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## Negotiating Conflict Through Federalism: Institutional and Popular Perspectives

**ABSTRACT.** The contours of our federal system are under constant negotiation, as governments construct the scope of one another's interests and powers while pursuing their agendas. For our institutions to manage these dynamics productively, we must understand the value the system is capable of generating. But no single conception of this value exists, because the virtues and costs of any particular federal-state relationship, in any given federalism controversy, will appear different depending on perspective: the federal, state, and even local will each perceive their own advantages. And none of these conceptions will map perfectly onto the people's perceptions. In this essay, I attempt to answer the question of what federalism might be good for from each of these perspectives by considering how it has structured various regulatory and social controversies in recent years on matters such as immigration, marriage equality, drug policy, and health care reform. I focus on the administrative and enforcement judgments that each of these debates has required, in order to illuminate the discretionary spaces in which much of the work of federalism occurs. I argue that the value of the system common to all participants and that should govern the negotiation of inter-governmental relations is its creation of a framework for ongoing negotiation of differences large and small. In the spirit of this Feature, I emphasize that having many institutions with lawmaking power enables overlapping political communities to work toward national integration, while preserving governing spaces for meaningful disagreement when consensus fractures or proves elusive.

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## INTRODUCTION

The question of what value federalism generates has no single answer, nor does its corollary of how the system ought to be structured to maximize its virtues. The value generated by decentralized decision-making will appear different depending on the perspective adopted when considering the matter, as will the ideal design of inter-governmental relations. If we step inside the system itself and adopt an institutionalist point of view, the answers will reflect the interests of the system's actors and take on partisan and bureaucratic characteristics. If we try to answer the questions externally, either from a popular or scholarly vantage point, the answers will become more ideological and normative. The question of federalism's value breaks down into several inquiries: Of what value is it to the central government to have state and local governments to contend with? Of what value is it to state and local governments to be embedded in a system with a strong central government and myriad competing governments? Of what value is it to the people to have government power split and decentralized?

A reader reasonably could conclude that the first two questions may matter to a descriptive account of our federalism, but only the third perspective—the popular one—truly matters when debating the merits of the system. But the institutional perspectives convey important information about how the system functions, which in turn helps reveal the possibilities for governance the system creates. In this essay, I adopt each of the three perspectives outlined above in order to develop a complete sense of these possibilities. In so doing, I give content to one of the central insights of the work highlighted in this Feature—that federalism does not consist of a fixed set of relationships. Instead, its parameters are subject to ongoing negotiation by the players in the system, according to the advantages each might accrue from a particular set of relations.<sup>1</sup> Understanding the substance of these negotiations should ultimately lay the groundwork for a normative account of inter-governmental relations.

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1. In describing federalism as consisting of constant negotiation, my thinking aligns with recent scholarship showing that the relationships among institutions are not fixed but rather evolve as necessity demands. As other scholars increasingly have begun to explore in varied regulatory settings, the levels of government set each other's agendas and help constitute each other's abilities to act through constraints that are as much political as legal. See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2012); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 *FORDHAM L. REV.* 1749 (2013); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534 (2011) [hereinafter Gluck, *Intrastatutory Federalism*]; Judith Resnik, *Federalism(s)'s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing*

None of the actors I name is unitary, of course, which makes defining any of their perspectives on a given federalism controversy, not to mention the system itself, tricky. The federal government consists of political and bureaucratic actors arrayed into different branches and representative of different political parties. The sub-federal consists of myriad state and local governments with varying degrees of autonomy from one another and from the center. And the “popular” perspective may be the most variegated and amorphous; it consists of a large and diverse assortment of interests woven together by economic, social, and cultural affiliations and through interest groups and networks such as political parties.

And yet, if we consider each of these actors in relation to one another, a distinct perspective on federalism’s value can be attributed to each. For the federal government, the virtues of the system include having states and localities to enlist in the expansion of its capacities, as well as having other governments to take the lead in various regulatory domains, for political and practical reasons. At the same time, pulling in the opposite direction will be the federal government’s interest in maintaining control (though not necessarily dominance) over the domains to which its powers extend. The federal interest can thus be served by managed diversity, rather than uniformity. State and local officials and entities will certainly have an interest in collaborating with the federal government and taking advantage of federal largesse, whether to advance their own or their parties’ political ambitions, or to help resolve the governance problems they face. But the decisional independence the federalist system affords will often be of political and policy value, too, and will be worth fighting to preserve, even when it places them at odds with the potential federal benefactor. From the popular point of view, federalism’s value will be harder to pinpoint, because the people themselves are not a bureaucratic institution set up in relief to other institutions. Instead, they consist of a sprawling agglomeration of diverse identities and interests. Whether the federal or the sub-federal should address a particular matter may depend on

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*Accommodations*, in *FEDERALISM AND SUBSIDIARITY: NOMOS LV* (James E. Fleming & Jacob T. Levy, eds.) (forthcoming 2014) (manuscript at 1) (on file with author) (arguing that the domains of authority within the federal system “are not fixed but renegotiated as conflicts emerge about the import of rights and the content of jurisdictional allocations”). I and others have taken to heart Rick Hills’s observation that what matters most in understanding federalism as a system is understanding how the levels of government work in tandem. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) (“[T]heories of preemption need to accept the truisms that the federal and state governments have largely overlapping jurisdictions, that each level of government is acutely aware of what the other is doing, and that each level regulates with an eye to how such regulation will affect the other.”).

how the form of regulation maps onto people's substantive preferences. In a more high-minded sense, the virtues of the system for the people will stem from the extent to which it advances the purposes of government.

Though pursuit of their interests by each player may often lead to conflict, particularly over which institutions should control any given policy domain, I argue that the value of the system common to all of its participants is the framework it creates for the ongoing negotiation of disagreements large and small—a value that requires regular attention by all participants to the integrity of federalism's institutions. It is in this sense that I think federalism constitutes a framework for national integration, in the spirit of this Feature. It creates a multiplicity of institutions with lawmaking power through which to develop national consensus, while establishing a system of government that allows for meaningful expressions of disagreement when consensus fractures or proves elusive—a value that transcends perspective.

In what follows, I attempt to establish these conclusions by considering how the negotiations required by federalism have structured our national debates over a number of pressing social welfare issues, including immigration, marriage equality, drug policy, education and health care reform, and law enforcement. I focus on how these debates play out in what I call the discretionary spaces of federalism, which consist of the policy conversations and bureaucratic negotiations that actors within the system must have to figure out how to interact with one another both vertically and horizontally. Indeed, within existing legal constraints, state and local actors will have considerable room to maneuver, and the federal government considerable discretion to refrain from taking preemptive action.<sup>2</sup> I highlight questions of administration and enforcement, because it is in these domains that the system's actors

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2. As Alison LaCroix illuminates in her essay for this Feature, though we might think of court doctrine as setting clear parameters for the political branches, judicial doctrine too is negotiated—the product of shifts in federal power and partisan and ideological dynamics that leave open “opportunities for creative litigation.” I take what she describes as the Court's turn to the “shadow powers” of Article I to be an effort to devise new approaches to conceptualizing and sometimes constraining federal power in the wake of a Commerce Clause jurisprudence that leaves the federal government with all the authority to regulate it could want or need. See Alison L. LaCroix, *The Shadow Powers of Article I*, 123 *YALE L.J.* 2044, 2049 (2014) (arguing that “the battles of judicial federalism are fought not across the well-trampled no-man's-land of the commerce power or the Tenth Amendment, but in the less trafficked doctrinal redoubts of these ‘shadow powers’”). These developments add yet another variable into the federal-state negotiation, especially to the extent that the Court has called into question the federal government's power to use the Spending Clause to provide states incentives for participation in federal schemes with its decision in *National Federation of Independent Business (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2012). The consequences of the shifts she describes for federal regulation are unfolding as we write.

construct one another's powers and interests on an ongoing basis, based on the value they seek to derive from the system. In these discretionary spaces, "winners" must sometimes emerge from discrete conflicts, whether through judicial resolution or political concession, and the parameters set by courts and Congress obviously define the terrain of negotiation. But the inter-governmental relationships and overlapping political communities the system creates are neither locked in zero-sum competition nor bound by fixed rules of engagement, precisely what makes federalism productive regardless of perspective.

The question then becomes, what follows from this conception of federalism, according to which the value generated by federalism varies depending on who's speaking. The talk of negotiation and the corresponding positionalist perspective on federalism work against the development of totalizing theories about how best to allocate power. It becomes difficult to move from describing the functions federalism performs in different domains to an overarching normative structural theory. As Heather Gerken has argued, many different federalisms exist.<sup>3</sup> Even if we can identify a proper conception of federalism as a matter of original understanding, or of Supreme Court doctrine, that conception still will depend on the regulatory domain in question—the Court's immigration federalism looks quite different from its economic federalism.<sup>4</sup> More importantly, when we step into the discretionary spaces I describe, the "look" of the system will depend on the particular choices made by the players in question—choices that will depend on the advantages both the federal and the local perceive from either asserting or declining to use their power, which in turn will be motivated by political and partisan commitments.<sup>5</sup>

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3. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550 (2012).

4. Cf. Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 31-32 (noting that the Court's preemption analysis in *Arizona v. United States*, 132 S. Ct. 2492 (2012), which rejects state enforcement redundancy, does not apply to other areas of state regulation).

5. As Jessica Bulman-Pozen has persuasively argued, the federal system provides a kind of scaffolding for partisan debate. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. (forthcoming 2014) [hereinafter Bulman-Pozen, *Partisan Federalism*]. In her essay for this Feature, she emphasizes the unity of state and federal interests and argues that the fault lines between state and federal governments are no longer so great, because the levels of government are united by politics and the demands of administration. See Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1932-33 (2014) [hereinafter Bulman-Pozen, *Afterlife*]. This observation certainly strikes me as correct in historical perspective, and an important element of the negotiation I describe is identification by federal and state actors of points of common cause and mutual advantage. As I explore throughout this essay, however,

I ultimately believe we can still express proceduralist preferences for decentralized decision-making, regardless of the perspective adopted, based on observations about the value over time of such a structure. Elsewhere, I explore how decentralization can help simultaneously shape political consensus and channel ideological diversity.<sup>6</sup> Here, I focus on the dynamics of negotiation in order to understand better the possibilities federalism creates for the players in the system. This conclusion does not preclude acknowledging that national institutions should be strong and sometimes cut off decentralized debate in the interest of protecting a national norm or the public good, or assert centralized authority to overcome regulatory dysfunctions.<sup>7</sup> But, again, it does point in the direction of developing rules of engagement that keep federalism's institutions robust.

This positionalist inquiry draws on my federalism-related work to date and dovetails with the approaches to federalism highlighted by the contributors to this Feature in at least two ways. First, in my work on immigration federalism, my central preoccupation has been to figure out what purposes state and local activity might serve in a traditionally federal domain, as well as to understand why state and local officials have claimed authority to act—whether those reasons differ from the concerns that motivate the federal government's regulation.<sup>8</sup> I have been concerned less with the identification and delineation of the scope of federal versus state power and more with understanding immigration federalism as an example of how the overlapping political communities in our body politic negotiate with one another to address matters of national concern.<sup>9</sup> My efforts to understand the motivations behind and significance of sub-federal activity has entailed challenging broad conceptual

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institutional interests drive the federalism dynamic, too, and even when governments align politically, those interests often lead to divergent conclusions about how power should be wielded.

6. Cristina M. Rodríguez, *Federalism and National Consensus* (Oct. 2013) (unpublished manuscript) (on file with author).
7. For a leading and powerful theory of the purposes of Article I, Section 8, see Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010), which rejects the economic/non-economic activity distinction drawn by the Supreme Court on the ground that neither the federal nor state governments are necessarily better at regulating one or the other, and proposes a theory of federal power as directed at solving collective action problems generated by inter-state externalities and national markets.
8. See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).
9. Of course, the fact that state and local power to regulate immigration might be limited cannot be escaped—the Supreme Court's 2012 decision in *Arizona* underscores the importance of sovereignty to the debate over immigration regulation.

assumptions of federal exclusivity with an appreciation of how deeply integrated the regulatory regime has become across levels of government, not to mention how fractured and decentralized the political conversation has been.

Second, in this same work, I have sought to highlight how decentralized ferment helps constitute our national debate on the subject of immigration. I have de-centered the national from the federal to explore how “national” issues—those whose salience cuts across state lines and constituencies—are not always or necessarily best served by a federal monopoly,<sup>10</sup> and how state and local debate and regulation can serve national interests. In more recent work on federalism generally, I highlight these same dynamics of decentralized ferment and inter-institutional negotiation in other contexts of highly charged social policy—same-sex marriage, drug policy, and gun regulation—and argue that among the most significant values of our federal system is its utility in managing social conflict across policy domains.<sup>11</sup> In line with the overarching frame of this Feature, I show how decentralized decision-making can promote national integration and national problem solving in a world of deep demographic and ideological diversity. But I also emphasize that integration does not depend on the achievement of a clear national consensus, though decentralized debate can certainly result in the consolidation of national norms or policies. Instead, integration can emerge through the achievement of an equilibrium that contains within it the possibility of ongoing debate—a picture of federalism I hope to illuminate here.

## **I. THE FEDERAL GOVERNMENT AND THE MIXED INTEREST IN CONTROL**

National debates can happen trans-locally with or without the federal government in the lead. Under this view, the federal government becomes one actor in the system. But because it has the authority to monopolize regulatory domains and displace states, localities, and even private actors, its conceptions of federalism will inform the character of the system more than any other single government. Considering how the federal government might perceive the value of federalism and therefore use its power—whether to consolidate its own positions, tamp down decentralized ferment, create room for diversity in

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10. As Alison LaCroix’s work suggests, this conception of federal power differs from the original design, according to which the Framers of the Constitution sought to create a union, with its own particular general welfare, of which the federal government presumably would be the custodian. See LaCroix, *supra* note 2, at 2089–90.

11. See Rodríguez, *supra* note 6.

regulation, or learn by observing how other actors address social problems—becomes crucial to understanding federalism as a governing structure.

It might seem futile to attempt to identify a federal perspective on federalism, given the complexity of the federal government.<sup>12</sup> Congress and the Executive Branch will often have divergent interests, particularly when controlled by different parties. The myriad agencies of the federal government itself will also interact with one another according to logics of cooperation, as well as competition.<sup>13</sup> The political layer of the bureaucracy may have different priorities from the civil service.<sup>14</sup> This multiplicity is part of what gives federalism its negotiated character. As I explore in Part II, it creates opportunities for state and local actors. But it also enables the federal government to take advantage of federalism in numerous ways. And thus, even if no single perspective can be attributed to the federal government, we can still think in general terms about how a variegated center might approach the governments contained within it.

The federal government (both Congress and the Executive Branch) constructs its relationships with state and local actors in myriad ways: through delegation; by incorporating state and local officials into federal bodies, commissions, and regulatory regimes; or by crafting legislation or enforcement policies to address tensions that might arise when state and local actors exercise parallel but overlapping regulatory authority. Abbe Gluck has explored this dynamic in the healthcare context, revealing the varied ways in which the federal and state governments are intertwined through federal design.<sup>15</sup> The Immigration and Nationality Act also balances delegation to and constraint on state authority and is full of different inter-governmental relationships designed by Congress to both employ and shape the federal structure to suit its policy objectives.<sup>16</sup> In each sort of relationship, the Executive Branch must regularly assess how to calibrate its involvement and assertions of authority.<sup>17</sup>

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12. For a perspective on how the variety of interests within the federal government intersects with federalism dynamics, see Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 259 (2011), which argues that states that disagree with positions taken by the Executive Branch attempt to position themselves as faithful agents of Congress, thus splitting open the federal government.
  13. See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (assessing the tools agencies use to resolve coordination challenges and arguing that the challenge calls for strong presidential leadership).
  14. For discussion of one such example, see *infra* notes 27-33, 41 and accompanying text.
  15. See Gluck, *Intrastatutory Federalism*, *supra* note 1.
  16. See, e.g., 8 U.S.C. § 1357(g)(1) (2012) (authorizing the Secretary to “enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision . . . may carry out” the functions of investigating,



Numerous factors will inform the federal government's choices about how to interact with sub-federal legal and political institutions and bureaucracies. The existence of the latter can expand the federal government's capacity to govern and enforce the law.<sup>18</sup> The federalist structure also can amplify the influence of political parties and national politicians. Turning to its institutions

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apprehending, or detaining "aliens in the United States"); *id.* § 1357(g)(10) ("Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee . . . to communicate with the [Secretary] regarding the immigration status of any individual . . . or . . . otherwise to cooperate with [the Secretary] . . ."); *id.* § 1622(a)-(b) (detailing state authority to limit eligibility of "qualified aliens" for state public benefits); *id.* § 1373(b) (prohibiting state and local governments from preventing their employees from exchanging immigration information with "any other Federal, State, or local government entity"). The comprehensive immigration reform bill passed by the Senate in 2013 would involve state officials in immigration policy in still new ways. For instance, section 4 of the bill would create a Border Security Commission that would include all border-state governors and the governor of Nevada. Together with presidential and congressional appointees, the Commission would recommend a border security strategy should the Department of Homeland Security (DHS) not be able to certify that the border has been "secured" by a certain date. See Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. § 4 (2013). In a similar vein, the FBI oversees myriad law enforcement task forces that rely on state and local police to assist in intelligence gathering, investigation, and other crime-fighting operations. For exploration of some of the legal issues surrounding joint law enforcement operations, see Authority of FBI Agents, Serving as Special Deputy US Marshals, to Pursue Non-Federal Fugitives, 19 Op. O.L.C. 33 (1995). Matthew Waxman describes FBI counter-terrorism task forces in which local law enforcement essentially "work on behalf of the federal government." See Matthew C. Waxman, *National Security Federalism*, 64 STAN. L. REV. 298, 308 (2011).

17. For an example of this process, see *infra* notes 31-33 and accompanying text, discussing enforcement priorities with respect to marijuana prosecutions. Along similar lines, during the litigation over Arizona's Senate Bill 1070, DHS issued a memorandum detailing the cooperation it sought from state and local police in immigration enforcement and defining state and local action that amounted to non-cooperation. See *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters*, U.S. DEP'T HOMELAND SECURITY, <http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf> (last visited Jan. 13, 2014) [hereinafter *Guidance on State and Local Governments' Assistance*] ("In light of laws passed by several states addressing the involvement by state and local law enforcement officers in federal enforcement of immigration laws, DHS concluded that this guidance would be appropriate to set forth DHS's position on the proper role of state and local officers in this context.").
18. States' and localities' utility as force multipliers has been invoked to justify the enlistment of state and local police in immigration enforcement. See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005). In her recent work, Gillian Metzger has highlighted how the Obama Administration has taken advantage of federalism to enhance the capacity to regulate. See Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567 (2011) (detailing regulatory and financial opportunities for states and the move toward more active government at the federal and state levels).

can help federal actors advance their substantive agendas through lawmaking, either by locating a substitute for it at the state or local level, or by laying groundwork for future federal action.<sup>19</sup> The federal system also enables federal actors to shift the burden of regulation and accountability for the handling of difficult issues to other officials and politicians.<sup>20</sup> Each of these interests will likely be at work in the federal government's "use" of the federal system.

But because the Constitution makes federal law supreme, working against these incentives to utilize the federal structure will be a strong impulse to maintain control over the domains to which federal power extends. When interacting with the federal system, particularly when attempting to use it to its advantage, the federal government frequently will face the questions of whether and how to assert its supremacy, particularly when dealing with questions of enforcement and administration. In the end, such control will be elusive and may even be counterproductive, as it is in tension with some of the strategies discussed above, but the desire to assert it will be an ever-present part of the federal government's negotiation of the federalism dynamic.

The federal government's decision to file a lawsuit challenging Arizona's Senate Bill 1070, which contained various provisions designed to crack down on illegal immigration, reflects a particularly robust effort to assert control over a decentralized debate. Despite a longstanding practice of significant state and local involvement in various aspects of immigration enforcement, the federal government sought to assert its primacy within that system through litigation.<sup>21</sup> From the Department of Homeland Security (DHS)'s law-enforcement point of view, the Arizona law abandoned cooperation with the federal government in favor of disruptive confrontation over how stringently to enforce the law.<sup>22</sup> For the Civil Rights Division, and perhaps even the Attorney

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19. See generally Bulman-Pozen, *Afterlife*, *supra* note 5.

20. Among the well-documented reasons that Congress delegates authority to the Executive Branch is to shift accountability to administrative actors for making controversial policy decisions or difficult technical choices. See, e.g., DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATED POWERS* (1999). It seems intuitive that a similar dynamic would motivate delegations to states and localities.

21. I explore this decision-making process in detail elsewhere. See Rodríguez, *supra* note 6 (manuscript at 12-18).

22. Whether Arizona's S.B. 1070 and similar laws present meaningful challenges to the federal government's actual ability to manage its system of immigration arrests and removals remains difficult to gauge. But in its filings in the case, the federal government repeatedly emphasized that "S.B. 1070 cannot be sustained as an exercise in cooperative federalism when its very design discards cooperation and embraces confrontation." Brief for the United States on Petition for Writ of Certiorari at 22, *Arizona v. United States*, 132 S. Ct. 2492

General, S.B. 1070 may have become emblematic of the risk of racial profiling<sup>23</sup> inherent in police enforcement of immigration laws, thus requiring a federal response. Perhaps most important, Arizona's challenge to the federal enforcement agenda, particularly when juxtaposed with the numerous other states that followed suit, threatened federal leadership of the immigration debate by offering a vision of immigration policy that relied on attrition through enforcement, directly challenging President Obama's preferred legalization strategy.<sup>24</sup>

The federal government thus felt compelled to reassert its primacy over the politics and policy of immigration through the highly unusual strategy of a government-sponsored preemption lawsuit. In litigation, the administration characterized Arizona as having made itself a "rival decisionmaker[]" based on disagreement with the focus and scope of federal enforcement,<sup>25</sup> reinforcing the premise that state and local participation in this domain could only be at the invitation of the federal government.<sup>26</sup> The government's rhetoric of

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- (2012) (No. 11-182); *see id.* at 46. In a guidance document laying out its conception of law enforcement cooperation, DHS made clear that state officials must be "responsive to federal enforcement discretion," such that DHS could exert "control over enforcement" and maintain flexibility to respond to "changing conditions," and that it was not appropriate for state and local governments to adopt their own "set of directives to implement [their own] enforcement policy." *Guidance on State and Local Governments' Assistance*, *supra* note 17, at 4.
23. Rooting out racial profiling has long been one of the priorities of the Department and is of heightened concern to the current DOJ. *See* Civil Rights Div., *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, U.S. DEP'T JUST. (June 2003), [http://www.justice.gov/crt/about/spl/documents/guidance\\_on\\_race.pdf](http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf); *see also* Matt Apuzzo, *U.S. to Expand Rules Limiting Use of Profiling by Federal Agents*, N.Y. TIMES, Jan. 15, 2014, <http://www.nytimes.com/2014/01/16/us/politics/us-to-expand-rules-limiting-use-of-profiling-by-federal-agents.html>.
  24. In her essay for this Feature, Jessica Bulman-Pozen notes that, in defending its law, Arizona claimed to be acting in full accord with the law as Congress had written it, thus stepping onto one side of a federal debate. Bulman-Pozen, *Afterlife*, *supra* note 5, at 1936. Whether this posture was strategic (to insulate the state law from preemption litigation) or sincere, much of Arizona's enforcement drive was in substance inconsistent with the visions of the Obama Administration and Democratic politicians in the current Congress, and even with the bargains struck by the Congresses that had enacted various provisions of the Immigration and Nationality Act. As the Supreme Court observed in *Arizona*, S.B. 1070 actually adopted regulatory strategies Congress had rejected, such as criminalizing work by unauthorized immigrants themselves, rather than just the employer's decision to hire. *See Arizona*, 132 S. Ct. at 2503-05.
  25. *See* Brief for the United States, *supra* note 22, at 22.
  26. *See id.* at 7. In other aspects of its enforcement policy, the federal government has adopted a similar position. It has chosen, for example, to terminate the 287(g) authority of Sheriff Joseph Arpaio of Maricopa County, whose department also has been found by a district court to have engaged in civil rights violations through racial profiling and enforcement

control and supervision in the *Arizona* case could have just reflected its particularly strong interest in maintaining primacy in a traditional federal sphere. Despite the erosion of the spheres conception of federalism in doctrine and practice, the federal government might still cling to its traditional exclusivities. Or the government's positions could have been a function of the especially oppositional behavior of Arizona and like-minded states. Whatever its motivation, the lawsuit suggests the federal government will often want its federalism both ways.

Developments in the drug policy arena suggest a slightly different, more cooperative conception of control – that federal primacy can be maintained and even served in the absence of monopoly. Numerous states have adopted regulatory regimes meaningfully distinct from the federal Controlled Substances Act (CSA), first by adopting exceptions to prohibitions on marijuana use for medicinal purposes,<sup>27</sup> and more recently by decriminalizing

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sweeps. See Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary Janet Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), <http://www.dhs.gov/news/2011/12/15/secretary-napolitano-doj-findings-discriminatory-policing-maricopa-county> (“Discrimination undermines law enforcement and erodes the public trust. DHS will not be a party to such practices. Accordingly, and effective immediately, DHS is terminating MCSO's 287(g) jail model agreement and is restricting the Maricopa County Sheriff's Office access to the Secure Communities program. DHS will utilize federal resources for the purpose of identifying and detaining those individuals who meet U.S. Immigration Customs Enforcement's (ICE) immigration enforcement priorities.”). Other shifts in federal enforcement strategies reflect a desire to utilize federalism's institutions while keeping its actors at bay. The Secure Communities program, pursuant to which fingerprint data collected from state and local arrests and sent to the FBI is made accessible to immigration officials through interoperable databases, uses information collected by state and local enforcement officials without involving them directly in immigration enforcement. For the government's summary of the program, see *Secure Communities*, IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities) (last visited Jan. 22, 2014). See also 8 U.S.C. § 1722(a)(2) (2012) (requiring the President to “develop and implement an interoperable electronic data system to provide current and immediate access to information in databases of Federal law enforcement agencies” to make immigration determinations). Eliminating state and local influence from enforcement will be difficult, however; local law enforcement that might have an immigration agenda could in theory still make arrests to advance that agenda; for example, they could make arrests for minor offenses such as traffic violations in order to funnel certain people into the immigration system. Cf. Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1109 (forthcoming 2014) (noting the vast expansion of state and local involvement in immigration policing that is resulting from Secure Communities and the corresponding elimination of choice by states and localities as to their participation).

27. As of November 2012, eighteen states and the District of Columbia have enacted measures that effectively decriminalize the use of marijuana for medicinal purposes by exempting “qualified individuals” from prosecution. TODD GARVEY, CONG. RESEARCH SERV., R42398,

use of marijuana even for recreational purposes while also authorizing its production and sale, as in Colorado<sup>28</sup> and Washington State.<sup>29</sup> Both sets of developments, but particularly the latter, could be said to disrupt the field of federal enforcement. The state laws sanction marijuana use, thus giving rise to an expanded market, and they deprive the federal government of the state and local enforcement resources on which it historically has relied to serve the purposes of the CSA.<sup>30</sup>

In response to these developments, the Obama DOJ has issued three memoranda articulating how the federal government intends to enforce federal law in the wake of state divergence. But what exactly those memoranda were meant to accomplish remains unclear, perhaps intentionally so. On the one hand, the memos have served to provide notice to state and local actors of federal intentions<sup>31</sup>—that consistent with its priorities the Department would

MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 1 (Nov. 9, 2012), <http://www.fas.org/sgp/crs/misc/R42398.pdf>.

28. COLO. CONST. art. XVIII, § 16; *see also id.* § 16(1)(a) (“In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.”).
29. WASH. REV. CODE § 69.50.401(3) (2013) (“The production, manufacture, processing, packaging, delivery, distribution, sale, or possession of marijuana in compliance with [the legalization initiative] shall not constitute a violation of . . . any . . . provision of Washington state law.”).
30. For a comprehensive discussion of the federalism implications of state marijuana decriminalization, see Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).
31. That notice may have been less than clear. The memo issued by Deputy Attorney General David Ogden in particular appears to have induced a naïve reliance by eventual federal defendants, who believed the federal government’s articulation of its intent to exercise discretion amounted to a kind of immunity from federal prosecution. *See, e.g.*, *United States v. Hicks*, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) (observing that “[t]he Department of Justice’s discretionary decision [in the Ogden memorandum] to direct its resources elsewhere does not mean that the federal government now lacks the power to prosecute those who possess marijuana,” and that Department officials’ statements “cannot be construed as affirmatively representing to Defendant that he is now authorized to possess or use marijuana under federal law”); *United States v. Stacy*, 696 F. Supp. 2d 1141, 1149 (S.D. Cal. 2010) (finding that “federal prosecuting authorities are free to investigate or prosecute individuals if, in their judgment, there is reason to believe that state law is being invoked to mask the illegal production or distribution of marijuana” and that there would in any case be no grounds “for dismissing an indictment because it is contrary to internal Department of Justice guidelines”). Even public statements by the Attorney General have given rise to such reliance, but the courts have rejected entrapment by estoppel claims based on those statements. *See Stacy*, 696 F. Supp. 2d at 1147 (“Holder’s statement that the Justice Department ‘had no plans’ to prosecute pot dispensaries that were operating legally under state laws was a loose statement that left open the possibility the Justice Department could

continue to enforce the law. The Department identified certain federal “lines” that it would continue to police, namely preventing distribution of marijuana to minors; the diversion of revenues to cartels or criminal enterprises; and the use of violence in the cultivation and distribution of marijuana.<sup>32</sup> But because its goals arguably have never included prosecuting minor possession offenses, the federal government could also announce its intention to look the other way with respect to much of the activity authorized by state law. This mixed commitment to enforcement likely reflects the imperatives facing a law enforcement agency, reconciled with political calculations concerning how best to respond to shifts in public opinion regarding marijuana use and possession.

But while asserting control essentially by reserving it, the federal government also struck a collaborative posture with states such as Colorado and Washington different in kind from its definition of cooperation in the immigration setting. Though similar in a certain spirit to the DHS guidance issued during the S.B. 1070 litigation laying out the forms of state and local assistance that constituted cooperation, the Department’s drug policy also went a step further by expressing a willingness to adjust federal policy in light of how the state regulatory regimes play out in practice.<sup>33</sup> Indeed, the fact that Attorney General Holder rejected the aggressive preemption strategy adopted in the immigration setting suggests that, in some settings, federal purposes and even primacy can be maintained amidst cacophony on ultimate policy objectives.

This tolerance for divergence could simply reflect the government’s calculation that state laws will not disrupt the federal enforcement status quo, or it could stem from the federal government’s own long-term interest in de-escalating the drug war. The fact that a Democratic administration has taken this position also underscores the role politics can play in the federal government’s construction of its power and its relationships with the states. Whereas Arizona’s immigration law, adopted in a highly partisan Republican

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change its ‘plans’ or could choose to prosecute medical marijuana dispensaries on a case-by-case basis.”).

32. See, e.g., Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Attorneys, Guidance Regarding Marijuana Enforcement 2 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.
33. See, e.g., *id.* at 3 (“In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten . . . federal priorities . . . . In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state laws by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.”).

environment, was anathema to key political constituencies of the Obama Administration, the movement to relax marijuana prohibitions, particularly for medicinal purposes, does not threaten any such constituencies and may be in line with the substantive preferences of the average voting Democrat (or even American). Regardless of the reason for its position, the Department acknowledged that its priorities could be maintained in the absence of uniformity of policy. The very fact that the Cole memorandum suggests that the federal government will think about prosecutions in states with effective regulatory regimes differently from prosecutions in states that maintain prohibitions suggests that local development can prompt variegated federal action that nonetheless constitutes an integrated national enforcement strategy.

Both approaches to cooperation ultimately suggest that, no matter how strong the desire to assert it, control will be elusive, and sometimes even counterproductive, for at least three reasons. First, as I noted at the outset, the federal government historically has relied on state and local actors as agents in the development of federal policy, and the law is replete with delegation strategies of numerous sorts.<sup>34</sup> Regardless of the particular form it takes,<sup>35</sup> as a

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34. In addition to the so-called 287(g) agreements that enable state and local officials to perform federal immigration functions, 8 U.S.C. § 1376(g) (2012), the law delegates authority to states to make judgments concerning benefits eligibility for noncitizens, and federal removal law itself depends on state criminal law predicates, which of course vary across jurisdictions on their face and in their enforcement, such that removal policy itself is not uniform. For recent literature documenting how criminal law enforcement choices made by state and local actors affect the federal agenda by determining who is eligible for removal in ways that reflect local preferences and values, see, for example, Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013); and Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011).
35. The decision to delegate, the form of delegation chosen by Congress, and the extent of the Executive Branch's use of the delegation option will be in large part a function of politics and not just institutional interest. For instance, a Republican Congress introduced the 287(g) program into the Immigration and Nationality Act in 1996, amidst a series of reforms designed to strengthen enforcement and limit access to benefits by noncitizens, all of which were signed by President Clinton as part of a larger triangulation strategy to help assure reelection in a tough political environment. See, e.g., *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-3546 (codified in scattered sections of U.S.C.) (making removal more expeditious); *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of U.S.C.) (denying lawful permanent residents access to certain means tested benefits and authorizing states to deny state benefits); *Anti-Terrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of U.S.C.) (constricting habeas review, expanding deportation grounds, and narrowing discretionary relief). Not coincidentally, the federal bureaucracy did not start entering into 287(g) agreements in significant numbers until after

method of regulation, delegation carries with it the possibility of divergence from what the federal government, working through its own agents, might choose to do. The federal government's embracing of the advantages of delegation also reflects a degree of acceptance of the divergences it generates. In some settings, the federal government will even have an affirmative interest in the divergence itself. In implementing the No Child Left Behind Act,<sup>36</sup> for example, the Obama Administration has granted waivers of the law's requirements to certain states. This strategy arguably helps facilitate states' development of new strategies tailored to their own needs to meet the federal law's requirements under federal supervision, thus using the tools of administration to simultaneously calibrate regulatory burdens in the states' interests and advance federal policy objectives.<sup>37</sup> We may bemoan this widespread delegation, following Michael Greve,<sup>38</sup> as inconsistent with the original design whereby states were to provide a check on the federal government. Or, we may regard delegation strategies as reflecting lamentable path-dependencies that stem from the original constitutional design but might be less effective than comprehensive federal regulatory regimes.<sup>39</sup> But the federal interest in making use of the structures of federalism requires constant adaptation and adjustment and therefore some limited loss of control.<sup>40</sup>

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September 11, 2001, and under the Republican Bush Administration. See Cristina Rodríguez et al., *A Program in Flux: New Priorities and Implementation Challenges for 287(g)*, MIGRATION POL'Y INST. 3 (2010). Though the current Administration has not eschewed this strategy, it has clipped the authorities of certain local officials and shifted its attention to Secure Communities. See *supra* note 26.

36. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at scattered sections of 20 U.S.C.).
37. See generally David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 279-81 (2013) (describing the waivers, their statutory basis, and the alternate requirements imposed on states receiving them).
38. MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012).
39. The implementation of the Affordable Care Act arguably reflects the pathology of delegation strategies. Both the refusal by numerous states to create their own insurance exchanges and to accept federal money to expand the coverage of Medicaid suggest the inefficiencies of relying on state bureaucracies to accomplish federal ends, not only because supervision of those bureaucracies will be challenging, but more importantly because partisan politics will always threaten to scuttle well-laid technocratic plans.
40. That the federal government understands an ongoing need to conceptualize its power with awareness of state and local interests is highlighted by the fact that the current Democratic administration purports to respect states' concurrent authority, as well as the possibility that states have often done a better job of advancing the public welfare than the federal government (though of course the definition of public welfare is up for debate). See Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 384, at \*1 (May 20, 2009) ("The Federal Government's role in promoting the general welfare and guarding individual



Second, because the federal government itself is not unitary in its views about how the law should be enforced, its responses to developments in the states can be complicated. Federal positions on federalism are often the product of internal compromise. The formulation of the DOJ marijuana memos was likely complicated by divergent interests that stemmed from institutional “role.” Whereas Attorney General Holder and other policy-makers might have seen the long-term benefits of de-escalation, the bureaucratic culture and professional interests of the officials of the DEA likely placed a heavy thumb on the scale in favor of enforcement vigilance, thus leading to the open, non-committal quality of the memos. Even the DHS memo on immigration cooperation, designed to point up the conflict between Arizona’s law and federal policy, reflected an institutional commitment to some state and local participation in immigration enforcement, another position likely reflective of compromise between law enforcement and political and civil rights interests. Further, certain actors within the federal system might prefer to work with local partners to advance their own particular preferences, which might differ from their superiors’. Devolution in immigration law enforcement highlights this dynamic. Federal field agents might share more in common with state and local officials interested in widespread enforcement, both for institutional and partisan reasons. This tension between center and periphery does not justify the latter in resisting the former, including through collaboration with more like-minded state and local officials, but it does underscore the difficulty of achieving a truly uniform enforcement policy.<sup>41</sup>

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liberties is critical, but State law and national law often operate concurrently to provide independent safeguards for the public. Throughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.”). For an exploration of how this has played out in practice, see Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 527-29 (2012) (considering agency responses to the President’s memorandum calling for attention to state interests). In exploring federalism under the Obama Administration, Gillian Metzger cites the government’s interest in providing states with opportunities to regulate in order to expand the capacities of government. See Metzger, *supra* note 18, at 598-610 (detailing regulatory and financial opportunities for states and the move toward more active government at the federal and state level).

41. A stark example of the potential for internal disagreement is the lawsuit brought by Immigration and Customs Enforcement agents challenging the Deferred Action for Childhood Arrivals policy adopted by DHS Secretary Janet Napolitano as a statement of Department enforcement priorities. This conflict underscores that federal agents in the field often take issue with the politically driven shifts in policy initiated by political appointees and bureaucrats centered in Washington. For a discussion of the claims made in the lawsuit, see *Crane v. Napolitano*, 920 F. Supp. 2d 724, 730-31 (N.D. Tex. 2013) (granting in part and denying in part the government’s motion to dismiss); *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 1744422 (N.D. Tex. Apr. 23, 2013) (deferring ruling on preliminary

Finally, the very existence of state regulatory authority, as well as the concurrent nature of much of federal and state authority, means state and local lawmaking will challenge federal positions, requiring the federal government to react. The preemption remedy will only infrequently be available, not least because litigation is slow and costly. In fact, preemption may also not be desirable. The federal government might have an interest in disharmony, because state and local forays into fields that touch on federal interests can provide the federal government with opportunities. Consider again the marijuana debate. The federal government may well have an interest in de-escalating the war on drugs. The Democratic politicians currently in charge might favor decriminalization as a matter of policy, perhaps in order to reduce incarceration rates and diminish drug-related violence abroad. Law enforcement officials might share the interest in reducing violence and prefer a world in which resources can be devoted to more dangerous public health threats than those marijuana poses. But because of a variety of political and institutional pressures, it cannot be the prime mover in that process. Much as I have argued in other work that the federal government benefits from states and localities fighting out the gory details of how to conceptualize illegal immigration,<sup>42</sup> the federal government may need a decentralized debate over legalization.

The debates concerning marriage equality and the Defense of Marriage Act also highlight the opportunities state-level divergence can create for the federal government. If we take DOMA's rise and fall as the lens through which to view the federal government's interest in the marriage equality debate, we can see that the federal position has been ideological and partisan, as well as reactive, and that the federal government has benefitted from state and local governments taking the lead in promoting marriage equality. Both Congress's enactment of DOMA in 1996 in response to developments in the states, and the administration's decision not to defend DOMA in court in 2011, were precipitated by decentralized developments throughout the country. In the case of the latter, the President began his administration publicly opposed to same-sex marriage. It therefore seems plausible that his and his administration's evolution on the question was made possible by the growing momentum in state and local governments in the direction that otherwise aligned with the preferences of Democratic voters, or at least core principles of the Democratic Party.

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injunction); and *Crane v. Napolitano*, No. 3:12-cv-03247-O, slip op. at 7 (N.D. Tex. July 31, 2013), <http://www.law.uh.edu/ihehg/documents/Crane207-31-13.pdf> (dismissing plaintiffs' claims for lack of jurisdiction).

42. See Rodríguez, *supra* note 8.

More concretely, in response to these decentralized trends, the administration began a concerted effort in June 2010 to require the bureaucracy to do what it could with administrative tools, within the confines of DOMA, to extend federal benefits to same-sex partners.<sup>43</sup> After the Supreme Court's invalidation of DOMA in 2013—a decision grounded largely in equal protection principles but informed by developments at the state and local level<sup>44</sup>—the administration innovated still further. For example, DHS, backed up by DOJ, now permits U.S. persons to sponsor their same-sex spouses for admission to the country.<sup>45</sup> As this essay went to press, the Attorney General took perhaps the boldest stance yet by the Department in relation to federal law. He declared that the federal government would recognize same-sex marriages performed in Utah pursuant to a district court order, extending benefits to same-sex spouses of federal employees married before the Supreme Court stayed the district court decision.<sup>46</sup> The Attorney General aligned this move with the

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43. Memorandum on Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 2010 DAILY COMP. PRES. DOC. 450, at \*1 (June 2, 2010) (“[S]ystemic inequality [in the provision of benefits] undermines the health, well-being, and security not just of our Federal workforce, but also of their families and communities,” such that administrative action should be taken “to the extent permitted by law,” even though “legislative action is necessary to provide full equality.”).
  44. The basis for the Court’s invalidation of DOMA is difficult to pinpoint, as the Court’s opinion veers between equal protection and federalism rhetoric throughout. But whether federalism concerns constituted a basis for the holding (I argue elsewhere the opinion turned on Fourteenth Amendment analysis, see Rodríguez, *supra* note 6 (manuscript at 34-36)), the challenge to the federal statute arose and became publicly salient because of the rapid progression of same-sex marriage through the states in the last decade.
  45. For the DHS position on the matter, see *Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, U.S. DEP’T HOMELAND SECURITY, <http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act> (last visited Jan. 23, 2014) (quoting former Homeland Security Secretary Janet Napolitano’s statement that “effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse”). For the adjudication of the issue by the Board of Immigration Appeals within the Department of Justice, see Oleg B. Zeleniak, 26 I. & N. Dec. 158, 159-60 (2013) (“The Supreme Court’s ruling in *Windsor* has therefore removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriages and spouses if the marriage is valid under the laws of the State where it was celebrated. . . . The Director has already determined that the petitioner’s . . . marriage is valid under the laws of Vermont, where the marriage was celebrated.”).
  46. In his statement announcing the decision, the Attorney General framed it as another step on the road to equality and declared that families consisting of same-sex spouses should not be asked to endure uncertainty as litigation unfolds. See *Statement by Attorney General Eric Holder on Federal Recognition of Same-Sex Marriages in Utah*, U.S. DEP’T JUST. (Jan. 10, 2014), <http://www.justice.gov/opa/pr/2014/January/14-ag-031.html>. From his point of view, it was

Department's substantive equal protection agenda, despite ambiguous signals coming from the governor's office about the legal status of those marriages under state law.<sup>47</sup> He thus untethered, if only slightly, the federal position from the state one. In its domain, then, the federal government has been able to advance civil rights principles now held (and perhaps long held) by its leaders that redound to the benefit of its employees.<sup>48</sup> These positions arguably have been made possible by developments in the states and have grown bolder as the debate has unfolded through dialogue between and among state and federal institutions.

As the Obama Administration's actions have shown in the immigration and drug policy contexts, not to mention DOMA, full enforcement of the law and federal dominance are often not the salient federal interests within the federal system. Federalism can ultimately provide the federal government with opportunities to extend its influence and capacities. Decentralized conflict can work to its advantage.<sup>49</sup> To be sure, as the case of S.B. 1070 suggests,

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enough for a federal district court to have declared the state's prohibition on same-sex marriages unconstitutional to create a state-law status the federal government could recognize for its own ends.

47. In a statement issued on January 9, 2014, the Attorney General of Utah recommended that county clerks provide marriage certificates to all persons married before the district court order was stayed, "as an administrative function and not a legal function," in part so same-sex couples could have "proper documentation in states that recognize same-sex marriage." *Attorney General Sean D. Reyes Counsels County Attorneys and County Clerks in Utah*, UTAH ATT'Y GEN. (Jan. 9, 2014), <http://attorneygeneral.utah.gov/2014/01/09/attorney-general-sean-d-reyes-counsels-county-attorneys-and-county-clerks-in-utah>. This statement could mean that the state recognizes the marriages in question, at least on some level, even if state benefits do not flow from that recognition. In a statement on January 8, the governor's chief of staff indicated that the state would not recognize same-sex marriages pending final judicial resolution of the issue, though the statement made clear that it was not intended to opine on the legal status of those marriages. *Governor's Office Gives Direction to State Agencies on Same-Sex Marriages*, UTAH GOV. GARY HERBERT (Jan. 8, 2014), [http://www.utah.gov/governor/news\\_media/article.html?article=9617](http://www.utah.gov/governor/news_media/article.html?article=9617).
48. In the Presidential Memorandum announcing the government's decision to expand benefits to same-sex partners before it decided not to defend DOMA in court, the President emphasized that the "systemic inequality [in the provision of benefits caused by DOMA] undermines the health, well-being, and security not just of our Federal workforce, but also of their families and communities." Memorandum on Extension of Benefits, *supra* note 43, at \*1.
49. This perspective provides a different spin on yet another role claimed for the federal government by commentators—that the central government ought to, or will want to, protect states from one another by policing their imposition of externalities or spillovers on their neighbors through judicial or legislative preemption or ad hoc executive action. The Department of Justice has articulated preventing diversion of marijuana to jurisdictions that have not legalized it as among its enforcement priorities, for example. See Memorandum

federalism can also create obstacles to the realization of federal goals. But the framework for negotiation the system creates makes these obstacles surmountable and the need to assert primacy real but not totalizing.

## II. STATE AND LOCAL INTERESTS IN OPPORTUNITY AND INFLUENCE

Articulating the value of federalism from the standpoint of sub-federal governments might seem like a strange enterprise, given that those entities owe their very existence to the Framers' choice to create a federal system in the first place. But much as the previous Part explored what use the federal government might have for state and local actors, and when it might seek to keep those governments at bay, here we can ask how states and localities approach their relationships not only with the center, but also with each other. Three basic features of the federalist system will be relevant to exploring this sub-federal perspective on federalism: the existence of a strong central government with the power to displace most state and local regulation; the decisional and jurisdictional independence of states and localities; and the horizontal relationships and effects that drive a great deal of politics and policy in a federal system.

Even still, the question of federalism's value will be difficult to answer, because of the density of the system: the sub-federal encompasses multiple sovereigns with varying degrees of power. Though in theory the fifty states stand on something resembling equal footing,<sup>50</sup> the vast disparities in their size affect the extent of their influence in national debates and in relation to the federal government during tugs-of-war over enforcement. Think of the capacity of the state of Texas to determine the content of school textbooks for national audiences given its share of the market and of California's ability to

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from James M. Cole, *supra* note 32, at 1. Given that the federal government can have an interest in conflict, I am skeptical that this interest in horizontal policing stands on its own two feet. Instead, it arises primarily to the extent that the policing of a given externality coincides with the federal government's own interests or policy preferences. Because federal intervention will necessarily require preferring one state's choice to another, the idea that the federal government stands in to protect the integrity of federalism itself makes little sense. Moreover, it may well be the case that the federal government's interests coincide with the imposition of externalities, as may be the case in the marijuana debate and is almost certainly the case with respect to gay marriage. In recent work, Heather Gerken and Ari Holtzblatt make a convincing affirmative case for spillovers of certain kinds. See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 112 MICH. L. REV. (forthcoming 2014).

50. For a critique of the notion that the federal government must treat states equally, see Zachary S. Price, *NAMUDNO's Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24 (2013).

drive environmental regulation.<sup>51</sup> As a result, the ideal vision of federalism, both as a system of dual sovereignty and as a system of inter-governmental relations, is likely to appear different across states. In addition, if we decentralize past the state level to the regional and the local,<sup>52</sup> the possibility of conflicting interests and multiplicity of relationships among governments proliferates. New York City and Los Angeles may be able to attract national

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51. For an account of California's leadership role, see Ann E. Carlson, *Regulating Capacity and State Environmental Leadership: California's Climate Policy*, 24 *FORDHAM ENVTL. L. REV.* 63 (2013). See also Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 *NW. U. L. REV.* 1097, 1099-100 (2009) (exploring how the federal government has effectively chosen certain states to be leaders in experimenting with environmental regulations); J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 *U. PA. L. REV.* 1499, 1500-38 (2007) (discussing state environmental regulation and the possibility that states intend to provoke federal action).
52. In *Federalism All the Way Down*, Heather Gerken highlights the importance of decentralized social institutions in harnessing the values of decentralized debate, including how they promote dissent and provide minorities with the opportunity to govern. Heather K. Gerken, *The Supreme Court 2009 Term – Foreword: Federalism All the Way Down*, 124 *HARV. L. REV.* 4 (2010). In thinking through the value of decentralization to the project of national integration, I also have focused on the role of what I call mid-level social institutions, such as the workplace and the public schools, which need not be state actors but through which critical regulatory and policy decisions that shape our national character are made. See Cristina M. Rodríguez, *Language and Participation*, 94 *CALIF. L. REV.* 687 (2006). Realizing the values of decentralization thus does not require a federal system. Even if the sub-federal institution in question is a public body of a sort, its significance does not necessarily flow from the fact that it is attached to a particular sovereign (e.g., public schools). What is more, within a national system, plenty of agency problems exist such that there will be politically charged, differing views as to policy and implementation questions. Decentralization and its benefits are therefore possible within a unitary system.

In this essay, however, I focus on governmental institutions with lawmaking power, in order to focus on power-sharing dynamics and to explore the significance and value of federalism as a system of government, as distinct from decentralization as a governing strategy that will be present to some extent in any complex society. So what is it about *federalism*, as opposed to decentralization, that is distinctive? Perhaps a federal system's salient feature is the existence of semi-independent, power-wielding structures through which debates and policy decentralization can happen, the results of which will be instantiated in law. Whether to include local governments within a definition of federalism presents a tricky question. Local governments exist in unitary systems, of course, and localities in the United States are creatures of state law. But local governments are governments in that they enact their own laws and engage in their own administration, sometimes consistent with and at other times at odds with their state and federal "masters." See also *infra* notes 61-66 and accompanying text. For a discussion of the relevance of local government in constitutional interpretation, see David Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 *YALE L.J.* 2218, 2249 (2006) (using San Francisco's challenge to California's marriage laws as a lens through which to consider localist interpretations of the Constitution that seek to "afford cities the space to make their own choices through the practice of local politics").

audiences and resist encroachments on their prerogatives by their creators and supervisors in the state legislature, but among the most interesting and important federalism dynamics scholars have begun to explore of late is the divergence between state and local interests and the use of state power to flatten the latter.<sup>53</sup> Finally, as I have emphasized in the immigration context, public opinion at the sub-federal level is better characterized by diversity than homogeneity, our political shorthand of blue states and red states notwithstanding.<sup>54</sup> The debates that rage across the country also occur within states themselves, no matter how ideologically coherent the state might seem on the electoral map. And so whereas it is possible to speak semi-coherently about the interests of the federal government, it will be far more difficult to speak in the abstract about the interests of states and localities within the federal system.

Despite this complexity, it should still be useful to evaluate federalism's virtues from the sub-federal point of view, because states and localities must all negotiate their relationship with a higher level of government. I therefore assess the potential values of the system to sub-federal entities in the discretionary spaces where these negotiations occur: when the federal government has invited states or localities into a regulatory scheme; and when states or localities seek to take positions using their regulatory powers that might put them in the crosshairs of other governments, not just in a manner susceptible to preemption, but also in a way that might force the federal government's enforcement hand. Without wholly discounting the ways Supreme Court doctrine has cabined federal power since the Rehnquist era,<sup>55</sup> I also assume that our central government is remarkably powerful. It has a broad regulatory reach that states themselves might embrace, to the extent they want the federal government to solve collective action problems or take charge of policy problems on their plates. That said, states themselves retain considerable decisional independence in the exercise of their regulatory

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53. I have discussed this dynamic in the immigration context. See Rodríguez, *supra* note 8, at 636-40; see also Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007).

54. Rodríguez, *supra* note 8, at 576-80.

55. The doctrinal uncertainty Alison LaCroix explores in her essay for this Feature, see LaCroix, *supra* note 2, underscores that we might expect further constitutional limits on federal power. Their extent will in part depend on whether and how Spending Clause litigation curtails the federal government's power to design regulatory schemes to expand its capacities through the states, or whether the Supreme Court's judgment in *NFIB v. Sebelius* was specific enough to the Affordable Care Act, which itself contained novel forms of regulation, that the substance of federal power will remain largely unchanged—that is, robust.

authority, because of the discretion the federal government exercises when wielding its own power, as well as the practical and political constraints on the federal government's reach.

When it comes to federal invitations to cooperate, state and local interests align to a substantial degree with the federal. Rather than think of the federal government as a rival, states and localities will often (if not usually) think of it as the bearer of benefits. Joint federal-state operations and delegation schemes enable the lower levels of government to develop close ties to federal regulators, which in turn can help states expand their capacity to solve problems. The integrated scheme of disaster relief offers a good example of this benefit of federalism. Though recognizing the states' frontline police powers, federal law enables governors to declare states of emergency and thus trigger federal assistance, leaving the power of initiation in the hands of states but providing invaluable opportunities to expand states' capacities to respond to disasters.<sup>56</sup> Through mechanisms such as joint law enforcement task forces and federal committees that include state and local officials, sub-federal actors gain access to useful information either generated by the federal government or pooled from disparate local sources by federal entities. Perhaps most valuably, as Abbe Gluck shows in her work on the Affordable Care Act, state actors can help shape federal regimes and priorities through their participation in joint regulatory exercises<sup>57</sup>—a phenomenon not lost on state and local bureaucrats who participate in immigration enforcement either.<sup>58</sup>

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56. See Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 93-288, 88 Stat. 143 (1974) (codified as amended at 42 U.S.C. §§ 5121-5207 (2006)). In fact, numerous states have enacted so-called peace officer and state deputation laws, which purport to empower federal officials to make state law arrests in certain circumstances, which the Department of Justice has found to conform to the general rule that federal authority to make arrests must be expressly provided for by law. See Virginia A. Seitz, *State and Local Deputation of Federal Officials During Stafford Act Deployments*, OFF. LEGAL COUNSEL (Mar. 5, 2012), <http://www.justice.gov/olc/2012/state-local-fleo-stafford-act-deployments.pdf>, 2012 WL 1123840.

57. See Gluck, *Intrastatutory Federalism*, *supra* note 1; see also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (discussing how cooperative federalism schemes put skeptics within the Executive Branch in ways that can challenge and push the development of federal policy). The recent literature on administrative federalism also highlights this dynamic, and much of it emphasizes how state participation in federal administration can work to preserve states' regulatory interests. See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2080-83 (2008). For a challenge to this point of view and the idea that states retain meaningful autonomy, emphasizing instead that they carry the mantle of federal policy, see Bulman-Pozen, *Afterlife*, *supra* note 5, at 1935-40.

58. In a 2011 study, researchers documented how local law enforcement officials shaped the



These possibilities generated by federalism will seem advantageous to state and local actors for high and low reasons. As a source of funding and technical support, the federal government ultimately enables states to expand their regulatory power and capacity to address the needs of their citizenry and amplify local policy preferences. Intertwinement with the federal government can also serve state politicians' interest in re-election (federalism provides opportunities for advancing personal ambition, after all) and satisfy politicians' and bureaucrats' sense of professional obligation and reputational pride. The handful of instances in which states reject federal funds reflects the value of this relationship to state and local officials (though some might decry it as dependency).

To be sure, whether state and local actors will see the federal government as a source of opportunity will depend at times on partisan alignments. The states that have rejected the Medicaid expansion under the Affordable Care Act are all Republican-run. And yet, not all Republican governors have rejected the Medicaid funds, and we have reason to believe there will be less non-cooperation than feared after the Supreme Court's unexpected decision enabling states to reject the Medicaid expansion without losing all program funds, though perhaps greater levels of non-cooperation than we have seen historically.<sup>59</sup> But in many instances, the party in control of the federal administration will matter less to the choice to enter cooperative schemes or accept federal funds than the substantive domain in question and how regulation in that field generally aligns with ideological or partisan preferences.

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distribution of detainees issued under the 287(g) program. See Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POL'Y INST. (Jan. 2011), <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>. State officials can also take advantage of flexible cooperative schemes to achieve important policy objectives of their own. In January 2011, New York Governor Andrew Cuomo launched a Medicaid Redesign Team to rethink the state's delivery of services under the program, which eventually led the state to seek a waiver from the federal government to pursue its reform goals. See *A Plan to Transform the Empire State's Medicaid Program: Better Care, Better Health, Lower Costs*, N.Y. STATE DEP'T HEALTH 4-5 (May 2012), [http://www.health.ny.gov/health\\_care/medicaid/redesign/docs/mrtfinalreport.pdf](http://www.health.ny.gov/health_care/medicaid/redesign/docs/mrtfinalreport.pdf).

59. In a recent working paper, Nicole Huberfeld documents that reports of non-participation have been overstated by the media and that many Republican governors are working toward implementation of the Medicaid expansion, despite hostility from state legislators and opposition by the national party. Her account highlights the sort of negotiation that characterizes many cooperative schemes. See Nicole Huberfeld, *Dynamic Expansion* (Nov. 22, 2013) (unpublished manuscript) (on file with author). It also is consistent with dynamics I have highlighted in the immigration context, namely that executive and administrative actors sometimes behave less ideologically than their counterparts in the legislature when addressing the practical realities of phenomena such as illegal immigration. See Rodríguez, *supra* note 8, at 579-90.

Think, for example, of the fact that states and localities that skew Democratic have resisted participation in immigration enforcement even within the Obama Administration, and that those that skew Republican have maintained their enthusiastic involvement in enforcement to the extent permitted by the current Administration.<sup>60</sup>

For state and local officials, there also will be value to a system of federalism that safeguards their decisional independence and capacities for regulation, and here the state interest in federalism has the potential to diverge from the federal, though not as significantly as might seem initially intuitive.<sup>61</sup> On a simultaneously quotidian and high-minded level, independent lawmaking authority creates an institutional framework to address local problems that might not otherwise register with a centralized bureaucracy, particularly in a vast nation-state, in ways that more closely reflect the preferences of the local constituency being served.<sup>62</sup> But the federal system also creates a valuable antagonist for state and local officials. Asserting independence from the center, even in ways that conflict with federal policy, can enhance the reputation and professional interests discussed above.<sup>63</sup>

The governing figureheads of Arizona's anti-immigration movement, such as Governor Janice Brewer<sup>64</sup> and Sheriff Joe Arpaio of Maricopa County, or California Governor Jerry Brown, who recently signed a slew of state laws designed to make life easier in California for unauthorized immigrants,<sup>65</sup> or

60. More problematic from the federal government's point of view is arguably the number of states that have declined to establish insurance exchanges under the Affordable Care Act, leaving the federal government to pick up the slack. Ideological opposition likely accounts for much of this resistance, as does the desire to avoid the regulatory burden.
61. See *supra* notes 41-42 and accompanying text (evaluating the federal interest in disharmony).
62. In theory, a field office of a central bureaucracy could do the same, but given a federal government such as ours in which partisanship affects bureaucratic choices—indeed, where the political accountability of the administration is cited as justification for delegation to administrative actors—a federalist structure likely will better serve these ends.
63. Bulman-Pozen & Gerken, *supra* note 57.
64. In August 2012, Governor Brewer issued an order denying drivers' licenses to recipients of relief under the federal government's Deferred Action for Childhood Arrivals initiative. After being rebuffed on equal protection grounds by a district court for denying DACA recipients licenses, while granting them to recipients of garden-variety deferred action, see *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049 (D. Ariz. 2013), the state opted to level its policy down and deny the benefit to all aliens with the deferred action designation.
65. See, e.g., CAL. S. RULES COMM., BILL ANALYSIS, A.B. 1024, 2013 Sess., at 5, [http://leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1001-1050/ab\\_1024\\_cfa\\_20130911\\_175859\\_sen\\_floor.html](http://leginfo.ca.gov/pub/13-14/bill/asm/ab_1001-1050/ab_1024_cfa_20130911_175859_sen_floor.html) (making explicit the intent of the legislature that "all individuals who meet the state law qualifications for the practice of law in California be affirmatively eligible to apply for and obtain a law license regardless of their citizenship or immigration status," thus satisfying the

New York's crusaders against Wall Street, such as former Attorney General and Governor Eliot Spitzer, traffic in the rhetoric of federal failure to frame their own regulatory projects.<sup>66</sup> Their use of this trope highlights how the federal system creates political opportunities, even when accusations of federal failure or indifference might be unfounded. These moments can turn into wins for local constituents, to the extent the contrast helps propel policy innovation in line with their preferences, and they can advance the objectives of the larger social movements that are often behind state and local assertions of independence,<sup>67</sup> which might in turn enhance the profiles and political horizons of state and local actors.<sup>68</sup>

While these uses of independent state power might be connected to advancing party interests on a larger scale, or to establishing a national profile for the local official, they also often will reflect genuine policy disagreements with the center. Having independent decision-making authority thus enables state and local officials to address local problems in the manner they see fit. Take for example immigration enforcement. For decades, local officials across the country have attempted to constrain federal enforcement of immigration law to protect local communities using forms of local power. New York City

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requirements of federal law); CAL. S. RULES COMM., BILL ANALYSIS, S.B. 150, 2013 Sess., [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0101-0150/sb\\_150\\_cfa\\_20130507\\_104309\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0101-0150/sb_150_cfa_20130507_104309_sen_floor.html) (creating nonresident tuition exemptions for unauthorized immigrant students to participate in concurrent enrollment programs with secondary schools and community colleges). Cf. GOV. EDMUND G. BROWN, JR., VETO OF A.B. 1401, 2013 Sess., [http://leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1401-1450/ab\\_1401\\_vt\\_20131007.html](http://leginfo.ca.gov/pub/13-14/bill/asm/ab_1401-1450/ab_1401_vt_20131007.html) ("Jury service, like voting, is quintessentially a prerogative and responsibility of citizenship. This bill would permit lawful permanent residents who are not citizens to serve on a jury. I don't think that's right.").

66. Examples of this sort of value generated by the federal system include the decisions by politicians to openly and loudly reject the Medicaid expansion of the Affordable Care Act, or Arizona's ongoing battle with the federal government over illegal immigration through its refusal to grant drivers' licenses to recipients of Deferred Action for Childhood Arrivals.
67. For a discussion of the connections between state and local assertions of authority and larger national movements, see *infra* notes 73-76. See also Bulman-Pozen, *Afterlife*, *supra* note 5, at 1952-56 (discussing national movements' work through particular states in the debate over marijuana legalization); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008) (describing states as a "collective national force").
68. Heather Gerken argues that one of the virtues of federalism, from the perspective of state and local actors, is that the platform their decision-making authorities provide amplifies the influence or impact of their policies and ideas. See Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1980 (2014) (noting also that decentralization "gives dissenters a chance to . . . show how [a policy] work[s] in practice," which "matters in policymaking").

mayors such as Rudolph Giuliani and Michael Bloomberg adopted variations on policies that limited communication of immigration status information by local officials to the federal government.<sup>69</sup> Today, state and local actors such as Governor Jerry Brown of California and Mayor Rahm Emmanuel of Chicago have signed state and local measures that decline to honor federal detainees, or requests that local police maintain custody of a person the federal government has identified for arrest under its immigration laws.<sup>70</sup> Though most supporters of these sorts of measures have been Democrats (but see Giuliani and Bloomberg), their adoption appears indifferent to which party controls the federal bureaucracy and reflects the particular interests of local qua local officials.

Of course, the very fact of sub-federal multiplicity and complexity can also stymie the interests of local actors. Local government law scholars have contributed a vital perspective to our understanding of the value of federalism by highlighting the localization of preferences and the value of more localized decision-making,<sup>71</sup> emphasizing that state bureaucracies and legislatures can be remote from electorates and operate in ways that flatten out points of popular disagreement.<sup>72</sup> But as I have written in relation to immigration federalism,

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69. See Rodríguez, *supra* note 8, at 600-05.

70. See Chi., Ill., Ordinance SO2012-4984 (Sept. 12, 2012), <http://chicagocouncilmatic.org/legislation/1156327> (“The cooperation of the City’s immigrant communities is essential to prevent and solve crimes and maintain public order, safety and security in the entire City. One of the City’s most important goals is to enhance the City’s relationship with the immigration communities.”); *id.* (“Unless acting pursuant to a legitimate law enforcement purpose that is unrelated to the enforcement of civil immigration law, no agency or agent shall: (A) permit ICE agents access to a person being detained by, or in the custody of, the agency or agency; (B) [give] ICE agents use of agency facilities for investigative interview or other purposes; (C) while on duty, expend their time responding to ICE inquiries.”). For an account of the California law, see Daniel C. Vock, *Capping String of Victories for Immigrants, Brown Signs California Trust Act*, PEW CHARITABLE TRUSTS: STATELINE (Oct. 7, 2013), <http://www.pewstates.org/projects/stateline/headlines/capping-string-of-victories-for-immigrants-brown-signs-california-trust-act-85899510189>.

71. Though local governments are creatures of state law and therefore do not fit within a traditional or strictly constitutional conception of federalism, as decision-makers with lawmaking authority and enforcement powers, the arms of local government fit comfortably within the framework of negotiated federalism explored here.

72. Nestor Davidson has written about how localities can form alliances with the federal government through cooperative schemes and thereby protect their interests. Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007). This possibility highlights the numerous forms of competition among governing actors and popular constituencies that arise in federal systems, which makes it challenging to “pick” a preferred level of government. For discussion of how cities should be understood as fitting into federalism frameworks, see Loren King, *Cities, Subsidiarity, and Federalism*, in FEDERALISM AND SUBSIDIARITY: NOMOS LV, *supra* note 1

just as federal officials might seek either to tamp down or unleash sub-federal activism, depending on how it serves federal objectives, state officials will face similar incentives. The phenomenon of state-level preemption of local laws not only demonstrates how state-level political communities are themselves internally diverse, but also highlights how giving effect to decentralization “all the way down” will be challenging. Though this dilemma merits close consideration, the most important element of this dynamic for my purposes here is that it demonstrates the importance of institutional position to thinking through how decentralization should take institutional form.

Finally, the value of federalism to state and local actors does not stem exclusively from the vertical dynamic—the perpetuation of localized decision-making and the preservation of local preferences on the one hand and the forging of relationships with the federal government on the other. Among the most important elements of the federal system that legal scholars have only recently begun to explore is the horizontal one. The forms of influence, cooperation, and competition that flow across the local often do so without direct engagement of the federal government or federal interests.<sup>73</sup> Indeed, the

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(manuscript at 3) (arguing that cities are the most important way people experience political decisions); and Daniel Weinstock, *Cities and Federalism*, in *FEDERALISM AND SUBSIDIARITY: NOMOS LV*, *supra* note 1 (manuscript at 13-14, 19, 27-30) (calling for greater constitutional standing for cities on various grounds, including that access to knowledge is greater at the local level, that urban density means individuals inter-relate more with one another, and that cities have distinct political cultures from broader society).

73. In Rodríguez, *supra* note 6, I explore in detail how state courts, moneyed interests, and various forms of association, including political parties, link local sites together in policy conversation, sometimes with a view to federal policy but often with a focus only on the substantive issue at hand. I highlight the work of scholars who have explored these dynamics through a preoccupation with controlling externalities. See, e.g., Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 529-60 (2008) (mapping the various constitutional doctrines that structure state-to-state relations); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1474, 1478 (2007) (calling attention to the fact that “the Court has scarcely addressed the question of Congress’s powers in the interstate context” and arguing that such inquiry is vital, because “[s]ome national umpire over interstate relations is essential to ensure union”); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884-85 (1987) (arguing that the extraterritoriality principle that attempts to regulate states’ extraterritorial behavior operates across many bodies of case law but is ill defined and inadequately justified); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002). But I align my narrative instead with the normative agenda in recent work by Heather Gerken and Ari Holtzblatt, who call for an affirmative account of the value of inter-state spillovers, see Gerken & Holtzblatt, *supra* note 49, fundamentally because I believe spillovers will often be both productive and desired by the local jurisdiction into which they flow.

policy goals of state and local actors might often be better served through the horizontal forms of information-sharing and influence that a federal system makes possible and robust. Officials can be connected to like-minded politicians and bureaucrats in different states through the kinds of inter-governmental networks Judith Resnik and co-authors have written about.<sup>74</sup> In addition, lobbying groups, public interest organizations, and policy entrepreneurs have been central in putting certain issues (marijuana legalization, immigration restriction, gun rights, and gay marriage, for example) on a national agenda by working through state and local governments with receptive electorates and institutional frameworks that make law reform possible,<sup>75</sup> in turn enabling local officials to advance their policy preferences and political profiles.<sup>76</sup>

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74. For a rich and detailed account of the numerous types of associations of this kind that incorporate governmental actors, see Judith Resnik et al., *supra* note 67, at 728-33. The associations that fit into this category include the National Governors Association, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the Council of State Governments, and various similar associations organized around party affiliation, regional affiliation, or racial and ethnic identity groups. *Id.* at 731.
75. These networks take on varying forms. Some are organized as multi-issue umbrella networks, such as the American Legislative Exchange Council (ALEC); others are single-issue, expressly ideological organizations, such as the NRA (though the umbrella organizations also tend to have ideological bents); and still others provide technical support to state and local officials. (Thank you to Alex Hemmer for this typology.) The best known example of the first sort of network—ALEC—has been in operation since 1973 with the goal of working to “advance the Jeffersonian fundamental principles of free-markets, limited government, federalism, and individual liberty among America’s state legislators” through “public-private partnership” and has been criticized for receiving most of its contributions from corporations. See, e.g., *Corporate America’s Trojan Horse in the States: The Untold Story Behind the American Legislative Exchange Council*, DEFENDERS OF WILDLIFE & NAT. RESOURCE DEF. COUNCIL 4, 20, 39 (2002), <http://alecwatch.org/11223344.pdf>. The network has been highly effective at circulating model legislation to state legislatures. For a discussion of the mobilization of these sorts of networks at the state level in pushing abortion restrictions, see Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008); cf. Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. (forthcoming 2014) (exploring the federalism implications of trans-local networks).
76. In her essay for this Feature, Jessica Bulman-Pozen highlights an especially salient manifestation of how interests transcend local jurisdictions—the phenomenon of out-of-state campaign contributions to state and local elections. Bulman-Pozen, *Afterlife*, *supra* note 5, at 1953-54. The affiliation voters in one state might feel with politicians in another might signal the gradual disappearance of local interests, though feeling connections with politicians from other jurisdictions is not mutually exclusive with the existence of local identity, even as it highlights a horizontal benefit of federalism in the creation of alliances with other politicians and constituencies.

These mechanisms of policy diffusion have been controversial. They are often made up of highly ideologically motivated groups. They can seem opportunistic in that they grow up not from localized interests but from moneyed networks that transcend any given local setting. They seek to extend their influence by shopping around template laws to potentially receptive state legislatures.<sup>77</sup> In other words, the influence of such groups challenges the idea that local actors have interests peculiar to their context, undermining democratic justifications for federalism based on the system's capacity to enable local expressions of popular will. Local interests can be constructed and even co-opted by larger networks. But the fact of our increasing inter-connection, enabled by technology and the evolution of trans-local associations, also highlights a different function of federalism—that it creates an inter-governmental connective tissue of benefit not only to local actors who derive support and even status from these inter-jurisdictional dynamics, but also of benefit to people who share the views amplified through these networks—a possibility whose value I explore in more depth in Part III.

For state and local actors, then, federalism generates opportunities. But those chances to serve both constituents' needs and their own ambitions depend on a high degree of integration, both vertically and horizontally. That is not to say that the desire to assert independence from the center, including when it does not serve federal interests, won't be strong, particularly when it *does* serve partisan objectives. But the very tensions the system creates will themselves be productive, and ultimately the variable nature of the relationship will produce value.

### III. THE POPULAR INTEREST IN MULTI-LEVEL POLITICS

The final perspective on federalism I explore in this essay requires asking what the value of the federal system might be to the people whom it represents and regulates. For a variety of reasons, the official interests in federalism will not necessarily map onto the popular ones. To the extent that officials approach the negotiations required by a federal system with a view to preserving either institutional prerogatives or advancing reputational or partisan objectives, the particular arrangements they strike might not serve

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77. For accounts of such groups' work in the immigration setting and evidence that partisanship in particular explains the emergence of state and local immigration laws, see Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. Rev. 2074, 2126-29 (2013); and S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431 (2012).

popular interests directly at all. But attempting to define popular interests could be futile, as they are enormously varied and emanate from the multiple and overlapping political communities that exist in any large and diverse republic.

It also might be hard to escape the banal observation that popular constituencies' objectives are best served by national regulation some of the time, such as when those constituencies make up a national majority, or when their state and local governments lack capacity or will, and local regulation at other times. More cynically, it might be tempting to think of federalism as nothing more than a procedural framework for opportunistic ideological struggle.<sup>78</sup> Perhaps federalism provides nothing more than a set of platforms for interest groups and the politically mobilized to shop policies and preferences around to receptive governments in hopes of advancing a policy agenda and perhaps eventually capturing a national majority, whether through statehouses or Congress.<sup>79</sup> A turn to federal power may be on balance preferable if its institutions are receptive to one's policy goals. But localism becomes appealing when federal action remains elusive, either for partisan political reasons or because of the relative difficulty of securing congressional action or even influencing executive decision-making.

Though these observations suggest that there may be no principled basis on which to defend a particular version of federalism, they do at least underscore that federalism can be useful from the popular point of view. To determine whether this utility generates consistent value, I would judge whether it serves the ends of government. At the risk of oversimplification, those would entail solving social problems and enabling the realization of popular values and preferences.<sup>80</sup>

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78. Government officials and politicians might think similarly, though they also will be motivated to preserve the institutional location of their power.

79. As I explain in more detail below, recent work on immigration federalism highlights the fact that restrictionist immigration measures have been adopted primarily in jurisdictions in which Republicans control the state or locality in question. Gulasekaram & Ramakrishnan, *supra* note 77, at 2126-29. The networks and norm entrepreneurs that have been shopping such measures around the country, not surprisingly, have found receptive audiences for their policy ideas in parts of the country with particular identities, accomplishing piecemeal through our decentralized system objectives that face greater resistance at the national level, not to mention in Democratic-leaning states. The challenges of enacting national legislation are not only structural, because of the numerous veto gates in the legislative process, but also partisan, because of the presence of a Democratic president and his political appointees at the helm of the federal immigration enforcement bureaucracy. Recent scholarship adds to the picture the possibility that restrictionist activity at the state and local level may in fact stymie reform in Congress. *See id.* at 2078-82.

80. Noticeably missing from this account of what a system of government should achieve is one



The first question—does federalism maximize welfare and effectively enable solutions to those problems the electorate believes need to be addressed—is of a piece with one of the traditional justifications for federalism, namely that it creates laboratories of democracy. The value of federalism to this activist conception of government is not clear.<sup>81</sup> The experimentation defense has not survived academic scrutiny in robust form,<sup>82</sup> though examples of welfare-enhancing experimentation made possible by federalism certainly abound, as the drug policy narrative explored in the previous Parts underscores. Whether federalism serves problem-solving ends by generating new programs or ideas for reform that could be borrowed by other states or scaled up to the national level likely will depend in part on the sort of problem at issue.<sup>83</sup> Federalism might have its greatest problem-solving value when the issue either doesn't rate on the national agenda or the veto gates built into the national policymaking apparatus mean the only government action possible is

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of the key benefits claimed in traditional constitutional theory for federalism—the preservation of individual liberty. See *infra* note 99 (identifying this value as articulated by the Supreme Court in cases such as *United States v. Lopez* and *Alden v. Maine*). I am skeptical that any necessary correlation exists between the creation of a system of dual sovereignty and the preservation of liberty, primarily because of the powerful entity the federal government has become. Recent judicial efforts to limit that power to preserve liberty have seemed puny on the ground, and even the very significant curtailment of the spending power in *NFIB v. Sebelius* has only the vaguest of connections to the protection of liberty. See also Memorandum on Preemption, *supra* note 40 (recording the President's observation that states and localities sometimes better protect individual liberties than the federal government). More to the point, public opinion and democratic accountability seem like far more meaningful checks on an overweening government. Cf. ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

81. We might just as easily identify a popular interest served by federalism as the interest in deregulation. If the existence of a federal system on balance pushes in the direction of deregulation by leaving social welfare matters in the hands of states, which will be less able and willing to regulate than the federal government, and we believe that private ordering better serves social welfare goals, then federalism serves popular ends, but for reasons different than the ones I have just described.
82. For the classic challenge to the laboratories assumption, see Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980). For a recent assessment of the arguments in defense of the laboratories justification and an affirmation of the skepticism voiced by Rose-Ackerman, see Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1334 (2009) (concluding that “there are no demonstrably overwhelming replies to Rose-Ackerman’s skepticism”).
83. For an argument that subsidiarity, or placing control over policy at the lowest level of government possible, improves the “adaptive efficiency” of federal systems, including by expanding the pool of views in the policy-making process, see Jenna Bednar, *Subsidiarity and Robustness: Building the Adaptive Efficiency of Federal Systems*, in FEDERALISM AND SUBSIDIARITY: NOMOS LV, *supra* note 1 (manuscript at 1).

at the state or local level, and popular pressure is strong enough to spur a response. An anti-preemption norm, at least within federal practice, if not doctrinally, thus may be appealing from the popular perspective as a means of ensuring that states and localities are left with the capacity to solve particularized problems. What is more, because the federal system already has entrenched certain mechanisms of governance that integrate the state and local with the federal, effective problem solving will necessarily entail negotiating the terrain I outlined in Parts I and II.

The clearer value of federalism from the popular point of view stems precisely from its creation of multiple electorates—a design feature that channels the complexity of public opinion by creating varied political communities with institutional features that can serve as vehicles for the realization of multiple and contradictory preferences.<sup>84</sup> These communities may be overlapping and connected, but they do not blend into an undifferentiated mass.<sup>85</sup> By expanding the capacity for politics, our federal system amplifies opportunities for the expression of popular preferences through law.<sup>86</sup> This value of the system will exist even when states and localities fail to function as the proverbial laboratories of democracy serving broader systemic interests in creative problem solving.

The marijuana legalization referenda in Colorado and Washington nicely illustrate how federalism as a system of governance can serve the interests of discrete groups of voters in this way. State-level decision-making has generated concrete benefits for citizens of the two states, in an environment in which the same benefits are unachievable at the national level. Despite the continuing

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84. In her essay for this Feature, Heather Gerken emphasizes the value of federalism in “making space for oppositional politics,” which she lauds as a means of building loyalty in the opposition by giving dissenters the chance to “offer real-life instantiations of their ideas.” Gerken, *supra* note 68, at 1978. In addition to providing more vehicles for the translation of popular ideas into law and therefore into power, this feature of federalism can have integrative functions by satisfying minorities as well as majorities.

85. Citing polling studies done by James Fishkin, Loren King notes that citizens seek to learn more in smaller polities. See King, *supra* note 72 (manuscript at 20-21).

86. This popular benefit of federalism resembles the claim made by scholars that federalism permits citizens to vote with their feet and thereby engenders competition that will improve the system or maximize people’s capacities to live out their preferences. For a recent example of this form of argument, see Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, in *FEDERALISM AND SUBSIDIARITY: NOMOS LV*, *supra* note 1 (manuscript at 3, 10-14) (arguing that foot voting enables political choice and enables individuals to maximize their freedom by selecting their destiny and that decentralization therefore should be maximized). I am reluctant to embrace this particular approach, though, because it has always struck me as highly implausible given the stickiness of family and other commitments, including to jobs, that trump preference maximization through relocation.

potential for federal enforcement, the referenda have eliminated state prohibitions that mirrored federal ones and thus substantially alleviated the risk of prosecution for marijuana possession, especially given the remote nature of the federal government and the comparative difficulty of federal prosecution. In addition to advancing certain individuals' liberties, this development could have salutary public policy consequences by shifting law enforcement resources to more serious dangers and chipping away at high levels of incarceration for non-violent offenses. In other words, sub-federal decision-making is not merely expressive (in this case of the irrationality and perverse consequences of the drug war)—it enables political communities to translate expressive interests into policy benefits not achievable at the federal level. To be sure, it remains to be seen whether these experiments will give rise to some of the federal government's fears, such as diversion to juveniles and neighboring states that would prefer not to have a marijuana market in their midst. One person's popular benefit is another's externality. But my strong intuition is that these experiments will promote long-term policy gains beyond the states where they began, even if in fits and starts.

The value of federalism to the realization of popular preferences stems not only from its creation of multiple sites for the people to exercise power, but also from the fact that the system enables polities to structure their governing processes in different ways that might change the scope and intensity of democratic decision-making. The referendum process that yielded the marijuana legalization laws in Colorado and Washington might not have been immune from the effects of money in politics, but it arguably expanded the people's capacity for politics by providing them a way around divided, cautious, or slow-moving legislatures and then forcing those legislatures to act to implement their will.<sup>87</sup> In the case of same-sex marriage, different forms of direct democracy also have enabled voters to respond to court decisions with which they disagree, either amending state constitutions to prohibit same-sex marriage or recalling judges who have struck down such prohibitions.

The horizontal dynamics created by federalism will re-enforce the expansion of the people's capacity for politics through these alternative forms of decision-making by allowing voters to derive external support for their efforts through the networks and fundraising of like-minded people. These expanded possibilities for deliberation will also help local interests influence national debates by giving their preferences profile and thus the opportunity to influence others.<sup>88</sup> As Heather Gerken puts it, the existence of "state and local

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87. Cf. Bulman-Pozen, *Afterlife*, *supra* note 5, at 1952 (discussing the value of ballot initiatives for creating "a space for lawmaking outside the usual partisan processes").

88. In some instances, the imperatives of enforcement might trump the desire for widespread

platforms . . . connect[s] dissenters to the large and powerful networks that fuel policymaking in the United States.”<sup>89</sup> In other words, lawmaking power at the state and local level can translate into influence at the national level, thus giving both minorities and dispersed majorities greater purchase on public debate and policy.

But the system also will create opportunities for national majorities by enabling national politics to take shape through sub-federal politics and decision-making—a lesson apparent in the discussion of horizontal federalism in Part II.<sup>90</sup> Particularly when channeled through the mechanisms of direct democracy, local lawmaking can provide a platform for outside groups to influence policy developments in other states and localities through contributions to political campaigns and issue drives.<sup>91</sup> To be sure, these horizontal forms of influence and information sharing can occur in unitary regimes as well. But the existence of sometimes rival but often peer governing institutions in other jurisdictions to learn from can make any policy gains made as a result of the sharing deeper and more lasting. As a result, contrary to assumptions made by some nationalists, the multiplicity fostered by federalism need not be balkanizing but can instead be productive and integrative, particularly if we assume the existence of a diverse or polarized polity.

Of course, in a world of expanded politics, voices that might otherwise be dominant may become muted or ineffective because of the multiplication of chances for contradiction—a particular dilemma for groups that might seek the entrenchment of a national governing norm to replace a multiplicity of regimes. For dispersed national majorities—for example, Democrats in Republican states when Democrats control Washington, or for the unorganized elements of the national electorate that nonetheless share

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politics, and the perpetuation of political debates can undermine effective governance. With respect to enforcement capacity, the dynamic does not always flow in the direction of expansion, at least not for the federal government, because sub-federal agents may have different ideas concerning implementation methods and enforcement priorities. What is more, for both the federal and the sub-federal, efforts to cooperate to expand capacity may result in irresolvable conflict or constraints on one or the other’s policy preferences. Negotiating these tensions is precisely what is at stake in the negotiation of the federal-state dynamic.

89. Gerken, *supra* note 68, at 1980.

90. See *supra* notes 73-76 and accompanying text.

91. See Bulman-Pozen, *Afterlife*, *supra* note 5, at 1952 (noting how participation by out-of-state actors in fundraising and campaigning around initiatives “provides a forum for Americans nationwide to participate in political contests that may fall outside of national party politics,” even though only state voters ultimately decide the fate of direct democracy initiatives).

common views—an active federal government might be preferable. Majorities that cut across jurisdictions might sometimes seek to foreclose diversity and impose commonality on popular constituencies in disagreement, sometimes simply to advance policy preferences but often to protect fundamental rights. The belief in the need for the federal government to impose a consensus can be fierce. The highly charged debate over abortion, for example, pits a strong commitment to the protection of a constitutionally guaranteed baseline right to terminate a pregnancy—the ultimate expression of a national norm—against deep ideological and moral disagreement that has resulted in pitched state-level politics and erosion of the right for the better part of thirty years.

The debate over abortion in fact highlights the most vexing puzzle, in my mind, that must be addressed in any effort to judge whether and how federalism serves the popular interest. Even if we can see the clear benefits of diversity in decision-making, when ought the central government, whether through the courts or the political branches, attempt to consolidate a principle or policy and thus shift the balance of the federal system from diversity to uniformity?<sup>92</sup> The trajectory of the marriage equality debate also highlights the challenge of determining when consolidation serves the public good. In 2003, when the Supreme Judicial Court of Massachusetts issued its landmark decision declaring prohibitions on same-sex marriage to be unconstitutional under the state constitution,<sup>93</sup> pursuit of a similar holding at the federal level seemed dangerous: to advocates of same-sex marriage because the Court could have entrenched the constitutionality of such prohibitions and generated political backlash, and to opponents who resisted national resolution of a moral issue over which broad national consensus had hardly materialized.<sup>94</sup> Over ten years later, the swift progress through the states of a marriage equality norm and the dramatic shifts in public opinion seem to have vindicated the value of federalism to the debate, but they also have brought us closer to the brink of a national-level reckoning. It seems just a matter of time before the Supreme Court will have to face the constitutional question on the merits of whether same-sex marriage can be prohibited. If it finds ways to avoid the issue, as it

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92. Another way to frame this central demand of a federal system, familiar to constitutional theory, is as the need to determine when outliers ought to be forced to cede to a higher-level consensus—a central question in death penalty jurisprudence, for example.

93. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

94. I argue elsewhere that concerns for backlash are often overstated and that the involvement of courts in the same-sex marriage debate has encouraged rather than strangled democratic politics, though early Supreme Court involvement would indeed have stymied what has amounted to a productive decentralized debate. Rodríguez, *supra* note 6 (manuscript at 50-56).

did in *Hollingsworth v. Perry*,<sup>95</sup> or finds prohibitions constitutionally permissible, then minorities in states that refuse to recognize marriage equality will be stuck in second-class status. But if it broaches the subject and declares prohibitions on same-sex marriage invalid, it will have foreclosed ongoing debate and opportunities for dissenters within the system to govern, in Heather Gerken's formulation.

To decide which road is in the popular interest, we must be able to answer the question: at what point do ideological or other forms of diversity degenerate from being democracy-reinforcing and constructive into producing rights violations, or balkanizing the polity in a way that undermines the integrative project of the nation-state, or creating mundane policy chaos? No doctrinal test will be adequate to answer this question, but it is the key question for a theory of federalism that characterizes the system as one that advances the national interest. We can at least begin by trying to spell out the relative values of conflict and uniformity—an inquiry that does not receive enough attention in federalism debates. I grapple with this tension elsewhere, and so I only note here that “it can be difficult even after nationalizing moments to entrench a clear national norm, because such norms are elusive, or even ephemeral, and a commitment that at one point might have been a matter of consensus often gives way to disagreement about its meaning, as public opinion evolves and political fortunes change.”<sup>96</sup> In other words, the project of bringing outliers within a federal system (whether at the national or the state level) into some sort of uniform line will be politically perilous and hardly straightforward,<sup>97</sup> in large part because consensus often exists only when principles are stated at a high level of generality. It is in the implementation of consensus that things begin to fracture into competing visions—precisely when having institutional means available to channel disagreement will be vital to the popular interest.<sup>98</sup> I thus return to an observation with which I began—that the

95. 133 S. Ct. 2652 (2013).

96. See Rodríguez, *supra* note 6 (manuscript at 47).

97. Indeed, the critique that a conventional or consensus morality does not exist has deep roots in constitutional theory. John Hart Ely wrote in 1980 that “there is a growing literature that argues that in fact there is no consensus to be discovered (and to the extent that one may seem to exist, that is likely to reflect only the domination of some groups by others).” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 63 (1980). Ely also emphasized that widespread social traditions can be both good and bad from the point of view of justice and that the reality is one of competition among traditions and moralities, not consensus. *Id.* at 60–62.

98. Elsewhere I have elaborated this point with respect to the civil rights movement, highlighting how the debates over disparate impact and affirmative action reflect the elusive nature of national consensus and how the debate over the validity of the former as a policy

popular interest depends on having a system of government that makes ongoing negotiation possible, which requires robust local institutions and fairly generous tolerance of disharmony.

## CONCLUSION

The preceding discussion accepts federalism as a hardwired feature of our Constitution and our political culture but emphasizes that, within its structures, a great deal of space remains for arguing about how inter-governmental relationships ought to be constructed and competing interests reconciled when they arise. I began with an internal point of view and considered how the actors within the system understand their relationships to one another, and the corresponding advantages that might be harnessed from decentralized decision-making as opposed to consolidation. This sort of inquiry, which defines the work of federalism as a system, highlights an important feature of the regime—that its contours are always under construction, determined in large part by the advantages the different actors might accrue through their interactions with one another. Though this point of view may make it difficult to articulate totalizing theories about the system's value and even its purposes, implicit throughout my discussion is an appreciation of the value of decentralization to all of the actors in the system, including the federal government. The discussion also highlights the importance of facilitating interactions and trade-offs among governments, not only by resisting overly rigid and hierarchical rules to govern relations, but also by identifying opportunities for institutional integration that enable either joint or concurrent decision-making.

The fact that federalism need not take on a fixed form does not mean that the processes of negotiation should not be informed by certain principles that transcend institutional interests. Ideally, the actors that shape its parameters would think of their roles in broader systemic perspective, or through the lens of how best to advance the popular interest and achieve the purposes of government.<sup>99</sup> I have only begun this sort of external evaluation here. But if we

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tool has taken shape in a decentralized fashion arguably productive of a *détente*, aided in part by the Supreme Court's willingness (for now) to permit decentralized debate. See Rodríguez, *supra* note 6 (manuscript at 44-48).

99. When courts in particular articulate the traditional values of federalism, they often begin from the premise that robust state sovereignty or identity (or limited federal power) ought to be advanced because of the inherent advantages of a decentralized structure. See, e.g., *United States v. Lopez*, 514 U.S. 549, 575-77 (2000) (Kennedy, J., concurring); *Alden v. Maine*, 527 U.S. 706, 748-52 (1999). Protecting states protects liberty by diffusing power;

assume that the purposes of government are to advance the popular will and help solve social problems that affect the people's health and wellbeing, I would defend the proposition that the federal system works well, at least to promote the former, by expanding the capacity for politics and therefore for popular expression. The primary systemic benefit of this expansion may ultimately be that it enables national conversations that embrace contradictions and that ultimately lead to better national integration over time. A decentralized system makes it possible for contradictory policies to coexist and keeps open the capacity for change—an especially important feature in a system of government in light of the elusive quality of consensus and the diverse nature of our polity. As I have attempted to show, these features of federalism are ones also appreciated by its institutional players, and they therefore inform federalism in practice as well as in theory.

I take one of the central contributions of this whole Feature to be its challenge to the nationalist's suspicion of the sub-federal through its demonstration of how decentralization can serve national and integrative ends by leaving open opportunities for negotiation. My own view is that federalism has been and will likely continue to be crucial to maintaining a functioning polity amidst a deeply diverse electorate. Throughout my work I have expressed strong intuitions that decentralization is well suited to the project of achieving equilibrium in a diverse setting, not only because it permits a sharp focus on the institutional locations of integration, but also because of its expansion of our capacity for politics and therefore for ongoing negotiation about our differences.

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states can serve as laboratories of democracy; and state governments and officials better channel popular will because they are closer to the people and can better track popular preferences. To be sure, each of these defenses of federalism serves a larger principle—protecting individual rights, promoting effective problem-solving, and instantiating the popular will in the work of government—all of which dovetail with what I have defined as the ends of government. But we should not assume that any particular federalist arrangement (or that federalism itself) will always advance these goals. Instead, we should consider how federalism plays out in practice to determine whether and then how best it can serve these ends.



