggested that in reapportioning legislative districts, it is important not to draw lines such that one party dominates and candidates end up appealing to the most extreme wing of their own parties; apportionment with less unequal numbers of voters from both parties will have a tendency to have a moderating effect on public discourse.[66] If no one party always knows it can

[64] On past incentives for movement for purposes of settlement of the West, consider the various Homestead Acts.

[65] cite

[66] See Barack OBama, Address to the Illinois General Asebly, January -- 2017) https://www.c-span.org/video/?404557-1/president-obama-address-illinois-general-assembly ("politicans should not pick their voters; voters should pick their politicians"). Cf. Donald Horwitz's Ethnic Groups in Conflict (1985) (arguing that "centripetalism" in places like Nigeria, with ethnic cleavages, and voting system driving politicians to seek to be a second or third choice for folks who are not their principal supporters, helps avoid extremism and governmental breakdowns)

control, candidates from each party will have incentives to listen to and appeal to a wider swathe of voters.

Scholars have observed forms of what Jessica Bulman-Pozen has called "executive federalism," meaning negotiations among federal officials and the officials of one or more states, that are providing "a needed forum for bipartisan compromise."[67] As she explains, "[r]ather than require a grand deal that satisfies an aggregate national body, executive federalism unfolds through many negotiations among disaggregated political actors. These discrete conversations facilitate intraparty difference at the same time as the process of implementation further complicates, and may attenuate, partisan commitments."[68] She argues that although these executive discussions take place in non-public fora, this may be a legitimate strength.[69] Non-public discussion may permit both more candor and more willingness to move off of initial positions, thereby facilitating the kinds of compromises on which working government depends.[70]

A seldom discussed possibility would be to introduce or reintroduce proportional voting for collegial bodies.[71] More than a dozen U.S. cities used proportional voting early in the 20th century; scholarly evaluations of its effects are largely favorable.[72] Well-designed PR systems can promote more inclusive forms of

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[67] Jessica Bulman-POzen, cite (2016) at 955, 1001-

[68] ID at __

[69] Id. at __. See also Sarah Binder and Frances E. Lee, *Making Deals in Congress*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 252 (Nathan Persily ed. 2015) (on importance of secrecy in enabling successful deal-making in Congress); George C. Edwards, *Staying Private*, in SOLUTIONS, supra at __; Jayne Mansbridge, chapter in same book.

[70] See Jackson, *Pro constitutional representation*, William and Mary 2016.

[71] For a recent proposal for proportional voting for Congress, see Arend Lijphart, *Polarization and Democratization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 76-78 (Nathan Persily ed. 2015).

[72] See Douglas Amy, *A Brief History of Proportional Representation in the United States* , http://www.fairvote.org/a_brief_history_of_proportional_representation_in_the_united_states. Amy, a professor of political science at Mt Holyoke, relies also on Kathleen Barber et al, Proportional Representation and Electoral Reform in Ohio.

representation that avoid giving excessive power within legislatures to parties that have only a small majority of the popular vote. How likely it is that such methods could be adopted is unclear; and, for the national Congress, legislation in place since 1967 requires single member districting.[73] But change at the state level can have effects, albeit indirectly, on national politics.

C. Constitutional amendment

Another avenue by which to redress the democratic deficit in our national politics is constitutional amendment. In theory the provisions of the Electoral College for the election to president could be amended through the ordinary amending process. This process, however, is quite arduous, and it would take years to build the political will. And, because it would require that smaller population states give up some of the advantage that Electoral College composition provides to the smaller states, it is unlikely that enough of the smaller states would willingly give up this advantage.

A fortiori, the possibility of amending the composition of the Senate is as a practical matter almost non-existent, absent some emergency that would create an extraordinary sense of exigency. Under Article V of the Constitution, no state may be deprived of its equal suffrage in the Senate without its consent. In effect, not only does this require meeting the every rigorous barrier of three-fourths of the states to ratify, but it gives a veto to any single state that objects to prevent the change.

Thus, at the national level, our politics on this issue is like the politics in Tennessee at the time of *Baker v Carr*[74] - -that is, frozen in an anti-democratic posture by virtue of the unwillingness of incumbents and their citizen populations

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According to Professor Amy, politicians successfully dismantled these systems., e.g., in the 1950s in New York city, when Communists were elected in small numbers and the Cold War provided ammunition for major party politicians to campaign against PR, or when (also in the 1950s) in Cincinnati, African-Americans were elected to the City Council for the first time. See also Amy (noting that proponents believe it is "accurate to conclude that this system was rejected because it worked too well").

[73] See 2 U.S.C. Section 2c

[74] 369 U.S. 186 (1962).

to abandon the advantage that time and demographic change had conferred on longstanding boundaries.[75] In the same way, our national representatives and their home constituencies are unlikely to be willing to redress the increasingly counter-majoritarian character of Congress. Constitutional amendment is thus, barring extraordinary circumstances, not an available vehicle for this kind of much needed change.

D. Secession

Many American scholars believe that the Civil War and subsequent caselaw decisively rule out the possibility of secession. Not so. What the slim caselaw after the Civil War rejects is unilateral secession, without the consent of other states.[76] The case thus contemplates that secession with consent would be permissible, though its language leaves unclear whether what is contemplated is the amending procedure or some other way by which the states could consent, as in by ordinary legislation.[77] If secessionary drive strong enough, other states might agree? But secession should be very last option (even if not accompanied by violence and

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[75] In 1790, the ratio between the largest population state (Virginia, 747,000) and the smallest (Delaware, 59,000), was around 13:1 -- and this assumes total population figures; the ratio of "free white men" over age 16 (110,000 to 11,000) would be even lower. [cite for source? I think U.S. Census bureau daya] Today, the ratio between our largest state today (California, about 39,250,000, U.S. Census Bureau, estimate 2016, https://www.census.gov/data/tables/2016/demo/popest/state-total.html) and our smallest (Wyoming, 585,000, U..S Census Bureau, 2016 estimate) is something like 67:1. Thus, in the United States as in Tennessee, the passage of time resulted in increasing the counter-majoritarian character of the Senate's composition.

[76] Texas v. White, 74 U.S. 700, 725 (1869) (stating that the union was "indissoluble" and "[t]here was no place for reconsideration, or revocation, except through revolution, or through consent of the States").

[77] Query whether the provisions of Article IV, Section 3, stating that no state's boundaries can be changed without its consent, would come into play in the event of secession. A secession would in theory leave boundaries untouched. What were formerly boundaries between two states would become boundaries between part of the United States and a different polity. Since the purpose of this provision was, I believe, to protect a state from losing part of its preexisting territory, it would not make sense to apply it to the situation of secession, giving any one state a veto on a political solution to what might otherwise be an intractable problem.

lasting bitterness that may confound relations for years) still tends to leave both polities less diverse than they were before.

Secession should be a last resort, hopefully one not needed. After secession both polities of what was once a single nation end up being less diverse than they were before. Secession is often, though not always, accompanied by violence and loss of life and enduring bitterness. It is to be hoped that things will not come to this pass.

Conclusion

The goal of this paper has been to identify different approaches to the enduring questions of U.S. federalism. Framing the discussion is the argument that American federalism now has better democratic representation within the states than it does at the national level. Until slavery was abolished this was not true of those states that maintained slavery. Many of those same states continued to disenfranchise African-American voters into the 1960s. But in the 1960s, Congress and the Court substantially reformed the democratic bases for representative state government. These reforms took some time to become accepted and bear fruit, although by the 1990s progress towards racial inclusion had begun to be seen.[78]

Scholars of federalism need to consider the democratic deficit at the national level, a deficit that has increased dramatically since the Founding.[79] and that now stands in marked contrast to the democratic legitimacy of the state governments.

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[78] For example, from 1877 until 1993, the State of Alabama elected no African Americans to Congress. See http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-State-and-Territory/. Alabama's population was 45% black in 1900; by 1990, it was 25% black. See http://www.bplonline.org/resources/government/AlabamaPopulation.aspx `

[79] See supra note 75.