Federalism 3.0

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INTRODUCTION

This Essay lays out a research agenda for federalism in the twenty-first century. I recognize the hubris in this, so let me hasten to add that what follows is a synthesis of hundreds of pages of law review articles.[1] I will give a bird's

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* Dean and Sol & Lillian Goldman Professor of Law, Yale Law School. I am deeply indebted to the Jorde Lecture Committee for inviting me to take part in this wonderful tradition. Thanks also to my three astute commentators—Jessica Bulman-Pozen, Bob Cooter, and Ernie Young—as well as the Brennan Center and Berkeley and NYU Law schools. What follows is a lightly footnoted, modestly expanded version of the remarks I delivered during my lectures.

1. Parts of this essay are adapted from my earlier work. *See, e.g.*, Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010)

eye view of the terrain I've already mapped and then describe the path we should take from here.

What I write is very much in the spirit of Justice William Brennan, whose legacy is honored by these lectures. Like me, Justice Brennan was a nationalist who believed that states could play a central role in our democracy, a "double source" of protection. "Federalism," he wrote, "need not be a mean-spirited doctrine that serves only to limit the scope of human liberty."[2]

Two great twentieth century debates over federal-state relations have shaped how constitutional theory treats what the Court once called "Our Federalism."[3] The first battle was over the legacy of the New Deal—call it Federalism 1.0. The second concerned the civil rights movement—Federalism 2.0. Whether you are a nationalist or one of federalism's stalwarts, the intellectual frames we now use to understand "Our Federalism" were largely forged during those battles. In effect, they created the operating system that has served as our interface between practice and theory. Each debate embedded a set of shared assumptions into constitutional theory. Both sides share those assumptions—hence the idea that constitutional theory has a common operating system—though each camp places a quite different normative spin on them.

The problem is that our operating system is outdated. It no longer matches on-the-ground realities, which means it can't help us negotiate the controversies that matter today. In our tightly integrated system, the states and federal government now regulate shoulder-to-shoulder. Sometimes they lean on one another, and sometimes they deliberately jostle one another, but neither reigns supreme. States are not sites where groups can shield themselves from national policy, national politics, or national norms. Instead, they are the sites where we *battle* over—and forge—national policy, national politics, and national norms. National movements, be they red or blue, begin at the local and state level and move their way up. National actors depend on states and localities to carry out national policies, which means that they need buy-in from state and local officials to get things done. Our Federalism, then, is not your father's federalism, and it's certainly not your grandfather's federalism. And yet constitutional theory is still geared around these past debates.

It's time for constitutional theorists of all stripes to catch up. We need an intellectual frame for thinking about today's federalism, Federalism 3.0. That is particularly true of my fellow nationalists, who inevitably point to these earlier debates in defending their position. Nationalists pride themselves on taking a

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[hereinafter Gerken, Foreword]; Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958 (2014); Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS L. REV. 997 (2015) [hereinafter Gerken, *Détente*]; Heather K. Gerken, Windsor's *Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587 (2015).

2. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

3. Younger v. Harris, 401 U.S. 37, 44 (1971).

clear-eyed viewed of regulatory realities, often rebuking federalism's supporters for not coming to grips with the changes brought on by the New Deal. But in fact the nationalists are now the ones behind the times when it comes to the virtues of state and local power. So, too, nationalists pride themselves on their solicitude for racial minorities and dissenters; that's one of the main reasons they are nationalists in the first place. In this day and age, however, they may have it backwards.

Federalism's stalwarts must change as well. They are right to think that states matter, but they rely on an increasingly archaic conception of state power. Their conception neither fits today's realities nor enables them to offer a full-throated defense of the roles state and localities actually play in a thriving democracy. Thus, while nationalists reject a federalism that is long past, federalism's stalwarts yearn for a federalism that we'll never see again. Our focus should be on perfecting the system we have. Our Federalism offers a robust, distinctively American strategy for ensuring our democracy thrives. While far from perfect, it is both a workable solution and a working solution.

Much of my prior work has been devoted to debunking the myths that emerged from these early debates. While I'll briefly canvas those debates here, my focus is on the future—what *should* federalism policy and doctrine look like in the twenty-first century? My arguments will feature none of the neatness and clarity that have characterized these debates in the past, but—as you will see—that's precisely my point.

Part I, which focuses on Federalism 1.0, describes the conception of state power that emerged from the New Deal debates and explains why it no longer holds. It then offers a concrete example of how constitutional theory and doctrine would change if we updated our operating system, Federalism 3.0, to reflect how state power functions in today's federalism.

Part II centers on Federalism 2.0. It analyzes the constitutional "settlement" we reached regarding the relationship between democratic protections and democratic institutions—between rights and structure—in the wake of the civil rights movement. This Part then argues that we should resist rather than accept the rights/structure divide and again suggests the ways in which existing doctrine is better explained by a theory that recognizes federalism and rights not as antithetical, but as interlocking gears moving us forward. Here again, Federalism 3.0 requires a new approach.

Part III turns to one last observation about Federalism 3.0, suggesting it is time for a détente between those in the nationalist and federalism camps. Our Federalism may not embody either side's dream, but it's not either side's nightmare, either. Instead, today's federalism offers a reasonable compromise that ought to provide common ground for debates moving forward.

I.
FEDERALISM 1.0 AND THE NEW DEAL

Let me first describe what I call "Federalism 1.0"—the assumptions about federal-state relations that were embedded into constitutional theory in the wake of the New Deal—before turning to the ways doctrine and theory would change if we were to update constitutional theory's operating system.

A. The New Deal "Deal"

During the first half of the twentieth century, the stubborn facts of modernization shifted federalism debates away from the separate spheres approach, which depicts states and the federal government as dual sovereigns confined to their own regulatory empires. Indeed, sovereignty has been declared "dead" so many times that one starts to believe in the doctrinal equivalent of reincarnation.[4]

The scholarly response to the death of sovereignty has been either to move to the nationalist camp, all but erasing the states from constitutional discourse, or to pivot from a sovereignty account of state power to an autonomy account. Ironically, both positions reveal the persistence of the old sovereignty story. That's because both sides share the same conception of how power works. Each camp assumes that power means the ability to preside over one's own empire, free from interference. A moment's thought should make clear that this isn't how the world looks any more. And yet the picture I've just described continues to animate much of constitutional doctrine and theory.

Let's start with the federalism camp. While most of federalism's stalwarts have abandoned sovereignty for autonomy in describing the power states should wield, the two are little different from one another.[5] An autonomy account—premised on the idea that states must have zones in which they can regulate freely—is softer around the edges and does not demand formal judicial protections, so it's more palatable to those who consider themselves *au courant*. At bottom, however, both accounts rest on the same basic conception of state power, one in which states preside over their own empire and regulate free from federal interference. Even process federalism[6]—the idea put forward by federalism's sensible center—rests on an autonomy account. Process federalists' basic claim is that states have enough political and administrative muscle to protect their ability to regulate free from federal interference. Process federalism

4. The tradition dates back at least to Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

5. For a more in-depth analysis, see Gerken, Foreword, *supra* note 1, at 11–21.

6. Wechsler first put forward the theory, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), and Larry Kramer and Ernie Young perfected it. *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223 (2000); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 53–63 (2004); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001).

is thus built on the assumption that federalism's end goal involves the states and the federal government engaging in the governance equivalent of parallel play.

The nationalist response to the death of sovereignty has simply been to endorse a sovereignty account of a different sort, one in which the *national* sovereign trumps the state.[7] Even students of the gloriously messy parts of federalism display their sovereignty bent when they celebrate federal-state interactions as "cooperative" and treat the principal-agent problem as a drawback to be solved rather than a feature to be celebrated.[8] The nationalist understanding of power is thus markedly similar to that of the federalism camp, save nationalists imagine the national government reigning supreme.

Note, then, that while the New Deal "deal" changed federalism theory, it didn't change how either camp thinks about power. Instead, both camps simply put different normative spins on a reality that both sides accept—the power of the national government to regulate what were once traditionally understood to be state domains. The nationalist camp celebrates that shift. The federalism camp accepts it begrudgingly, urging us to leave some regulatory terrain to the states.

The key, however, is that each camp still assumes that *whoever* regulates will reign supreme. That's precisely why these debates pit the values of centralization against those associated with state autonomy. The camps' shared assumption is that one or the other government will win out in the end, so the only question that remains is which side you think *should* win out. Put differently, each side assumes that whichever side wins out will be . . . sovereign. The New Deal debate may have shifted our idea of where federal power begins and ends, but it didn't change how we think about power itself.

The problem with both positions is that they are painfully difficult to square with today's regulatory realities.[9] The evidence abounds in environmental law,[10]

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7. *See* Gerken, Foreword, *supra* note 1, at 71–73.

8. *See id.* at 11–18.

9. *See, e.g.*, ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009); Abbe R. Gluck, Essay, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011).

10. *See, e.g.*, David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 1 (1997); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 154, 157 (2007); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. Rev. 1097 (2009); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Daniel C. Esty & Damien Geradin, *Regulatory Co-Opetition*, *in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 30 (Daniel C. Esty & Damien Geradin eds., 2001); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2002); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011).

health care,[11] telecommunications,[12] and financial regulation.[13] We see strong evidence in areas thought to be largely in the state's control, including education,[14] crime,[15] family law,[16] and even a place as unlikely as land use law.[17] These days, neither the state nor the federal government presides over its own empire. Instead, they govern shoulder-to-shoulder in a tight regulatory space, sometimes leaning on one another and sometimes deliberately jostling each other. When one moves, the other moves with it. Overlap and interdependence are the rule, not the exception. The choice in federalism fights is almost never between decentralization or centralization; it's almost always both/and.

While the assumptions undergirding Federalism 1.0 might match what happens in a one-off Supreme Court case, they do not capture how the states and federal government interact over time and across domains. We argue as if one side or another will win out, when in fact neither side has had much success in playing a regulatory trump card under Our Federalism. Instead, states and the federal government are usually governing together in a regulatory space that is constantly negotiated and contested. Federal-state relations look more like the implementation of the Affordable Care Act (ACA),[18] with its messy negotiations between the Obama administration and the states, than the Court's one-off decision in *National Federation of Independent Businesses* (*NFIB*).[19] They are better captured by the delicate negotiations between the Attorney General and state officials limiting federal marijuana enforcement in Washington and

11. *See, e.g.*, Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749 (2013); Theodore W. Ruger, *Health Policy Devolution and the Institutional Hydraulics of the Affordable Care Act*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 359 (Nathaniel Persily et al. eds., 2013); *see also* Nicole Huberfeld, *With Liberty and Access for Some: The ACA's Disconnect for Women's Health*, 40 FORDHAM URB. L.J. 1357 (2013).

12. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001).

13. Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why A Combination of National and State Antitrust Enforcement Is A Model for Effective Economic Regulation*, 30 NW. J. INT'L L. & BUS. 285 (2010).

14. Gerken, *Détente*, *supra* note 1, at 1014–18.

15. *Id.* at 1012–14.

16. *Id.* at 1018–21.

17. *See* Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397 (2012); Ashira Pelman Ostrow & Patricia E. Salkin, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049 (2009).

18. *See, e.g.*, Heather K. Gerken & Ted Ruger, *Real State Power Means Getting in the Obamacare Game*, HARV. BUS. REV. (Apr. 2, 2013), https://hbr.org/2013/04/real-state-power-means-getting [https://perma.cc/R696-43B7].

19. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

Colorado[20] than they are by the Court's decision on the reach of federal regulatory power in *Gonzalez v. Raich*.[21]

Unfortunately, neither camp's account is well adapted to that regulatory truth. On the pro-federalism side, both the sovereignty and autonomy account depend on open regulatory space for the states to govern freely. The trouble is that there's not much of it left anymore. National regulations have washed across virtually all of the states' shorelines.

This does not mean (as a conventional nationalist would have it) that the states are now irrelevant. Nor does it mean (as federalism's stalwarts might fear) that states have been swamped by the tides of federal power. In fact, contrary to the assumptions undergirding Federalism 1.0, the federal government doesn't exercise unencumbered sway when it regulates any more than the states wield unfettered power when they do. During much of the twentieth century, federal law washed over much of the states' regulatory terrain, just as the nationalists insisted it should and federalism's fans feared it would. But contrary to the working assumptions of the New Deal debate—embodied in the term *federalization*—as the federal government moved into states' domains, it didn't displace them. Instead, the federal government consistently found it easier to enlist the states' existing administrative apparatuses in the federal project than to build its own from scratch. Health care is but the latest instance, but we see examples in such varied domains as the environment (the Clean Air Act, the Clean Water Act, CERCLA), labor regulation (OSHA, unemployment insurance), children's health (the Child and Adult Care Food Program, the Children's Health Insurance Program), transportation (the National Highway System), telecommunications (Telecommunications Act of 1996), even voting (Help America Vote Act). Cooperative federalism and joint regulation dominate our administrative scheme, and states often wield substantial power within these regulatory structures.

State power, in effect, exhibits a hydraulic quality. Even as federal officials enter state domains, state officials find ways to assert their power informally through networks, administrative and political ties, and the leverage provided by the federal government's heavy dependence on state and local apparatuses. Those channels of influence are less legible to lawyers but no less important to policymakers. These relationships aren't captured by one-off judicial decisions or even the one-time passage of legislation, but by the quotidian workings of the administrative state.

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20. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 979–82 (2016); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 85–90 (2015); Sam Kamin, *The Battle of the Bulge: The Surprising Last Stand Against State Marijuana Legalization*, 45 PUBLIUS 427, 429–34 (2015); Rosalie Winn, Note, *Hazy Future: The Impact of Federal and State Legal Dissonance on Marijuana Businesses*, 53 AM. CRIM. L. REV. 215, 222–25 (2016).

21. 545 U.S. 1 (2005).

Moreover, just as the federal government regularly treads on traditional state domains, the states consistently encroach on federal turf. Cristina Rodríguez's work on immigration federalism gives the lie to the notion of federal exclusivity.[22] Benjamin Sachs's analysis of the role local and state officials play in labor law makes clear that, despite the clear dictates of the National Labor Relations Act and the exceedingly broad preemption doctrine, labor law does not lie solely within the federal government's province.[23] Robert Ahdieh has described what he terms "dialectical regulation" between federal and state officials in the area of securities regulation.[24] Scholars have even claimed that states and localities play a robust role in national security regulation,[25] foreign policy,[26] and patent law.[27] All of this work looks past the case law on exclusivity, preemption, and the allocation of authority—the lawyers' traditional sources of information—to examine what's actually taking place on the ground.

To be sure, as a formal matter, the national government reigns supreme, but as a practical matter it must overcome regulatory intransigence, resource constraints, and inertia to vindicate its aims.[28] That's why the federal government's success almost always depends as much on politics as decrees. While the feds hold the national supremacy trump card, they must be circumspect about playing it. If an issue matters for national values, that fight can be had, and it can be won. The states can be shoved aside or brought to heel or bribed. But the federal government must work to do so. In a world of regulatory overlap, resource constraints, and a heavy federal dependence on state and local actors, the federal government's programs depend as much on politics as law. Technically the federal government can preside over its own empire, but practically it relies heavily on the states and thus takes on all of the fractiousness and messiness associated with that reliance. As Jason Weinstein-Tull has quipped, the Supremacy Clause trump card turns out to be a jack.[29]

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

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

24. Ahdieh, *supra* note 13, at 868 (2006).

25. Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1719–20 (2010); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012).

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

27. *See, e.g.*, Paul R. Gugliuzza, *Patent Trolls and Preemption*, 101 VA. L. REV. 1579 (2015); Paul R. Gugliuzza, *Patent Law Federalism*, 2014 WIS. L. REV. 11 (2014).

28. For an in-depth analysis, see Gerken, *Détente*, *supra* note 1.

29. Jason Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 889 (2017).

B. *Toward a New Process Federalism*

What would happen if we updated our understanding of power embedded in the New Deal "deal"? How would theory and doctrine change if we moved past the assumptions of Federalism 1.0?[30]

At the very least, an updated account of federalism would force us to rethink our account of the role judges play in policing state-federal tussles. Process federalism—the idea that states have enough political and administrative muscle to protect their ability to regulate free from federal interference—has absolutely dominated the field for decades, and with good reasons. But it now rests on an outdated set of assumptions about the nature of state power and fails to capture how the states and federal government interact. It makes perfect sense to look primarily to politics to safeguard healthy federal-state relations and to focus on the second-order policing of federal-state bargaining[31] rather than the first-order policing of federal-state boundaries. But process federalists' core argument is that states will leverage their connections to federal officials in order to protect state autonomy. Process federalists' assumption, as I noted above, is that federalism's end goal is for the states and federal governments to be engaged in the governance equivalent of parallel play.

You can see Federalism 1.0's vestigial remains embedded in this argument. Anyone positing state autonomy as federalism's end goal is pursuing a conception of state power that is quickly becoming beside the point in our highly integrated regime. If you want further evidence of how strong a pull the New Deal continues to exercise on our collective imagination, just think for a moment about the mechanics that process federalists have identified to preserve this increasingly archaic form of state power. The basic idea is that states will use their political and administrative ties to the federal government in order to regulate independently. Process federalism thus rests, as Jessica Bulman-Pozen has noted, on the contradictory assumption that federal-state "integration . . . yields separation."[32] Bulman-Pozen observed that it's odd that process federalists never anticipated the possibility that "integration [would] yield integration."[33]

Process federalism begins, then, with the correct insight—that political and administrative integration can preserve a robust role for the states in "Our Federalism." But they are wrong about what that robust role looks like. State power comes from integration and reliance, not separation and autonomy. I've

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30. This Section adapts and expands upon an argument made in Gerken, *Détente*, *supra* note 1, at 1027–32.

31. Erin Ryan frames it differently, but I take her project to be aimed at figuring out whether and how we should regulate state-federal negotiations. *See, e.g.*, RYAN, *supra* note 9; Ryan, *supra* note 10.

32. Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1922 (2014).

33. *Id.* at 1922. This work builds on the scholarship of Rick Hills, who has explored the relationship between state and federal actors in intricate detail.

termed this form of state authority the "power of the servant" to emphasize that it stems from what amounts to a principal-agent relationship.[34] That is a deliberately provocative term, deployed in the hope that federalism's stalwarts will shake loose the foolish notion that the states cannot be powerful unless they are presiding over their own empires. While the word *servant* is directed at those in the federalism camp, nationalists should pay attention to the word *power*. Conventional nationalists are all too comfortable with the idea of the national government serving as the principal to state agents. That attitude is perfectly captured by the moniker "*cooperative* federalism." As the term suggests, nationalists forget just how powerful a servant can be. As Jessica Bulman-Pozen and I have argued, federalism can be uncooperative as well as cooperative.[35]

In some senses, it's odd that Federalism 1.0 has taken so long to adapt to today's regulatory realities. You would think that fans of state authority, at least, wouldn't neglect the power that states wield in the cooperative federal regime. After all, entire fields—administrative law, corporate law—worry incessantly about how much power the agent wields against the principal. But until quite recently, those who placed faith in the states didn't imagine the power of the servant as a form of power in the first place.

Going forward, process federalism should focus not on the power of the sovereign, but the power of the servant. Our goal should be preserving the correct conditions for federal-state bargaining over the role they play inside the system, not trying to preserve the meager role they play outside of it.[36]

You might think that federal dependence on state and local officials is sufficiently pronounced that courts can pull up the stakes and withdraw from federalism cases entirely. I'm skeptical, precisely because the states and federal government are so deeply intertwined. Federal-state tussles are inevitable. As Abbe Gluck's work makes clear,[37] the states and federal government have become so deeply imbricated that courts must have "rules of engagement" just to carry out their quotidian duties.[38] We can't expect the judiciary to stop refereeing this game, but we can hope that it will better understand how the game is played.

I thus assume that the "new" process federalism is going to look more like Rick Hills'[39] or Ernie Young's preferred variant,[40] where courts aren't policing

34. Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006); *see also* Gerken, Foreword, *supra* note 1, at 11–21, 35–43.

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

36. Some of the most important work on this comes from Erin Ryan. *See* RYAN, *supra* note 9; Ryan, *supra* note 10.

37. Gluck, *Intrastatutory Federalism*, *supra* note 9.

38. *Id.*

39. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998).

40. Ernest A. Young, *Two Cheers for Process Federalism*, *supra* note 6.

state-federal boundaries but playing an Elyian role[41] in ensuring that the right conditions of federal-state bargaining are obtained. But the new process federalists must discard the idea that dominates most of their work—that the point of process federalism is to safeguard state autonomy.

C. *The New Process Federalism in Practice*

Just to ground this discussion a bit, let me describe what this might look like in practice. I suspect that many federal-state tussles will be worked out under the umbrella of a given administrative scheme, just as Gillian Metzger and others have suggested.[42] That would push vertical federalism to look more like horizontal federalism, the allocation of power among the coequal states. Within horizontal federalism, intergovernmental conflict tends to be resolved within doctrinal silos (the Dormant Commerce Clause, personal jurisdiction, the Full Faith and Credit Clause) rather than as a matter of constitutional theory writ large.[43]

There may be good reason to celebrate this shift from constitutional law to administrative law when it comes to process federalism. After all, if the goal is to preserve healthy state-federal relations, the need for judicial intervention will vary dramatically from context to context. In some arenas, the state will have a great deal of leverage by virtue of tradition or federal dependence on its administrative apparatus or whatever factors are at play. In other arenas, though, the states may need a boost.

Until now, the Court hasn't engaged in this sort of calibration in the context of vertical federalism. That's because in vertical federalism cases, the Justices have long asked the same question in every case—how should we think of federal-state relations writ large?—and unsurprisingly get the same answer in virtually every case.[44] Commandeering doctrine, for instance, has been applied when the federal government has roped in understaffed local sheriffs to enforce gun laws[45] *and* when the states themselves have called upon Congress to help them deal with the shared problem of nuclear waste disposal.[46]

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41. The frame comes from Ernie Young. *Id.* at 1395.

42. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2089 (2008); Gillian E. Metzger, *States as National Agents*, 59 ST. LOUIS U. L.J. 1071 (2015); *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); Stuart Minor Benjamin & Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009); Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008).

43. Heather K. Gerken, *The Taft Lecture: Living Under Someone Else's Law*, 84 U. CIN. L. REV. 377, 378 (2016).

44. *Id.* at 383.

45. *See* Printz v. United States, 521 U.S. 898 (1997).

46. *See* New York v. United States, 505 U.S. 144 (1992).

Horizontal federalism, in sharp contrast, resolves interstate tussles issue by issue, problem by problem, domain by domain.[47] Rather than focusing on a single big question, it evaluates interstate relations in a given context, emphasizing facts on the ground and a myriad of doctrinal questions writ small.

An administrative focus is likely to push vertical federalism toward horizontal federalism's more variegated model. It will be more domain-centered and thus more attentive to context than the typical constitutional law case. Moreover, as Metzger astutely observed, administrative law's "nonconstitutional and generic character" may be "particularly well suited for addressing the central challenge of contemporary federalism: ensuring the continued relevance of states as regulatory entities in contexts marked by concurrent federal-state authority and an extensive national administrative state."[48]

As to the inevitable constitutional challenges that will arise, it's tricky to find much that looks like a new process theory in the Court's current doctrine. The Court, after all, isn't even enamored of the *old* process theory, as it remains tied to the out-of-date sovereignty paradigm. The Commerce Clause cases are nonstarters. These cases define federal power entirely in isolation.[49] Because they attempt to identify limits through sheer force of logic, the doctrine they generate amounts to little more than logic games, which can be played by both sides of any issue. This doctrine is unlikely to endure, and there will be little reason to mourn its passing. Moreover, even if the doctrine were more coherent, the point of the new process federalism isn't to stop federal power from encroaching on state terrain but to facilitate healthy interactions on shared terrain.

The cases that mark where Congress's power ends by identifying where state power begins (the commandeering cases, for instance) are a bit more helpful.[50] It's useful that they define state power in what I've called "relational terms."[51] That should be the core insight of the new process theory, after all. But these cases are tainted by the same obsession with preserving autonomous zones of state power as the Commerce Clause cases. While the Court is correct to define federal power in relational terms, it's missed how that relationship actually works. The core problem with the Court's nominally relational account of federal power is that it's not sufficiently relational. It fails to capture the deeply integrated, highly interactive relationship that exists between the states and federal government in so many regulatory arenas.[52]

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47. Gerken, *The Taft Lecture*, *supra* note 43.

48. Metzger, *The New Federalism*, *supra* note 42, at 2089–90.

49. For an in-depth exploration, see Heather K. Gerken, *Slipping the* Bonds *of Federalism*, 128 HARV. L. REV. 85 (2014).

50. *Id.*

51. *Id.* at 96–97, 98–100, 101–19.

52. Still, one could imagine recasting some of this doctrine in relational terms. Think, for instance, of Rick Hills' and Ernie Young's recasting of the anti-commandeering rule—premised on a conventional sovereignty account—into a rule that gives states an important bargaining chip in

Perhaps that's why the closest example of the new process federalism comes from a case that deals with cooperative federalism: *NFIB*'s much-maligned Spending Clause ruling.[53] For all its many demerits, it represents an effort by the Court to come to grips with the reality of ongoing state-federal relations and to set some rules about how they should unfold over time. In a rudimentary way, it asks the right question: Was the bargaining process fair? And whatever you think of the Court's conclusion on that question, its decision rests upon a simple, intuitive premise: the federal government can't pull the rug out from underneath the states by threatening to cut off substantial portions of their budgets for failure to comply.

There are other reasons the *NFIB* decision may be a harbinger for the new process federalism. First, it's tailored to context. To be sure, the Justices still disagreed rather vehemently about the context.[54] But rather than trying to evaluate state-federal relations writ large, both sides were asking whether, in the context of *this* administrative scheme, state-federal bargaining had been fair. There are many reasons to question the Court's effort to compare the legislation to a contract or to focus its inquiry on whether the regulatory change brought about by the ACA was fundamental or not. But at least the Court was trying to work out whether the state officials had adequate notice and could enter the deal with their eyes wide open. More importantly, it was paying attention to the fact that this relationship was built against a backdrop of a decades-long partnership.

If we imagine *NFIB* as a harbinger of the new process federalism, we can also identify shortcomings of the case that weren't canvassed by law professors deploying the conventional assumptions of constitutional theory. For instance, *NFIB* offers at least a rudimentary understanding of how state-federal bargaining works, but it assumed—incorrectly—that the bargaining process ended when Congress passed the ACA. Once you recognize that state-federal relations as ongoing and iterative, not one-off battles, then it's clear that the timeline must be extended. Just think, for instance, how much has occurred in the wake of the ACA's passage. States like Florida, New Jersey, and Arkansas took advantage of what some have termed the "big waiver"[55] in order to cut deals that allowed them to carry out the ACA's mandates in a fashion more to their liking. The

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negotiations. *Supra* notes 39, 40. So, the clear statement rule enunciated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), makes perfect sense if you want to be sure that the states know precisely what they are bargaining over.

53. For an intelligent discussion on the strengths and weaknesses of Chief Justice John Roberts' effort to wrestle with this problem, see Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83 (2012).

54. That's precisely why Justice Ruth Bader Ginsburg and Chief Justice Roberts engaged in such an intense debate about whether the ACA was a "new" program or simply an amendment to an existing one. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605–07 (2012) (Roberts, J.); *id.* at 2634–39 (Ginsburg, J., dissenting).

55. *See, e.g.*, Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, *in* THE HEALTH CARE CASE, *supra* note 11, at 227–44; David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

Court need not predict the future, of course, but it should recognize that states routinely flex their political muscle after legislation has been passed. There is a great deal more play in the joints especially where, as here, the federal government is heavily dependent on the states' administrative apparatus. In the era of the "big waiver," federal-state bargaining must be examined ex post as well as ex ante.

None of this will be easy. The new process federalism will necessarily implicate multidimensional problems involving resource allocation, governance, and politics. Federalism debates were hard enough when we imagined federalism battles as one-off problems involving a small number of institutional actors and the causal arrows pointed in only one direction. But the new process federalists must figure out how to take these complexities into account—especially the fact that decentralization can serve nationalist ends—without losing sight of the core problem. The questions the new process federalism will pose are hard, but at least they are the right ones.

II.
FEDERALISM 2.0 AND THE CIVIL RIGHTS ERA

Let me turn to the second debate that has shaped our understanding of federalism: the debate over the legacy of the Civil Rights Era.[56] Here too, I will offer a concrete, doctrinal payoff to illustrate how our thinking would change if we updated constitutional theory's shared operating system.

A. The Rights/Structure Divide

The Civil Rights Era was one of federalism's ugliest moments, with states' rights routinely invoked to deprive individuals of their rights. Federalism 2.0 thus grew out of the intuition that, as William Riker put it, "if . . . one disapproves of racism, one should disapprove of federalism."[57] Unsurprisingly given the treatment of civil rights protestors, religious minorities, and other dissenters in the Deep South, racism isn't the only "ism" linked to federalism and localism. We also associate these institutional arrangements with other dreaded "-isms," like parochialism and cronyism. And thus Federalism 2.0 was born.

The nationalist tropes associated with Federalism 2.0 are reasonably straightforward. While nationalists gripe about courts' failure to fulfill the promise of the civil rights amendments, they still believe in rights. They'd just prefer the Warren Court vindicating them to the Roberts Court watering them down. And while some occasionally offer atmospheric paeans to the values of

56. Portions of this Part are adapted from and expanded upon in Gerken, *Loyal Opposition*, *supra* note 1, and Heather K. Gerken, *Second-Order Diversity: An Exploration of Decentralization's Egalitarian Possibilities* (Yale Law Sch. Pub. Law Reseach Paper No. 591, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2868032 [https://perma.cc/D5LR-GCHE].

57. WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 155 (1964).

local participation, most nationalists are deeply skeptical of states and localities when it comes to the groups that they most want to protect: dissenters and racial minorities. It's not just that federalism calls to mind the Alabamas of the past and the Fergusons of the present. People are also skeptical as to whether the equality project should ever be left in the hands of democracy, let alone *local* democracy. It is precisely to combat the evils of decentralization that equality scholars emphasize the need for nationally enforced constitutional rights in the first place.[58] While this conversation has largely centered on race and the legacy of the civil rights movement, I take it to be part of a larger nationalist fear—that states facilitate a retreat from national norms.

The response from federalism's champions has been tepid, to say the least. They typically offer an apologetic sidebar on race and emphasize the need for a floor of basic rights in any federal scheme, but otherwise they have little to say about the relationship between federalism and race. As to the role that structure plays in promoting *dissent*, most of federalism's supporters haven't found a middle ground between the anodyne notion of states as laboratories of democracy and the alarming idea of armed state rebellion. As with equality, a rights framework remains the default for the federalism camp.

In sum, federalism's proponents have simply reified the nationalist assumption that rights, not structure, are what matter for equality and dissent, and most have accepted the notion that federalism and localism are properly cast in opposition to the interests of racial and political minorities. They have thereby further embedded the rights/structure divide into constitutional theory's operating system. The rights/structure divide runs so deep that law professors even organize classes and casebooks around them. If you want to study the distribution of power, you study federalism and the separation of powers. If you care about equality and dissent, you study the First and Fourteenth Amendments. As a result, when constitutional theory turns to its grandest democratic projects, it privileges rights over governance, courts over politics, participation over power, outsiders over insiders, and minority rights over minority rule.

As with the shared assumptions undergirding Federalism 1.0, the intuitions behind Federalism 2.0 are hard to square with modern realities. They rely on an outdated view of decentralization and a wrongheaded understanding of how equality norms work. As to the first, ours is no longer our father's federalism. Today's federalism is sheared of sovereignty. For every limit the Court has tried to impose on the national government, there is a ready workaround.[59] The

58. Gerken, *Second Order Diversity*, *supra* note 56, manuscript at 8–11.

59. As I have detailed elsewhere, "Congress has a ready-made workaround to bypass the anti-commandeering doctrine, it can usually write in a jurisdictional element to satisfy *United States v. Lopez*, it can borrow a page from Justice O'Connor's 'drafting guide' to fit its regulations within the ambit of *Gonzalez v. Raich*, it can turn to its taxing power when the Commerce Clause won't do, and it will presumably have no trouble evading the dictates of *NFIB* (unless the Court lends some oomph to its Spending Clause ruling)." Gerken, *Slipping the* Bonds *of Federalism*, *supra* note 49, at 90–91.

nationalists have lost battles, to be sure—*Shelby County*[60] being the most heartbreaking defeat—but they are undoubtedly winning the war. Even *Shelby County* is easily remedied as a constitutional matter; we simply lack the political will to impose a constitutional solution.[61] That means that states cannot shield their discrimination from national norms, as they did during the days of Jim Crow, but they can help fuel the process by which those norms are constructed.

As to those who equate equality talk with "rights talk,"[62] it is useful to remember that rights are built, not born. As a legion of scholarship makes clear, constitutional rights don't descend from on high. They are built through social movements, which are essential to make norms stick and thereby convert the rights guarantees that lawyers dismiss as "parchment barriers"[63] into robust shields. And social movements are almost always built from the ground up, moving through local and state sites before hitting the national stage. If I may borrow an evocative phrase from Robert Cooter, in a decentralized system like ours, where law is forged within communities, judges tend to "find law, rather than make it."[64]

So, too, congressionally conferred rights do not, like Athena, spring fully formed from the head of a god. They, too, require politicking. It would certainly be easier if those who believed in equality norms didn't have to fight for them. But there is a profound difference between calling for a national rights regime and achieving one.

Note, then, that I am framing the conversation about decentralization quite differently than most. Academics often unthinkingly blame decentralization for shortfalls in our equality norms. This simplistic formulation ignores the fact that the turn to decentralization is a sign of weakness in the norms themselves. We adopt a decentralized solution only when our national norm *is* to tolerate shortfalls. Rather than condemning federalism for weak national norms, we should focus on whether federalism makes it easier or harder to change those norms. We should focus, in short, on whether decentralization helps us get from "here to there" with the equality project.[65] It is a fiendishly complex inquiry because local and national politics constitute each other. But it's the right inquiry nonetheless.

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60. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

61. There are any number of constitutionally viable solutions to revive Section 5 of the Voting Rights Act. *See, e.g.*, Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and an Opt-In Approach*, 106 COLUM. L. REV. 708 (2006). Here again, what's stopping us isn't law, but politics.

62. I borrow the formulation from Mary Ann Glendon, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

63. The term was, of course, first coined by James Madison. THE FEDERALIST No. 48, at 305 (James Madison) (Clinton Rossiter ed., 2003).

64. Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1646 (1996).

65. For an analysis of why scholars should pay more attention to the "here to there" on the context of reform, see HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT (2009).

If you turn your focus from enunciating national norms to actually bringing them about, it becomes clear that decentralization can both inhibit progress and dramatically expand the leverage points for change. While national norms are responsible for shortfalls in our equality regime, decentralization surely makes it easier to tolerate these shortfalls. And embedding a weak national norm through decentralization can make change harder going forward. That's not because sovereignty poses a barrier to enforcing equality norms any more, as noted above, but because institutional arrangements are sticky. Think, for instance, about our collective decision to leave school funding or public housing to state and local authorities—a decision that makes it more difficult to change our policies going forward. Given the overlay of residential segregation and economic inequality, decentralization can preserve, even compound, the deep and persistent effects of discrimination, something that makes it that much harder to pursue a centralized solution in the future.

These costs are quite familiar, and they would be enough to condemn decentralization but for the fact that decentralization also plays a central role in the creation of national norms. It is precisely because local and national politics constitute one another that decentralization is as much a tool for change as it is a tool for preservation. This complex pairing may irritate us, but it at least frames the question correctly.

As I've written elsewhere,[66] social movements have long depended heavily on federal and local politics to change equality norms, using state and local policymaking as an organizing tool, a rallying cry, a testing ground for their ideas.

The most remarkable example in recent years has been the same-sex marriage movement, but we see the same phenomenon with other core parts of the equality project, including immigration reform, policing, sentencing, and the living wage movement, just to name a few. Marriage equality—LGBTQ equality—had always been an outlier position in the United States. Proponents of equality correctly understood that rights, like families, are built, not born. As an enormous amount of scholarship has shown,[67] constitutional rights don't descend from on high. They are built through social movements, which are essential to make norms stick and thereby convert "parchment barriers" into robust shields.[68] So advocates used their First Amendment rights to change how we think about the LGBTQ community. They protested, they marched, they wrote editorials and blog posts. All of that was important. But the moment when

66. Gerken, *Loyal Opposition*, *supra* note 1.

67. Many law professors have abandoned this formalist conception of rights and acknowledged the crucial role that politics plays in forging robustly enforced rights regimes. The work on "democratic constitutionalism" is extensive. For an excellent overview of these questions, see Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286 (2012).

68. For an exploration of how parchment barriers become constitutional commitments, see Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

the ground really shifted in the debate came when marriage-equality advocates were able to put their principles into practice as Massachusetts and San Francisco began issuing marriage licenses to same-sex couples.[69]

There's a reason that this opportunity for "dissenting by deciding"[70] mattered so much. The First Amendment is rarely enough for social movements to change how we think.[71] The real problem for political outliers these days isn't getting their message out; it's getting their message across. It is extremely hard to do that with speech alone. I could make that point by discussing long-standing political science literature on agenda setting,[72] but I can make it more simply here by invoking our iconic image of a dissenter: someone standing on a soapbox. Now ask yourself: What do you do when you see someone standing on a soapbox? You walk on by. Radio silence is the tool of the powerful these days—it is always safer to ignore dissenters than to engage with them. If you want to change how we see the world, you need something more.

The structure of federalism and localism supplies something more: different platforms and different forms of advocacy for would-be dissenters.[73] By giving social movements a chance to "dissent by deciding"—converting abstract appeals into concrete policies—decentralization confers a variety of benefits on democracy's outliers that the First Amendment, standing alone, cannot supply.

Elsewhere I've canvassed these many benefits,[74] so I'll only describe them briefly here. The platform itself matters. Decisions made by state and local governments are highly visible, as they typically garner more publicity than protests or blogs or editorials.

Decentralization also facilitates agenda setting.[75] When those seeking change put in place a real-life instantiation of their ideas, the majority can't

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69. Here I mean to describe when the ground shifted *in favor of* same-sex marriage. Hawaii, of course, really jumpstarted the debate when its Supreme Court threatened to make same-sex marriage a reality there. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). That decision ignited the debate that led Congress to pass DOMA in the first place. For an overview, see MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 57–60 (2013).

70. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

71. I develop this argument in greater detail in Gerken, Loyal Opposition, *supra* note 1, from which the next few paragraphs are adapted.

72. FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS, (2d ed. 2009); ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (2d ed. 1983); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 2003; WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982).

73. *See* Gerken, *Loyal Opposition*, *supra* note 1, at 1977–82.

74. *Id.*; *see also* Gerken, Foreword, *supra* note 1.

75. Agenda setting may be the most powerful tool minorities wield in a majoritarian system. *See* Adrian Vermeule, *Submajority Rules: Forcing Accountability Upon Majorities*, 13 J. POL. PHIL. 74, 80–83 (2005).

ignore them, as majorities are wont to do. Decentralization thus helps social movements shift the burden of inertia and force the majority to engage.[76]

"Dissenting by deciding" also gives dissenters a chance to move from the abstract to the concrete. They don't have to talk about how a policy would work in theory. They can show how it does work in practice. Better yet, it allows advocates of change to build their movement one step a time. It is hard to jumpstart a national movement. That's why virtually every national movement began as a local one.[77] Equality movements of all sorts began small and grew into something bigger. And precisely because the federal government depends so heavily on states to carry out its policies, states can exercise unexpected sway over national policymaking as well.

In sum, while rights and structure have long been cast in opposition to one another, in fact rights and structure serve as interlocking gears in a disaggregated democracy: the First Amendment and federalism working in tandem to move debates forward. Debate leads to policy, which in turn provides a rallying point for still more debate. Social movements include pragmatic insiders, forging bargains from within, and principled outsiders, demanding more and better from without.

The egalitarian benefits associated with decentralization are particularly salient these days because of the inherent limits of rights frameworks. A rights framework can guarantee the right to vote; it's much less helpful in raising voter turnout. Constitutional rights do a better job of combatting state-mandated school segregation than preventing the private choices that lead to residential segregation. Courts can ensure vulnerable populations have a right to counsel but they are less suited to monitoring prosecutorial discretion or police training. Our rights tradition, at least, can deter the most obvious forms of employment discrimination, but it cannot guarantee a robust minimum wage, and it's poorly suited to beating back the effects of implicit bias or structural discrimination. Many equality fights—including those to change social norms—are being waged through our policymaking apparatus rather than our Constitution. Here again, federalism and localism play an important role. National policy, after all, is a *giant* gear to move. As with a clock, you need movement from lots of small, interlocking gears to move a bigger one. For those committed, as I am, to a well-enforced, national equality regime, it's useful to remember that decentralization can beget centralization.

Unfortunately, both sides have overlooked the democratic possibilities associated with today's federalism. Nationalists have a bad habit of conflating "Our Federalism" with our father's federalism, when state sovereignty loomed large. Given their emphasis on national politics and national norms, they have

76. For a fuller account, see Gerken, *Dissenting by Deciding*, *supra* note 70, at 1763–65.

77. This idea may even undergird *Romer v. Evans*, 517 U.S. 620 (1996), the first gay-rights victory at the Supreme Court. *See, e.g.*, Nicholas S. Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445, 452–55 (1997).

trouble imagining any room for states and localities in shaping them. So, too, those in the federalism camp describe federalism in Westphalian terms, with states facilitating choice and experimentation precisely because they are enclaves from federal norms. Indeed, those in the traditional federalism camp essentially want to preserve space for states to regulate free from federal interference, which again runs one into sovereignty's most troubling features—it prevents the federal government from enforcing national norms. But when federalism is sheared of sovereignty, federalism's signature vices can become plausible virtues. States and localities don't shield people from national norms, but constitute sites for constructing those norms. And the national government can police federalism's worst excesses while taking advantage of its best features, including the benefits it offers to racial minorities and dissenters. These facts ought to change our calculation as to whether the decentralization game is worth the candle.

B. The Discursive Benefits of Structure and the Political Process Cases

What would happen if we moved past Federalism 2.0? What if constitutional theory updated its operating system and acknowledged what I've called the "discursive benefits of structure"[78]—the many ways in which structure serves the same ends as the First and Fourteenth Amendments? At the very least, we can supply a more robust justification for a set of cases that scholars have long struggled to explain: the political process cases.[79]

While academics have long accepted the rights/structure divide, the Court has occasionally muddied the distinction through what some have called the "political process" cases. The formula is virtually the same in every case. A minority group succeeds in winning an egalitarian policy at one level of governance, and the majority insists that such policies must be passed through a different (and more challenging) part of the political hierarchy. In *Washington v. Seattle School District*,[80] for example, a school district adopted a bussing plan to combat discrimination, only to have it invalidated by a statewide initiative banning bussing. In *Hunter v. Erickson*,[81] a city council enacted a fair housing policy, only to be invalidated by an initiative requiring such policies to be approved directly by the city's voters. In recent years, we've seen similar cases play out with regard to LGBTQ equality. *Romer v. Evans*[82] concerned the decision of Colorado voters to amend the Constitution to prevent cities like Boulder and Denver from protecting members of the LGBTQ community from discrimination based on sexual orientation. *Windsor v. United States*[83] addressed

78. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1894 (2014).

79. For an important effort to rationalize these cases, see John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211 (1998).

80. 458 U.S. 457 (1982).

81. 393 U.S. 385 (1969).

82. 517 U.S. 620 (1996).

83. 133 S. Ct. 2675 (2013).

the same kind of question, except it was bumped up one level of governance, with the federal government refusing to recognize same-sex marriages legalized by the states.

These cases are a muddle, to say the least, and they contain at least two challenging doctrinal puzzles. First, it's hard to figure out the nature of the claim animating the Court's decision. At least *Washington* and *Hunter* concerned discrimination against an acknowledged protected class. But in *Romer* and *Windsor*, the Court invalidated the law without granting gays and lesbians protected class status. Second, as *Palmer v. Thompson*[84] makes clear, animus alone is not enough to establish an equal protection violation. You still need to identify an injury, and it's tough to do that in these cases. All of the policies challenged were, at least in the eyes of the Court at the time, constitutional. The Court wasn't willing to say that anti-bussing ordinances are illegal or that voters can't reserve certain decisions about discrimination enforcement to themselves or that local LGBTQ protections are constitutionally mandated or that the federal government can't choose which marriages it's willing to recognize. That meant that the "injury" stemmed solely from the decision to move these issues up the governance hierarchy, thereby undermining the ability of minorities to lobby for their preferred policies at the state or local level. The problem, as Justice Antonin Scalia points out in his dissent to *Romer*, is that we routinely move policies up the governance chain.[85] If shifting something up a level of governance is an injury, then routine questions involving state and federal preemption—even the way we structure local, state, and federal governments—will always be suspect.

Most of the work on the subject has examined these cases through the lens of equal protection and minority protection.[86] If you take seriously the discursive benefits of structure, however, you might well conclude that scholars have been focusing on the wrong section of John Hart Ely's book. The better way to understand these decisions is as efforts to "clear the channels of political change."[87] That idea not only captures what the courts were doing in each instance, but helps us solve the two doctrinal puzzles these cases raise.

It's not hard to see that passing local ordinances to aid desegregation or forbid discrimination constitute crucial parts of the process of bringing about

84. 403 U.S. 217 (1971).

85. 517 U.S. at 639 (Scalia, J., dissenting).

86. Consider the efforts to rationalize *Romer v. Evans*. *See, e.g.*, J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 VAND. L. REV. 419 (1997); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996); H. Jefferson Powell, *The Lawfulness of* Romer v. Evans, 77 N.C. L. REV. 241 (1998); Mark Strasser, *From Colorado to Alaska by Way of Cincinnati: On* Romer, Equality Foundation, *and the Constitutionality of Referenda*, 36 HOUS. L. REV. 1193 (1999); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127 (1982).

87. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105–35 (1980). This Section adapts and expands upon an argument made in Gerken, Windsor's *Mad Genius*, *supra* note 1, at 588.

change. As I noted earlier, social movements almost always build from the local in the pursuit of national goals. Indeed, we see similar efforts today. The marriage-equality movement is but the latest example of how equality debates are pushed forward not just through speech, but through state and local governance. New Haven's adoption of an "Elm City ID" led cities in eight different states to create a government ID for all of its residents regardless of their immigration status.[88] That effort, in turn, made it possible for states like California to do the same through driver's licenses.[89] The $15 minimum wage movement has moved from cities to states in a similar fashion. Following Baltimore's lead in the 1990s, 140 cities passed living-wage ordinances by 2009.[90] Grassroots efforts continue among cities, and now two states—New York and California—have followed their lead in the *Fight for 15*.[91] So, too, the movement to place body cameras on police officers has moved from cities to eleven states[92] and even has garnered the support of President Barack Obama and his Department of Justice.[93] Today, a host of issues salient to racial equality are pushed through states and localities, and from university admissions to public school districting, from police practices to the living wage, from environmental justice to sentencing reform. States and localities, in short, are the channels of political change and are thus every bit as important to those seeking change as the right to free speech.

It might seem trickier to fit *Windsor* into this frame until you reflect for a moment on the power states enjoy by virtue of their imbrication in federal lawmaking. The Defense of Marriage Act (DOMA) reflected what was once the national view, forged in the wake of Hawaii's threat to allow same-sex marriage in 1996.[94] But the brouhahas in the states over same-sex marriage signaled to the

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88. Paul Bass, *ID Idea Catches On*, NEW HAVEN INDEP. (Aug. 15, 2007), http://www.newhavenindependent.org/index.php/archives/entry/id_idea_catches_on [https://perma.cc/J74A-GRQ9].

89. Tatiana Sanchez, *There's Been a Boom in Driver's Licenses Issued to Immigrants Here Illegally*, L.A. TIMES (Feb. 8, 2016), http://www.latimes.com/local/california/la-me-0208-immigrant-drivers-licenses-20160208-story.html [https://perma.cc/J8JR-BYHL].

90. LIVING WAGE RES. CTR. (2009), http://bit.ly/2btwj9K [https://perma.cc/HB2Q-W3QT].

91. *See* Daniel Victor, *California Enacts $15 Minimum Wage*, N.Y. TIMES (Apr. 4, 2016), https://www.nytimes.com/2016/04/05/us/california-enacts-15-minimum-wage.html [https://perma.cc/3DPT-YGZF]; Patrick McGeehan, *New York's Path to $15 Minimum Wage: Uneven, and Bumpy*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/2016/04/02/nyregion/new-yorks-path-to-15-minimum-wage-uneven-and-bumpy.html [https://perma.cc/PJZ5-TPQL].

92. *See* Nancy G. La Vigne et al., *Police Body-Worn Cameras: Where Your State Stands*, URB. INST., http://apps.urban.org/features/body-camera [https://perma.cc/23ZH-LZNL].

93. Jennifer Epstein & Carrie Budoff Brown, *Obama Considered Trip to Ferguson: White House Decided Presidential Visit Would Be Too Disruptive*, POLITICO (Dec. 1, 2014), http://www.politico.com/story/2014/12/obama-ferguson-community-policing-113230 [https://perma.cc/FPX3-CYN5]; Press Release, Dept. of Justice Office of Pub. Affairs, Justice Department Announces $20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), http://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program [https://perma.cc/CZN7-M3BR].

94. KLARMAN, *supra* note 69, at 57–60.

Court that the consensus was unraveling, as Justice Anthony Kennedy himself acknowledged.[95]

The Court would surely have stepped in if the federal government had tried to silence proponents of marriage equality during this period. In *Windsor*, it took a similar stance on the structural side. The Court made sure that federal law didn't inhibit the debate as it was running through the states, which Jessica Bulman-Pozen described as the staging grounds of national politicking.[96] By lifting DOMA's restrictions, Justice Kennedy enabled proponents of marriage equality to take full advantage of the regulatory integration between the states and the federal government. Before *Windsor*, when the states changed their positions on same-sex marriage, the federal government didn't have to adjust. After *Windsor,* when the states moved on marriage quality, they got to do what the states do elsewhere in the marriage arena and tug the federal government along with them. The Court made sure, in short, that proponents of same-sex marriage could take advantage of the interlocking gears of rights and structure. As with the other political process cases, it ensured that both of the interlocking gears of our democracy—rights *and* structure—were free to move without committing to them moving in a particular direction.

Note that characterizing these cases in this fashion helps us solve the two major puzzles the cases generate. First, "clearing the channels of political change" doesn't require the presence of a protected group, as does the other main strand of Ely's work.[97] It's perfectly plausible for the Court to deploy the same reasoning in cases involving LGBTQ equality as it does in cases involving racial equality.

Second, the injury in question is much easier to understand against the backdrop of structure's discursive benefits. If these cases really involved a classic equal protection framework—protecting discrete and insular minorities from the majority's power—you would have to be able to identify a concrete injury. None of these cases satisfies that requirement; they merely involved overturning policies that the Court concedes weren't constitutionally mandated. But if your focus is clearing the channels of political change, you don't have to think that the policies in question were constitutionally mandated to believe an injury took place. Instead, in each of these cases the majority took away a crucial weapon in the fight for change. The injury looks more like a First Amendment problem than an equal protection violation.

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95. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013) (explaining that while "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage," now "came the beginnings of a new perspective, a new insight"); *id.* ("New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."); *id.* at 2693 (describing the "evolving understanding of the meaning of equality").

96. *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1119 (2014).

97. ELY, *supra* note 87, at 105.

There are other benefits associated with classifying these cases in this fashion. For instance, these cases provide an interesting window on the democratic dimensions of rights protections. Think about the debate between Justice Thurgood Marshall and the majority in *Cleburne* over whether the fact that people with disabilities had won some political victories meant that they shouldn't be classified as a protected class.[98] Marshall recognized the deep paradox embedded in the quest for protected class status: you have to have at least some political power in order to be recognized as politically powerless.[99] *Romer*—where Justice Scalia raised just this issue[100]—and *Windsor* fit neatly with this story, and they indicate that the Court has a role in shepherding this process in its early stages.

I don't want to suggest that recasting the political process cases in this fashion converts them into manageable legal doctrine. The fusty doctrinalist in me has always struggled with these cases, and my framework doesn't make them any less challenging. After all, even if a court were able to identify when a national consensus has started to fray, it would then have to make exquisitely difficult judgments about whether the political process is working properly. It's also hard to imagine what kind of limiting principles the Court would place on these sorts of claims. The First Amendment, after all, can be invoked by anyone, but governance would break down if everyone could bring political process claims like these. But my interpretation has at least one substantial advantage over other efforts to make sense of these cases: it requires us to recognize that rights and structure—long thought to be inimical or at least orthogonal to one another—are deeply and importantly connected to one another and to the central projects of our democracy. They are interlocking gears, moving the projects of discourse and equality forward.

III.
FEDERALISM 3.0: TIME FOR A DÉTENTE?

Let me make one, final point about where federalism theory will go if we abandon the mistaken assumptions of the New Deal (that state and national power should be conceived of in sovereignty-like terms) and the civil rights movement (that decentralization is properly cast in opposition to the interests of dissenters and racial minorities). Here I will pull together the arguments I've offered about federalism's regulatory dimensions, the subject of the New Deal debates, and its democratic ones, the subject of the Civil Rights debates, in order to paint a picture of federal-state relations that constitutional theory has yet to fully absorb. All of these arguments suggest that it is time to dispense with the camps that have been at the bedrock of constitutional theory for decades. That is so for both analytic and normative reasons.

98. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 466–67 (1985).
99. *Id.*
100. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

A. *The Relationship Between Means and Ends in Federalism Debates*

Let me start with the analytic point. While federalism's stalwarts and nationalists have long feuded about the merits of decentralization, they have always agreed on one thing—the relationship between means and ends. Scholars on both sides have all but universally assumed that devolution promotes state-centered ends and centralization promotes nationalist ones. Indeed, each side has fought passionately for devolution or centralization based on their faith in that simple hypothesis.

That hypothesis is incorrect. Federalism 3.0 has undermined what everyone takes to be the *nondebatable* part of the nationalism/federalism divide. That's because devolution can serve nationalist aims.[101] That's precisely why we've seen the emergence of the nationalist school of federalism, of which I am a proud founding member. For ease of exposition, I'll term these scholars the "new nationalists," just to make clear that they are outside the traditional nationalist camp.

So why *does* Federalism 3.0 further nationalist aims? I've canvassed these arguments in detail in my other work, taking dozens of pages to summarize hundreds of pages of research.[102] Here I'm going to try to do it in a few paragraphs. At the highest level of generality, you can divide the reasons into three categories: democratic, technocratic, and structural.

One of the primary reasons nationalists should care about states and localities has to do with a distinctive set of democratic goods, which I've termed "the discursive benefits of structure."[103] Federalism and localism don't just matter to racial minorities and dissenters as they push for change, as I described earlier in this essay. These structural arrangements also help us accommodate partisan competition[104] and tee up national debates.[105] We aren't forced to debate issues on an impossibly large national scale, but are rehearsing those battles on a smaller scale in an iterative fashion and in a myriad of political contexts. Better yet, we aren't having these fights just in the airy and abstract realm of political speech, where ideologues and intellectual purity hold sway. We're also having those fights through governance, where pragmatism dominates and accommodation is necessary.

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

102. *See, e.g.*, Gerken, *Détente*, *supra* note 1; Gerken, *Federalism as the New Nationalism*, *supra* note 79; Gerken, Foreword, *supra* note 1; Gerken, *Loyal Opposition*, *supra* note 1.

103. Gerken, *Federalism as the New Nationalism*, *supra* note 78, at 1894.

104. Bulman-Pozen, *Partisan Federalism*, *supra* note 96.

105. Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014).

But note that states are not, on this account, red and blue enclaves that allow us to live and let live, separate and apart from one another. That's the conventional account of why federalism serves democracy, and it rests on the mistaken assumptions of the New Deal. Instead, these arguments depend on a high level of political integration, on the use of state and local platforms to wage the fight over national values and national politics.

Devolution also serves more technocratic aims for the new nationalists.[106] Traditional federalism imagines states as laboratories of democracy, engaged in local policymaking, separate and apart from the feds, in order to compete for our hearts and minds.[107]

The new nationalists have moved past the tired laboratories of democracy account in other ways, identifying the policymaking benefits associated with devolution, including mutual learning, iterative regulation, helpful redundancy, and healthy competition.[108] All of these benefits stem from integration not separation, from joint regulation not autonomy. I've even written that the laboratories account is a myth, however—a vestige of Federalism 1.0's attachment to sovereignty. For all intents and purposes, however, there aren't fifty independent laboratories these days; there are two.[109] One is red, one is blue, and they are composed of highly networked national interest groups running their battles through any state (or local) system where they have political leverage. Moreover, once one of these "experiments" takes root, it is typically widely mimicked—copied with surprisingly little thought to local circumstances—by states with similar leanings well before the final results are in. Again, this is a benefit that derives from integration, not separation.

Finally, the states serve an important structural role in a thriving national democracy. Federalism scholars have always argued that states help check federal overreach and serve as bulwarks of liberty. But because they remain attached to the sovereignty model, federalism scholars haven't found much of a middle ground between the anodyne (states competing for the hearts and minds of its citizens) and the alarming (armed rebellion). That's not the structural role

106. This work dates as far back to Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981), though it was made prominent by Robert Schapiro and environmental law scholars like Bill Buzbee and Erin Ryan. *See supra* note 9 and accompanying text.

107. The progenitor is, of course, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

108. Dynamic federalism, iterative federalism, polyphonic federalism, negotiated federalism, relational federalism—all are terms designed to capture the ways in which state regulation improves federal regulation, and vice versa. *See* sources cited *supra* note 9. The new nationalists have even offered a friendly amendment to the laboratories argument, with Abbe Gluck showing that cooperative federal regimes can be the best catalysts of local experimentation, Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014), and Jessica Bulman-Pozen, Chas Tyler, and I exploring its political dimensions. Bulman-Pozen, *Partisan Federalism*, *supra* note 96, at 1124–29; Heather K. Gerken & Charles Tyler, *The Myth of the Laboratories of Democracy* (2014) (unpublished manuscript).

109. Gerken & Tyler, *supra* note 108.

states play these days, however. Precisely because states regulate jointly with the federal government in a fashion that the New Deal debates failed to contemplate, the states can check the Fourth Branch, introducing dissent and debate inside the administrative state. Cooperative federalism is paired with uncooperative federalism.[110] The fact that states are embedded in a federal regime also allows them to play a crucial role in defending congressional prerogatives, checking executive overreach, and safeguarding the separation of powers.[111] Here again, these are decidedly nationalist concerns and decidedly in keeping with realities undergirding Federalism 3.0.

All of this work shows that devolution can further *both* state-centered ends and traditional nationalist ends. Once we recognize that the causal arrow goes both ways, it becomes clear that it's time to dispense with camps. If the causal arrow goes both ways, the question to centralize is always a complicated, context-sensitive question even if you care only about national culture, national politics, and national citizenship. So, too, the simple equation of federalism's stalwarts—devolution furthers state-centered ends—isn't as linear as we have thought.

A. A Shared Account of Federalism's Ends?

But *still*, you might be thinking. Maybe we have to be more careful about causal claims, but the real reason the two camps are divided is because they have such different visions of federalism's ends. That brings me to the second reason why we should abandon the camps. Federalism 3.0 is a different reality than either side anticipated, but it's also a different reality than either camp feared. And it's one that should provide ample grounds for compromise between the camps going forward.

If you care about state power, the states are still powerful. While states can't block the federal government from invading their turf, they are also licensed to invade the federal terrain. They may not preside over their own empires, but they hold sway over large swaths of the federal empire. That means that state and local officials play an important role in shaping not just state law, but federal law. They can engage in cooperative federalism and uncooperative federalism. They aren't outsiders to the behemoth we call the Fourth Branch, but powerful insiders on whom the federal government is often heavily dependent. States these days may not look as powerful as they once did to law professors who focus unduly on the formal exercise of jurisdiction and unthinkingly assume that principal can always command the agent. But if you focus on conditions on the ground you'll see that states retain their preeminent role. Real power comes not

110. Bulman-Pozen & Gerken, *Uncooperative Federalism*, *supra* note 35.

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

just from formal legal authority, but from money and manpower, politics and practice.

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

If you care about national power and national politics, in contrast, it's worth remembering that states retain this important role even as the courts have permitted Congress to regulate with close to a free hand. Nationalists have never begrudged efforts at decentralization provided that the national government gets to make the call about when to decentralize. And in almost every instance nowadays, the federal government gets to make that call.

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

Moreover, balanced against those regulatory costs are the benefits we accrue from structuring our national democracy in this fashion. States are not separate and autonomous enclaves that facilitate a retreat from national norms but are at the center of the fight over what our national norms should be. And states serve important technocratic and structural benefits that are impossible to reproduce in a fully centralized system.

Best of all, the compromise I'm describing is the federalism we actually have: *Our* Federalism. To be sure, the question of how to "perfect" our existing system might just reproduce the same debate over differing visions of democracy. But that would require a pretty robust confidence that decisions to devolve or centralize this or that program are going to effect a radical change in our system, overcoming long-standing regulatory trends, cultural and media forces and, most importantly, the tides of politics.

Again, the reality I've described isn't either side's ideal; but it's also neither camp's nightmare. And it should provide a reasonably satisfying compromise for debates going forward.

CONCLUSION

This observation returns me to my overarching theme: constitutional theory is outdated. Embedded within federalism theory are a series of assumptions that no longer describe Our Federalism, *today's* federalism. Our regulatory structures and politics are deeply intertwined. Neither the federal government nor the states preside over their own empire; instead, they regulate shoulder-to-shoulder in a tight regulatory space, sometimes leaning on one another and sometimes

deliberately jostling each other. So, too, states are no longer enclaves that facilitate retreats from national norms. Instead, they are the sites where those norms are forged. And while local and state structures were once condemned solely as tools for blocking racial change, they also provide crucial structures for seeking change. None of these truths has been fully absorbed by constitutional theory. It's time to update constitutional doctrine, to adapt constitutional theory to the realities of Federalism 3.0. That should be federalism's research agenda for the twenty-first century.