

Working Paper: 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, frequently rejecting challenges to state laws restricting economic competition and regulating commercial activity.³

The virtues of smaller communities as sites of decision-making were overshadowed and obscured by the pretextual "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 since the mid-20th century's ugly invocation of "states rights" to protect the racial caste system expressed in segregation, there have been significant structural changes in the democratic quality of state governments. These changes might provide the occasion for revisiting the constitutional law of federalism, as both political liberals and conservatives explore the value of degrees of autonomous decision-making at the state and local level.

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² See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). So far as I am aware, Brandeis did not have in mind "experiments" in such basic rights as those protected by the Fourth Amendment or First Amendment, eloquently discussed in, e.g., *Olmstead v United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting) and *Whitney v California*, 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring). But in economic matters, Brandeis was a fan of smallness, where people could learn facts and participate in making decisions.

³ See *generally* PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984); JEFFREY ROSEN, *LOUIS D. BRANDEIS: AMERICAN PROPHET* (2016).

The purposes of this paper are three-fold: First, it seeks to articulate a perspective on the relative democratic character of the Congress and the state legislatures that has not received much attention in the literature. Second, it hopes to prompt further research, both on the significance vel non of the comparative "democratic deficit" identified on the actual operation of Congress in comparison to the state legislatures and on the significance, if any, such comparisons may have for the development of federalism doctrine. Finally, it raises questions, not focused on judicial doctrine, about the possibilities for re-constituting political communities through actions involving multiple levels of government.

I. The Relative "Democratic Deficit" of the Congress?

Both the Warren Court's reapportionment decisions and the 1965 Voting Rights Act arguably have had significant effects on one important aspect of the democratic character of state governments: the degree to which the one-person, one-vote principle is observed in the selection of the legislatures.⁴

Democracy is a complex and contested concept, involving commitment to the participation of people in the process of their own government.⁵ Because

⁴ See Vicki C. Jackson, *The Early Hours of the Post World War II Model of Constitutional Federalism: The Warren Court and the World*, 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 the population was not allowed to vote that the democratic legitimacy of the state government could be questioned. That appears less true today -- though how long it will remain so in the face of concerted efforts to reduce voting by relatively less privileged voters is a troubling question. *Cf.* *Evenwel v. Abbott*, 136 S.Ct. 1120, 1132-33 (2016) (rejecting claim that districts must be apportioned by eligible voters, rather than by population; not resolving whether states could constitutionally draw districts based on number of eligible voters rather than total population).

⁵ As illustrations, consider these questions: Should democracy be primarily conceived in terms of the adequacy of the representation of individuals or of groups? If the participation and treatment of groups are an important part of a well-functioning democracy, what kinds of groups are important to consider: organized political parties? Ethnic, racial, linguistic or religious groups? Gender groups? Should democracy be conceived of as primarily competitive and majoritarian in character, with respect for rights only as a side constraint? Or should it be conceived of in more "consensual" terms, see ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN*

governance in a sizable polity requires knowledge of complex problems and institutions, capacities for deliberation, and capacities for compromise (which the tools of direct democracy do not (yet) function well to promote), democracy is typically linked to representation. Representation, too, is a complex and contested concept, embracing important elements of both standing for and acting for constituents, that poses its own set of contests and dilemmas.⁶

One important, though not exclusive, criterion for evaluating a legitimate democratic government is the degree to which the individual members of the polity enjoy political equality, that is, equality of opportunity to be represented in basic self-governance functions. And one measure of this equality is whether roughly equal weight is given to each person's vote in selecting representatives for the governing body. It is this one measure of one criterion, out of many elements of good constitutional democracies, on which this paper focuses.

A. State Legislatures and Governments at mid-century and the Effects of Court and Congressional Decisions in the 1960s:

In the early 1960s, state legislatures in many states were severely malapportioned: Urban voters were significantly underrepresented, and rural voters significantly over-represented. State governments had been subject to massive critique as ineffective and out of touch with current needs.⁷ In the South, African American voters were largely disenfranchised in a number of states. But by

CONSTITUTION? 103-09 (2d ed. 2003), designed to reflect more than the views of a simple majority through mechanisms of consensus and/or proportional representation? How important is the quality of deliberation to understandings of democracy? Voting mechanisms are central elements of any democracy: should voting schemes in democracies rely on first past the post, winner take all schemes, or forms of weighted or proportional voting that either create incentives for candidates to attract support across lines of division or permit participation in governance by political parties in proportion to their voting strength?

⁶ A classical study is HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60-143 (1967) (noting different kinds of representation, including "standing for" others in "symbolic" or "descriptive" ways, in which senses of affiliation and personal identity play a significant role in the representational relationship, as well as "acting for" representation).

⁷ See, e.g. ROBERT MCKAY, *REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION* 36-40 (1965) (describing governance failures in the states).

the 1970s, these malapportionment and disenfranchisement features of state government were in the process of significant change. These changes came about through a combination of judicial and legislative action at the federal level.

The Warren Court's one-person, one-vote decisions, epitomized by *Baker v. Carr* (1962),⁸ *Reynolds v. Sims* (1964),⁹ and *Lucas v. 44th General Assembly of Colorado* (1964),¹⁰ required that state legislatures be apportioned by population, in both their upper and lower houses. 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."¹¹ The Voting Rights Act of 1965 and its subsequent enforcement helped enfranchise many voters of colors, including African Americans in the South who suffered decades of violence, intimidation, deception, and obstructive legal efforts to prevent them from exercising their right to vote.

Improvement in the quality of state government seemed to follow these judicial and legislative decisions.¹² That the reapportionment decisions would have revitalizing effects on state governments was anticipated by some prescient scholars at the time.¹³ Justice Brennan in extrajudicial remarks in 1964 also foresaw an improvement in state level decisionmaking from the effects of legislative reapportionment.¹⁴ And, levels of trust in state governments began to rise in the

⁸ 369 U.S. 186 (1962).

⁹ 377 U.S. 533 (1964).

¹⁰ 377 U.S. 713 (1964).

¹¹ *Reynolds v. Sims*, 377 U.S. at 565 (1964) (emphasis added).

¹² See Jackson, *supra* note 4, at 159-60 (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 17 (noting effect of reapportionment, prompted by the courts, in giving state governments new energy).

¹³ 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").

¹⁴ William J. Brennan, *Some Aspects of Federalism*, 39 NYU L. Rev. 945, 955 (1964) ("Our decision in the reapportionment cases have enforced this guarantee [of equal protection] and the result should be, not the return of discredited judicial intrusion

late 1960s.¹⁵ Today one sees greater confidence expressed in the state governments than in the federal government.¹⁶ Interestingly, all state governors today are directly elected, although in the early 19th century many were appointed by legislatures.¹⁷

Thus, today, in all 50 states, the legislatures (both the upper house and lower house of those that are bicameral) are elected through districts that are roughly equal in population. The chief executive officer of every state, its Governor, is likewise elected in a statewide election in which all voters have equal opportunity to influence the Governor's selection through their vote.

into the field of political judgment, *but a more effective operation of the process by which political judgments are reached.*") (emphasis added).

¹⁵ 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. MILLER & SANTA TRAUOGOTT, 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); *infra* note 16.

¹⁶ 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%)), at <http://www.gallup.com/poll/5392/trust-government.aspx>. See also Indiana Univ. Center on Representative Government, *Polarization Not Just a Washington Thing, and State Governments Rate Above Congress* (May 2017), at <http://corg.indiana.edu/polarization-not-just-washington-thing-and-state-governments-rate-above-congress> (reporting higher levels of trust in state than federal governments re policy making and ethics of legislators). In this last source, respondents also reported paying less attention to news about state, than federal, government; Lee Hamilton thus raised the question whether their views would change if they knew more. *Id.*

¹⁷ At the Founding this was not the case. See Margaret Ferguson, *Introduction to State Executives*, Eagleton Institute of Politics, Rutgers Center on the American Governor, at <http://governors.rutgers.edu/on-governors/us-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).

B. Congress and the National Government Compared to the States: A Democratic Deficit?

The Congress, by contrast, is constitutionally malapportioned: Wyoming and its 585,501 people have two Senators, while California, with its 39.25 million people, also has just two Senators.¹⁸ At this writing, there are 52 Republican Senators in the U.S. Senate, and 48 non-Republicans (46 Democrats and 2 independents, who generally caucus with the Democrats). Based on total state populations for 2016 projected by the Census Bureau,¹⁹ the 52 Republicans could be said to represent roughly 144 million Americans, while the 48 Democrats could, on the same basis, be said to represent roughly 178 million.²⁰ On this account, the Republican majority that controls the Senate represents states that have a minority of the population; the Democratic minority in the Senate, by contrast, represent states with a substantial majority of the people in the United States, based on the simple metric that links representation with the number of constituents in the represented polity.²¹ Although there are other ways of looking at who is being represented by particular members of Congress or by Congress as a whole,²² on its face the constitutional

¹⁸ See U.S. Census Bureau, State Population Totals Tables: 2010-2016, <https://www.census.gov/data/tables/2016/demo/popest/state-total.html>.

¹⁹ See *id.* (estimate for 2016). (If one uses the 2010 Census data, the numbers would be 136 million and 172 million, roughly. *Id.* (2010 data)) The above numbers were calculated as follows: For states with two Democratic Senators, or two Republican Senators, all of the state population is attributed to that party. In states with one Senator from each party the state population was split in half and allocated accordingly. See *infra* note 20 below for treatment of the two Independent Senators.

²⁰ The two independent Senators are from Vermont and Maine, and generally caucus with the Democrats in the Senate. If the total population numbers represented by these independents are subtracted, the 46 remaining registered Democratic senators still represent 177 million persons (according to the 2016 estimate, 171 million according to the 2010 Census) -- well more than the number represented by Republican senators.

²¹ Other measures confirm the Senate's malapportionment. See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE* 10-12 (1999) (applying "the theoretical minimum percentage of the population able to elect a majority of the legislative body" to demonstrate Senate malapportionment); *id.* at 237-38 (applying the "Schubert-Press measure" to same effect).

²² A different measure might look at actual votes cast in Senate races. In 2016, Democratic Senatorial candidates won more of the popular vote than did

design of the Senate appears to create a "democratic deficit" of sorts in Congress in comparison to the apportionment of the state legislatures.

The consequences of the equal voting power in the Senate, frozen into our constitutional architecture, have become more severe over time.²³ Some over-representation of smaller population subnational entities exists in many federal systems and may serve useful democratic purposes in the national legislative process of assuring consideration of views and interests that might otherwise be neglected. But while the Senate's composition was understood from the beginning as designed to represent states as entities in contrast to the population-apportioned House, the degree of malapportionment has increased dramatically over time: In 1790, the ratio between the total population of the largest population state (Virginia, 747,610) and the smallest (Delaware, 59,094), was around 13:1; the ratio

Republicans, but Republicans gained 22 of the 34 Senate seats up for election. (Based on data found at Politico, <http://www.politico.com/2016-election/results/map/senate> and supplemented with data from Ballotpedia.org for the states of California (to account for the unusual primary and run off system and not overcount Democratic votes in the final election), Louisiana (to account for the primary and runoff and not undercount Republican votes in the final election) and Washington (because the data on Politico had only 95% of the returns in). For different perspectives on being represented by a "legislator" and by the "legislature", see Robert Weissberg, *Collective vs. Dyadic Representation in Congress*, 72 Am. Pol. Sci. Rev. 535 (1978); see also Jeffrey J. Harden & Christopher Clark, *A Legislature or a Legislator Like Me? Collective and Dyadic Political Representation*, 44 Am. Pol. Research 247 (2015). On the idea of "surrogate" representation -- that is, where a member of Congress represents voters outside his or her constituency by staking out a role on a set of issues of particular concern to a particular group -- see Jane Mansbridge, *Rethinking Representation*, 97 Am. Pol. Sci. Rev. 515 (2003).

²³ See LEE & OPPENHEIMER, *supra* note 21, at 10-11, 237-38. See *infra* text at notes 24-25 (describing the ratio of largest to smallest population states in 1790, and in 2016). At least some of the considerations that drove the compromise leading to the composition of the Senate (and related mechanisms, like amendment) have long since disappeared, see *id.* at 34-35 (western lands); slavery has been abolished, see Henry Monaghan, *We the People[s], Original Understanding and Constitutional Amendment*, 96 Colum. L. Rev. 121, 145 (1996), and major regional differences have diminished, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994), though not disappeared.

of "free white men" over age 16 (110,936 to 11,783) was under 10:1.²⁴ Today, the ratio between our largest state (California, about 39.25 million) and our smallest (Wyoming, 585,501),²⁵ is about 67:1. Thus, the passage of time has resulted in increasing the variations from one-person one vote, and increasing the counter-majoritarian possibilities, in the Senate's composition.

The equal suffrage of the states in the Senate is the most hard-wired part of the Constitution.²⁶ That the Senate is malapportioned, with real consequences for differential participation in the national congressional process, is not a novel observation (indeed, it dates to the Founding period).²⁷ As William Eskridge observed more than twenty years ago, given the equal numbers of Senators for each state, "the one Senator, one Vote clause systematically skews national policy towards sagebrush values. The fourteen sagebrush states [identified as "Alaska, Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming"] have almost one-third of the votes in the U.S. Senate, but less than one-tenth of the people in the country. Although the sagebrush Senators are not completely homogeneous, they do exhibit

²⁴ US Census Bureau, 1790 Census: Return of the Whole Number of Persons within the Several Districts of the United States 3 (1790), available at <https://census.gov/library/publications/1793/dec/number-of-persons.html>.

²⁵ U.S. Census Bureau, estimate 2016, <https://www.census.gov/data/tables/2016/demo/popest/state-total.html>).

²⁶ Because Article V provides that no state can be deprived of its equal suffrage in the Senate without its consent, it is close to inconceivable that all small states would agree to give up that equal suffrage absent the most urgent of crises.

²⁷ See LEE & OPPENHEIMER, *supra* note 21, at 32 (noting Madison's view that "the equal representation of states was 'confessedly unjust,'" and Hamilton's similar views). A comparison might be drawn with one aspect of the debate over the "gerrymandering" of House and state legislative districts, to the extent that one underlying concern is that manipulation of geographic district lines to maximize the electoral success of one party (or one set of incumbents) over another party (or set of challengers), diminishes the opportunities for voters of differing views and parties to fairly and effectively participate not just in voting for, but also in having their views fairly represented in, the legislature. For two ways of measuring such empirical effects, see Nicholas Stephanopolous & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 849-53, 855-63 (2015) (describing the "partisan bias" and "efficiency gap" approaches).

block voting characteristics and predictably affect closely divided chamber votes."²⁸ Unequal apportionment also means that citizens in small population states are able to and do have more personal contacts with their senators.²⁹

The impact of the entrenched equal suffrage in the Senate rule is not limited to the legislative branch. The President of the United States is of course the powerful head of the executive branch and a participant in the lawmaking process with Congress. The President is elected through the Electoral College, which -- depending on what the battleground states are in any given campaign-- can have the effect of giving disproportionate weight to voters in small population states.³⁰ Twice in the last five elections presidents have been chosen by the Electoral College even though another candidate won more of the popular vote. Thus, U.S. Presidents can not necessarily claim the kind of democratic legitimacy that state Governors can, although, to be clear, if elected in accordance with controlling election laws and by the vote of the Electoral College, they have rule-of-law legitimacy.³¹

²⁸ William N. Eskridge, Jr., *Constitutional Stupidities, a Symposium: One Senator, One Vote*, 12 Const. Commentary 159, 160 (1995) (providing examples: "if Senate votes were weighted according to the states' representation in the House (each Senator receiving half of the state's House allotment), the Senate would have voted 295 -140 to override President Bush's veto of the 1990 civil rights bill, would have rejected the nomination of Judge Clarence Thomas for the Supreme Court in 1991 (albeit in a close vote, 224 -211), and would have overwhelmingly (238 -165) voted to remove the ban on entry into the United States of people who are infected with the HIV virus (a move that was defeated by 52-46 when proposed in 1993)").

²⁹ See LEE & OPPENHEIMER, *supra* note 21, at 52-55.

³⁰ See U.S. CONST'N, Art. II §1 (providing that each state should appoint "a Number of Electors ... equal to the whole Number of Senators and Representatives to which the State" is entitled in Congress).

³¹ On different forms of constitutional legitimacy, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1187 (2006); COMPARATIVE CONSTITUTIONAL LAW 343 (Vicki C. Jackson & Mark Tushnet eds., 3d ed. 2014) (excerpting work by Jackson). To be sure, the Electoral College mechanism skews campaigning, in ways that may mean the popular vote under an Electoral College system would differ from what the vote would have been under a national presidential referendum system in which candidates would choose different campaign strategies. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 87-89 (2006). For critique of many features of the system for selecting the President, see *id.* at 83-97.

It is the Congress and the President who together are the lawmaking institutions of the national governments.³² To the extent that representatives are reflective of or responsive to the views of voters in their constituencies, there may now be a greater risk at the national level that legislative action will be inconsistent with the views of the people of the country than there is that, in any given state, legislative action will be inconsistent with the views of the people of that state.³³ Effects of the over-representation of small population states in the national lawmaking process have been identified in the distribution of federal funds: Lee and Oppenheimer demonstrate that the per capita distribution of federal monies for distributive programs (especially those for which Congress provided the spending formula) to smaller population states substantially exceeds the per capita distribution to larger population states.³⁴ Baker and Dinkin found "a systematic redistribution of wealth from the larger states to the smaller states" through federal "pork barrel" expenditures.³⁵ These are predictable effects of the Senate's

³² The counter-majoritarian possibilities raised by the selection methods for the Senate and the Presidency are balanced, to some extent, by the population-based apportionment of the House: According to Ballotpedia, in House elections in 2016, Democrats received 61.8 million votes, and Republicans received 63.2 million, while more than 3 million votes were cast for Independent or third party candidates. With 49% of the vote for members of the House, Republicans controlled 55% of the House seats; the Democrats, who won 48% of the vote, held 45% of the House seats. See https://ballotpedia.org/United_States_House_of_Representatives_elections,_2016.

³³ The potentially distorting effects of the equal suffrage in the Senate rule on national decisionmaking have been widely observed. See, e.g., Gillian Metzger, *The States as National Agents*, 59 St. Louis Univ. L.J. 1071, 1075 (2015) (noting concern with "provid[ing] small states disproportionate influence").

³⁴ LEE & OPPENHEIMER, *supra* note 21, at 158-85.

³⁵ Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution whose Time Has Gone?*, 13 J.L. & Pol. 21, 39-42 (1997). This effect is not explained by poverty levels; indeed, "the rate of poverty in the ten largest states is substantially higher on average than in the ten smallest states," yet "the direction of the federal income transfer is from the larger to the smaller states." *Id.* at 42. Mathematically, they found, "the disproportionately great power, relative to its share of the nation's population, that the Senate affords a small state is only very slightly mitigated by the proportional representation that the House provides," *id.* at 26.

malapportionment. And it is the Senate and President, without participation of the House that, together, appoint federal judges and approve treaties.³⁶

To be clear: there is much we do not know about the full effect of the Senate on the representative capacities of Congress.³⁷ Moreover, there are countervailing considerations that may well justify some departures from political equality; democracy is only one of several important constitutional values. Federal systems, in particular, not uncommonly provide special recognition and protection for the constituent units, including some degree of over-representation of smaller

³⁶ Thus, in the 114th Congress, the Republican majority in the Senate refused to vote whether to confirm President Obama's nominee, Merrick Garland, nominated March 16, 2016. At this time, the Democrats held both Senate seats in the following states: Washington, Oregon, California, Hawaii, New Mexico, Minnesota, Michigan, Virginia, Maryland, Delaware, New Jersey, New York, Vermont (if one counts the independent, Sanders, as a Democrat for these purposes), Massachusetts, Connecticut and Rhode Island; the Democrats had one of the two Senate seats in: Nevada, Montana, Colorado, North Dakota, Wisconsin, Illinois, Missouri, Indiana, Ohio, West Virginia, Pennsylvania, Florida, New Hampshire and Maine (if one counts King, an independent, as aligned with the Democrats). According to the Census Bureau's 2016 estimates of state populations, this means that in the 114th Congress, Democratic senators were representing states with about 53% percent of the population, while the Republicans, notwithstanding their majority in the Senate, represented states containing only about 47% percent of the population. See U.S. Census Bureau, Population Estimates by State, at <https://www.census.gov/data/tables/2016/demo/popest/state-total.html>. Table nst-est2016-alldata.csv Column N. Cf. Eskridge, *supra* note 28, at 160 (noting that had the Senator's votes on the nomination of Justice Thomas been "weighted according to the states' representation in the House (each Senator receiving half of the state's House allotment)" he would, by a narrow vote, not have been confirmed).

³⁷ See *supra* note 22; *infra* note 89; see also Eskridge, *supra* note 28, at 161 ("The overrepresentation of small-population states . . . in the Senate does not affect every issue that comes before Congress; it probably has no decisive effect on most issues. When it does have a decisive effect, the phenomenon is anti-majoritarian but perhaps defensible according to some other normative criterion."). There is much more to learn, for example, on the extent to which the apparent over- and under-representations balance out in a congressional process in which large and small state populations exist on both sides of a debate. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 748 (2002) (arguing that, despite under-representation and over-representation of some state populations, "majority rule in the Senate will often operate as a reasonably accurate device for registering the preferences of a majority of the citizens").

subnational units in the upper house. But I am aware of no other successful constitutional federalism with a malapportionment nearly as great as that which exists in the United States. And, in respect of the mathematical relationship of elected representatives to the numbers of constituents, state legislatures and governors now have an arguably stronger claim to democratic legitimacy in representing the people of their respective jurisdictions than does the Congress in representing the people of the United States.³⁸ There is, in this respect, a structural "democratic deficit" in our national lawmaking processes vis-a-vis those of the states.³⁹

This structural democratic deficit cannot be considered in isolation from other features of the state legislatures and the Congress that affect how well they serve their functions as representative institutions of self-government. Democratic

³⁸ By contrast: Although both the Congress and the state legislatures were malapportioned by population in the decades prior to the 1965 Voting Rights Act, during that time African-Americans living outside the South were not as systematically excluded from voting as they were in the South. See U.S. House of Representatives: History, Art & Archives, *Black-American Representatives and Senators by Congress, 1870–Present*, 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). It could thus be argued that during that pre-VRA period, the House of Representatives -- to the extent that 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 and excluded African Americans from voting.

³⁹ See also LEVINSON, *supra* note 31, at 25-77; DAHL, *supra* note 5, at 144-45. As noted, per capita voter representation is not the only form of democratic legitimacy that is important, nor is voter equality 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 the degree of disproportion that the U.S. Senate represents is quite unusual. See also *infra* note 114. As to other values, for example: having staggered terms for members of the legislature, as in the Senate, may help prevent rapid swings based on single elections -- a stability benefit also important to legitimate government.

government is not simply a mathematical concept of government by the will of popular majorities. Some malapportionment at the national level may be justified if it assures better account of interests that might otherwise become permanent "losers" in the making of national policy. (At the same time, one would worry if national majorities, instead, were to become the permanent losers.) Deliberation and decisionmaking at the national level can take account of spillovers that some states' decisions have for others, in ways that no single state legislature has the representational incentives to do; the longer terms of members of the Senate and the absence of term limits may contribute to democratic deliberation more informed by expert knowledge and a longer-term view than will be found in some state legislatures. Further, the national government is easier to monitor; more news sources are available; and people are more likely to attend to national news than to news about their state governments. The informational basis for democratic decisionmaking may thus be superior at the national level. These and other democratic advantages may exist, then, for lawmaking at the national level.

Moreover, a national legislature, even if malapportioned, may do a much better job at some functional tasks of government, including, for example, national defense; securing a national common market; protecting minorities that are discriminated against within particular states; or identifying and responding to problems of corruption or other threats to the "republican form of government" in the states. Indeed, to the extent national action is needed, the Congress is the most democratic branch. But in terms of the one criterion on which this paper focuses -- the degree to which the political lawmaking branches of a polity are selected through voting based on one-person, one-vote principles -- states are at this point structurally superior to the federal lawmaking organs. How, if at all, might this arguably more democratically grounded legitimacy of state governments vis-a-vis the federal government 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 relative democratic representativeness of

state governments vis-a-vis the federal, can find more 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.

The rest of this paper aims to assist this re-evaluation by describing three approaches to thinking about the possibilities and challenges of U.S. federalism. Part II below discusses a set of doctrinal constraints on national power, substantive and interpretive, articulated by the courts. Part III considers the "new nationalism" theories, including those of "disruptive" or "uncooperative" federalism. Part IV briefly considers alternative political forms of federal reconstitution or reconstruction, to provide a broader context for thinking about the role of federalism in American political life. The discussion is an effort to lay out these approaches as a positive matter; normative arguments will, for the most part, need to await other papers, and further research and analysis.

II. Existing Doctrine

The "federalism revival" in the Supreme Court's jurisprudence can be dated to a statutory decision, *Gregory v. Ashcroft*, in 1991.⁴⁰ The issue in that case was whether the federal 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's exemption for persons "on a policy making level" also applied to Missouri's appointed state court judges. The interpretation of the ADEA was informed by constitutional considerations, as Justice O'Connor explained the historical reasons for and benefits 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.⁴¹

⁴⁰ 501 U.S. 452 (1991).

⁴¹ *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.")

Gregory could be understood as a constitutionally inflected extension of the "clear statement" approach to interpreting federal statutes claimed to subject states to suits by abrogating their sovereign immunity, which had prevailed in Eleventh Amendment caselaw in the immediately preceding decades.⁴²

As discussed below, *Gregory* foreshadowed shifts in constitutional jurisprudence concerning the outer limits of federal power. As also discussed below, while federalism doctrine expanded in other areas, statutory canons of interpretation have been inconsistently deployed in federalism-related cases, despite arguments that a presumption against preemption should be more consistently applied to preserve room for different state laws.

A. Anti-Commandeering doctrine as a Limit on Congress

The first clear doctrinal signal of the Court's willingness to revive judicially enforceable substantive limits on Congress to protect the states was its 1992 decision, *New York v. United States*,⁴³ holding that a federal statute was invalid insofar as 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 bar federal requirements that *executive* officials of state or local governments enforce federal laws against others.⁴⁴

⁴² See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."); *Employees v. Mo. Dep't Publ. Health & Welfare*, 411 U.S. 279, 285 (1973) ("It would ... be surprising ... to infer that Congress deprived Missouri of her constitutional immunity without ...indicating in some way by clear language that the constitutional immunity was swept away.").

⁴³ 505 U.S. 144 (1992).

⁴⁴ See *Printz v. United States*, 521 U.S. 898 (1997). In earlier work, I disagreed with the absolutist approach of these decisions, though I found more basis for a strong presumption against "commandeering" of legislatures than of 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

This doctrine, not inconsistent with awareness of the comparative democratic deficit, is likely to remain a stable limit on federal power: Although 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.⁴⁵

B. Substantive Limits on Congress' Powers under the Commerce Clause of Article I

In *United States v. Lopez*,⁴⁶ 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, the connection depended on multiple steps in analysis that would support federal legislation reaching into many areas of life. The fact that the prohibited conduct 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 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 the congressional process failed to take seriously the need to show how the legislation was connected to interstate commerce or why a federal law was needed.⁴⁷

Subsequent cases, however, developed *Lopez*'s rule into a more categorical one, prohibiting reliance on the commerce power to regulate activity that the Court identifies as **not** "economic in character," notwithstanding its aggregate effect on

of the national government. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2251-52, 2253-54 (1998).

⁴⁵ 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.")

⁴⁶ 514 U.S. 549 (1995).

⁴⁷ See Jackson, *supra* note 44, at 2234 & n 238, 2238-39.

commerce. In *United States v. Morrison*,⁴⁸ 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.⁴⁹ Yet in *Gonzales v. Raich*,⁵⁰ the Court upheld a federal ban on possession of marijuana (even as applied to medical marijuana cultivated and used for those purposes within a single state) because of the relationship of such possession to an unlawful interstate market. Looking at *Lopez*, *Morrison* and *Raich*, it appears that determining what behaviors or possessory actions the Court will find "not economic" in character remains somewhat uncertain.

In *NFIB v. Sebelius*,⁵¹ the Court identified another substantive limit on the commerce power: that federal legislation cannot compel persons to engage in commercial activities. It thus held that the Commerce Clause did not support a mandate that people purchase or otherwise obtain health insurance (though the provisions were upheld under the taxing power). The Court rejected the argument that virtually everyone participates in the health care market, in virtue of the fact that virtually everyone will need health care at some point, because of concerns that such a rationale would allow federal compulsion of virtually any private behavior.⁵² Determining the line between compelling action and regulating commercial action already undertaken may pose interpretive challenges in the future.

In *Lopez*, Justice Kennedy's concurrence expressed concern about the degree to which the federal criminal statute there at issue would interfere with states'

⁴⁸ 529 U.S. 598 (2000).

⁴⁹ I was a coauthor of an amicus brief in the *Morrison* case, arguing, unsuccessfully, that the connection to commerce was substantial, and well-documented in the legislative record, because 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 v. United States*, 379 U.S. 241 (1964).

⁵⁰ 545 U.S. 1 (2005).

⁵¹ 567 U.S. 519 (2012).

⁵² *Id.* at 557-58 (noting that such logic might justify a mandate to purchase broccoli).

abilities to experiment in how best to protect schools and their students from gun violence.⁵³ In so arguing, Justice Kennedy's argument invoked the virtues of a federal system in allowing room for innovative democratic lawmaking at levels closer to the people. That there are democratic costs from national level action has been widely recognized in the federalism literature. Are these costs magnified insofar as the national lawmaking process may not even represent the views of a majority of the people of the country?

If so, how -- if at all -- should this understanding affect constitutional doctrine?⁵⁴ Here is the challenge: There may be "costs" to democratic processes both in upholding a federal statute that limits state authority and in striking down a federal statute enacted by the democratically elected Congress that, however imperfectly democratic, is the most democratic branch of the national government. Doctrinal efforts to capture both of these kinds of democratic costs would be at best complex, and may be beyond the capacity of doctrine to account for.

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

The Fourteenth Amendment was enacted as a limitation on the power of the states and includes a grant of power to the Congress to enforce its measures. The Amendment established a national baseline of rights below which no state could fall, a national baseline typical of contemporary federal systems in constitutional democracies.⁵⁵ The Fifteenth Amendment guaranteed the right to vote, regardless of

⁵³ See *Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring) (noting that a federal criminal statute might interfere with state efforts to reduce gun violence through other means, such as amnesty programs or penalties imposed on parents or guardians for failure to supervise their children).

⁵⁴ With respect to matters claimed to be within federal power not because they are "within" an enumerated power but because of their connection to such a power, the "Necessary and Proper" clause might be understood to embody a "subsidiarity" requirement, that there be a need for national legislation that is not being or cannot be addressed by the separate states. *McCulloch*, however, suggested that the "necessary and proper" clause, if it imposed any limit at all on national power, imposed a limit of which Congress was the only judge. *But cf. NFIB v Sibelius*, 567 U.S. at 559 (Roberts, C.J.) (suggesting that even if the "necessity" of a measure is for Congress, whether it is "proper" is for the Court).

⁵⁵ Canada, Germany, Brazil, South Africa, India, would be examples. See generally Jackson, *supra* note 4.

race, color, or previous condition of servitude; it too empowered Congress to enforce its provisions.

In *Katzenbach v. Morgan*,⁵⁶ 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.⁵⁷ In *Morgan*, however, the Court upheld the law both on the grounds that Congress has power, under the Fifteenth Amendment, to conclude that state acts claimed to violate equality and voting rights norms, which have not been struck down by the Court, nonetheless do violate the Constitution, or alternatively, that providing access to the vote was a means to enable Spanish speakers to prevent unlawful discrimination in other areas.

In *City of Boerne v. Flores*,⁵⁸ the Court held unconstitutional certain provisions of a statute, the Religious Freedom Restoration Act, designed to overcome the effects of the earlier decision in *Employment Division v. Smith*.⁵⁹ In *Smith*, the Court had held that states generally need not accommodate genuine religious objections to a generally applicable laws, distinguishing an earlier 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

⁵⁶ 384 U.S. 641 (1966).

⁵⁷ *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

⁵⁸ 521 U.S. 507 (1997).

⁵⁹ 494 U.S. 872 (1990).

adopt prophylactic measures, those measures must be "congruen[t] and proportiona[l]" to the constitutional violation to be sustained.⁶⁰

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.⁶¹ Similarly, the preclearance provision of the Voting Rights Act – which had been an essential tool for increasing and maintaining voter registration among African-American voters in some parts of the country-- were invalidated in *Shelby County v. Holder* (2013),⁶² because, the Court believed, the factual basis that once supported the legislation no longer existed.⁶³ Discounting the record on which Congress acted and Congress's conclusion otherwise,⁶⁴ the Court found the provision unconstitutional, as not meeting the standards of congruence and proportionality.

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 -- or for that matter, the Commerce Clause -- might be

⁶⁰ 521 U.S. at 520. The "congruence and proportionality" standard, *id.*, might be an effort to revive the pretext inquiry, which has played a relatively small role in post-1937 jurisprudence.

⁶¹ *Morrison*, 529 U.S. at 621-22. The Court, inter alia, mischaracterized 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 626 (stating that Congress's findings suggest that the problem of gender bias does not exist in all or "even most states") with *id.* at 665-66 (Breyer, J., dissenting) (noting that "Congress had before it the task force reports of at least 21 States documenting constitutional violations," that Congress "made its own findings about pervasive gender-based stereotypes hampering many state legal systems," that the record "nowhere reveals a congressional finding that the problem 'does not exist' elsewhere," and asserting that Congress may "take the evidence before it as evidence of a national problem").

⁶² 133 S.Ct. 2612 (2013).

⁶³ *Id.* at 2627-29.

⁶⁴ *See id.* at 2642-44 (Ginsburg, J., dissenting).

thought to lead in this direction. But it is hard to understand why the Court did not adopt the approach of *McCulloch v. Maryland*,⁶⁵ interpreting the Necessary and Proper Clause to allow Congress ample choice of means to fulfill its legislative powers, as long as they were nonpretextual, appropriate to the legitimate end and not otherwise prohibited.

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. In these circumstances, there is little reason to regard state lawmaking as having stronger claims to democratic legitimacy than federal, because what is at issue is whether the state is fairly and even-handedly dealing with and representing its citizens. The judgment of the Constitution, in the Fourteenth and Fifteenth Amendments, is that there were grounds to be skeptical of state governments on this score, and Congress was empowered to enact "appropriate" legislation to protect the rights those Amendments recognized.⁶⁶ 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.⁶⁷ In this respect the case is unlike *Boerne v. Flores*, where the existence

⁶⁵ 17 U.S. 316, 421, 423 (1819).

⁶⁶ On voting rights, might Congress's power be drawn not only from the Fourteenth and Fifteenth Amendments but also, perhaps, from the Guaranty Clause of Article IV, and the presumed lawmaking authority of the United States to help protect a "republican form of Government" in the states?

⁶⁷ The Court has held nonjusticiable the question of how long a period is reasonable within which to ratify a constitutional amendment; "criteria for such a *judicial* determination" were lacking because a variety of factors were relevant and better considered by Congress. *Coleman v. Miller*, 307 U.S. 433, 452-54 (1939) (emphasis added). Although the contexts differ, *Coleman's* reasoning would have supported more deference to Congress's determination that the pre-clearance remedy was still needed in evaluating the constitutionality of its extension of a statutory remedy that was, at its inception, constitutional. Moreover, the idea that entrenched patterns of racist thinking, given the force of law in Southern states for centuries prior to the 1965 Voting Rights Act, would have so dissipated in less than 50 years seems simply implausible: many adults in power in jurisdictions across the Old South in the year 2013 would have been raised by parents and influenced by grandparents who had

of massive constitutional violations was doubtful under judicially-controlling standards, and quite unlike *Lopez*, where there was virtually no indication that states were indifferent to the dangers of guns in and around schools or incapable of addressing the problem.⁶⁸

Boerne v. Flores and its progeny will enable the Court to monitor more closely pretextual, illegitimate uses of the Fourteenth Amendment power, should they arise. Arguments in cases like *Florida Prepaid v. College Savings Bank*,⁶⁹ that Congress enacted changes to the patent laws because of concern about constitutional rights violations, may have been to some degree pretextual insofar as 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* and *Morrison* involved statutes reflecting serious congressional attention to constitutional rights of equality 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 legislations' substance.

An absolute predicate for a constitutional democracy is the right to vote and be represented on terms of equality. When there is a history of subnational unit vote suppression, the national legislature should seek to redress it. Where there are doubts about the actual equality of access to voting in a state, any reason to defer to state law grounded on democratic legitimacy is diminished. Correspondingly more deference to Congress's findings should be accorded where Congress in good faith acts to protect voting rights from state or local interferences.

The Court's Fourteenth and Fifteenth Amendment doctrine concerning the scope of federal legislative power thus holds both promise and pitfalls for the overall well-functioning of the democratic system in the states and the nation.

lived under the racial caste system embodied in segregation laws, and in some cases who had actively supported segregation and exclusionary voting practices.

⁶⁸ See Jackson, *supra* note 44, at 2243.

⁶⁹ 527 U.S. 627 (1999).

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.⁷⁰ Specifically, she argues, early nineteenth century constitutional thought conceived of the spending power as requiring structured forms of cooperation, in order to prevent federal dominance.⁷¹ 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 more 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*.⁷² The Court there 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 required states in the Medicaid program to expand the eligible recipients. Even though the federal government would have paid most of the direct new costs, states objected to the financial and 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 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, given the scale of the change. The Court wrote: “Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.”⁷³ As Heather Gerken put it, “the Spending Clause analysis is ... the most deeply intuitive portion of the opinion ...

⁷⁰ Allison LaCroix, *The Interbellum Constitution*, 67 Stan. L. Rev.397 (2015)

⁷¹ *Id.* at 401.

⁷² 567 U.S. at 577-78.

⁷³ *Id.* at 577-78 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

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.”⁷⁴

This part of the Court’s decision captures something important: Unbounded authority to condition federal grants on the observance of positive or negative requirements does have coercive potential. Where the federal government has come to play a significant role in providing certain forms of assistance (thereby encouraging the development of programs and services contingent on that funding), unlimited authority to impose new conditions on those grants may have too much coercive potential -- both for state and local governments, and for colleges and universities.⁷⁵ Each 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.

Whether or not one agrees with the application of this insight in *NFIB v. Sibelius*, the principle that imposes some limits on the establishment of significant, immediately effective new conditions, based on older consent, to long-established major programs, seems on the whole salutary, and not inconsistent with the concern for the relative democratic deficit of Congress.

E. Limitations on Congress’s power to subject states to private suits

The Court has been of two minds in recent decades on whether the Eleventh Amendment, or a constitutional principle of state sovereign immunity, prevents Congress from specifically authorizing suits against states under federal law. In 1976 the Court held that Congress had such power when enacting legislation under its Fourteenth Amendment powers.⁷⁶ In 1989 the Court held that Congress had such

⁷⁴ Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 Harv. L. Rev. 85, 109 (2014).

⁷⁵ *But cf., e.g.,* Rumsfeld v. FAIR, 547 U.S. 47 (2006) (rejecting First Amendment challenge to federal law conditioning federal funds on universities allowing military to recruit even if military’s policy violated universities’ anti-discrimination norms).

⁷⁶ 427 U.S. 445 (1976).

a power in enacting Commerce Clause legislation.⁷⁷ In 1996 (after *Gregory v. Ashcroft*), the Court overturned that 1989 decision, in *Seminole Tribe of Florida v. Florida*,⁷⁸ holding that Congress lacked power to subject states to private suits in legislation enacted under Article I, although the United States retained the ability to itself sue states for damages under federal statutes. As I have suggested elsewhere,⁷⁹ 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 enforce such laws. As such it is unlikely to play a major role in significant federalism debates.

F. Preemption: *Gregory v. Ashcroft*, Revisited

Preemption doctrine stands at the intersection of constitutional law and statutory interpretation. Under the Supremacy Clause, valid federal statutory and treaty law is supreme over state law; courts have enforced this rule since the earliest years of the Republic. Our complex federal system could not function well without such a rule. But if one were to conclude that the democratic deficit in federal lawmaking might bear on federalism doctrine at all, statutory preemption is a good candidate, in important part because a finding of "no preemption" generally does not foreclose congressional action but requires a clearer statement of intent.⁸⁰

Existing doctrine recognizes three forms of preemption: 1) express preemption, where Congress is explicit in the statute, 2) "obstruction" preemption, where it is either impossible to comply with both state and federal law or, the more

⁷⁷ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

⁷⁸ 517 U.S. 44 (1996).

⁷⁹ Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 4 (1988); Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. Rev. 495, 503 (1997).

⁸⁰ See, e.g., Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1, 91 (2004) (describing "soft" clear statement rules as "go[ing] a long way to stem centralization, even though they leave final decision to Congress" noting that they function "as a "remand" to Congress, requiring Congress to reconsider," and that "[w]hile Congress may still reinstate its earlier decision, the inertial barriers to doing so are often high").

expansive prong, where allowing state law to operate will frustrate the purposes of the federal statute, and 3) "field" preemption, where some combination of the nature of the issue and the legislation that exists establishes exclusive federal legislative jurisdiction precluding the possibility of state laws, even if no obvious obstructive effect exists.⁸¹ The "frustrate the purpose" prong of obstacle analysis has potentially broad and indeterminate applications,⁸² and preemption doctrine as a whole has been repeatedly characterized as an inconsistent "muddle."⁸³ Federal administrative agency action sometimes provides a basis for a finding of preemption, and was invoked as a deregulatory tool in the George W. Bush administration.⁸⁴ Scholars who accept or support administrative preemption argue that agencies can bring to bear far more expertise than Congress in deciding when it is necessary to preempt state law;⁸⁵ scholars who are more skeptical of administrative preemption raise both separation of powers and relative attentiveness to federalism interests as grounds for requiring some clear indication or authorization from Congress, apart from situations of direct conflict between state and federal law, before state laws are preempted.⁸⁶

⁸¹ See, e.g., *United States v. Arizona*, 567 U.S. 387, 399 (2012).

⁸² See, e.g., Judith Resnik, *Fairness in Numbers: A Comment on At&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 Harv. L. Rev. 78, 112-33 (2011) (criticizing the Court for taking an "early-twentieth-century provision [in the Federal Arbitration Act], modeled for negotiated contracts, and apply[ing] it to the anonymous transactions recorded in boilerplate clauses" and arguing that "[t]ext alone could not produce that result").

⁸³ See, e.g., Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 232-33 (2000) ("muddled in general"); Ernest Young, "The Ordinary Diet of the Law": *The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 255-56 (describing doctrine as a "muddle," but one explained in part by the great range of statutory schemes).

⁸⁴ See David C. Vladeck, *The Emerging Threat of Regulatory Preemption* (Jan. 2008), at <https://www.acslaw.org/files/Vladeck%20Issue%20Brief.pdf>

⁸⁵ See, e.g., Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 477 (2008); see also Gillian Metzger, *Administrative Law as the New Federalism*, 57 DUKE L. J. 2023, 2069-2072, 2082-83 (2008).

⁸⁶ See, e.g., Nina Mendelson, *A Presumption against Agency Preemption*, 102 N.W. UNIV. L. REV. 695, 699 (2008); Robert S. Peck, *A Separation-of-Powers Defense of the "Presumption Against Preemption"*, 84 TUL. L. REV. 1185, 1195-2001 (2010).

Does the relative democratic deficit perspective add anything to this debate? It is not clear that the Senate's make up will tend to skew ideologically in either a pro-preemption or anti-preemption way across all issue areas; nor is it clear what the Senate's effect is on congressional action or inaction as a whole, across regulatory areas.⁸⁷ Moreover, there are often large population states on both sides of an issue. But requiring clear bases for preemption, and/or for authority by agencies to preempt, might help protect state lawmaking capacities, including those

⁸⁷ See *supra* note 22; *infra* note 89. One might argue that the structural makeup of the national government is what it always has been and that under rule of law principles, the democratic legitimacy of the different levels of government should play no role in judicial decisions about federalism, including preemption doctrine. Such an argument raises large questions of interpretive theory. But given the Court's interpretive practices, which have generally considered history, context, text, precedent, principles, and consequences, in developing constitutional doctrine, there is no a priori reason to preclude judicial consideration of the relative democratic deficit of the Congress in resolving interpretive issues of the valid scope or preemptive force of federal law.

Federalism involves an effort to balance the benefits of self-governance at the state level with the benefits of self-governance at the central level. If the national government is acting under the increasingly disproportionate influence of an overly empowered minority of the population in a way that differs from representation in the state legislatures, the relative costs of displacing opportunities for state lawmaking are arguably greater. In 1819, the Court explained why it rejected Maryland's effort to impose a special tax on the Bank of the United States: "In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). This is a foundational explication, from the perspective of representation, of the preemptive force of federal law. But where the people of large states are represented on significantly less equal terms than at the Founding, by virtue of population changes, the basis for confidence that the national legislature will not "abuse[]" or misuse its powers may be undermined. See also *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824) ("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are ... the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."). When Congress's "identity" with the people is diluted through malapportionment, the "restraints" may be less reliable, but it remains the most democratically representative part of the national government. Where it is not clear that Congress has spoken to the question of preemption, however, the comparative democratic advantage of state lawmaking would support a presumption against statutory preemption.

of the larger population states underrepresented in the Senate; clear statements of preemptive intent by Congress may put the states on notice and thus better enable objecting states to mobilize in one or the other house to defeat the measure.

The democratic deficit in national lawmaking, then, relative to state lawmaking, identified in this paper, might lend support to arguments for more consistent application of the oft-cited presumption against preemption and for more constrained forms of administrative preemption. Insofar as federal law purports to close off large areas of what would otherwise be within the states' concurrent jurisdiction,⁸⁸ the democratic deficit arguably supports doctrines that are more rather than less respectful of lawmaking authority at the state level, in interpreting the preemptive effects of federal measures.⁸⁹

⁸⁸ Cf. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, And The Floor/Ceiling Distinction*, 82 NYU L. Rev. 1547 (2007) (arguing that federal preemption in the form of a floor below which state law cannot fall should be distinguished from where a "unitary" floor-and-ceiling federal rule is involved).

⁸⁹ As noted, however, one cannot be confident of the actual effects of the Senate on the complicated questions of the policy representativeness of the Congress as a whole and in comparison to the state legislatures. *See supra* notes 22, 37; *see also*, e.g., Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and their Members in Congress*, 104 Am. Pol. Sci. Rev. 519 (2010) (finding "leapfrogging" from a member with an extreme right view to a member with an extreme left view, or vice versa, in both houses of Congress, but also concluding that "the Senate is a more moderate institution whose median member does not move as abruptly as the House," *id.* at 536, a result not explained by differential turnover rates). Whether this is an artifact of the particular time period studied, or results from the six-year terms, staggered elections, state-wide election (connected to the apportionment), or other features of Senate races or candidates, is not clear. More empirical research on the effects of the Senate's composition is needed. But that the House and Senate may diverge on which party holds a majority of seats does not of itself signal a democratic deficit; House membership reflects the results of a single election at one moment in time, the Senate reflects voters' views over the course of three elections, a different measure of democratic opinion, which, absent the severe malapportionment, would plausibly be defensible as improving the overall representativeness of a Congress.

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

An important set of scholarly approaches challenge conceptions of federalism that are based on the idea of sovereignty. They instead emphasize descriptive accounts of how the formal doctrines concerning sovereignty, the allocation of powers and even supremacy of federal law do not reflect the reality of influences going in multiple directions.⁹⁰ Emphasizing the role of "voice" over "exit," Gerken, for example, argues that "federalism without sovereignty" embraces a system of vertical checks and balances through situations of interdependence in law enforcement, implementation, interpretation.⁹¹ Gerken and other scholars offer rich accounts of how the federal government shapes state and local agendas and how states and localities (sometimes acting through what Judith Resnik calls "translocal organizations of government actors"⁹²) can shape federal agendas (even after law is enacted).⁹³ No doubt these observations are true, and emphasize how the complexity of intergovernmental relations may be obscured by undue focus on assumptions of autonomy implicit in many accounts of constitutional federalism.⁹⁴

⁹⁰ 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., Metzger, *supra* note 85; Gillian E. Metzger, *Federalism under Obama*, 53 Wm. & Mary L. Rev. 567 (2011) (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).

⁹¹ See Gerken, *supra* note 90, at 10 ("the energy of outliers serves as a catalyst for the center"); *id.* at 33-44 (exploring the "power of the servant").

⁹² Judith Resnik, *Ratifying Kyoto at the Local Level: Sovereignty, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 Ariz. L. Rev. 709 (2008). For elaboration of the "jurisdiction-bending" character of the relations of the states and federal governments over time, see Judith Resnik, *Lessons in Federalism From the 1960s Class Action Rule and the 2005 Class Action Fairness Act[CAFA]: "The Political Safeguards" of Aggregate Translocal Actions* 156 U. Pa. L. Rev. 1929, 1959, 1960-62 (2008) (also noting how national organization of state officials were not able to prevent enactment of CAFA but were able to obtain a special role for state attorneys general under that federal statute).

⁹³ See also Abbe Gluck, *Our [National] Federalism*, 123 Yale L.J. 1996 (2014) (arguing that Congress is the primary source of our federalism).

⁹⁴ See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 Yale L. J. 619, 620 (2001) (arguing against a quest for tidy, unchanging divisions of the "local" and the national").

But it is not clear how Gerken's "federalism all the way down" in this respect differs from decentralization.

That political processes in our federal system afford many opportunities for multiple levels of government to exercise influence one on the other may be accepted, without necessarily accepting an implication that doctrine enforceable by courts to protect states' capacities to self-govern is unnecessary. The normative conclusion may not follow from the description; and this approach may not offer sufficient guidance as to federalism as law, except in one direction. New nationalists, including Gerken, clearly intend to preserve the supremacy of national law as a matter of judicially enforceable constitutional law, a point on which I agree.⁹⁵ However, while explaining that her account is supplementary to others,⁹⁶ at times Gerken seems to suggest that no judicially enforceable substantive federalism-based constraints on national power are needed,⁹⁷ though at other times she argues that both "process" and "sovereignty" approaches to federalism can contribute "sensible, middle-ground" positions.⁹⁸

Powerful normative arguments are made for an approach of allowing experimentation, and disagreement, at state and local levels, subject to correction by national legislation. Indeed, Gerken argues, "division and discord are useful

⁹⁵ Gerken, *supra* note 90, at 10 (insisting on the "center's ability to play the national supremacy card").

⁹⁶ *See id.* at 10-11.

⁹⁷ *See e.g., id.* at 16-18 (discussing debate between "nationalists" and "federalists" over state power and identity and asking, why "we bother to have it" and suggesting that "in a world of competitive party politics and lumpy residential patterns, it is perfectly plausible to think that federalism can work even if states are simply convenient sites through which regionally concentrated interests organize, politic, and compete") (footnote omitted). In other work Gerken appears to endorse clear statement requirements as procedural constraints, Gerken, *Slipping the Bonds, supra* note 74, at 122, and also to endorse the "anti-commandeering" rule, because it provides a stronger incentive for state and local governments to engage in "uncooperative federalism." Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 Yale L. J. 1256, 1297-98 (2009).

⁹⁸ *See, e.g.* Heather Gerken, *Our Federalism(s)*, 53 Wm & Mary L. Rev. 1549, 1562-64 (2012).

components” of the federal system;⁹⁹ she suggests, along with Jessica Bulman-Pozen,¹⁰⁰ that the “uncooperative” and disruptive features of federalism have considerable normative value.¹⁰¹ These accounts lend normative force to presumptive requirements that if national legislation intends to disempower such state and local initiatives it should speak clearly in doing so.¹⁰² Emphasizing the benefits of state experimentation, as well as of concurrent state and federal regulatory jurisdiction, such accounts also support arguments against broad executive or administrative power to preempt state laws.¹⁰³

Some of the legal components of Gerken's approach, though framed under the rubric of federalism, might instead be understood as seeking a more expansive concept of constitutional equality than exists under current doctrine. For example,

⁹⁹ Gerken, *supra* note 90, at 10.

¹⁰⁰ Bulman-Pozen & Gerken, *supra* note 97.

¹⁰¹ Gerken, *supra* note 90, at 20 (arguing that this uncooperative dimension allows “minority rule” in states and local governments to shape identity, promote democracy, and diffuse power); *see also id.* at 24 (“When state bureaucrats 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 (discussing the value of “dissent and resistance”). She urges attention to cities, zoning boards, school boards, juries and other “special purpose institutions” of local governance, *id.* at 23-33, but without explicitly connecting them to constitutional federalism, indeed, drawing on scholarship noting the strength of mayors in a unitary system. *Id.* at 42. *Cf.* Vicki C. Jackson, *Citizenships, Federalisms, and Gender*, in *MIGRATIONS AND MOBILITIES* 451-53 (Selya Benhabib & Judith Resnik eds., 2009) (noting school boards and other institutions of local government as locations for “acts of public citizenship” and exploring whether the density of local governments and related institutions is related to federalism).

¹⁰² *Cf.* Gerken, *supra* note 74, *Slipping the Bonds*, at 92, 109, 122 (celebrating clear statement approach to interpreting federal legislation, stating, inter alia, that “If you worry about Congress inadvertently treading on state power in implementing treaties, it makes perfect sense to impose a clear statement rule.”) Gerken and Pulman-Bozen argue that a narrow approach to preemption not only allows autonomous state or local development of policy but encourages thicker connections between local, state and federal officials in jointly regulating in the same areas. *See* Bulman-Pozen & Gerken, *supra* note 97, at 1304.

¹⁰³ *See supra* note 102; *see also* Jessica Bulman-Bozen, *Executive Federalism Comes to America*, 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).

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.¹⁰⁴ This appears to envision a reinterpretation of the equal protection clause. If so, questions would arise, including whether current U.S. law has sufficient tools to distinguish the situation of disadvantaged racial minority or immigrant groups from the situation of those who feel subjectively disadvantaged by efforts towards more equal treatment of minorities.

In law, descriptive and normative claims are often blended; the thrust of much "new nationalism" scholarship feels normative even when it appears simply to be descriptive. It is, in part, a useful effort to disrupt lawyers' focus on categories and courts, and in part an effort to shift meanings/understandings of categories like diversity, as well as to expand beyond sovereignty/autonomy based understandings of federalism's values. It suggests that some defiant or uncooperative behavior (facilitated by the many governments, officials and special purpose units that exist at state and local levels) may be necessary to advance legal development. History shows the truth of this, sometimes.

But there are rule of law concerns for approaches that rests too much on disobedience and disruption.¹⁰⁵ Bearing in mind *Cooper v Aaron*,¹⁰⁶ 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. Is there a risk that arguments for "disruptive" federalism may detract from rule of law values requiring compliance with unpopular but important norms (e.g., of criminal procedure rights for defendants)? 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

¹⁰⁴ See Heather K. Gerken, *The Loyal Opposition*, 123 Yale L.J. 1958, 1986-88 (2014); Gerken, *supra* note 90, at 42-52.

¹⁰⁵ See also Metzger, *The States as National Agents*, *supra* note 33, at 1071-73 (arguing that Gerken's account gives too little weight to state autonomy and sovereignty).

¹⁰⁶ 358 U.S. 1 (1958).

final court judgment on a legal point.¹⁰⁷ Another question is whether such an approach is presumed to carry a one-way ratchet. Apparently not for Professor Gerken, who seems to embrace both "progressive" and "conservative" forms of dissent through government decisions when she discusses together municipal grants of marriage licenses not allowed under existing statutory law (pre-*Obergefell*) and a local school board's decision to teach "intelligent design".¹⁰⁸ Would one equally celebrate defiance of federal gun control laws? Is there an argument for celebrating defiances on some but not all issues— and if so, what are the arguments for such a normative position? Is it necessary to civilized society to grant those one disagrees with similar rights of “defiant” or “disruptive” federalism?

To return to the implications for existing doctrine of these “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 such interactions. More consistently applied presumptions against preemption (and especially against preemption by executive or administrative action alone, at least absent clear authorization and careful processes) would be consistent with the normative arguments implicit in some of this scholarly work. As already noted, clear statement rules might help promote actual congressional consideration of the effects on state and local governments and put state and local governments on notice of the effects of possible new federal legislation (if they come up early enough in the legislative process to do so).¹⁰⁹

¹⁰⁷ How would the theory apply to issues decided by a Supreme Court decision, but by a narrowly divided Court? *Cf.* Mark Joseph Stern, *Is Same-Sex Marriage Safe?*, Slate (Mar. 1, 2017) (describing Texas Supreme Court's hearing of a case challenging expenditure of public funds to provide benefits to same-sex couples), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/will_the_texas_supreme_court_roll_back_marriage_equality.html.

¹⁰⁸ *See* Gerken, *supra* note 90, at 60; *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁰⁹ Whether courts would enforce any such a procedural timing rule is uncertain, but legislative rules might be able to move in that direction.

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

Scholars of Congress have identified troubling trends -- failures of responsibility in oversight and legislative action; disabling polarization leading to stronger focus on defeating the opposition than advancing policy goals; and exclusion of the opposition from the ordinary give and take of the legislative process.¹¹⁰ Excluding the opposition, whether Democrats or Republicans are in the majority, from the work of Congress results in inattention to the range of impacts of proposed courses of action. A good democracy should not be concerned only with how a majority view an issue, but should also take some account of minority views.¹¹¹ (Although the Senate itself can be understood as designed to take minority views into account in the national legislature, a question is, what minorities, and how heavily weighted those views are; historically disadvantaged racial minorities are disproportionately concentrated in larger population states;¹¹² for these groups, the Senate's malapportionment may make it more difficult for their concerns to be appropriately represented.) The growing polarization and intolerance found in Congress seems to exist in the broader American society as well, though to different

¹¹⁰ See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

¹¹¹ Although the first parts of this paper raised concerns about the Senate's malapportionment, my focus there was on the degree of departure from one-person one vote principles, and especially relative to the state legislatures. I do not think that one-person one vote, rigidly applied, is a necessary feature of a well-designed "upper" house of a well-designed federal system, indeed, it is quite common that there are over-representation of the interests of small subnational units.

¹¹² See LEE & OPPENHEIMER, *supra* note 21, at 20-23 (showing that the "median state" is less racially and ethnically diverse than the nation as a whole and that "Senate apportionment works contrary to the purpose of protecting [racial and ethnic] minorities"); Baker & Dinkin, *supra* note 35, at 46 (noting, based on the 1990 Census, that "fully fifty percent of the nation's persons of color reside in the five largest states"); see also *id.* at 43-44 (exploring how the Senate's apportionment and at-large elections disadvantage racial minorities); Christina Marcos, *115th Congress will be Most Racially Diverse in History*, The Hill (Nov. 17, 2016), <http://thehill.com/homenews/house/306480-115th-congress-will-be-most-racially-diverse-in-history> (identifying 3 African-Americans and 4 Hispanic-Americans in the Senate, and 46 African-Americans and 34 Hispanic-Americans in the House).

degrees. What, if any, are the possibilities presented by federalism for improving the quality of political and civic life?

Federalism might be thought to offer opportunities not only to enact, enforce, implement and influence substantive policies at multiple levels of democratic governance, but also to address problems of polarization, civic intolerance, and failures of representation -- including failures to represent majorities, through inaction and gridlock, and failures to give appropriate consideration to legitimate concerns of minorities. A reasonably well-designed federal system, for example, can provide opportunities for national minorities to be majorities in subnational levels of government,¹¹³ without the degree of undue distortion of equal voting opportunities for representation in the national legislature found in the U.S. Senate.¹¹⁴ But federal systems can also entrench power or identities in counterproductive ways, posing risks of fragmentation or even civic violence.

A. How we live: Physical movements of populations?

It is unclear the extent to which state populations are more politically polarized now than in the past but there is reason to think that living patterns today reflect and reinforce greater political polarization than in the past. Some data suggest that 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

¹¹³ See Gerken, *supra* note 90 at 11-12, 50.

¹¹⁴ For example, the six Australian states each have 12 votes in the Australian Senate (and two territories have two votes each); the largest Australian state (New South Wales) has about 7.6 million persons, while the smallest (Tasmania) has about 516,000. This ratio is dwarfed by the ratio between California and Wyoming. See Parliament of Australia, Senators and Members, at http://www.aph.gov.au/Senators_and_Members; Australian Bureau of Statistics, at <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3235.0Main%20Features402015?opendocument&tabname=Summary&prodno=3235.0&issue=2015&num=&view=> (estimated data for 2015). See also GERMAN BASIC LAW, Art. 51(2), available in official English translation including amendments through 2014 at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (describing the composition of the upper house of the national parliament: ""Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.").

recent elections).¹¹⁵ This accords with data showing an increase, between 1994 and 2014, of “ideological silos” of social circles, that is, the percentages of liberal and conservative voters who are close friends primarily with politically like-minded people.¹¹⁶ It is also consistent with data reflecting a significant urban-rural divide in partisan and ideological identification.¹¹⁷

This polarized distribution of voters by partisanship may reflect some sort of Tiebout sorting.¹¹⁸ 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 may 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. The more polarized and homogenous our ideological communities, the greater the risk of less bridgeable differences arising. Territorial self-governance offers “a space for public participation at some remove from [the] familial and ascriptive

¹¹⁵ Bill Bishop, with Robert Cushing, *The Big Sort: Migration, Economy and Politics in the United States of “Those people”* 13-17 (2012), https://web.archive.org/web/20080624204202/http://www.aei.org/docLib/20080229_BillBishop.pdf; see generally BILL BISHOP, WITH ROBERT CUSHING, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED PEOPLE IS TEARING US APART* (2009).

¹¹⁶ Carroll Doherty, *7 Things to know about polarization in America*, PEW RESEARCH CENTER (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/>.

¹¹⁷ 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/>.

¹¹⁸ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 418 (1956) (hypothesizing that a major difference between central and local governments is that a “consumer-voter” can choose to live in a local community that “best satisfies his preference pattern for public goods”).

identities" that often undergird deep cleavages; such spaces are "rooted in the shared geography of every day life."¹¹⁹ But as territorial spaces become more homogenous, the impact of "shared geography" in permitting bridge-building across political divides may diminish. Whether there are appropriate and non-coercive ways to incentivize people to move into (and create) more rather than less ideologically diverse communities -- both communities of discussion and communities of territorial living -- is a question,¹²⁰ as is whether as a normative and practical matter any such approaches should be pursued.

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

Is it possible given existing demographics to persuade voters to adopt new political rules increasing tendencies towards moderation and inclusiveness? 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 recently adopted a nonpartisan commission to reapportion its districts, in a move that was upheld by the Supreme Court.¹²¹ In speeches during his last year in office, President Obama 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

¹¹⁹ Jackson, *Citizenships, Federalisms*, *supra* note 101, at 440; *see also* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 Mich. L. Rev. 57, 88 (2014) (arguing that the "big sort" into like-minded enclaves is "too easy" for both citizens and representatives, and reduces opportunities for democratic engagement and compromise).

¹²⁰ On past incentives for movement for purposes of settlement of the West, consider the various Homestead Acts.

¹²¹ *See Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015).

will have a tendency to have a moderating effect on public discourse.¹²² If no one party always knows it can 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."¹²³ 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."¹²⁴ She argues that although these executive discussions take place in non-public fora, this may be a legitimate strength.¹²⁵ Non-public discussion may permit both more candor and

¹²² See Barack Obama, Address to the Illinois General Assembly (Feb. 10, 2016) <https://www.c-span.org/video/?404557-1/president-obama-address-illinois-general-assembly> ("politicians should not pick their voters; voters should pick their politicians"); Barack Obama, Remarks by the President in Farewell Address (Jan. 10, 2017), <https://obamawhitehouse.archives.gov/the-press-office/2017/01/10/remarks-president-farewell-address> ("When Congress is dysfunctional, we should draw our congressional districts to encourage politicians to cater to common sense and not rigid extremes.")

¹²³ Bulman-Pozen, *supra* note 103, at 955, 1001-09. Cf. Gillian E. Metzger, *Agencies, Polarization and the States*, 115 Colum. L. Rev. 1739(2015) (drawing theoretical attention to the role of federal administrative agencies and the states in a polarized political environment and arguing that "the Medicaid expansion represents an instance in which federal agencies acting with and through the states have moved polarized politics on a major policy issue").

¹²⁴ *Id.* at 955.

¹²⁵ *Id.* at 1006-07. See also Sarah Binder & Frances E. Lee, *Making Deals in Congress*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 252 (Nathan Persily ed. 2015) (on the importance of secrecy in enabling successful deal-making in Congress); George C. Edwards, *Staying Private*, in SOLUTIONS, *supra* at 279-81; Jane Mansbridge, *Helping Congress Negotiate*, in SOLUTIONS, *supra*, at 266-67.

more willingness to move off of initial positions, thereby facilitating the kinds of compromises on which working government depends.¹²⁶

A seldom discussed possibility would be to introduce "ranked choice" or proportional voting for legislative bodies.¹²⁷ More than a dozen U.S. cities used proportional voting early in the 20th century; its effects have been praised as promoting more inclusive forms of representation,¹²⁸ although such voting systems must be carefully designed to avoid such risks as fragmentation and undue power to smaller parties. Another approach, called "ranked choice" voting, can work in single member districts, in ways that may better reflect voter preferences than plurality first-past-the post systems, though it is uncertain how widely these will be adopted.¹²⁹ For the Congress, legislation in place since 1967 requires single member

¹²⁶ See Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy, constitutional representation*, 57 Wm. & Mary L. Rev. 1717 (2016).

¹²⁷ For a recent proposal for proportional voting for Congress, see Arend Lijphart, *Polarization and Democratization*, in SOLUTIONS, *supra* note 125, at 76-78.

¹²⁸ See Douglas Amy, *A Brief History of Proportional Representation in the United States*, FAIRVOTE, 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*.) 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").

¹²⁹ On governments with ranked choice, cumulative or other proportional voting, see *Ranked Choice Voting/Instant Runoff*, FAIRVOTE, at <http://www.fairvote.org/rcv#rcvbenefits> (describing ranked choice method, used in 11 U.S. cities and in other jurisdictions, as one in which voters vote for their first choice and then rank the other candidates; if no one receives a majority, the least popular candidate is eliminated, and his or her second place votes are allocated, and so forth, until one of the candidates receives a majority); *Communities in America Currently Using Proportional Voting*, FAIRVOTE, at <http://archive.fairvote.org/?page=2101>; *Cumulative Voting -- A Commonly Used Proportional Representation Method*, FAIRVOTE, <http://archive.fairvote.org/?page=226>

districting.¹³⁰ But change at the local or state level may over time have effects, albeit indirectly, on national politics.

C. Constitutional amendment

One avenue by which to redress democratic deficits in our national politics, or no longer well-functioning aspects of our constitutional system, is by constitutional amendment.¹³¹ 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.¹³²

A fortiori, the possibility of amending the composition of the Senate to apportion voting power roughly by population is, as a practical matter, almost non-existent, absent some emergency creating 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. This means that, beyond meeting the very rigorous barrier of three-fourths of the states to ratify a proposed amendment, any single state that is disadvantaged by an amendment changing the equal suffrage rule has a veto. In this sense, national politics on the issue may be like that in Tennessee at the time of *Baker v Carr*¹³³ -- frozen by virtue of the unwillingness of incumbents and their constituents to abandon the advantages that time and demographic change conferred on longstanding boundaries. Constitutional amendment is thus, barring

¹³⁰ See 2 U.S.C. § 2c. Efforts to repeal the single-member district requirement have been unsuccessful. See *State Choice of Voting Method Act*, FAIRVOTE, at http://www.fairvote.org/state_choice_of_voting_method_act (promoting "State Choice of Voting Methods Act" to effect the repeal, stating it is modeled on a bill introduced in 1999).

¹³¹ See generally LEVINSON, *supra* note 31, 173-78 (arguing for a constitutional convention to revamp the Constitution).

¹³² See DAHL, *supra* note 5, at 161 (calculating that an amendment could be blocked by senators from states representing only 7.28% of the population and, if passed by the Senate, could then be blocked by 13 state legislatures in the smallest states, with a population of just 3.87% of the population).

¹³³ 369 U.S. 186 (1962).

extraordinary circumstances, not an available vehicle for this kind of much needed change,¹³⁴ although it may be practicable for others.¹³⁵

D. Secession

Federalism can facilitate secession, by providing seemingly "natural" boundaries within which secessionary movements organize; federalism can also enable a country divided by deep cleavages nonetheless to remain together. Secession is not presently a salient issue in the United States; a very small number of states have teeny to small groups that favor secession. But rising U.S. levels of polarization and civic intolerance, against the backdrop of the "big sort," raise concerns about what the future holds.

Many American scholars believe that the Civil War and subsequent caselaw decisively rule out the possibility of legal secession. Not so. What the slim caselaw after the Civil War rejects is unilateral secession, without the consent of other states; the Court stated that the union was "indissoluble" and "[t]here was no place for reconsideration, or revocation, except through revolution, *or through consent of the States.*"¹³⁶ The case thus contemplates that secession with consent would be permissible, though it is unclear whether what is contemplated is the amending procedure or some other way by which the states could consent, as in by ordinary legislation.¹³⁷ If secessionary momentum becomes strong enough, might other

¹³⁴ For a perhaps slightly less impossible to achieve alternative, see Michael Lind, *75 Stars: How to Restore Democracy in the U.S. Senate (and end the tyranny of Wyoming)*, *Mother Jones* 46 (Jan.-Feb. 1998) (suggesting subdividing states above a certain size to reduce the effects of the two senators per state rule).

¹³⁵ Cf. Vicki C. Jackson, *Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman's The Will of the People*, 13 U. Pa. J. Const. L. 413, 433-52 (2010) (arguing against "amendophobia" and urging consideration of amendments to enable appropriate regulation of campaign finance).

¹³⁶ *Texas v. White*, 74 U.S. 700, 725 (1869) (emphasis added).

¹³⁷ New states, after all, are admitted by Congress, not by amendment. 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. If the purpose of this provision were to protect

states agree to a secession? Will the mechanisms for decision provide enough democratic flexibility to manage a peaceful resolution?

Secession should be a last resort option, one whose consideration will hopefully not be required. After secession both polities of what was once a single nation end up less diverse than they were before. Secession is often, though not always, accompanied by violence and loss of life and enduring bitterness. The establishment of national boundaries where once there were none, especially on a landmass not otherwise divided through features of geography, may create greater risks of war in the future. It is to be hoped that things will not come to a pass in which secession once again becomes a live public issue.

Conclusion

This paper began by identifying an under-considered perspective that may bear on enduring questions of U.S. federalism. Framing the discussion is the possibility that American federalism now has better democratic representation (along one dimension) within the state legislatures than it does at the national level. Until slavery was abolished, this was plainly not true of those states that maintained slavery. Many of those same states continued to disenfranchise African-American voters into the 1960s. And many states had severely malapportioned state legislatures well into the 20th century. 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 reapportionment of state legislatures proceeded quite quickly after the Court's decisions and, more slowly, progress towards racial inclusion began to be

a state from losing part of its preexisting territory, it would not apply to the situation of secession. But secessions are always painful, especially where communities at a border are forced to become citizens of separate countries or to move. Yet giving any one state a veto, through a construction of Article IV or other constitutional provision, could prevent peaceful political solutions to what might otherwise be intractable problems.

seen.¹³⁸ At the same time, however, state legislatures may suffer from various "democratic deficits" of their own: for example, state legislatures may be harder to monitor and access information about (as mentioned above), and partisan gerrymandering of districts for state legislatures may be a threat to their representative capacities.¹³⁹

Constitutional federalism may, in the right circumstances, serve positive values -- promoting democracy, protection of rights, preservation of different sites for participation in governance, diffusing government powers, and promoting innovation, among them. In other circumstances, however, federalism's operation can threaten important values. The Senate was originally conceived as representing the interests of the different states, not the interests of the population as such. Some of the original reasons for its structure no longer exist; others may endure, but -- given developments since, including the increasing importance of political equality in the Constitution's values and the ensuing democratization of state legislatures --

¹³⁸ See Teresa Wiltz, *Why State Legislatures are Still Pretty White*, *Governing* (Dec. 9 2015), at <http://www.governing.com/topics/politics/legislative-boundaries-lack-of-connections-lead-to-few-minority-lawmakers.html> (stating that "[b]etween 1971 and 2009, the percentage of African-American state legislators more than quadrupled, from 2 to 9 percent. But . . . [t]he share of African-American state legislators has increased by only a single percentage point since 1999;" also describing underrepresentation of Asian-Americans and Hispanic in state legislatures). African-American representation in Congress has also reflected the impact of the Voting Rights Act. For example, from 1877 until 1993, the State of Alabama elected no African Americans to Congress; since 1993, three African Americans have been elected to Congress from Alabama. For this and other examples, see U.S. House of Representatives, *Black-American Representatives and Senators by Congress, 1870–Present*, *supra* note 38. Alabama's population was 45% black in 1900; by 1990, it was 25% black. See <http://www.bplonline.org/resources/government/AlabamaPopulation.aspx>. Yet some laws continue to impose disproportionate burdens on African-American voting. See MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012 paperback ed.) (describing the effects of felon disenfranchisement laws); see also *id.* at 193 (arguing that the location of prisons in which many African Americans are housed in predominantly white rural neighborhoods has the effect of increasing the voting power of the free white residents).

¹³⁹ See, e.g., Stephanopolous & McGhee, *supra* note 27, at 876 (comparing congressional and statehouse districting plans, and identifying more state districting than congressional House districting plans that appear unbalanced under their "efficiency gap" approach).

may have different weight today than at the Founding. Identifying a relative "democratic deficit" of the federal and state legislatures across the one criterion discussed in this paper may in the end not change how lawyers and judges reason about federalism. But it is my hope that it will prompt additional scholarly thinking and response. Likewise, expanding the range of thinking about what the federal structure may permit, or lead to -- possibilities both attractive and not so -- may have no immediate practical pay off but, given the urgency of our national challenges, may elicit better ideas and action in the years to come.