

# Federalism and State Democracy

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*When scholars, judges, and politicians talk about federalism, they frequently praise the qualities of state and local democracy. State and local governments, it is said, are closer to the people, promote more innovation, and produce outputs that are a better fit for the diverse set of preferences that exist in a large nation. But these stories about state democracy rarely wrestle with the reality of elections for, say, state senator and city council. Voters frequently know little about the identity or performance of officials in these offices or about political parties at the state and local levels. Voting in state and local elections is frequently “second order,” reflecting voter preferences about the President and Congress with little or no variation based on the performance or promises of state officeholders and candidates. State and local elections vary in the degree to which they are second order—chief executive races seem to be less second order than legislative ones, and elections were less second order in the 1970s and 1980s than they are today—but we see second-order voting behavior quite consistently across many state and local elections.*

*This Article addresses the consequences of second-order elections for federalism doctrine, policy making, and theory. First, it argues that virtually all of the ends of federalism—responsiveness, respect for diversity, laboratories of democracy, variation to permit foot voting, and so forth—are premised not only on state governments having authority but also on the success of state democracy at reflecting local needs and wants. Second, it shows that proponents of greater federalism focus largely on questions of state authority rather than the quality of state democracy, leading to proposals and doctrines that frustrate federalism’s normative goals. For instance, efforts to repeal the Seventeenth Amendment are premised on the grounds that doing so would give greater authority to state governments. But proponents fail to see that repeal would make state legislative elections even more second order. Further, proponents of more devolution of power either ignore or are hostile to efforts by the federal government or courts to shift power from state legislatures to governors, viewing the question as somehow not central to debates over federalism. Given that gubernatorial elections are less second order than legislative ones, cooperative federalism regimes or changes in state law doctrines that empower state executives should lead to policies that are more responsive to specific state needs. The Article also sketches several new paths for proponents of federalism that aim at reform of state government and state elections rather than changes to federal policy.*

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*Finally, the Article shows that research on second-order elections reveals the emptiness of several prominent theories about federalism, particularly work about the “political safeguards of federalism.”*

## Introduction

Be honest.<sup>1</sup> Do you know who your state senator is? Which party controls the state assembly in your state?<sup>2</sup> What issues were in front of your state legislature this year? Do you know what the Democratic and Republican legislative caucuses in your state think about, say, pension reform or transportation financing?<sup>3</sup> Whether to authorize local governments to file for Chapter 9 bankruptcy?<sup>4</sup> Reforming the environmental review process?<sup>5</sup> If you live in a big city, do you know your councilmember’s stance on

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1. Really, it’s fine. See David Schleicher, *From Here All-The-Way-Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV. 401, 415 n.112 (2013) (“Voter ignorance is not a problem of a benighted ‘they,’ but rather is a problem for all of us who live in the real world with its competing demands; requirements that we feed ourselves, and the like. If you show me someone who has deeply and truly studied each choice [she has] to make when voting, I will show you someone who is not all that busy.”).

2. Fewer than half of voters do. Steven Michael Rogers, *Accountability in a Federal System* 35 (Sept. 2013) (unpublished Ph.D. dissertation, Princeton University), <http://stevenmrogers.com/Dissertation/Rogers-Dissertation.pdf> [<https://perma.cc/U9FE-VV3J>].

3. In Rhode Island and Illinois, pension reform was the biggest issue facing the legislatures in the early 2010s, and the parties split internally. See Carl Horowitz, *Rhode Island Public-Sector Unions Lock Horns with State Treasurer over Pensions*, NAT’L LEGAL & POL’Y CTR. (Dec. 23, 2013), <http://nlpc.org/stories/2013/12/23/rhode-island-unions-lock-horns-state-treasurer-over-pensions-liuna-boss-resigns> [<https://perma.cc/GY94-4UB2>] (discussing union pushback on pension reform in Rhode Island); Monica Davey & Mary Williams Walsh, *Pensions and Politics Fuel Crisis in Illinois*, N.Y. TIMES (May 25, 2015), <https://www.nytimes.com/2015/05/26/us/politics/illinois-pension-crisis.html> [<https://perma.cc/JRE7-FAXK>] (describing the crisis in Illinois); see also Matt Taibbi, *Looting the Pension Funds*, ROLLING STONE (Sept. 26, 2013), <http://www.rollingstone.com/politics/news/looting-the-pension-funds-20130926> [<https://perma.cc/KPE7-SSY7>] (surveying the problem of high-fee pension fund investments). Transportation financing was the biggest issue in front of the Virginia legislature in 2013, and the bill that eventually passed split both parties. See Fredrick Kunkle & Laura Vozzella, *Virginia Lawmakers Approve Sweeping Transportation Plan*, WASH. POST (Feb. 23, 2013), [https://washingtonpost.com/local/va-politics/va-lawmakers-approve-landmark-transportation-plan/2013/02/23/712969d8-7de4-11e2-82e8-61a46c2cde3d\\_story.html](https://washingtonpost.com/local/va-politics/va-lawmakers-approve-landmark-transportation-plan/2013/02/23/712969d8-7de4-11e2-82e8-61a46c2cde3d_story.html) [<https://perma.cc/34C9-USLM>] (noting that Virginia had struggled with transportation reform for decades).

4. State-level Republicans and Democrats across the country have taken a variety of stances on the eligibility of localities for Chapter 9. See Cate Long, *The Looming Battle Between Chicago and Illinois*, REUTERS (Aug. 7, 2013), <http://blogs.reuters.com/muniland/2013/08/07/the-looming-battle-between-chicago-and-illinois> [<https://perma.cc/SGE4-H9V5>] (mapping the states’ varying approaches to municipal bankruptcy).

5. California has repeatedly considered reforms to its environmental review process around permitting dense development. The dominant Democratic Party in the state is divided on the issue. See Steven Greenhut, *Climate Bill May Chill New Infrastructure*, SAN DIEGO UNION-TRIB. (Sept. 4, 2015) (describing the “infamous” California Environmental Quality Act).

mayoral control over schools, broken windows policing, or allowing increased housing density?<sup>6</sup>

You probably answered “no” to at least one of these questions. But when you showed up to vote, my guess is that your lack of knowledge about individual politicians or state parties didn’t trouble you, perhaps generating a “no”<sup>7</sup>—but not more.<sup>8</sup> Most voters don’t know much about the candidates when they vote for Congress, either. But members of Congress are also members of political parties, and most voters have at least some preferences about Democrats and Republicans. As a result, most are able to vote somewhat knowledgeably—particularly in an era of party polarization.<sup>9</sup>

Many voters treat state races the same way. If they like President Obama and Senator Chuck Schumer, they vote for Democrats for state legislature; if they do not, they vote Republican.<sup>10</sup> Elections where voters rely on party preferences developed in relation to another level of government are common enough worldwide that political scientists have developed a term for them: “second-order elections.”<sup>11</sup> It is relatively clear that many state and local elections in the United States are substantially second order. The extent to which they are second order, though, varies across type of office (gubernatorial races are less second order than state

6. See David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 433–36 (2007) (showing the lack of consensus among Democrats on these issues).

7. Cf. Kyle Chayka, *The Life and Times of “No”*, AWL (May 20, 2014), <https://theawl.com/the-life-and-times-of-%E3%83%84-39697541e6ac#.4svds1wv8> [<https://perma.cc/7WUJ-A3BR>].

8. Assuming you even showed up to vote. See Charlotte Alter, *Voter Turnout in Midterm Elections Hits 72-Year Low*, TIME (Nov. 10, 2014), <http://time.com/3576090/midterm-elections-turnout-world-war-two> [<https://perma.cc/3AWN-TJPE>] (reporting that only 36.4% of eligible voters participated in the 2014 midterm elections).

9. See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 363–84 (discussing use of party heuristics in federal elections).

10. There are obviously many types of state and local elections other than chief executive (governors, mayors, county executives) and legislative. These elections vary in prominence—state supreme court judges and attorneys general are more prominent, while state insurance commissioners and local treasurers are less prominent and more likely to be second order. Existing research does not allow us to know in each instance whether these elections look more like gubernatorial races or legislative ones, although they likely either fall between those poles or are like legislative races, depending on their prominence. But given the scope of this Article, inquiries into how to think about specific non-chief executive and judicial races will have to wait for future efforts.

11. The theory was developed to explain European Parliament elections but has been applied to local elections in Europe as well. See David Schleicher, *What if Europe Held an Election and No One Cared?*, 52 HARV. INT’L L.J. 110, 111–13, 111 n.3 (2011) (describing the consistency with which national-party preferences predict European Parliament election results); Karlheinz Reif & Hermann Schmitt, *Nine Second-Order National Elections—A Conceptual Framework for the Analysis of European Election Results*, 8 EUR. J. POL. RES. 3, 8–9 (1980) (providing the original description of “first-order” and “second-order” elections, in the context of European politics).

legislative elections), location (small-town elections are less second order than those in big cities) and time (state elections in the 1970s and 1980s seem to have been less second order than elections today).<sup>12</sup>

Party-line voting can be individually rational both across the federal ballot and between the levels of government.<sup>13</sup> But the systemic implications differ substantially. At the federal level, party-line voting can promote representation and accountability. Particularly following the intense party polarization of recent years, preferences or beliefs about the positions or performance of Presidents Obama or Bush translate relatively easily to their copartisans in Congress.<sup>14</sup> Their beliefs about issues facing the federal government are quite similar.<sup>15</sup> And beliefs among members of Congress of a single party are more similar than they have been at any point since the end of World War I.<sup>16</sup> Further, the major parties have been pretty consistent ideologically and organizationally over time,<sup>17</sup> so observations from many

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12. See *infra* Part I.

13. See *infra* notes 66–71 and accompanying text.

14. See Geoffrey Skelley, *Coattails and Correlation: Presidential and Senate Results Should Track Closely in 2016—And That’s Nothing New*, *Sabato’s Crystal Ball*, U. VA. CTR. FOR POL. (Mar. 5, 2015), <http://www.centerforpolitics.org/crystalball/articles/coattails-and-correlation-examining-the-relationship-between-presidential-and-senate-results/> [https://perma.cc/Y2SW-9KHT] (showing the correlation between public support for the President and copartisans in the Senate, taking political polarization into account).

15. See generally ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010); NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006); PEW RESEARCH CTR., *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTI-PATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE* (2014).

16. See MCCARTY ET AL., *supra* note 15, at 23–25 (tracking polarization by classifying roll call votes). Nolan McCarty, Keith Poole, Howard Rosenthal, and Chris Hare have created illuminating graphs to illustrate the phenomenon. See Nolan McCarty et al., *Polarization is Real (and Asymmetric)*, *MONKEY CAGE* (May 15, 2012), <http://themonkeycage.org/2012/05/polarization-is-real-and-asymmetric/> [https://perma.cc/4ZRX-QFMC] (demonstrating that party polarization has largely been driven by the Republican party’s rightward shift); Keith T. Poole, *The Polarization of the Congressional Parties*, *VOTEVIEW BLOG* (Jan. 30, 2016), [http://www.voteview.com/political\\_polarization\\_2015.htm](http://www.voteview.com/political_polarization_2015.htm) [https://perma.cc/E8BY-7JKV] (illustrating ideological party means since the end of Reconstruction). This isn’t to say that there isn’t variation inside parties—between Tea Party types and more institutionalist Republicans, for instance—but rather that the parties have been growing more internally similar over time. See generally David Schleicher, *Things Aren’t Going That Well Over There Either: Party Polarization and Election Law in Comparative Perspective*, 2015 U. CHI. LEGAL F. 433 (arguing that a global change in voter preferences toward “more radical and fundamentalist opinions” explains observed polarization).

17. A quick note on the last election cycle. Given the upheavals of the 2016 election, some have argued that American politics is about to go through a transition period during which party heuristics become less predictive for a period of time until things shake out. See Michael Lind, *This Is What the Future of American Democracy Looks Like*, *POLITICO* (May 22, 2016), <http://www.politico.com/magazine/story/2016/05/2016-election-realignment-partisan-political-party-policy-democrats-republicans-politics-213909#ixzz4KLzZZw1o> [https://perma.cc/EUD7-SQZD] (arguing that the 2016 election marks the beginning of a shift in party platforms to align with a shift in party voters that has already happened). President Trump’s political success is

years ago remain useful today.<sup>18</sup> As a result, if voters know the party of a member of Congress (information that, after all, is on the ballot), and know how they feel about that party, then they have quite good tools to vote as if they were informed—even if they know little about the candidates or the goings-on of Congress.<sup>19</sup>

In contrast, to the extent that they are second order, the outcomes of many state and local elections have little to do with anything that *ought* to matter—like the past performance of state government, or candidates' positions on issues in front of the state or local governments.<sup>20</sup> Beliefs about political parties are almost entirely based on the performance and promises of national politicians on issues largely addressed by national officials—war and peace, monetary policy, deficit spending, Medicare, and Social Security, for example.<sup>21</sup> Because these issues lack clear state or local analogues, preferences about national issues do not necessarily correlate closely with preferences about state or local ones.<sup>22</sup> Further, the ideological location of the state median voter is almost always different from the ideological location of the national median voter. When state elections are second order, the parties do not have any incentive to cater to the median voters' positions, resulting in policies unrepresentative of the majority in that state.<sup>23</sup> Finally,

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certainly problematic for those who argue state politics are useful for national-level democracy because statehouses provide a venue for ideas that are excluded from national politics to develop. See *infra* Part IV. Trump's combination of ideological stances—nationalism, mercantilism, criticism of Wall Street, opposition to “political correctness,” support at least the basics of the welfare state—has few if any state-based precursors. One might see aspects of “Trumpism” in the rise of Governor Paul LePage of Maine, perhaps, or Jan Brewer of Arizona, but that's about it. Wherever Trumpism came from, it was not a major part of Republican politics in statehouses around the country.

18. This isn't to say that there hasn't been change in the parties, but that their relative ideological positions have been quite consistent, far more consistent than they were decades earlier. A voter in 1940 who relied on observations about the parties' stances in 1920 would be fundamentally misled. A voter today who only knew what the parties stood for in 1995 and her own preferences likely would make similar choices to those of a fully informed voter, particularly for federal offices other than the Presidency.

19. In addition, because the most important vote for members of Congress is the vote about how to organize their chamber, voting based on party preference is in many ways a more reasonable stance than taking into consideration facts about the individual candidates.

20. See Rogers, *supra* note 2, at 3–8 (reviewing evidence that local elections are generally not responsive to local-party performance); Schleicher, *supra* note 6, at 424 (noting that national parties do not compose “coherent ideological blocs” on local issues).

21. See Elmendorf & Schleicher, *supra* note 9, at 397–98 (presenting evidence that voters in municipal elections respond to national-party brands rather than local-party performance).

22. To be clear, for the theory of “mismatch” voting that I have offered elsewhere and describe in notes 68–69 and accompanying text, *infra*, these preferences must correlate to some degree. And they certainly do, particularly because of the ubiquity of cooperative federalism arrangements. But they do not necessarily correlate closely, nor do they correlate to the same degree across space and type of government (state or local).

23. See *infra* Part IV. A world in which, say, Wisconsin or North Carolina's median voter is faced with a choice between a Republican Party that would be at home in Alabama and a Democratic Party much like California's is not likely to produce particularly representative outcomes.

voting behavior can be retrospective rather than prospective in focus. Generally, voters punish incumbents when the economy does poorly, or when policies work out badly, providing officials with an incentive to produce good results.<sup>24</sup> When elections are second order, however, incumbent officials have little direct electoral incentive to promote successful policies; their electoral futures will not sink or swim based on the effect of their decisions on the general public. That is, to the extent that they are second order, state elections provide voters with weak prospective representation and little retrospective accountability.<sup>25</sup>

Discussions of federalism often elide any consideration of how or why state legislators get to places like Albany, Austin, Sacramento, or Tallahassee. Instead, when politicians, judges, and scholars talk about federalism, they put state democracy on a pedestal.<sup>26</sup> Speaker of the House Paul Ryan, for example, argues in favor of Medicaid block grants because state governments are “closer to the people.”<sup>27</sup> The Supreme Court praises federalism for being “more sensitive to the diverse needs of a heterogeneous society” and for “increas[ing] opportunity for citizen involvement in democratic processes.”<sup>28</sup> These purely theoretical claims do not consider the real, on-the-ground problems of state democracy.

This Article will argue that federalism doctrine, policy, and theory should take the problem of state elections far more seriously. Doing so will result in proponents of greater devolutions of power (and merely interested parties) asking different questions about how federalism operates and looking at different tools for achieving their goals.

First, it will argue that many of the benefits of federalism turn on the quality of state elections. Scholars have long assumed that what “federalism” protects is a state government’s authority to make policy decisions.<sup>29</sup> While

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24. See generally MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* (1981).

25. See Rogers, *supra* note 2, at 15–16 (arguing that second-order elections decrease local political accountability by skewing the incentives of prospective challengers); see generally John E. Chubb, *Institutions, the Economy, and the Dynamics of State Elections*, 82 AM. POL. SCI. REV. 133, 134 (1988) (showing that state politicians face little accountability for local economic conditions).

26. See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 220–21 (2000) [hereinafter Kramer, *Putting the Politics Back in*] (explaining that “almost everything that really matters to people in their daily lives” is done by state officials, and describing “the enduring importance of the states”); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1504 (1994) [hereinafter Kramer, *Understanding Federalism*] (declaring that “most governing in this country is still done at the state level and by state officials”).

27. Paul Ryan: *Poverty Programs Should Be Measured by Outcomes*, REAL CLEAR POL. (May 7, 2012), [http://www.realclearpolitics.com/video/2012/05/07/paul\\_ryan\\_poverty\\_programs\\_should\\_be\\_measured\\_by\\_outcomes\\_not\\_compassion.html](http://www.realclearpolitics.com/video/2012/05/07/paul_ryan_poverty_programs_should_be_measured_by_outcomes_not_compassion.html) [https://perma.cc/9FPP-BTX7].

28. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

29. This is true whether states have autonomy over some policy area or merely influence a broader policy process. See *infra* note 84. To be clear, none of this turns on whether one views

they regularly debate whether federalism doctrine should protect the power of state governments to make decisions autonomously or merely the power to influence decisions made in coordination with the federal government, scholars generally agree that federalism protects state power one way or another. While this focus is understandable, it misses that the underlying reasons for caring about federalism—better fit between policies and preferences, laboratories of democracy, interstate diversity and sorting, protection of political or cultural identities—only make sense in the context of functioning state democracies. Where state democracy does not produce policies or outcomes that are responsive to preferences of residents of the state, we will see less of the benefits of federalism. Thus, when state elections become more second order, the case for devolving power becomes weaker.<sup>30</sup>

Once the reliance of federalism on the quality of state democracy comes into focus, new issues arise, changing how we think about federalism and what we need to do to make it functional.<sup>31</sup> Some policies affect whether elections are second order; other policies allocate power among different state entities that are more or less second order. These policies have not traditionally been thought of as central to federalism doctrine or theory. But they should be.

Where an increase in state authority has the effect of making elections more second order, we should understand the greater power held by the state to lead, perhaps counterintuitively, to a reduction in the “federalism benefits” we should expect to see (and vice versa). For instance, the Seventeenth Amendment reduced the authority of state governments by removing from state legislatures the power to select U.S. senators and giving that power directly to voters.<sup>32</sup> As was argued at the time, the power of the state legislature to choose senators gave voters a strong incentive to ignore state issues and use state legislative elections to vote their federal preferences.<sup>33</sup> Modern federalism advocates argue for repeal of the Seventeenth Amendment but fail to acknowledge its likely effect on state legislative elections: repeal would make them (even more) second order. State

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federalism through the lens of sovereignty or of influence in cooperative federal–state policy making.

30. This, however, does not on its own answer any *specific* question about whether the federal government should assume control over some policy area or whether courts should protect state decisions against federal encroachment. There are, of course, many considerations in any such decision, and state elections are never entirely second order. Further, one’s beliefs about the proper allocations of power between entities are almost surely developed not on a chalkboard but through experience of how states and localities actually performed during periods when their elections were at least somewhat second order. But regardless of one’s *ex ante* belief about the balance of federal and state and local power, increases in the degree to which state and local elections are second order should weaken the case for devolution (and vice versa).

31. Thanks to Larry Kramer for suggesting this formulation.

32. See *infra* subpart III(A).

33. See *infra* subpart III(A).

legislative power to draw congressional district lines works in a similar fashion—a power held by state legislatures that makes state elections more responsive to national-party preference and hence reduces the gains from federalism generally.

How power is divided between state legislatures and governors is rarely considered a question with many implications for federalism *per se*.<sup>34</sup> But in eras—like today’s—when state legislative elections are more second order than gubernatorial ones, it should be. When and if the federal government attempts to allocate power in cooperative federalism programs to specific branches of state governments, rather than to state governments as entities, we can understand the choice as one that either increases difference, sorting, and local democracy (when power is allocated to an official like the governor whose election is less second order) or one that tends simply to allocate power among national parties (when power is allocated to a branch elected in largely second-order elections, like the state legislature).

Similarly, we can understand state constitutional and statutory decisions about allocations among state entities as having a federalism dimension of a similar type, even in the absence of explicit federal policy. For instance, New York State’s nondelegation doctrine has been employed against the delegation of major “policy decisions” to New York City’s mayoral agencies, most famously Mayor Michael Bloomberg’s ban on large single offerings of soda.<sup>35</sup> Viewed with an understanding of how mayoral and city council elections actually work, the New York Court of Appeals’ decision to adopt a nondelegation doctrine far stronger than its (almost nonexistent) federal counterpart in the name of political accountability is extremely odd. The likelihood that mayoral agencies in big cities are more responsive and accountable to the local voters than the city council is far higher than the likelihood that federal agencies are more responsive and accountable than Congress.

Third, when federalism scholars do consider state elections, they misunderstand either how such elections work or the normative implications of second-order elections. The most well-known discussion of political

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34. There are, of course, exceptions to this. *See, e.g.*, Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1573–75 (2015) (analyzing the roles of governors and state administrative actors in cooperative federalism programs); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1202–03 (1999) (discussing the federal government’s ability to delegate powers to various state and local institutions without the consent of the state legislature).

35. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 16 N.E.3d 538, 560–61 (N.Y. 2014) (Read, J., dissenting) (noting the political furor surrounding the ban).



parties in the literature is Larry Kramer's account of how decentralized, nonideological parties provide "the political safeguards of federalism."<sup>36</sup>

While his description may have had some purchase on the politics of the 1960s and 1970s, today, Kramer's account of the political safeguards of federalism gets three things wrong: politics, safeguards, and federalism.

Contemporary political parties are national in scope, largely coherent ideologically, and do little to represent state-specific interests in Washington. That so many state elections are second order shows that Kramer's understanding of safeguards is backward; modern political parties frequently make state politics responsive to national concerns and limit the degree to which state politics is representative of state-specific interests or the state median voter. And his description of federalism focuses exclusively on state authority and not at all on the quality of state democracy, despite the fact that the normative justifications for federalism largely turn on the latter. While Kramer was right to focus the study of federalism on how the institutions of democracy work, evidence about second-order elections shows Kramer's account has aged badly.

Other accounts provide more insight into how parties have changed and how state governments actually operate today. State behavior today is, as Jessica Bulman-Pozen argues, virtually impossible to understand without reference to how it reflects national-party politics—we have a "partisan federalism."<sup>37</sup> But Bulman-Pozen's (admittedly tentative) normative claim that such partisan federalism produces a better functioning national democracy is far less convincing. While second-order elections are clearly bad for traditional accounts of the ends of federalism, it is not clear that they make for a more effective opposition at the national level or provide greater checks on the party that controls the Presidency. In each case, it is equally plausible that a more differentiated set of state governments—not divided exclusively along lines that are red and blue—would improve national democracy. These differentiated governments could provide a wider set of possible alternatives for opposition parties to draw on, and they could set up more (and different kinds) of hurdles for dominant national coalitions. The supposed benefits of partisan federalism and second-order elections are largely conjectural, but the harms to the traditional goals of federalism are easily seen.

The problem of second-order elections should also urge federalism's advocates to develop a new normative agenda. The arguments developed in this Article suggest that those who seek the ends of federalism should focus not only on protecting the authority of states but also on enhancing the quality

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36. See Kramer, *Putting the Politics Back in*, *supra* note 26, at 217–22.

37. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1092 (2014) (arguing that federalism is often used by state governments to advance partisan goals rather than state interests).

of state democracy. Avenues for doing so could include: (1) enhancing the power of state and local executives vis-à-vis relatively unknown legislatures and divided executives (attorneys general, insurance commissioners, etc.) and (2) developing election law tools that aid voters in differentiating state and national elections.

The rest of the paper is organized as follows. Part I surveys the evidence of second-order elections in states and localities. Part II discusses why protecting the outcomes of state democracy, and not merely the extent of state authority, fits the normative justifications usually offered for federalism doctrine and practice. Part III discusses implications of second-order elections for constitutional reform and for state-level separation of powers. Part IV discusses the implications of second-order elections for federalism theory. Part V is a conclusion that sets out what election and constitutional reforms those interested in enhancing federalism might use to improve state democracy.

## I. Second-Order Elections in States and Localities

As the goal of this Article is to explore the implications of second-order elections for federalism theory, it is necessary to review *what* a second-order election is, *how much* evidence exists that state and local elections are second order, and *why* elections might be second order. This Part will show that state and local elections vary substantially in the degree to which they are second order—by type of office, over time, and across place. But there is substantial evidence that many state and local elections today are largely second order—particularly, elections for state legislatures, city councils in big cities, and other lower profile state and local offices. A full recounting of which elections are mostly or entirely second order is beyond the scope of this review. But it can be said that swings in preferences about national issues and reviews of the performance of national officials, rather than preferences of state voters about state policies and the performance of state officials, do a great deal to determine the outcome of state elections and the direction of state policy.

What are second-order elections? A term coined by Karlheinz Reif and Hermann Schmitt, second-order elections refers to elections at one level of government that reflect voter preferences developed in relation to another level of government.<sup>38</sup> Reif and Schmitt developed the term to discuss European Parliament elections (a directly elected European Union institution) in which voters relied exclusively on their preferences for national parliaments and prime ministers.<sup>39</sup>

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38. Reif & Schmitt, *supra* note 11, at 8–9.

39. Prior to 1979, the international organization now known as the European Union (EU) had no directly elected officials; appointees and officials from Member States made all decisions. *See* SIMON HIX & BJØRN HØYLAND, *THE POLITICAL SYSTEM OF THE EUROPEAN UNION* 146–47 (3d

But second-order elections happen in many multilevel democracies, not just in supranational institutions. In Europe, local races are often second order.<sup>40</sup> So too in the United States.

The best recent evidence on state legislative elections comes from the work of Steve Rogers. He found that the correlation in the percentage change by party in seats in the U.S. House of Representatives and state legislatures is 96%!<sup>41</sup> Further, causation almost certainly flows from the way national

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ed. 2011). Concerns about a “democratic deficit” led Member States to reform the institution, creating a directly elected body, the European Parliament (EP), that would over time become a powerful part of the EU’s legislative process. See Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1697 (2002) (“The primary response to concerns about a ‘democratic deficit’ has been a call to enhance the role of the European Parliament—the only directly elected institution in the Community system.”). But as Reif and Schmitt showed in their pathbreaking paper, voters largely did not use those elections to express their preferences about EU policy or hold EU officials accountable for their performance. Reif & Schmitt, *supra* note 11, at 8–15; see also SIMON HIX, WHAT’S WRONG WITH THE EUROPEAN UNION AND HOW TO FIX IT 79–80 (2008) [hereinafter HIX, WHAT’S WRONG] (discussing the extent to which EP elections are second order). Instead, voters in EP elections simply voted for their preferred domestic-level party—i.e., Labour or the Conservatives in Britain, the Christian Democrats or the Social Democrats in (then) West Germany—using the elections to punish or reward domestic politicians and parties. Reif and Schmitt called EP elections “second order” because voters use preferences developed in relation to one level of government—say, the performance of a Prime Minister—as a guide for voting at an entirely different level of government. Reif & Schmitt, *supra* note 11, at 8–9. Across a series of treaties, EU Member States responded to the problems of EP elections by making the EP more and more powerful. See Schleicher, *supra* note 11, at 122–23; HIX, WHAT’S WRONG, *supra*, at 34–37. Even so, voters continue to simply vote their domestic preferences in EP elections, although the low turnout and seemingly low stakes have also meant that radical (and just plain strange) parties do better than they do in national elections. See, e.g., David Charter & Rory Watson, *European Elections: Extremist and Fringe Parties are the Big Winners*, TIMES (June 8, 2009), <http://www.thetimes.co.uk/tto/news/politics/elections/article1842621.ece#> [https://perma.cc/FK4M-N7RN] (discussing the effects of low turnout); Jonathan Eyal, *EU Parliament on Fringe of Lunacy; Newly Elected Rightist and Extremist Parties Have Little Clout But Could Undermine Unity*, STRAITS TIMES (Sing.), June 14, 2009 (describing the success of xenophobic, nationalist, and odd parties like the Pirate Party of Sweden); *Swing Low, Swing Right: The European Elections*, ECONOMIST (June 11, 2009), <http://www.economist.com/node/13832286> [https://perma.cc/BK2Y-MHP6] (discussing turnout and results); *Trouble at the Polls: The Worrying European Elections*, ECONOMIST (June 11, 2009), <http://www.economist.com/node/13829453> [https://perma.cc/7W2G-86DV] (bemoaning “wide support for a ragbag of far-right, populist, anti-EU or plain nutty parties”). For the most part, despite the increasing importance of the EP as an institution, EP elections remain almost entirely second order. As I have noted, “nothing a Member of European Parliament . . . has ever said, and nothing one has ever done, has ever [affected] an EP election.” David Schleicher, *What if Europe Held an Election and No One Cared?*, OPINIO JURIS (Feb. 8, 2011), [http://opiniojuris.org/2011/02/08/hilj\\_what-if-europe-held-an-election-and-no-one-cared/](http://opiniojuris.org/2011/02/08/hilj_what-if-europe-held-an-election-and-no-one-cared/) [https://perma.cc/HD32-5ASS].

40. See, e.g., Anthony Heath et al., *Between First and Second Order: A Comparison of Voting Behaviour in European and Local Elections in Britain*, 35 EUR. J. POL. RES. 389, 391 (1999). But see George A. Boyne et al., *Democracy and Government Performance: Holding Incumbents Accountable in English Local Governments*, 71 J. POL. 1273, 1282 (2009) (finding that extremely poor performance in local office is punished by voters, but elections are otherwise second order).

41. Rogers, *supra* note 2, at 3–6.

events influence state legislative elections and not the other way around.<sup>42</sup> Presidential approval rates and the health of the national economy play a large role in determining which party gains seats in state legislatures.<sup>43</sup> In contrast, objective measures of the performance of state government—from state economic variables to student test results to the crime rate—do not seem to matter very much in state legislative elections.<sup>44</sup> This is consistent with earlier research showing that state economic variables have little effect on state legislative races.<sup>45</sup> And subjective measures, like voter impressions of the performance of state legislatures, matter only a bit and are far outweighed in influence by national factors.<sup>46</sup> “The state economy, state policy outcomes, or voters’ approval of the legislatures appear to have little—if any—consequences for members of the governor’s or state house majority party in state legislative elections.”<sup>47</sup>

Further, individual legislators are not punished for unpopular votes. By comparing roll call votes with subsequent referendum elections, Rogers shows that unpopular votes do not substantially influence election outcomes. In two district-level analyses, Rogers found that voters punished unpopular votes in only two of ten states and punished ideologically extreme representation (relative to the district) in only nine of thirty-eight.<sup>48</sup> A majority of voters cannot identify which party is in charge of the state assembly or the state senate, making retrospective voting difficult.<sup>49</sup> Voters generally use their national-level preferences in state legislative elections and

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42. *Id.* at 55–56 (finding that “[s]tate representatives’ behavior and performance may matter at the margins, but evaluations of the president more likely determine whether legislators are reelected”).

43. *Id.* at 43. Rogers’s finding is consistent with previous research, which found a presidential coattail effect in state legislative races (the party of the presidential race winner gained seats) and an opposite “repercussion” effect in midterm elections. The presidential coattail/repercussion effects were only slightly weaker than the coattail/repercussion effects for Congress. James E. Campbell, *Presidential Coattails and Midterm Losses in State Legislative Elections*, 80 AM. POL. SCI. REV. 45, 60–61 (1986) (“[T]he median magnitude of presidential coattail and repercussion effects in state legislative races is only slightly less than those effects in congressional races.”).

44. See Rogers, *supra* note 2, at 39–42 (finding that impressions of performance have a small effect on state legislative voting).

45. Chubb, *supra* note 25, at 140–41. This is not to say that there are no studies finding state-level effects. For instance, it seems that the governor’s party does slightly worse in midterm state legislative elections (by one to four percent under most specifications) controlling for other factors—a weak version of the midterm “balancing” hypothesis regularly discussed at the national level. See Michael A. Bailey & Elliot B. Fullmer, *Balancing in the U.S. States, 1978–2009*, ST. POL. & POL’Y Q. 148, 155–58 (2011); Olle Folke & James M. Snyder, *Gubernatorial Midterm Slumps*, 56 AM. J. POL. SCI. 931, 946 (2012).

46. See Rogers, *supra* note 2, at 48–49 (finding that strong approval of state legislatures correlates with a small increase in voter turnout for state elections).

47. *Id.* at 6–7.

48. *Id.* at 7.

49. *Id.* at 35.

pay little to no attention to what state legislators (individually or as a caucus) actually think or how they actually voted.

Since voters do not judge state candidates and parties as we might expect (say, for promises breached or roads mended), there is little reason to expect that state legislative elections should produce either representative policies or much in the way of accountability for performance. And as it happens, state policy is not particularly representative of popular preferences. Jeffrey Lax and Justin Phillips have found that, at the state level, “[r]oughly half the time, opinion majorities lose—even large supermajorities prevail less than 60% of the time. In other words, state governments are on average no more effective in translating opinion majorities into public policy than a simple coin flip.”<sup>50</sup> Even after close state elections, voters rarely get what they want from state legislatures.<sup>51</sup>

Gubernatorial elections seem to work a bit differently. These races are less predictable than state legislative races. The attributes of candidates matter more, though national-level partisanship and preference swings are still relatively more important.<sup>52</sup> Further, voters do hold governors accountable to *some extent* for events that happen during their term, particularly state economic performance and tax increases.<sup>53</sup> The reason is

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50. Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 149 (2012).

51. *See id.* at 148–49. Others have found contrary results, however, suggesting that close elections can cause state parties to change their behavior in order to attract the few informed swing voters. *See* Elmendorf & Schleicher, *supra* note 9, at 401 n.187 (noting that researchers have “found evidence consistent with the hypothesis that the imminent prospect of winning or losing control of state government induces lawmakers to invest in building statewide party brands”); Gerald Gamm & Thad Kousser, *Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures*, 104 AM. POL. SCI. REV. 151, 151–56, 161–63 (2010) (finding, in a study of thirteen states over almost 120 years, that balance between “particularistic” (district oriented) and “general” (issue oriented) policymaking shifts toward the latter when parties are evenly balanced); Thad Kousser et al., *Ideological Adaptation? The Survival Instinct of Threatened Legislators*, 69 J. POL. SCI. 828, 829 (2007) (showing that “the electoral connection can indeed motivate legislators to adjust their behavior in response to a strong signal that their constituents have shifted”).

52. *See* Chubb, *supra* note 25, at 149 (arguing that “[w]hile party establishes a firm baseline, and outside influences encourage a regular pattern of change, [gubernatorial] elections can easily turn on the qualities of the candidates themselves”).

53. *See, e.g., id.* (finding state economic variables have some effect on gubernatorial elections, although far less than national economic variables); Richard G. Niemi et al., *State Economies and State Taxes: Do Voters Hold Governors Accountable?*, 39 AM. J. POL. SCI. 936, 936 (1995) (finding, against the “prevailing wisdom in research on gubernatorial voting . . . that the *national economy*” is all that is important, that “[a] poor state economy, increases in taxes, and lowered personal finances all contribute to votes against incumbent governors and their parties”). This includes holding governors responsible for things over which they have little control, like national economic booms. But all the same, voters still have some ability to link governors to relative state economic performance. As economist Justin Wolfers notes, voters are about as good at linking governors to state economic performance (independent of national performance) as boards of directors are at linking CEO pay to company performance (independent of industry performance). Justin Wolfers, *Are Voters Rational? Evidence from Gubernatorial Elections I* (Mar. 19, 2002) (unpublished manuscript) (on file with the Texas Law Review).

pretty clear: governors are higher profile than legislators, and voters know enough about the identity and positions of a governor to hold her accountable—at least somewhat.<sup>54</sup>

We see similar trends at the local level. There is substantial evidence that city council races in big cities are extremely second order.<sup>55</sup> But the degree to which local elections are second order differs substantially based on the type of local government and the type of office. William Fischel's "homevoter hypothesis" argues that voters in small local governments have incentives to pay attention to local politics and thus can and do exert substantial control over local and county legislators.<sup>56</sup> Empirical evidence supports this. For instance, voters in less-population-dense areas are more wont to split their tickets, voting one way in national races and another in local ones.<sup>57</sup> But voters in denser places do this rarely.

Some big-city officials are sufficiently high profile that the electorate is able to reward them for good performance. For instance, the Mayor of New York's approval rating is closely tied to the crime rate.<sup>58</sup> And sometimes an event occurs in an otherwise sleepy race that makes voters sit up and pay attention to local officials' performance.<sup>59</sup> But in general, down-ballot elections in big cities are second order.

The degree to which elections are second order also changes over time. While the correlation between changes in control of state legislative and congressional seats is tight over time, it was weaker in the 1970s and 1980s

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54. In general, the more visible a candidate is—whether on account of incumbency, name recognition, or campaign spending—the more likely we are to see her gain support through ticket splitting. Paul Allen Beck et al., *Patterns and Sources of Ticket Splitting in Subpresidential Voting*, 86 AM. POL. SCI. REV. 916, 925 (1992) ("Candidates who enjoy a visibility advantage are very successful in attracting votes beyond their own partisan camp . . .").

55. See Schleicher, *supra* note 6, at 447–59 (presenting a "somewhat stylized" political markets model to explain this phenomenon).

56. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 4 (2001). Fischel suggests that this dynamic recedes in larger cities both because voters there are less likely to "know what is going on in local government" and because they are less likely to be homeowners in the first place. *Id.* at 92–93.

57. Kristen Badal & Jessica Trounstine, *The Mystery of Local Versus National Partisan Representation* 18 (unpublished manuscript), [http://faculty.ucmerced.edu/jtrounstine/Local\\_partisanship\\_March10\\_3.pdf](http://faculty.ucmerced.edu/jtrounstine/Local_partisanship_March10_3.pdf) [<https://perma.cc/5YH4-5SEA>] ("In contexts where local politics is likely to be less salient—counties with large populations and a higher proportion of recent movers—the local vote is more predictable. In these settings, voters appear more likely to be consistent across levels of government with regard to their partisan loyalty.").

58. R. Douglas Arnold & Nicholas Carnes, *Holding Mayors Accountable: New York's Executives from Koch to Bloomberg*, 56 AM. J. POL. SCI. 949, 960 (2012).

59. See, e.g., Christopher R. Berry & William G. Howell, *Accountability and Local Elections: Rethinking Retrospective Voting*, 69 J. POL. 844, 845, 851–52 (2007) (finding a brief surge in retrospective voting in South Carolina school board elections driven by public interest in a new student-testing accountability system).

than it is today.<sup>60</sup> Ticket splitting happened more frequently in the 1960s, 1970s, and 1980s than it does today.<sup>61</sup> Gubernatorial votes by county correlated relatively weakly with presidential votes in the 1960s and 1970s, but now correlate more strongly than at any point since the 1940s.<sup>62</sup> Consistency between presidential and state legislative votes seems to be increasing as well, as Gary Jacobson has documented in California.<sup>63</sup> The high levels of ticket splitting from 1960 through the 1980s were a deviation from prior periods, when ticket splitting was much rarer.<sup>64</sup> Eras (like today) with “strong parties”—that is, with clear ideological divisions between parties and less internal variation within them—are correlated with low levels of ticket splitting by voters, even across levels of government.<sup>65</sup> As we see greater polarization, we should expect to see increasingly second-order state elections.

There is very little scholarship about the structural factors underlying second-order elections. My previous work, both individual and with Christopher Elmendorf, provides the most thorough effort to explain why we see second-order elections in the United States and Europe.<sup>66</sup> Because voters know little about individual candidates at lower levels of government, they often rely on preferences formed in relation to another level of government. As there is likely some degree of correlation (even if it is weak) between party stances at different levels of government, this reliance is rational.<sup>67</sup> The result is party-line voting across levels of government.

Minority parties at the local or state level *ought* to want to distinguish themselves on local issues to appeal to voters. But election laws often limit their ability to rebrand themselves.<sup>68</sup> The result is “mismatch”: local parties

60. See Elmendorf & Schleicher, *supra* note 9, at 400 fig.1.

61. ABRAMOWITZ, *supra* note 15, at 95–97; Gary C. Jacobson, *Partisan and Ideological Polarization in the California Electorate*, 4 ST. POL. & POL’Y Q. 113, 118 (2004).

62. Dan Hopkins, *All Politics Is Presidential*, FIVETHIRTYEIGHT (Mar. 17, 2014, 5:38 AM), <http://fivethirtyeight.com/features/all-politics-is-presidential/> [<https://perma.cc/NC66-HCSP>].

63. See Jacobson, *supra* note 61, at 124 fig.2 (showing a marked increase in shared variance between votes for the California Assembly and votes for the President).

64. See Joe Soss & David T. Canon, *Partisan Divisions and Voting Decisions: U.S. Senators, Governors, and the Rise of a Divided Federal Government*, 48 POL. RES. Q. 253, 256 fig.1 (1995) (detailing the increase in split senator–governor outcomes from 1962 to 1992).

65. See *id.* at 261 (explaining that when voters perceive party labels as less relevant, ticket splitting and divided outcomes become more common).

66. See generally Elmendorf & Schleicher, *supra* note 9; David Schleicher, *I Would, but I Need the Eggs: Why Neither Exit Nor Voice Substantially Limits Big City Corruption*, 42 LOY. U. CHI. L.J. 277 (2011); David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043 (2014) [hereinafter Schleicher, *Seventeenth Amendment*]; Schleicher, *supra* note 11; Schleicher, *supra* note 6.

67. Schleicher, *supra* note 6, at 451.

68. See *id.* at 450–51 (describing three “unitary party rules”: first, national parties are automatically entitled to enter candidates in local elections; second, loyalty rules forbid membership in multiple parties—say, one national and one local; and third, the First Amendment enables national parties to endorse candidates even in formally nonpartisan elections); see also Elmendorf

are organized according to splits at the national level and fail to develop locally specific platforms to compete for the median voter.<sup>69</sup> Further, even if parties do develop locally specific platforms, voters may not react.<sup>70</sup> Some substantial percentage of voters may have affective or social ties to national parties and thus support them in local elections regardless of preferences on local issues. And they may not trust platforms of minority parties that have not governed in a long time. For example, Wyoming Democrats have not had a majority in either house of the legislature since 1964; Massachusetts Republicans have not controlled either house since 1958.<sup>71</sup>

If the second-order voting that this mismatch model attempts to explain is a problem, primary elections are unlikely to do much to mitigate it. Second-order voting is either the result of an informational problem (voters lack information about a minority party's state-policy stance) or an organizational one (election laws do not allow minority parties to easily rebrand). Both of these problems become more acute at the primary level. Primary voters have even less ballot information, since there are no parties internal to the Democrats or Republicans, and thus voters cannot easily determine what faction within a party each candidate is associated with. So if a voter wanted to choose or reject, to reward or punish, say, the Tea Party, she could not easily determine this faction's membership among Republican legislators. Further, primary voters are unlikely to be particularly representative of the general population. State or local primaries will therefore do little to make state or local elections more representative or accountable.<sup>72</sup>

But regardless of its structural causes, second-order voting in state elections weakens state democracy. One might think that no harm results if citizens' preferred (national) party wins at the state level too. Pressing this argument even slightly, however, reveals its emptiness. First, elections should ensure both prospective representation (roughly, the fit between candidate platforms and voter preferences) and retrospective accountability for the performance of a state under a party or coalition's control. Second-order elections completely undermine the latter of these two democratic imperatives. If elections are second order, the *actual* votes of legislators and the *actual* performance of the state government will not affect elections.

Prospective representation also suffers when we see second-order elections. There is no reason to assume perfect correlation between voter

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& Schleicher, *supra* note 9, at 405–07 (discussing how local party building is limited by unified registration rules, which gut the local party's prospective primary electorate).

69. Elmendorf & Schleicher, *supra* note 9, at 367–68.

70. *See id.* at 403–05.

71. *See* MICHAEL J. DUBIN, PARTY AFFILIATIONS IN THE STATE LEGISLATURES: A YEAR BY YEAR SUMMARY, 1796–2006, at 94–95, 205–06 (2007).

72. *See* Elmendorf & Schleicher, *supra* note 9, at 388–90.



preferences on what states do and what the federal government does. The federal government does all sorts of things that states often cannot do as a constitutional matter: wage war, make foreign policy, engage in Keynesian deficit spending, use monetary policy to fight unemployment or inflation, and appoint Supreme Court judges—among other things.<sup>73</sup> Similarly, states decide issues that the federal government (largely) does not—like land use, property issues, and tort, contract, and family law.<sup>74</sup> Other issues are mostly state based and make up a far larger part of state budgets and policy making, like criminal law (90% of prisoners are in state prisons),<sup>75</sup> public infrastructure investment (85% funded by states and localities),<sup>76</sup> and education (88% funded by states and localities).<sup>77</sup> This is equally true at the local level in big cities, where it is often very hard to identify a consistent Republican or Democratic position on important policy questions.<sup>78</sup>

73. See U.S. CONST. art. I, § 10 (war, foreign policy, monetary policy); U.S. CONST. art. II, § 2 (Supreme Court justices); see generally NAT'L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS (Oct. 2010), <http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf> [<https://perma.cc/8V6N-WF8W>] (describing various state constitutional prohibitions on deficit spending).

74. See Steven G. Calabresi, *Does Institutional Design Make a Difference?*, 109 NW. U. L. REV. 577, 581 (2015) (“[T]he substantive law of contract, property, torts, inheritance, family law and criminal law are overwhelmingly areas of state law . . .”).

75. John F. Pfaff, *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 HASTINGS L.J. 1567, 1572–73 (2015) (finding that almost 90% of prisoners are in state prisons and that federal grants to states do little to encourage greater state incarceration rates).

76. BARRY BOSWORTH & SVETA MILUSHEVA, INNOVATIONS IN U.S. INFRASTRUCTURE FINANCING: AN EVALUATION 2 (2011), [https://www.brookings.edu/wp-content/uploads/2016/06/1020\\_infrastructure\\_financing\\_bosworth\\_milusheva.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/1020_infrastructure_financing_bosworth_milusheva.pdf) [<https://perma.cc/8BKA-54AV>].

77. *School Funding*, NEW AM., <https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/school-funding/> [<https://perma.cc/83DY-ZK23>].

78. What is the Democratic position on raising limits on building heights? On mayoral control of the schools? See Schleicher, *supra* note 6, at 440–45 (discussing polling data and newspaper endorsements in New York City’s mayoral elections as prime evidence that political commitments on national and local issues are not closely correlated); see also Fernando Ferreira & Joseph Gyourko, *Do Political Parties Matter? Evidence from U.S. Cities*, 124 Q.J. ECON. 399, 420–21 (2009) (using regression discontinuity design around close elections to find no systematic differences in policies adopted by Democrat- and Republican-controlled cities); Elisabeth R. Gerber & Daniel J. Hopkins, *When Mayors Matter: Estimating the Impact of Mayoral Partisanship on City Policy*, 55 AM. J. POL. SCI. 326, 330, 337 (2011) (using regression discontinuity design around close elections to find no systematic differences in fiscal policies outside of public-safety spending between Democratic and Republican mayors). But see Katherine Levine Einstein & Vladimir Kogan, *Pushing the City Limits: Policy Responsiveness in Municipal Government*, 52 URB. AFF. REV. 3, 4–5 (2016) (finding that Democrats spend more on social services, adopt more progressive taxation systems, and seek more intergovernmental transfers); Matthew E. Kahn, *Do Liberal Cities Limit New Housing Development? Evidence from California*, 69 J. URB. ECON. 223, 227 (2011) (finding that more liberal cities grant fewer housing permits than otherwise observationally similar cities in the same metropolitan area). Some degree of correlation between national party and local policy is to be expected—it is in fact *necessary* for the “mismatch model” discussed above to work (otherwise it would not be individually rational for voters to use their national-party preference in local elections). The question is one of degree. And local elections that follow national-party voting

Therefore, we should expect at least some differences between voter preferences on state and local issues and federal issues, meaning that second-order elections result in poor representation.

Even if the types of issues faced by the state and the federal government were exactly the same, though, prospective representation would *still* suffer. The preferences of the federal-level and state-level median voter are likely to differ; the median voter's bundle of preferences in Arkansas or New York probably doesn't match the federal median voter's preferences. If state-level party competition were decided by voters based on state-level policy preferences and state-specific retrospective evaluations, then state parties would tailor their platforms to the state median voter's preferences instead of following the stances of the national parties. Second-order elections thus rob the state median voter of her influence.

For these reasons, second-order elections undermine both prospective representation and retrospective accountability. The rest of the paper will discuss the implications of second-order elections for federalism theory.

## II. "You Keep Using That Word. I Do Not Think It Means What You Think It Means"<sup>79</sup>: Federalism as State Democracy, Not Just State Authority

How much federalism is optimal? How much does the Constitution require? These are perhaps the oldest and most debated questions in American constitutional law.<sup>80</sup> There are endless arguments over whether more or less should be done to protect the power of state governments through the courts, the political system, or inside federal statutory regimes. But, with a few exceptions, scholarly discussions and judicial opinions have largely elided a different question: What is federalism meant to protect?<sup>81</sup>

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do not produce as much responsiveness as they ought to (or as national elections due to national-voter preferences).

79. THE PRINCESS BRIDE (20th Century Fox 1987).

80. See *New York v. United States*, 505 U.S. 144, 149 (1992) (describing the "proper division of authority between the Federal Government and the States" as "perhaps our oldest question of constitutional law").

81. There are some exceptions. Most notable is the work of John McGinnis and Ilya Somin. Taking off from the well-known section from *New York v. United States*, 505 U.S. at 181–82, that argues that federalism must be protected from state officials who would like to cede responsibility to the federal government, McGinnis and Somin clearly distinguish a state's power to make policy decisions from what should be protected by constitutional guarantees of federalism. John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. Rev. 89, 89–92 (2004). Jim Gardner argues that national parties influence state politics as much as (if not more than) state parties influence national politics, and that federalism theory does not reflect this. James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 1 (2013). As I will argue below, I agree—although Gardner's account does not discuss why elections are second order or explain much about the connection between second-order elections and normative federalism theory.

The reason for this elision is that the answer may seem obvious. Larry Kramer stated the standard view: “[F]ederalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices.”<sup>82</sup>

This Part will show that the standard view is wrong. More specifically, it will show that the most common normative justifications for federalism are not premised on state regulatory authority as such, but rather on the ability of state majorities to choose policy outputs.<sup>83</sup> This is true whether “authority” refers to state autonomy or merely the state’s capacity to introduce differentiated state preferences into a federal policy process.<sup>84</sup> The quality of state democracy is central to virtually any possible justification for distributing power to states and protecting that allocation either structurally or constitutionally.

Although this Part will make the case on the basis of theory, the argument has deep roots in the American constitutional tradition. After all, although the Guarantee Clause has meant many things to many people, at the very least it makes clear that state democracy—a “republican form of

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82. Kramer, *Putting the Politics Back in*, *supra* note 26, at 222; *see also* Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEXAS L. REV. 1, 50–52 (2004) (“[I]t makes sense to look to the underlying values that federalism is generally thought to serve. . . . Autonomy . . . provides the common theme of all these arguments.”).

83. Malcolm Feeley and Edward Rubin reject the idea that federalism is the same as local democracy. They argue that “federalism reserves particular issues to subnational governmental units, regardless of the political process that exists within these units.” MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* 31 (2008). While it is not impossible to imagine systems of federalism that rely on nondemocratic subnational regimes, they are unlikely to produce many of the commonly cited benefits of federalism, as discussed below. And the quality of democracy matters a great deal if the subnational units’ claims to representation are based on elections. For Feeley and Rubin, the main benefit of federalism is that it protects distinct political identities inside a single country. If subnational elections become more second order—i.e., less representative of the preferences of locals on local issues—they will do less to achieve this end. If subnational entities’ claims to representation of distinct political identities are based on an elected form of government (rather than some other claim, like hereditary leadership), then the quality of those elections is more important than the formal authority of the unit.

84. There is substantial argument that, even in this era of cooperative federalism, scholars still focus too much on “autonomy”—that is, a state’s ability to make decisions unimpeded by federal oversight. Instead, these critics argue, we should understand state authority or power as the means to participate in national policy making, rather than as the power to legislate free of oversight. *See, e.g.*, Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014) (arguing that federalism’s value lies in its creation of a framework that facilitates negotiation between governments); Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7–8 (2010) (arguing that federalism gives minority factions a voice in national policy making). For what it’s worth, not much in this Article turns on whether states are acting autonomously or inside a national policy-making process. Even if we conceive of federalism as simply providing state officials with the means to present alternative viewpoints and participate meaningfully in national policy making, the quality of that participation will turn on whether state elections provide accurate representations of state voters’ preferences. Thus, there is no need to debate the point here.

government”<sup>85</sup>—is a bedrock principle of American constitutionalism.<sup>86</sup> At first glance, a distinction between state authority and state democracy may seem unimportant. After all, states hold elections, and expanding state authority gives power to the candidates who win those elections. But the distinction between state authority and the product of state democracy turns out to be important to a number of policy, legal, and theoretical disputes.

Second-order elections help explain the need for this distinction. First, giving authority to state governments may not produce policies that are particularly representative of local preferences or for which state officials are held accountable.<sup>87</sup> If the legislators in Albany win their seats in second-order elections, then increasing New York’s authority may not lead to policies much more agreeable to the people of New York than whatever the federal policy would have been otherwise. That is, the degree to which granting (or not denying) state authority *actually* achieves the goals of federalism will depend substantially on how well state democracy works.

Further, some federal policies that enhance state authority can actually retard the ability of majorities at the state level to choose state policy. Some forms of increased state authority will increase the degree to which state elections are second order—that is, the degree to which state majorities use state elections for something other than selecting state policies or retrospectively imposing accountability on state officials who have chosen ineffective policies. Anything that makes state elections more second order, including this sort of increase in state authority, harms the normative goals of federalism.

With this distinction (between state authority and the quality of state democracy) in mind, consider now some of the most common normative justifications for federalism. I will not be able to capture all the varied arguments in the literature here, but the best place to start is the Supreme Court’s discussion in *Gregory v. Ashcroft*<sup>88</sup>:

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85. U.S. CONST. art. IV, § 4.

86. “Like the apostle Paul, Republican Government has been ‘made all things to all men.’” Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (quoting 1 *Corinthians* 9:22). As Amar argues, “[t]he central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule.” *Id.* This understanding of republican government provides the roots of the theory of federalism this Part advances.

87. That said, one has to answer the “compared to what” question. Even if elections are second order, state authority may result in more responsive policy making than whatever the national government would impose, as at least Republican states will get Republican policies (and the same for Democratic states). But the *degree to which* devolution of power achieves the ends discussed below will turn substantially on how well state elections work at expressing state-level preferences. For most policy areas, there are reasons to nationalize and reasons not to, and where state democracy is working less well, the argument for devolution is relatively weaker.

88. 501 U.S. 452 (1991).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>89</sup>

The sources cited by the Court for this proposition—work by Michael McConnell and Deborah Merritt—add to this that federalism serves as a check on federal power, limits the principal-agent problems that arise as governments expand in size, produces greater legitimacy given wide differences in values across a large nation, and provides an outlet for differences in values and identity.<sup>90</sup> To these, one should add that federalism might promote good policy through cooperation between officials at two levels with different talents or sources of authority (cooperative federalism) or through disagreement and conflict (uncooperative federalism).<sup>91</sup> These are far from the only justifications one could provide for federalism doctrine or policies, but they are the ones that are offered most frequently.

Each of these justifications for federalism requires state democracy actually to function. More precisely, we will see (a) that policies that enhance state authority but detract from the majoritarianism of state democracy retard these values, and (b) that the quality of state democracy will determine the extent to which any allocation of power to states enhances these normative values of federalism.

A. *Democracy-Promoting Theories of Federalism and the Quality of State Elections*

Under some theories, constitutional protections for the states are good because they encourage policy formulation by a sovereign closer to the people—either because citizens can more easily monitor officials closer to home or because state lawmaking allows a better fit between preferences and policies in an expansive, heterogeneous society. If this is true, then the

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89. *Id.* at 458 (citations omitted).

90. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); see also Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853–57 (1979) (reviewing the advantages of localism and greater state autonomy).

91. See, e.g., ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 90–97 (2009) (defining and evaluating the concept of cooperative federalism); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1274–80 (2009) (developing a theory for uncooperative federalism and offering case studies of “interstitial dissent”).

quality of state democracy clearly matters.<sup>92</sup> If voters choose state legislators because of their copartisan president's stance on war in Iraq, rather than anything the state legislators themselves do, then state elections probably will not promote representative policies at the state level. If states are allocated authority to make policy in such a way that state officials' policy choices are not rewarded or punished at the ballot box, there is no reason to believe that these policies will be made according to local preferences.<sup>93</sup>

Further, certain types of increases in state authority can make elections more second order, and hence less representative of local preferences on policies the state makes. If voters select state legislators so that they, say, will gerrymander congressional districts in order to influence voting in Congress, state officials will not be held accountable for the results of state policy.<sup>94</sup> Thus, state authority—in this example, the power of state officials to draw congressional districts—can reduce the representativeness of state democracy regarding the issues for which states make public policy.

#### B. *Political-Identity Theories of Federalism and the Quality of State Elections*

Malcolm Feeley and Edward Rubin have argued that federal regimes exist to “resolve conflicts among citizens that arise from the disjunction between their geographically based sense of political identity and the actual or potential geographic organization of their polity.”<sup>95</sup> This argument for federalism clearly turns on state elections representing state-specific preferences. If political identity were solely centered on a state (if, for example, Texans defined themselves only as Texans and thought about politics through a Texan lens), then the political dynamics discussed in Part I would never occur. State elections would not be second order.

But political identity is often mixed in form (Texans identify both as Americans and as Texans). And identity-protecting theories of federalism end up relying quite heavily on the quality of state elections and thus are

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92. This is equally true for theorists who focus on the benefits federalism provides by creating multiple points of entry for interest groups and rights claimants. See generally Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006). As Resnik notes, “translocal” nonstate entities condition how much diversity and fit federalist arrangements create. Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-essentializing Jurisdictional Divides, and Temporizing Accommodations*, in FEDERALISM AND SUBSIDIARITY 363, 363–64 (James E. Fleming & Jacob T. Levy eds., 2014). Political parties are simply the most powerful translocal entities in state politics and, with rising polarization and second-order elections, entities that iron out differences between states in very dramatic ways.

93. And as discussed above, it turns out that state policies are only weakly connected to popular opinion at the state level. See Lax & Phillips, *supra* note 50, at 149 (indicating that “state policy is far more polarized than public preferences” (emphasis omitted)).

94. See Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1089.

95. FEELEY & RUBIN, *supra* note 83, at 38.

frustrated by second-order elections. If voters use elections to comment on national rather than state policies, then holding such elections likely weakens state identity formation. This idea is central to the work of constitutional-design theorists working under the banner of “centripetalism.” They argue that holding national elections can help overcome deep ethnic or cultural divisions in transitional democracies following civil wars or other democratic failures.<sup>96</sup> Centripetalists favor using election systems like single transferable voting or distributional requirements (requiring candidates to get a certain percentage of the vote in every state) to create national political parties because holding elections over national issues encourages voters to think like members of a national community rather than a provincial one.<sup>97</sup> To the extent that increases in state authority—for instance, having state legislatures appoint U.S. senators, as they did before the Seventeenth Amendment<sup>98</sup>—force state voters in choosing state officials to consider national politics to a greater extent, such increases undermine rather than protect distinct political identities in states.

### C. *Laboratories of Democracy and the Quality of State Elections*

States are often lauded as “laboratories of democracy,”<sup>99</sup> but the quality of state experiments turns crucially on how state elections function. As Susan Rose-Ackerman has noted, states innovate less than we might think because states lack property rights in their policy innovations and local politicians are risk averse.<sup>100</sup> If state officials are likely to win or lose without respect to their performance, but exclusively due to the performance of their copartisans, then there is even less reason to expect innovation.<sup>101</sup> To the

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96. See BENJAMIN REILLY, *DEMOCRACY AND DIVERSITY: POLITICAL ENGINEERING IN THE ASIA-PACIFIC* 83–91 (2006) (characterizing centripetalist mechanisms as designed to “break down the appeal of narrow parochialism or regionalism”); TIMOTHY D. SISK, *DEMOCRATIZATION IN SOUTH AFRICA: THE ELUSIVE SOCIAL CONTRACT* 17–55 (1995) (contrasting centripetalist and consociational theory in context of the negotiated transition to a new democratic political order); see also DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 569–70 (1985) (outlining key features of consociational theory). For a discussion of this literature, see Schleicher, *supra* note 11, at 149–52.

97. REILLY, *supra* note 96, at 85–86.

98. See *infra* Part III.

99. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

100. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 603–05 (1980) (identifying governmental innovations as “pure public goods,” therefore subject to the free-rider problem); see also Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1346–61 (2009) (discussing the free-rider problem in an assessment of Rose-Ackerman’s work).

101. A counternarrative should be noted. As entities that exist in multiple jurisdictions, national political parties have incentives to invest in “R&D” in the laboratories of democracy. Rose-

extent that general elections turn on national issues, risk-averse politicians seeking to stay in office, or to advance, will realize that their fates turn on primary elections—where ideological conformity, support from key political organizations, or fundraising may be more important than policy success.<sup>102</sup> And if increases in state authority further reduce the degree to which local politicians see electoral benefit from their successes, then so too will they reduce the politicians' incentive to innovate.<sup>103</sup>

#### D. *Competitive Federalism and the Quality of State Elections*

Second-order elections also reduce the benefits of interstate competition. The existence of mobile residents inside a federal system produces benefits by allowing individuals to choose where to live among many jurisdictions and, by doing so, to opt in to the jurisdiction's policies. This promotes fit between state policies and popular preferences, and creates accountability for officials worried that unpopular decisions will result in residential or capital flight. The classic version of fiscal federalism, the Tiebout Model, notably did not have a "supply side"—it simply assumed that governments would change policies in order to keep an optimal number of residents.<sup>104</sup> However, more recent Tiebout-based theories, like William Fischel's work, have incorporated the "supply side"—on the insight that the population is not as mobile as the classic model suggests because the attractions of particular agglomeration economies make populations sticky

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Ackerman's worry about a lack of property rights is thus obviated as parties (who likely won't steal from one another because of ideological differences) have incentives to experiment so they can export successful policies to other states they control. But this requires a particular view of political parties. They must be extremely centralized organizationally, but without much pressure from primary voters on state officials to toe the party's ideological line. Modern political parties are almost exactly the opposite, featuring very consistent ideologies but less in the way of internal political control. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 278–80 (2011) (describing the increase in parties' internal ideological consistency); see also Jonathan Martin, *Eric Cantor Defeated by David Brat, Tea Party Challenger*, in *G.O.P. Primary Upset*, N.Y. TIMES (June 10, 2014), <https://www.nytimes.com/2014/06/11/us/politics/eric-cantor-loses-gop-primary.html> [<https://perma.cc/XP7X-TM24>] (discussing the then-House majority leader's shocking, ideology-driven primary defeat). The specific state legislators trying out an innovation with an eye toward export would have to be more influenced by a scheming party chairman than worried about local ideologues who vote in primaries.

102. See Elmendorf & Schleicher, *supra* note 9, at 388–90 (discussing voter information in primary elections).

103. On the other hand, politicians in states with second-order elections may be less risk averse, as they will not see any electoral penalty for failures. They may lose the upside from innovating, but they also lose the downside. But even if this is the case—and it very well may be in some situations—the types of experiments these politicians undertake will be biased away from things that produce positive policy results for the state's general population and toward experiments that advance a narrower partisan agenda.

104. See Charles M. Tiebout, *A Pure Theory of Local Expenditure*, 64 J. POL. ECON. 416, 424 (1956) (arguing that diffusing power to many local governments will produce an optimal provision of local public services under some conditions).



and exit economically costly.<sup>105</sup> More efficient voice obviates the need for a potentially costly exit.<sup>106</sup>

To the extent that state elections become more second order, voice is less efficacious, and the system must rely on exit more extensively and at greater cost.<sup>107</sup> Further, when state elections turn on shifts in national-level politics, exit by mobile citizens may not actually harm incumbent officials. While state budgets are reduced by exit, incumbents still know their jobs will turn on the President's success and not their own.

Second-order elections also likely create less variation across jurisdictions. If states are either Republican or Democratic with little local flavor, mobile citizens will have fewer options and, as a result, public service will fit local preferences less well. If state authority increases the degree to which elections are second order, there will be less effective sorting and competition between states.<sup>108</sup>

#### *E. Cooperative Federalism and the Quality of State Elections*

Other normative theories in favor of federalism are altered by the problem of second-order elections and the resulting difference between state authority and state majoritarianism, although in several directions. For instance, theories of “interjurisdictional synergy” come in a variety of flavors, both cooperative or “polyphonic” (in Robert Schapiro’s nicely turned phrase)<sup>109</sup> and “uncooperative” or perhaps discordant (in Heather Gerken and Jessica Bulman-Pozen’s work).<sup>110</sup> Cooperative theories call for state and federal officials to work together, bringing to bear the representative, regulatory, and fiscal capacities of each to solve problems in areas where both have power to act.<sup>111</sup> Discordant or uncooperative theories focus on the

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105. See FISCHER, *supra* note 56, at 74–76 (noting that exit costs incentivize homeowners’ political participation); Wallace E. Oates, *The Many Faces of the Tiebout Model*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 21, 29–32 (William A. Fischel ed., 2006) (describing Fischer’s work as providing a supply side to the Tiebout Model). For a discussion of this work and an explanation for why agglomeration economies can explain why people do not sort in ways suggested by the Tiebout Model, see David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1535–40.

106. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 37 (1970) (explaining that voice, or direct influence, can function as an alternative or a complement to exit).

107. See Schleicher, *supra* note 105, at 1510–11 (discussing the costs of sorting).

108. Modern federalism is full of examples of just this. Republican-controlled Midwest states adopt the same type of right-to-work laws as Southern states, despite a median voter who is presumably more pro-labor. State exchanges under the ACA theoretically allowed for a great deal of state variation, but no Republican-controlled state adopted them, reducing diversity. And so on.

109. See SCHAPIRO, *supra* note 91, at 92.

110. See Bulman-Pozen & Gerken, *supra* note 91, at 1258–59.

111. SCHAPIRO, *supra* note 91, at 98–101. “Process federalism” ideas are similar in this regard. Under these theories, federalism incorporates existing or natural subnational governmental units like states into the national governing process because their legitimacy and efficacy will exceed that of the national government. See FEELEY & RUBIN, *supra* note 83, at 70–71. But granting powers

benefits created by allowing diverse subnational jurisdictions to “dissent by deciding,” creating concrete examples of alternatives to the preferences of national majorities, and allowing minorities to force majorities to overrule them, giving the minorities some degree of agenda control.<sup>112</sup>

If federalism is supposed to create beautiful interjurisdictional symphonies or useful discord from a polyphonic nation, then second-order elections reduce this synergy to a monotone (or, perhaps, to two notes repeating across the country). When state elections are second order, the nonformal capacities of federal and state authorities—that is, their ability to call upon popular support—become more similar. This affects both theories of interjurisdictional synergy. Strong organizational similarity between state and federal officials should make cooperation more likely, at least when the same party is in the White House and the statehouse (otherwise, cooperation becomes less likely). Discordant theories are changed in similar ways. If the state supports the national minority party, there is likely to be more disagreement and more use of uncooperative means to control the federal agenda (and if the state supports the majority party, then we might expect less disagreement than we would if state politics were more independent from national politics). Further, the use of uncooperative federalism is more likely to be on behalf of the national minority party and will not be used to the benefit of other types of dissenters or to add more dimensions to national politics.<sup>113</sup>

*F. Federalism as a Check on Federal Authority and the Quality of State Elections*

“Checks and balances” theories are similarly changed, but not necessarily weakened, by second-order elections. The existence of many states, each with some degree of autonomy, makes it harder for a national majority to achieve its objectives. Where state elections are second order, this effect becomes stronger at some times and weaker at others. Second-order elections make the President’s coattails longer, and state officials who will only be reelected if the President is popular will have incentives to push the President’s national agenda in areas where Congress cannot legislate (due to constitutional constraints or sheer lack of time and resources). However, where the President’s party is rejected in midterm elections, as is often the

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to states that make it harder for the states’ citizens to control state government reduces the states’ efficacy and legitimacy.

112. See Bulman-Pozen & Gerken, *supra* note 91, at 1263–64 (framing uncooperative federalism as an account of how integration “can empower states to challenge federal authority”); Gerken, *supra* note 84, at 61–62 (drawing a connection between federalism and First Amendment values). For what it is worth, it would be equally reasonable to see these theories as an aspect of checks and balances, discussed below.

113. See Schleicher, *supra* note 1, at 417–19 (discussing the implications of second-order elections for uncooperative federalism).

case, his power will diminish, and there will be greater checks on federal power.<sup>114</sup> Thus, increases in the degree to which state elections are second order will alternatively increase and decrease the extent of checks and balances in the system. In contrast, having state elections turn on state issues will mean a steadier check on the power of national officials.

### G. *The Quality of State Elections and Federalism Theory*

What the above shows is that, across theories of federalism, the functioning of state elections as a method for state voters to express preferences about state issues is crucial. That said, it does not follow that the existence of second-order elections means that we should not give any authority to states. First, even fully second-order elections express something about state-voter preferences on state issues. After all, there is likely some correlation between preferences on state issues and on federal issues (sometimes high, sometimes not so much). If there were not, it would be irrational for voters to use national-level preferences in state elections.<sup>115</sup> Thus, leaving power in state or local governments with purely second-order elections would achieve the ends of federalism to some extent. But the degree to which such state or local power achieves the traditional ends of federalism turns substantially on how well state elections express the preferences of state voters on state policy.

This Part is not intended to canvass the entire field of federalism studies—the field is too rich and too varied to do so adequately here.<sup>116</sup> What

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114. This is a generalization of the point made by Daryl Levinson and Rick Pildes. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006). They noted that the separation of powers does not work as the framers intended except where institutions like the Presidency and Congress are controlled by different parties. To the extent that states are another source of checks and balances, the same thing is true. States will check presidential power to a greater degree when they have electoral incentives to do so.

115. Unless, of course, their reasons for doing so are affective, expressive, instrumentally aimed at future federal elections, or otherwise motivated by something other than a desire to get preferred policies at the state or local level. See Elmendorf & Schleicher, *supra* note 9, at 396 (describing the rationality of uninformed voting and the implications of affective “Michigan Voters”).

116. For instance, Michael McConnell notes that devolving power is attractive because allowing Congress to make policy on issues that only affect one state is problematic. See McConnell, *supra* note 90, at 1493–96 (discussing the diversity of local interests and the costs of localized externalities). We are likely to see in these instances the problem of distributive politics. Every member of Congress might prefer low taxes and low spending to high taxes and high spending, but most also prefer to protect spending in their districts. The result of this can look something like a prisoner’s dilemma: a stable norm forms when each member protects her pork spending by not voting against anyone else’s. Devolution of power avoids this problem *even if* elections are largely second order. But increases in polarization and party identification, which also drive second-order elections, make distributive politics problems less likely. As party membership becomes more likely to drive voting patterns, pork becomes less important for creating majority coalitions. For a more detailed discussion on how greater polarization makes pork less needed, see David Schleicher, *How Polarization Cooked Congress’s Pork*, PRAWFSBLAWG (May 8, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/05/-how-polarization-cooked-congress-pork-.html> [https://perma.cc/3NS2-H2FF].

I hope the above discussion shows, however, is that to the extent that granting a power to states reduces the ability of state voters to achieve policy results, that grant of power reduces rather than enhances the values of federalism. This appears true across most common theories of federalism. The next Part will discuss a number of areas in which this distinction turns out to be important.

### III. State Authority v. State Democracy and the Problem of Second-Order Elections: Two Examples

The problem of second-order elections could theoretically influence any question about federalism or the devolution of powers. If devolution makes sense in the context of providing power to state democracy, and state democracy is functioning poorly, it follows that we ought to devolve less power when we see second-order elections (not zero, as discussed above, but less). If we devolve some policy choice to the states (or bar the federal government from entering) to some degree, and then we see state elections become more second order as a consequence, perhaps we ought to reduce the extent of that devolution or protection of state authority.

But one should be cautious. First, there are countervailing effects. If an increase in the degree to which local elections are second order means that devolving power results in, say, less variation and thus less sorting, we might say that we need to devolve more power because the amount of state variation is insufficiently low.<sup>117</sup> Second, and probably more importantly, such an argument relies on a curious assumption about how our prior notions about devolution are formed. If we come to our beliefs about how much power should be devolved through some process not informed by recent experience, by all means the discovery of second-order elections should cause us to shift those beliefs away from devolution. But if our preferences for devolution develop based upon our knowledge of how programs and doctrines have worked in practice over time (and we do not see shocks in the degree to which state elections are second order), we already will have factored in the problems of state democracy when developing our beliefs about how much power should be devolved.<sup>118</sup>

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117. The logic is like that of an income effect versus a substitution effect in tax policy. See JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 35–36 (2d ed. 2007).

118. This problem crops up in many discussions of voter ignorance. Consider Ilya Somin's fascinating book, ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2013). He notes that the lack of individual incentives to learn about politics leads to both ignorance and "rational irrationality" (roughly, incentives to have a coherent worldview even if it is not based on facts or likely outcomes). *Id.* at 62–66, 78–83. Rather than rely on voters cursed with such problems, Somin argues, we should devolve power to states, localities, and individuals because people engaged in "foot voting," or choosing where to live, have better incentives to become informed than voters at the ballot box. *Id.* at 121–25. Whatever one makes of this claim, Somin's argument only provides a reason to believe in "smaller" government relative to some baseline, not in any particular level of "small" government. As long as one's beliefs

This does not mean that our beliefs about federalism should not be influenced by understanding second-order elections. To start, during periods of political change, we should be skeptical about evidence and examples drawn from substantially earlier periods. If a new cooperative federalism policy is imagined, examples about how states behaved under similar programs in the 1970s, when state politics was more distinct from federal politics, may not tell us much.

Two other lessons are possible. Where policies increase the degree to which elections are second order, we should be more skeptical of them on federalism grounds. And where powers are devolved not simply to states as entities, but rather to particular institutions and individuals inside states, we can see that the choice among those institutions and individuals has implications for the normative ends of federalism discussed in Part II. This Part will discuss these lessons through contemporary debates about repealing the Seventeenth Amendment, the design of cooperative federalist regimes, and states' separation-of-powers doctrines.

#### A. *The Seventeenth Amendment and Constitutional Design*

Over the past half decade, a large group of conservative politicians, jurists, and activists have gravitated to constitutional reform as a method of limiting the power of Washington and increasing the power of states.<sup>119</sup> Perhaps the group's most-widely-agreed-upon pro-federalism constitutional reform is repeal of the Seventeenth Amendment, which gave voters rather than state legislatures the power to choose U.S. senators. Senators Ted Cruz, Jeff Flake, and Mike Lee have all raised their voices in criticism of the Seventeenth Amendment, as have a host of members of the House, as well as other prominent figures like columnist George Will and radio host and author of a bestselling book on constitutional law Mark Levin. Even the late Justice Antonin Scalia joined in.<sup>120</sup>

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about how large the federal government should be were developed through experience and testing using evidence from periods when many voters were both ignorant and rationally irrational, there is no reason to change those beliefs upon realizing the problem of voter ignorance. To do so would be to account for the problem twice.

119. David Schleicher, *States' Wrongs: Conservatives' Illogical, Inconsistent Effort to Repeal the 17th Amendment*, SLATE (Feb. 27, 2014, 11:20 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/02/conservatives\\_17th\\_amendment\\_repeal\\_effort\\_why\\_their\\_plan\\_will\\_backfire.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/conservatives_17th_amendment_repeal_effort_why_their_plan_will_backfire.html) [https://perma.cc/R6Y6-YEYNT].

120. *Id.*; Alan Greenblatt, *Rethinking the 17th Amendment: An Old Idea Gets Fresh Opposition*, NPR (Feb. 5, 2014), <http://www.npr.org/blogs/itsallpolitics/2014/02/05/271937304/rethinking-the-17th-amendment-an-old-idea-gets-fresh-opposition> [https://perma.cc/YJ6K-5KVS]; George F. Will, *Sen. Feingold's Constitution*, WASH. POST (Feb. 22, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/20/AR2009022003034.html> [https://perma.cc/6XN2-R3TF].

The argument above—as I have shown elsewhere<sup>121</sup>—reveals why this “reform” is premised on a severely problematic concept of federalism. Repealing the Seventeenth Amendment would be terrible for federalism because it would make state elections even more second order than they already are. State policy would track the preferences of state voters less well because all of the focus in state legislative elections would be on their effect on the U.S. Senate. The effect that state legislative appointment of U.S. senators had in making state elections second order was, in fact, central to the argument in favor of passing the Seventeenth Amendment in the first place.<sup>122</sup> Today’s constitutional reformers fail to heed the lessons of history and, as a result, propose something in the name of federalism that would be quite damaging to constitutional federalism’s values.

Prior to the passage of the Seventeenth Amendment, senators were chosen by state legislatures.<sup>123</sup> But contrary to the understandings offered by modern supporters of repeal, this did not mean that state-focused figures pondered which candidate among many would be best for the interests of the state.<sup>124</sup> Instead, state legislative elections were frequently led by candidates for U.S. Senate over national issues.<sup>125</sup> The most famous example of this “public canvass” was the 1858 election in Illinois.<sup>126</sup> Neither Stephen Douglas nor Abraham Lincoln was on the ballot, but they campaigned for U.S. Senate on behalf of their copartisans; the election was seen as a referendum on the Senate race.<sup>127</sup> Following the nationalizing of party organizations in the 1870s and the realigning election of 1896, national parties developed clearer stances on national issues, and state legislative elections became increasingly second order.<sup>128</sup> By the 1890s, newspapers criticized state legislative candidates for even talking about state issues rather than national ones like the tariff or monetary policy.<sup>129</sup>

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121. This subpart largely summarizes the case made in Schleicher, *Seventeenth Amendment*, *supra* note 66 and Schleicher, *supra* note 119 and fits it into the broader argument of this paper.

122. See Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1075–78 (presenting evidence that “the effect of senatorial appointment on state legislative elections was a key concern in the debate in Congress over the Seventeenth Amendment”).

123. U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

124. See Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1075–76.

125. *Id.*

126. *Id.* at 1055.

127. For a terrific history of the Lincoln–Douglas Senate race, see generally Allen C. Guelzo, *Houses Divided: Lincoln, Douglas, and the Political Landscape of 1858*, 94 J. AM. HIST. 391 (2007). Notably, and rarely discussed, in 1858 Republicans won a majority of the popular vote in both the state house and state senate, but Douglas was reelected because of the way legislative seats were apportioned. *Id.* at 414–16.

128. For further discussion, see Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1055–1058, 1065–71.

129. See *id.* at 1080–81; *They Want to Dodge National Issues*, CHI. TRIB., May 14, 1894, at 6 (“Do these Democratic State Senators think the voters can be called off from the national issues involved in the direct election of Representatives and the indirect election of a Senator to consider

State legislators and powerful state interest groups did not simply accept this move toward national elections. In states around the country, state legislatures began to move away from choosing senators long before the Seventeenth Amendment was enacted. They began calling for a constitutional amendment during the 1880s and 1890s, and eventually a number of states passed resolutions calling for a constitutional convention for the purpose of ending appointment by state legislatures.<sup>130</sup> At the same time, states began instituting electoral reforms. States passed laws requiring direct primaries for Senate candidates, tying legislators' hands about the identity of each party's candidate.<sup>131</sup> And some states moved to the "Oregon System," under which a formally nonbinding direct election for senators was held, the winner of which state legislative candidates pledged to support.<sup>132</sup>

The effect of senatorial appointment on state legislative elections was central both to the public campaign for the Seventeenth Amendment and in debates on the floor of Congress. One early advocate, Senator John Mitchell, argued that a "vital objection to the choosing of Senators by the legislatures" is that "the question of senatorship . . . becomes the vital issue in all such campaigns, while the question as to the candidate's qualifications or . . . the views he entertains upon the great subjects of material interest to the State . . . is wholly ignored . . ."<sup>133</sup> Another Senator argued that "legislators are elected with reference to the vote they will cast for Senator . . . and the national interests, the party interests, are so overwhelming in comparison with those of the people of the States . . . [that] if they elect a Senator who is satisfactory to the party in power all their shortcomings in regard to the interests of the people of their States are forgiven . . ."<sup>134</sup> Debate in the House was similar.<sup>135</sup> The leading scholar studying the movement for the Seventeenth Amendment during the early twentieth century noted that its "advantage to the state and local governments" was central to the case for the Amendment.<sup>136</sup> State legislative appointment put voters in a "most embarrassing dilemma," voting in state legislative elections, between voting for the party of the senator they preferred or the party who they supported on state issues.<sup>137</sup>

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only local questions? That they will drop the Wilson bill and devote their attention to the establishment of a Police Board in Chicago?").

130. For further discussion of these movements, see *id.* at 1055–57.

131. *Id.* at 1055.

132. *Id.* at 1056.

133. John H. Mitchell, *Election of Senators by Popular Vote*, FORUM, June 1896, at 385, 394, <http://www.unz.org/Pub/Forum-1896jun-00385> [<https://perma.cc/96M7-QBUB>].

134. 28 CONG. REC. S6160–61 (June 5, 1896) (statement of Sen. Palmer).

135. Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1077–78.

136. GEORGE H. HAYNES, THE ELECTION OF SENATORS 180 (American Public Problems, Ralph Curtis Ringwalt ed., 1906).

137. *Id.* at 185.

Repealing the Seventeenth Amendment would make state legislative elections more second order. Today, voters rely on federal-level cues in state legislative elections for informational and affective reasons. Relying on one's national-level preference in state elections makes sense for individuals (if not for society) when voters know little about the state party's performance and where there is likely a correlation between preferences on state issues and on federal issues (which there surely is). And it makes sense for individuals when party membership is a group identity and furthering the group's success provides psychic benefits.<sup>138</sup> But state legislative appointment of senators would add a perfectly rational reason for even well-informed, non-affective voters to follow national-level preferences in state legislative elections. And it would give national-level interest groups an even greater incentive to get involved in state legislative elections.<sup>139</sup>

While repealing the Seventeenth Amendment would increase state authority, it would reduce the degree to which state elections turn on state issues. Thus, it would reduce the quality of state democracy. As argued in Part II, this would undermine federalism's normative goals. The conservatives supporting repeal of the Amendment fly the flag of federalism but work against its operation.

Further, the logic that applies to the Seventeenth Amendment also applies to all state election laws. State legislatures are the central players here: they draw congressional district lines, determine ballot access and voter qualifications, and generally conduct elections.<sup>140</sup> These are powers of the state, but they also force state voters to think about the effect of their vote for state legislature on future congressional and presidential races. Given that context, state authority over election laws likely reduces the degree to which state elections produce responsive and accountable state governance.

*B. State Democracy v. State Authority: Executives v. Legislatures as Agents of Federalism*

For most federalism scholars, the study of federalism stops at the statehouse door<sup>141</sup>: States are the proper subject of questions about the

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138. Cf. Elmendorf & Schleicher, *supra* note 9, at 375, 380 (noting that party identification exerts "a powerful pull on voters' choices and even their opinions on issues").

139. Not that they need much encouragement. See Republican State Leadership Comm., *2012 REDMAP Summary Report*, REDMAP (Jan. 4, 2013), <http://www.redistrictingmajorityproject.com/?p=646> [<https://perma.cc/C6YK-C7BT>] (celebrating the GOP's successful initiative to win control of state legislatures ahead of decennial redistricting).

140. See Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 553 (2015) (noting the tremendous power that states have in running federal elections).

141. Not everyone, of course. For some prominent examples, see generally Fahey, *supra* note 34 (discussing the federalism implications of federal statutes that give different state actors the power to sign off on cooperative federalism arrangements); Gerken, *supra* note 84 (arguing that federalism should be understood as encompassing all devolutions of power); Hills, *supra* note 34 (discussing under what conditions the federal government can allocate money or regulatory



allocations of power, and it is up to them to decide how to allocate power internally. One of the centerpieces of modern federalism—the *Erie* doctrine—is partially premised on exactly this understanding, that it is not the place of federal officials to decide between different lawmaking sources at the state level.<sup>142</sup> If states possess authority to make certain decisions, they also have authority to decide how to decide.

But if the focus is on the quality of state democracy, then it matters which entities within states make decisions. The problem of second-order elections exists to a different extent for different officials. Whether a governor or state legislature is left to decide an issue will affect whether it results in greater fit to state-specific preferences, and therefore also in greater policy variation across states, or whether delegation to state governments reflects something more like a division of power among national parties.

This subpart will focus on conflicts between legislatures and executives, although one could just as easily focus on conflicts between state governments and localities, between executives and courts, or between any other divisions inside state government. The problem of second-order elections should also inform a whole variety of policy proposals and judicial decisions<sup>143</sup> about the relative influence of the executive and legislative branches at the state and local level. To narrow the scope, I will discuss two types of health regulation.<sup>144</sup>

1. *The Affordable Care Act (ACA)*.—Under the terms of the ACA and following Health and Human Services (HHS) regulations, an application by a governor is sufficient to establish a state-based health insurance exchange.<sup>145</sup> Medicaid expansions, including expansions under the ACA, require a peculiar process of proposals and comments between a state’s Medicaid agency and its governor. This has led to a number of conflicts. In

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authority to state agencies and local governments in the face of opposition from the state legislature); Judith Resnick et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008) (discussing the role of translocal organizations in shaping the practice of federalism); Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE L. & POL’Y REV. 149 (1996) (discussing how the institutional structure of states—from the size of agencies to the number of legislators—and the relationship between state and local governments affects our federalism).

142. Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL’Y 17, 108–09 (2013).

143. I am not going to discuss the doctrine or legal materials in these cases. I mean something like “the effects of legal decisions” and not the degree to which they are “rightly” decided according to some interpretive theory.

144. These just happen to be useful examples; one can find many others. For instance, Cristina Rodriguez shows that state and local executives making immigration policy are far more flexible than state legislators. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581–90 (2008).

145. See Bridget A. Fahey, *Health Care Exchanges and the Disaggregation of States in the Implementation of the Affordable Care Act*, 125 YALE L.J. F. 56, 57–58 (2015).

Mississippi, the insurance commissioner attempted to establish an exchange but was not allowed to do so under the terms of governing regulations.<sup>146</sup> In Kentucky, Democrat Steve Beshear succeeded in creating a state-based health insurance exchange and expanding Medicaid coverage under the Act, over the opposition of Republicans in the state legislature, using executive authority to accept federal money granted under previously passed statutes.<sup>147</sup> The Governor of Ohio, Republican John Kasich, pushed through Medicaid expansion over Republican legislative opposition, acting through a hybrid legislative–executive agency created to accept federal money.<sup>148</sup> These expansions were opposed by Republican state legislatures and were challenged in state courts as excessive uses of executive authority.<sup>149</sup> Nine states have passed laws explicitly barring governors from expanding Medicaid or establishing state-based health insurance exchanges without legislative approval.<sup>150</sup>

The regulations governing state exchanges are a straightforward effort to give authority to the parts of states most responsive to local opinion and least tied to Washington’s political fights. As Bridget Fahey notes, the federal government frequently designates who speaks on behalf of a state for the purpose of agreeing to the terms of cooperative federalist programs.<sup>151</sup> HHS regulations assigned the power to establish exchanges to governors—

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146. See Fahey, *supra* note 34, at 1564–65 (describing the Mississippi Insurance Commissioner’s rejected effort to establish a state-based exchange).

147. In 2012, the Governor issued executive orders to establish the exchange and accept Medicaid money for expansion. He issued new executive orders reestablishing them in 2014. See Matt Young, *Beshear Reauthorizes Health Care Exchange, Again Sidestepping State Lawmakers*, LEXINGTON HERALD-LEADER (July 2, 2014), <http://www.kentucky.com/news/politics-government/article44496006.html> [<https://perma.cc/P95T-UPBM>].

148. See Trip Gabriel, *Medicaid Expansion Is Set for Ohioans*, N.Y. TIMES (Oct. 21, 2013), [http://www.nytimes.com/2013/10/22/us/medicaid-expansion-is-set-for-ohioans.html?\\_r=0](http://www.nytimes.com/2013/10/22/us/medicaid-expansion-is-set-for-ohioans.html?_r=0) [<https://perma.cc/PBW3-346C>].

149. See *id.* (describing Ohio Republicans’ opposition to Medicaid expansion); Mike Wynn, *Medicaid Expansion Can Go On, Judge Decides*, COURIER-JOURNAL, July 27, 2013, at B1 (reporting a Kentucky court’s decision not to enjoin Medicaid expansion); State *ex rel.* Cleveland Right to Life v. State of Ohio Controlling Bd., 3 N.E.3d 185, 192 (Ohio 2013) (rejecting a challenge to the Controlling Board’s authority to approve increased Medicaid funding).

150. See Richard Cauchi, *State Laws and Actions Challenging Certain Health Reforms*, NAT’L CONF. ST. LEGISLATURES (July 1, 2016), <http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx> [<https://perma.cc/2NR-7-D4T6>].

151. Fahey, *supra* note 34, at 1564. Fahey argues that giving the federal government—unchecked by the Supreme Court—the power to make these decisions can “turn state-federal collaboration into state-federal assimilation.” *Id.* at 1571. This critique assumes that if the states instead were to determine their structures for accepting federal money, those structures would maximize the benefits of federalism. But it may be that a state’s chosen structure would serve other ends, like maximizing the power of the national party favored in the state. Allocations of authority among state officials should be analyzed for whether they go to figures more likely to adopt state-specific preferences or to those more likely simply to reflect national-party concerns. Either allocation may be justified, but it is not the case that privileging organizational structure chosen by a state government necessarily enhances diversity, sorting, local democracy, etc.

high-profile executives facing elections are less likely than other state elections to be second order. In contrast, state-insurance-commissioner elections are lower profile and candidates are less likely to represent the state median voter. By assigning this responsibility and power to a governor instead of a state agency, federal regulations actually further federalism values.

In the Medicaid-expansion litigation, we can see the same federalism issues emerging in cases about state statutory interpretation and state constitutional law.

In Ohio, for example, the Controlling Board—a strange, hybrid legislative–executive body<sup>152</sup>—is able to authorize state agencies to apply for and accept federal money,<sup>153</sup> but it “shall take no action which does not carry out the legislative intent of the general assembly regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the general assembly.”<sup>154</sup> After the Controlling Board voted to accept Medicaid expansion, its decision was challenged in court.<sup>155</sup> Challengers argued that the passage through the legislature of a bill barring the state from expanding Medicaid, which was vetoed by the Governor, should be understood to limit the power of the Controlling Board.<sup>156</sup> The statutory interpretation question was thus whether “legislative intent of the general assembly . . . as expressed in the prevailing appropriation acts of the general assembly” meant only laws passed into effect, or whether it included laws passed by the general assembly that did not actually become law. The Ohio Supreme Court held that the Controlling Board was only limited by actual laws and not vetoed ones.<sup>157</sup>

As noted in Part I, gubernatorial elections are less second order than state legislative ones. Policy changes or the performance of the state economy during a governor’s term can have a substantial effect on her reelection chances—but they hardly make a difference in state legislative elections, in which national-party preference plays a larger role. The Ohio Supreme Court’s decision thus had the effect of privileging state residents’ distinct preferences about state policy.

On the other hand, governors are also elected at a given time and in a given context, which should lead to greater variation in their behavior, as a

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152. The Controlling Board is made up of: one executive appointee; two members from the majority party and one member from the minority of the Ohio House of Representatives; and two members from the majority and one from the minority of the Ohio Senate. OHIO REV. CODE ANN. § 127.12 (West 2016).

153. *Id.* § 131.35(A)(5).

154. *Id.* § 127.17.

155. *State ex rel. Cleveland Right to Life v. State of Ohio Controlling Bd.*, 3 N.E.3d 185, 190 (Ohio 2013).

156. *Id.* at 191.

157. *Id.*

scandal, personal characteristics, a candidate's capacity to raise money, etc., can introduce a lot of randomness. As multimember bodies, state legislatures are more likely to accurately express the preferences of state voters on issues where the correlation between national-level politics and state-level politics is high. The court's reading of the statute was hostile to this interest. Further, as Jessica Bulman-Pozen argues, voters may vote in state elections in order to influence national politics rather than to change state policies.<sup>158</sup> As state legislative elections are more second order than gubernatorial ones, legislatures are more likely to advance this "partisan federalism" interest. The ACA is probably the best example that exists for this claim. In 2010, voters surely voted in state elections partially to comment on the ACA, giving Republicans huge wins across many states.<sup>159</sup> To the extent that state law ought to maximize the degree to which state voters can and do use state elections to influence national debates or advance their national preferences, the Ohio decision retarded this goal.

In Kentucky, the question was whether accepting federal Medicaid money to expand the program violated the state's nondelegation doctrine.<sup>160</sup> Kentucky law provides that "it is the policy of the Commonwealth to take advantage of all federal funds that may be available for medical assistance."<sup>161</sup> Previous Kentucky decisions had applied a version of the nondelegation doctrine similar to federal constitutional law, limiting legislative decisions to delegate to an administrative agency only if there were no "sufficient standards controlling the exercise of that discretion."<sup>162</sup> And in ACA litigation a trial court dismissed a complaint that the law violated this rule.<sup>163</sup> In the context of second-order elections, a loose nondelegation doctrine furthers the goal of state policy being more responsive to state voters on state issues, but also reduces the degree to which state officials will be direct participants in national partisan conflict.

2. *The Soda Ban.*—We can see similar themes emerge even when the federal government is in no way involved. State courts frequently invoke federal precedent when deciding separation-of-powers cases. But the problem of second-order elections and differences in the level of bureaucratic remove give the same doctrines very different meanings.

In 2014, the New York Court of Appeals held that the New York City Board of Health under Mayor Michael Bloomberg had overstepped its authority by barring restaurants and stores from selling sodas in containers

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158. See *infra* subpart IV(B).

159. See Brendan Nyhan et al., *One Vote Out of Step? The Effects of Salient Roll Call Votes in the 2010 Election*, 40 AM. POL. RES. 844, 862–63 (2012) (estimating that Democrats lost twenty-five House seats solely on the basis of backlash to the ACA).

160. *Adams v. Commonwealth*, No. 13-CI-605, slip op. at 1–2 (Ky. Cir. Ct. Sept. 3, 2013).

161. KY. REV. STAT. ANN. § 205.520(3) (LexisNexis 2013).

162. *Holtzclaw v. Stephens*, 507 S.W.2d 462, 471 (Ky. 1974).

163. *Adams*, slip op. at 4–5.

larger than sixteen fluid ounces.<sup>164</sup> The court reasoned that the board's regulation "involved more than simply balancing costs and benefits according to preexisting guidelines; the value judgments entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch."<sup>165</sup> The court thus reaffirmed a precedent that put far sharper nondelegation-doctrine limits on local legislatures than there are on Congress.<sup>166</sup>

The "soda ban" case, *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*,<sup>167</sup> shows how misleading it can be for courts to use separation-of-powers analogies across levels of government.<sup>168</sup> In *Statewide Coalition*, the Court of Appeals applied a test developed in a previous case, *Boreali v. Axelrod*,<sup>169</sup> to overturn the Board of Health's limit on the size of sodas.<sup>170</sup> *Boreali*, relying largely on materials developed to understand the federal Constitution, developed a four-factor test to determine whether there has been an excessive delegation of power from the legislature to a regulatory agency.<sup>171</sup> This test required the court to ask: (1) whether the agency in issuing regulations impermissibly balanced concerns from within its expertise with other concerns and thereby engaged in impermissible policy making; (2) whether the regulation was created on a "clean slate" (a stronger version of the "intelligible principle" concept); (3) whether the legislature had previously considered addressing the issue; and (4) whether the regulation required the agency's "special expertise or technical competence" (which is largely repetitive of the first factor).<sup>172</sup> New York courts consider these four "coalescing circumstances" together to determine whether "the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed."<sup>173</sup> The court in *Statewide Coalition* noted that *Boreali* applied because the New York City Charter includes a "doctrine of separation of powers" and argued that "[a]ny *Boreali* analysis

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164. N.Y. *Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 16 N.E.3d 538, 541 (N.Y. 2014).

165. *Id.* at 547.

166. States vary substantially in how they apply the nondelegation doctrine, ranging from a relatively lax approach to one much stricter than that taken by federal courts. See Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 560–62 (2001) (highlighting Texas as an example of the stricter approach).

167. 16 N.E.3d 538 (N.Y. 2014).

168. The discussion here is largely informed by a brief in *Statewide Coalition* written by a group of law professors. See generally Brief of Amici Curiae, Paul A. Diller et al., in Support of Respondents-Appellants, *Statewide Coalition*, 16 N.E.3d 538 (APL 2013-00291).

169. 517 N.E.2d 1350 (N.Y. 1987).

170. *Statewide Coal.*, 16 N.E.3d at 549.

171. *Boreali*, 517 N.E.2d at 1355–56.

172. *Id.*; see also *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

173. *Boreali*, 517 N.E.2d at 1355; *Statewide Coal.*, 16 N.E.3d at 545–46.

should center on the theme that ‘it is the province of the people’s elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.’”<sup>174</sup>

The court focused on the first *Boreali* factor. By making soda sales inconvenient but not impossible, the court ruled, the agency’s rule “embodied a compromise that attempted to promote a healthy diet without significantly affecting the beverage industry,” which “implied a relative valuing of health considerations and economic ends . . . . Moreover, it involved more than simply balancing costs and benefits according to preexisting guidelines; the value judgments entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch.”<sup>175</sup> Further, because the Board of Health considered other ways of limiting the effect of soda on obesity (from providing public information to banning soda sales), the choice of an “indirect means achieving compliance with goals of healthier intake of sugary beverages was itself a policy choice.”<sup>176</sup> When administrators choose information-forcing requirements or outright bans, “personal autonomy issues related to the regulation are nonexistent and the economic costs either minimal or clearly outweighed by the benefits to society, so that no policy-making in the *Boreali* sense is involved.”<sup>177</sup> But the choice of a middle ground implicated “policy” in ways that disclosure requirements or an outright ban on an unsafe product did not.

The court’s distinction between disclosure or outright bans on the one hand and maximum sizes on the other is quite strange. Requiring disclosure of calories would have clearly had an effect on personal autonomy (a form of required speech, by some lights).<sup>178</sup> Such rules are regularly the subject of major political debates, and it is unclear whether they actually promote healthier eating (or just greater guilt).<sup>179</sup> Similarly, regulations that ban products that are demanded by some consumers but pose substantial public health risks can be very “difficult or complex.”<sup>180</sup> The distinction the court sought to draw between clear subjects for regulation and complex policy questions is both impossible and silly.

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174. *Statewide Coal.*, 16 N.E.3d at 545–46 (quoting *Boreali*, 517 N.Y.2d at 1356).

175. *Id.* at 547.

176. *Id.*

177. *Id.*

178. See *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 621–36 (D. Vt. 2015) (discussing a First Amendment challenge to a Vermont food-labeling law).

179. Compare Bryan Bollinger et al., *Calorie Posting in Chain Restaurants*, AM. ECON. J.: ECON. POL’Y, Feb. 2011, at 91, 113 (finding that calorie posting was associated with a 6% reduction in calories per transaction at Starbucks stores), with Eric A. Finkelstein et al., *Mandatory Menu Labeling in One Fast-Food Chain in King County, Washington*, 40 AM. J. PREVENTIVE MED. 122, 125 (2011) (finding no significant effect).

180. Think of debates about drug legalization.

But the bigger problem with the opinion is that it continues *Boreali*'s strict rule of limiting regulatory agencies from making policy determinations. The court argued that the Board of Health engaged in "policy-making, not rule-making," in violation of the state constitution.<sup>181</sup> The *Boreali* and *Statewide Coalition* version of the nondelegation doctrine thus substantially limits the ability of the state legislature or of city councils to devolve the power to make policy decisions to administrative agencies. Despite relying exclusively on materials created to understand the federal Constitution, the New York Court of Appeals created a doctrine far stricter than its almost nonexistent federal counterpart, which only requires that Congress give agencies an "intelligible principle" to guide rule making.<sup>182</sup>

What's stranger still is that the effect of a strict nondelegation doctrine is almost certainly different at the local level than it is at the state level. Supporters of a stricter federal nondelegation doctrine worry about vast, unaccountable bureaucracies displacing the decisions of a democratically accountable (but lazy or craven) Congress.<sup>183</sup> Or they worry about entrenchment by a Congress seeking to ensure that a friendly president or bureaucracy can continue to govern even after the coalition currently in charge is out of power.<sup>184</sup> In contrast, opponents of the nondelegation doctrine (and the federal courts) argue that Congress frequently wants to, and should have the power to, leave such decisions in the hands of apolitical experts or presidential designees, and is unlikely to excessively limit its own power.<sup>185</sup>

At the local level, a nondelegation doctrine is likely to have almost the exact opposite effect that it has at the national level. While turnout for presidential elections is greater, both congressional and presidential races are largely referenda on the popularity of national political parties. The local level is very different. Mayors, due to their high profile, are judged at least somewhat on their performance in office.<sup>186</sup> In contrast, elections to city council can be almost entirely second order, with general elections turning

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181. *Statewide Coal.*, 16 N.E.3d at 548.

182. See David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1387 (2011) (describing the modern nondelegation doctrine); see also Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (noting that the nondelegation doctrine "has had one good year [1935], and 211 bad ones (and counting)").

183. See, e.g., Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1466–67 (2015) (arguing that delegation makes Congress less accountable as an entity and allows individual legislators to influence policy through control over agencies without owning those decisions).

184. *Id.* at 1479.

185. See, e.g., Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2148 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1744–45 (2002); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 494 (1987).

186. See Arnold & Carnes, *supra* note 58, at 951–52.

on the President's popularity in the district.<sup>187</sup> The national-level worry about a shift of power from the politically accountable to the insulated should be reversed. Similarly, state and local bureaucracies are less likely to be vast and insulated from politics. Local mayoral agencies are more likely than the city council to be responsive to majoritarian opinion.<sup>188</sup>

Further, consistency of control is higher in city councils. Parties often dominate city councils for decades, whereas mayoral races feature more competition.<sup>189</sup> On average, delegating power will not result in entrenchment; keeping power in the city council will.<sup>190</sup> On the other hand, we should expect substantially less expertise from smaller, less-well-funded local agencies than we do from national agencies. So even if we are more respectful of their claims of democratic responsiveness, we should be comparatively more skeptical of their claims of apolitical knowledge.

The *Boreali* and *Statewide Coalition* courts got local administration almost entirely backward. They misunderstood federal law, using federal constitutional materials—a case here, a treatise there—and invocations of common constitutional principles like the separation of powers to create a rule far stricter than applies at the federal level. And then they failed to consider the differences between state and local government on the one hand and the federal government on the other, creating a doctrine skeptical of the thing local administrative agencies might be good at (representing majoritarian opinion) and trusting of the things they are less likely to be good at (apolitical expertise).

### C. *On What Types of Questions Should Proponents of Federalism Focus?*

Attention to the problems created by second-order elections should change the range of issues that are considered part of the debate over federalism. Scholars, judges, and policy makers should recognize that the quality of state democracy is as important as the authority of state governments in producing the ends of federalism, like fit between preferences and policy, laboratories of democracy, variation that permits foot voting, etc. Doing so will force those interested in federalism to look beyond divisions of power between the federal and state governments and to consider allocations of power inside states and how state and federal policies affect the quality of state elections.

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187. See Schleicher, *supra* note 6, at 459. This is despite party labels carrying only very weak information about the policy stances of candidates on local issues. Elmendorf & Schleicher, *supra* note 9, at 397–98.

188. Or at least there is less likely to be a major difference in responsiveness than there is at the federal level.

189. Schleicher, *supra* note 6, at 420.

190. By party. The council does have term limits, but then again so does the mayor.



#### IV. Federalism Theory and the Problem of Second-Order Elections

As discussed in Part II, the existence of second-order elections presents challenges for traditional theories of federalism. We devolve power or protect state authority in order to encourage sorting, representative outcomes, laboratories of democracy, etc. But for any given devolution of power, as state elections become more and more second order, we get less and less of federalism's benefits.

One might leave discussions of the scholarship there. But two major strands in contemporary federalism theory directly address the question of the role of parties in promoting the benefits of federalism and are worth commenting on separately. This Part will address the literature first on the "political safeguards of federalism" and second on "partisan federalism" and, more generally, "federalism as the new nationalism."

##### A. "*The Political Safeguards of Federalism*" and Second-Order Elections

First discussed by Herbert Wechsler and then substantially reformed by Larry Kramer, the most influential theoretical argument in modern federalism has been that the Constitution and the structure of American politics provide states with "the political safeguards of federalism," which obviate the need for the judiciary to enforce limits on federal encroachment on state authority.<sup>191</sup> Fights over the political safeguards theory have been waged throughout the literature and in judicial opinions for decades.

One hesitates before wading into this swamp of argument, but the discussion above provides a useful frame for thinking about this theory. When we take into account the fact of second-order state elections, we can see that nothing about the operation of our constitutional order or party-based democratic politics necessarily (or even probably) preserves the benefits of federalism.

Before I can offer this critique, a quick summary is probably necessary. Wechsler argued that the hardwired parts of the Constitution—the Senate, that representatives in the House were allocated by state and not purely by population, the electoral college—meant that states were protected inside the branches of the federal government.<sup>192</sup> Accordingly, states could stand up for themselves in Washington.<sup>193</sup> The Supreme Court largely accepted

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191. See Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558–60 (1954) (presenting the argument); see generally Kramer, *Putting the Politics Back in*, *supra* note 26 (updating the argument); Kramer, *Understanding Federalism*, *supra* note 26 (same).

192. Wechsler, *supra* note 191, at 546–47.

193. Other scholars have critiqued this on the grounds that the vast increase in federal authority in the 1960s and 1970s was inconsistent with the belief that states could stand up for themselves in Washington. See Kaden, *supra* note 90, at 867–68.

Wechsler's reasoning, along with similar arguments advanced by Jesse Choper, in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>194</sup>

Kramer rejected Wechsler's characterization of the safeguards of federalism.<sup>195</sup> In Kramer's telling, the institutional protections cited by Wechsler may protect interests inside states—groups powerful enough to win state elections—but they do little for states as institutions.<sup>196</sup> For example, there is little reason to believe that a presidential candidate fighting to win a state's electoral votes will defer to the state's governor once elected.<sup>197</sup> But this does not mean that states need courts to protect their authority.<sup>198</sup> The framers' design relies not on "Wechsler's tidy, bloodless constitutional structures" to protect states, but on "real politics, popular politics: the messy, ticklish stuff that was (and is) the essence of republicanism."<sup>199</sup> State leaders can use their popularity at home to limit federal encroachment on their authority.<sup>200</sup> And this lasted through the twentieth century as a result of the way that American political parties developed: in contrast with European political parties, the Democrats and Republicans have been less "programmatically" (roughly, less ideologically coherent) and less "centralized" (lacking a hierarchical organizational structure).<sup>201</sup> Instead, American political parties are run by state and local politicians and activists; since these actors can use their control over the party apparatus and local elections to discipline efforts by federal officials to grab too much power, the parties protect the states as institutions.<sup>202</sup> And state officials can similarly work to limit federal aggrandizement through their important role both in lobbying and running the administrative state and in implementing federal legislation.<sup>203</sup>

Kramer's version of the political safeguards of federalism is a powerful argument. It is right to focus on how political institutions, and not just formal ones, work. Further, Kramer helpfully pushed not only the Supreme Court but also the attention of federalism scholars away from constitutional

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194. 469 U.S. 528, 550–51, 551 n.11 (1985) (citing JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980) and Wechsler, *supra* note 191).

195. See Kramer, *Putting the Politics Back in*, *supra* note 26, at 221–27 (arguing that Wechsler's hardwired constitutional structures do not themselves guarantee a robust federalism); Kramer, *Understanding Federalism*, *supra* note 26, at 1503–14 (same).

196. Kramer, *Putting the Politics Back in*, *supra* note 26, at 223.

197. See *id.* at 225–26; Kramer, *Understanding Federalism*, *supra* note 26, at 1507–08.

198. Kramer, *Putting the Politics Back in*, *supra* note 26, at 278–79.

199. *Id.* at 256–57.

200. See *id.* at 256–66 (detailing the framers' views).

201. See *id.* at 278–87 (describing the evolution of the party system); Kramer, *Understanding Federalism*, *supra* note 26, at 1522–42 (same).

202. See Kramer, *Putting the Politics Back in*, *supra* note 26, at 279–82 (arguing that the weakness of American parties has contributed to a robust federalism).

203. *Id.* at 283–85; Kramer, *Understanding Federalism*, *supra* note 26, at 1542–43.

protections and toward thinking about how politics shapes how federalism works in practice. But the argument is very wrong in how it understands how party politics work in the United States, who has an interest in protecting states against federal encroachment, and what federalism is all about.

In reverse order, the “federalism” protected by political safeguards is, as Kramer states directly, the regulatory authority of state governments.<sup>204</sup> As discussed in Part II, this is a mistake. Normative theories of federalism suggest that we should be concerned about the ability of state majorities to set state policy—and the extent of state authority and the majority’s ability to set policy are not necessarily the same thing. Certain increases in state authority can make state elections more second order and therefore reduce the degree to which state majorities can and do use state elections to implement state policy.

This is particularly true for the types of questions that Kramer’s theory is designed to answer. When Congress passes laws that enhance state authority but decrease the impact of local democracy, state officials may support it—but not to the benefit of federalism. A number of scholars—notably John McGinnis, Ilya Somin, and Lynn Baker<sup>205</sup>—have made just this point with respect to conditional spending cases like *South Dakota v. Dole*<sup>206</sup> and *NFIB v. Sebellius*.<sup>207</sup> State officials may like conditional grants of spending, as it gives them more money and thus more authority. But such conditional spending can, theoretically at least, reduce the degree to which local preferences drive policy outcomes by making it harder for voters to allocate responsibility.<sup>208</sup> Further, the federal government can act as a “cartel manager,” reducing competition by effectively ensuring that states adopt the same policies and do not undercut one another.<sup>209</sup> In these ways, conditional spending can increase state authority while at the same time reducing

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204. Kramer, *Putting the Politics Back in*, *supra* note 26, at 222.

205. See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1914 (1995) (characterizing *South Dakota v. Dole*, 483 U.S. 203 (1987), as creating an “easy end run” around constitutional limits to the federal regulation of states); Lynn A. Baker, *The Revival of States’ Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL’Y 95, 101 (1998) (same); McGinnis & Somin, *supra* note 81, at 117 (arguing that even “noncoercive” grants undermine federalism); Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 462 (2002) (same). For what it’s worth, I have no strong opinion on how these cases should come out.

206. 483 U.S. 203 (1987).

207. 132 S. Ct. 2566 (2012).

208. See McGinnis & Somin, *supra* note 81, at 118 (suggesting that federal grants operate as bribes to suppress vertical competition). McGinnis and Somin generalize this point as an outworking of the commandeering doctrine. However, there is a possible counternarrative here. Heather Gerken argues, for example, that states continue to exercise substantial power even when they are commandeered: it is the “power of the servant” (rather than the sovereign) to refuse to follow orders and thereby force the national government to respond. Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633, 2635 (2006).

209. McGinnis & Somin, *supra* note 81, at 117–18.

diversity, fit, innovation, and sorting. Kramer is wrong to focus on state authority instead of state democracy.

Second, the concept of “safeguards” in both Kramer and Wechsler’s work is substantially problematic. Central to both versions of the safeguards argument is the idea that someone—state officials or state-party bosses, perhaps—*wants* to maximize the authority of state governments. But as Daryl Levinson argues, this theory has no microfoundations.<sup>210</sup> The individual incentives of state legislators, governors, administrators, and activists at the state level run in many directions. It is not necessary, or even likely, that they will seek to maximize the power of state governments.<sup>211</sup> As Levinson has shown in a number of contexts, the assumption that individuals in government institutions will necessarily engage in “empire building” on behalf of the institutions in which they work lacks both theoretical underpinning and empirical evidence.<sup>212</sup> Government officials do not have the direct pecuniary incentives to maximize the size and power of their institutions that corporate officials often have. Individual state legislators may achieve their ideological or policy goals by granting power to institutions other than the state legislature, or may focus on growing their power inside their institution rather than enhancing the power of the institution relative to others.<sup>213</sup> Alternatively, a legislator may grant power to the executive for the sake of a later appointment or other favor. Nor is there any systematic reason to believe that an elected official’s electoral chances increase when the power of the institution of which she is a part increases.<sup>214</sup> Legislators avoid electoral risk by granting power to executives and thus avoiding responsibility; executives might do the same by vetoing bills that would give them authority. Similarly, an official may believe that her reelection chances are enhanced if power is allocated to another, more effective branch or level of government controlled by a copartisan.<sup>215</sup>

So, the individual incentives of state officials do not necessarily push them to enhance the power of their state vis-à-vis the federal government. There is similarly no reason to believe that federal officials seek to enhance the power of the federal government at the cost of the states. Levinson levies this summary critique: “Subtract the assumption of empire-building,

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210. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 940–41 (2005).

211. *Id.*

212. *Id.* at 923–37.

213. *Id.* at 926–29; see also Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 93, 98–99 (discussing politicians’ individual incentives).

214. See Levinson, *supra* note 210, at 929–31 (describing electoral incentives).

215. *Id.* at 952–55.

however, and the political safeguards solution disappears along with the problem it is meant to solve.”<sup>216</sup>

Levinson’s critique of the very idea of “safeguards” has even greater weight in a world where state elections are largely second order. To the extent that state officials’ reelection chances turn on the fortunes of the President and the national parties, their interest (at least their short-term electoral interest) in autonomy becomes largely dependent on how that autonomy would affect perceptions of the President in their states. A state legislator may have interests in reducing state authority if doing so would make her copartisan president’s program more successful. Or it may go the other way if greater state authority would make the policy more effective and hence more popular. The reverse is true for party officials from the opposition party. State authority may allow opposition-party state officials to gum up the works of the President’s program, or alternatively, state officials may refuse authority on the grounds that accepting it would make the policy work better. Similarly, federal officials may view granting power to states as a way of making better policy, improving both their electoral chances and those of their copartisans at the state level, or they may be intensely skeptical of doing so if it would help the other party. In a world where national-party preference determines the result of all types of elections (which is not quite our world, as noted above), the likelihood of federal empire building or of state political figures safeguarding anything is contingent on how it helps or hurts the parties in a given context. It is not a hardwired part of the political system. In such a world, no one can be counted on to safeguard anything except, perhaps, the party’s interest.

Finally, Kramer’s view of parties—that state parties were dominant in determining federal elections for most of American history—is simply not true, as it ignores the huge swings in power between state and national political figures over time and the extent to which state elections have been second order.<sup>217</sup> Kramer acknowledges in his work that parties by the 1990s had become more centralized and programmatic.<sup>218</sup> But he did not see how much more programmatic and nationalized (if not centralized) they would become.<sup>219</sup> As the data on polarization makes clear, today’s parties are

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216. *Id.* at 940.

217. That the parties change in form over time has been invoked as a reason to ignore safeguards arguments in constitutional adjudication. See Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 960 (2001).

218. See Kramer, *Putting the Politics Back in*, *supra* note 26, at 281–82 (describing shifts in party structure and function toward the end of the century). Further, even before the rise of polarization, the weakness of state parties (in the 1960s and 1970s) meant that federal elected officials were increasingly independent of the influence of state-party organizations. See Kaden, *supra* note 90, at 862–67.

219. The degree of centralization is disputed. See Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 980 (2002) (discussing party centralization); see also Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy*

extremely programmatic, with Republicans and Democrats almost entirely differentiated by ideology—and with party medians continuing to move further apart.<sup>220</sup>

But Kramer also ignores how much the parties changed before the modern period. Different eras saw massive changes in the degree of centralization and of the programmatic nature of the parties.<sup>221</sup> For instance, after the Realignment of 1896, the parties became much more clearly programmatic than they had been before. Rates of party-line voting in Congress and the degree of centralized control both increased substantially.<sup>222</sup>

Further, Kramer focuses almost exclusively on the way that state and local parties influence national politics.<sup>223</sup> But he ignores the ways in which national politicians and parties influence state politics. National politicians

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*Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571, 571–72 (2012) (laying out a model of parties as networks of interest groups and activists). But, whether or not the parties have become more organized (a discussion that depends crucially on the definition of party), the key here is that they have become more national. See Elmendorf & Schleicher, *supra* note 9, at 393–94.

220. MCCARTY ET AL., *supra* note 15, at 22–25.

221. See Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1062–66 (describing how the parties became more centralized and programmatic after 1876 and 1896); see generally HANS NOEL, POLITICAL IDEOLOGIES AND POLITICAL PARTIES IN AMERICA (2013) (discussing how parties became more matched with ideology).

222. Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1064–66.

223. Kramer also argues that, as parties became more centralized, states developed other capacities for influencing the federal government, particularly through influence inside the regulatory state. Kramer, *Putting the Politics Back in*, *supra* note 26, at 283–85; Kramer, *Understanding Federalism*, *supra* note 26, at 1542–43. Miriam Seifter picked this line of analysis up, arguing that institutions like the National Governors Association (NGA) or the National Association of Attorneys General are dominant players in advocating the interests of states as institutions. Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 984–91 (2014). Seifter's ingenious argument is that these organizations protect the interests of states qua states because these institutional interests represent the lowest common denominator—a compromise that all members can accept. *Id.* at 957–58. What Seifter misses, though, is that the generalist institutions she focuses on have largely been eclipsed by partisan organizations. The NGA is just less important than its partisan counterparts, the Democratic Governors Association and Republican Governors Association. Zeke J. Miller, *Governors in D.C.: Beset by Lobbyists, Riven by Partisanship*, TIME (Feb. 23, 2015), <http://time.com/3717941/national-governors-association/> [<https://perma.cc/P3KY-KD72>] (“[I]n recent years, governors and staff say . . . the NGA . . . has lost influence, driven by concerns about a slow-moving organization and growing polarization among the governors, who increasingly favor party-specific Governor gatherings.”). The Republican Attorneys General Association and the Democratic Attorneys General Association have risen in importance. See Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), [http://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html?\\_r=1](http://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html?_r=1) [<https://perma.cc/63Q7-TCG5>] (describing fundraising prowess of partisan attorneys general groups). Partisan groups of state legislators like the American Legislative Exchange Council and the State Innovation Exchange are in many ways more important today than the National Conference of State Legislators. Polarization runs deep. And this shift toward partisan state institutions is understandable in the terms discussed in this Article.

have been involved in state politics in order to improve their standing and their chances in federal elections for virtually the entire history of the United States. For instance, in 1800, New York was the swing state in the presidential race between John Adams and Thomas Jefferson. The state legislature was then in charge of choosing electors for the Electoral College.<sup>224</sup> In order to swing the election, Alexander Hamilton campaigned for Federalist state legislative candidates and Aaron Burr did so for Democratic-Republicans, focusing almost exclusively on national issues.<sup>225</sup> Today, we see something similar when federal groups get heavily involved in state elections every ten years in order to influence post-Census redistricting.<sup>226</sup>

Even more fundamentally, party brands make state elections second order, with voters responding to national rather than state cues. As a result, it is far from clear that the structure of American political parties has either led to greater state influence over the federal government or protected federalism in a meaningful sense.

Put together, we can see that the problem of second-order elections gives added punch to each major strand of criticism of the safeguards theory. Understanding that state elections are second order may or may not help resolve particular cases in front of the Supreme Court about Congress's power. But it does suggest that we must resolve those questions without recourse to "the political safeguards of federalism."

It's time to put this one to bed.

### B. *Partisan Federalism and Its Discontents*

Scholarship, particularly recently, has not entirely missed how national partisanship influences theories of federalism. Perhaps the most important of these recent works is Jessica Bulman-Pozen's *Partisan Federalism*. The piece proposes that one can only understand contemporary state-governmental behavior in light of the party membership of state officials.<sup>227</sup> While its positive description of contemporary federalism is both extremely insightful and hard to dispute, its normative analysis is less convincing. Bulman-Pozen argues that partisan federalism improves the functioning of national politics by providing out-of-power parties a space to develop policies and coalitions and a capacity to check the power of the national government.<sup>228</sup> As we saw in Part II, the harmful effects of both second-

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224. EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN 86 (2007).

225. *Id.* at 87–106.

226. *See, e.g.*, Republican State Leadership Comm., *supra* note 139.

227. Bulman-Pozen, *supra* note 37, at 1078–81.

228. Bulman-Pozen notes that her paper provides a "sympathetic rendering of partisan federalism," but that "[c]onsideration of the many tradeoffs that inform a complete normative

order elections and partisan federalism are easy to see. The supposed benefits Bulman-Pozen discusses, though, are harder to measure and may be illusory.

Bulman-Pozen argues that it is impossible to understand recent state behavior without an “appreciation of partisanship’s influence.”<sup>229</sup> She notes that traditional state interests (economic ones, for example) do not drive state reactions to federal initiatives. Instead, state governments seek to block or limit federal policies when the party that does not control the White House or Congress controls the state. Likewise, states controlled by the President’s copartisans follow and encourage federal policy making.<sup>230</sup> According to Bulman-Pozen, central to contemporary federalism are “[1] political actors’ use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and [(2)] the affective individual processes of state and national identification that accompany this dynamic.”<sup>231</sup> Bulman-Pozen calls this “partisan federalism.”

State governments, she continues, have become “site[s] of partisan opposition,” where out-of-power parties enact their own preferred policies and develop new policy ideas that may work their way into the party’s platform.<sup>232</sup> These recalcitrant states also act “uncooperatively,” administering federal statutes in ways that frustrate the President’s agenda.<sup>233</sup> Even absent a federal policy, states frequently enact policies designed by nationally organized partisan groups—from the American Legislative Exchange Council to national labor unions.<sup>234</sup> Traditional stories about federalism (like state competition for limited resources or greater responsiveness to local opinion) cannot explain these phenomena. But a story about party politics does.

Bulman-Pozen also notes that partisan federalism can explain some problems in federalism theory. Consider Daryl Levinson’s critique (discussed above) that federalism scholars assume that state officials check the federal government, but do not provide any account of why.<sup>235</sup> Bulman-Pozen argues that state officials act on behalf of their parties and thus check federal encroachment when it serves their party’s interests—that is, only

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assessment must await future work.” *Id.* at 1081 n.7. This subpart will not provide a “complete normative assessment” either, but it will consider some of the tradeoffs involved.

229. *Id.* at 1079, 1082–96.

230. *See id.* at 1096–108 (discussing examples of states’ partisan response to federal measures). As examples of these initiatives, she cites in particular the ACA and the federal ban on stem cell research.

231. *Id.* at 1080.

232. *Id.* at 1082–108, 1122–35.

233. *Id.* at 1105–08; *see also* Bulman-Pozen & Gerken, *supra* note 91, at 1260–64 (putting this in context of prevailing themes in federalism theory).

234. Bulman-Pozen, *supra* note 37, at 1101.

235. *See supra* notes 210–16 and accompanying text.



some of the time.<sup>236</sup> This is a powerful account of how contemporary federalism operates. Though Bulman-Pozen rarely discusses the role of elections, partisan federalism can be seen as the behavior-in-office analogue to second-order elections.

Her story becomes problematic when it shifts from the positive to the normative. The degree and kind of partisan federalism are neither inevitable nor constant. Elections are more or less second order over time, between offices, and in different places. Partisan state behavior mimics this variation, since different officials face different incentives to act, or not to act, on behalf of their parties.<sup>237</sup> Changes in policy—in election law or in cooperative federal consent procedures, for example—may affect the extent to which states act on behalf of the interests of a national political party. In particular, policies that make elections less second order may disrupt partisan federalism. So the relevant normative question is whether such policy changes have marginal benefits that outweigh their costs. Further, even if changes in policy would *not* alter patterns of partisan-federalist behavior, decisions to devolve power to the states should depend on the degree to which state officials currently engage in partisan federalism.

Parts I and II canvassed some of the costs of second-order elections for traditional justifications of federalism. All of these arguments apply here. As state officials act more and more on behalf of their national party, the fit between state-voter preferences and state-policy outcomes will become weaker and weaker; party platforms will not tack toward the state's median voter but rather according to the demands of the national party. When voter preferences about state policies do not correlate strongly with the main

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236. Bulman-Pozen, *supra* note 37, at 1089–93. That said, Bulman-Pozen does not *quite* respond to Levinson's critique and thereby misses some important dynamics affecting when states will check the federal government. She argues that state officials act on behalf of their national party as an institution. *Id.* at 1100–01. But this is just another form of an "empire-building" argument. It does not provide an individual-level explanation for the behavior of state officials. There is no explanation of why state officials engage in empire building on behalf of their national political party when, alternatively, they can work on burnishing their own image or simply slack and allow others to do the hard work of building the party brand. An account that focuses on second-order elections can provide the type of microfoundations needed to explain state officials' partisan behavior. State officials may work to enhance the national-party brand: (a) when elections become more second order and thus their reelection chances are more closely tied to the national party (an incentives story, although one where officials must overcome collective-action problems); (b) because they were selected due to their preferences on those issues in nationally oriented primaries and their preferences match those of the party (a representation story, although one where changes in the national party's strategy might result in more dissent and less partisan-federalist behavior); or (c) because toeing the party line will result in some kind of reward from the organization or because failure to do so will result in punishment in primaries (an internal-party-accountability story, driven by forces like centralized campaign-finance decisions or the participation of interest groups in primaries). Each of these explanations operates at the individual level, not the group level, and can yield predictions about when partisanship might cause states to check federal power (and when it might not).

237. See *supra* subpart III(B).

dimension of national politics, this problem becomes even more pronounced. These areas of substantial state policy making range from land use to occupational licensing to criminal procedure to aspects of educational policy, and each area lacks neat Republican or Democratic camps. Similarly, as party officials increasingly act on behalf of national interests, regional variation will be increasingly dampened, reducing the gains from sorting and experimentation.<sup>238</sup>

Bulman-Pozen doesn't deny these problems. But her "sympathetic rendering of partisan federalism" lays out a set of benefits that may offset these costs.<sup>239</sup> Like her fellow travelers in the new "nationalist school of federalism," she focuses on how federalism organizes, shapes, and creates national political debate.<sup>240</sup> But Bulman-Pozen's specific claims about how partisan federalism improves democracy at the national level are questionable at best.

For instance, consider her argument that partisan federalism serves as a "safeguard of parties." Control over state governments gives minority parties space to reform themselves, refashion themselves, and advertise their ideas.<sup>241</sup> Republicans shut out of the presidency from 2008–2016 used their control over state legislatures to work out policies—for example, on immigration—that have now found their way onto the national agenda.<sup>242</sup>

But it is not clear that partisan federalism makes for more effective opposition parties. Minority-party control over state governments could just as easily lead to complacency. If policies that would sell on the national stage would be unpalatable to state officials and interest groups, party officials might choose not to risk their control over friendly states in service of

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238. Bulman-Pozen notes that variations among red states and blue states remain—but this is because there is more to state politics than partisan federalism. Changes that make for more partisan federalism should reduce variation at the margin. Alternatively, it is possible that an organized central party apparatus might intentionally create variation among the states. But this relies on a great belief in the power of the party organization and a lack of belief in the capacity of the ideological groups that make up the party to impose discipline on outliers.

239. Bulman-Pozen, *supra* note 37, at 1081 n.7.

240. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889, 1890, 1893 (2014) (observing that scholars in the "nationalist school of federalism" view "[s]tate power . . . [as] a means to achieving a well-functioning national democracy").

241. See Bulman-Pozen, *supra* note 37, at 1123–30.

242. See Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 *YALE L.J.* 2094, 2122–23 (2014); see also Randal C. Archibold, *Arizona Endorses Immigration Curbs*, *N.Y. TIMES* (Apr. 14, 2010), <http://www.nytimes.com/2010/04/15/us/15immig.html> [<https://perma.cc/HRL9-5UJC>]; Glenn Thrush, *Trump's Immigration Whisperer*, *POLITICO* (Oct. 19, 2016), <http://www.politico.com/story/2016/10/kris-kobach-donald-trump-immigration-rigged-230000> [<https://perma.cc/4X72-9MMJ>] (discussing how Kris Kobach, the Secretary of State of Kansas, helped develop restrictive immigration policies in Arizona, Alabama, and Kansas, and then advised now-President Trump to push these policies at the national level).

increasing the odds of a far-off, national political success.<sup>243</sup> Further, when state parties are integrated with national parties, successful state politicians naturally become national-party leaders.<sup>244</sup> This can result in less effective minority parties, as their natural leaders may come from states with politics distant from the national median voter.<sup>245</sup>

In contrast, a system with less partisan federalism could make out-of-power parties more successful at the national level because they could draw on figures and ideas untainted (or less tainted) by losing national political stances. Independent figures like generals and businesspeople, free from previous partisan compromises or policy commitments, can be attractive candidates.<sup>246</sup> Similarly, in earlier eras, with greater divides between the images of state and national parties, state leaders often rose to power quickly at the national level. For instance, differences between the national Democratic Party and the more conservative Arkansas and Georgia Democratic parties were central to the ability of Bill Clinton and Jimmy Carter to be effective national candidates.<sup>247</sup>

Or take the argument that heavily partisan state governments create greater checks on the President or on national-level majorities. For example, Republican governors generally chose not to expand Medicaid under the ACA.<sup>248</sup> But dominance of national parties over state parties might also result in *fewer* checks on the Executive or the majority party in Congress. After all, parties in power at the national level also have allies in state government. If the President's party were to tap these allies, it would effectively commandeer the institutional capacity of state governments, thus

243. Consider the Democratic Party after the Civil War, which only won two Presidential elections between 1868 and 1912, but retained control over many state governments, particularly in the South.

244. See Alex Greer, *The Most Common Jobs Held by Presidents*, INSIDEGOV (Dec. 4, 2015), <http://us-presidents.insidegov.com/stories/8620/common-jobs-presidents#Intro> [<https://perma.cc/UZ6M-WNRT>] (showing that seventeen former presidents had prior experience as state governors and that twenty had experience as state legislators); Masood Farivar, *Americans Most Likely to Elect Former Governor, Senator as President*, VOA (Oct. 13, 2016), <http://www.voanews.com/a/us-voters-interest-foreign-policy-presidential-election/3548162.html> [<https://perma.cc/MWJ7-CCYR>] (detailing the American electorate's tendency to favor state experience when voting in national elections). Newly elected President Donald Trump never served in state office, but prior to him, the last President who did not serve in state office was Gerald Ford.

245. Think Bernie Sanders of Vermont, for instance.

246. Jane Hampton Cook, *How Often Do Americans Elect Political Outsiders to the Presidency?*, HILL (Sept. 2, 2015), <http://thehill.com/blogs/pundits-blog/presidential-campaign/252557-how-often-do-americans-elect-political-outsiders-to> [<https://perma.cc/2TD5-LEZG>] (discussing the backgrounds of nonpoliticians who became president).

247. See D. Jason Berggren, *Two Parties, Two Types of Nominees, Two Paths to Winning a Presidential Nomination, 1972–2004*, 37 PRESIDENTIAL STUD. Q. 203, 211 (2007) (noting the “catch-all, coalitional nature of the Democratic party” as compared to the GOP).

248. See Bruce Japsen, *As Red States Balk, Medicaid Expansion Stops at 31 States*, FORBES (Apr. 3, 2016), <http://www.forbes.com/sites/brucejapsen/2016/04/03/as-gop-digs-in-medicaid-expansion-holds-at-31-states> [<https://perma.cc/V34R-2Z4V>].

furthering national-partisan purposes and eliminating a possible check. The checks-and-balances argument cuts both ways.

So too with the “laboratories of democracy.” Partisan federalism may lead to parties using state governments as “laboratories of party politics”—that is, to help develop new ideas or coalitions.<sup>249</sup> Or it might lead to less experimentation, as parties choose not to experiment with their safe assets in state governments. Laboratories of party politics also may lead to experiments that do not translate to the national level due to differences in population and preferences between minority-party-controlled states and the rest of the country.

One could go on. Nonetheless, pointing out these contrary narratives is not a debater’s trick. Absent some clear metric, it is hard to say whether marginal changes in partisan federalism improve national democratic discourse. In contrast, the heavy costs of partisan federalism for traditional justifications of federalism—representation, accountability, variation, sorting, etc.—are manifest.

Finally, Bulman-Pozen’s *Partisan Federalism* suggests a disagreement—or at least the seeds of one—among the scholars comprising the nationalist school of federalism. Many in that group, including scholars like Heather Gerken and Cristina Rodríguez, embrace the ways in which the devolution of power can enable political minorities to shake up national politics.<sup>250</sup> They focus on low-level governmental institutions (city councils, juries, school boards) to show how devolution allows national-level minorities to exercise power and to engage in meaningful dissent by enacting actual policies and forcing national majorities to overrule them (thereby taking some control of the majority’s national agenda).<sup>251</sup> Bulman-Pozen’s work, in contrast, focuses on the very biggest national minority—a losing political party, which rarely represents less than 45% of the national electorate—and *its* ability to use federalism for similar purposes.<sup>252</sup>

But there are very different reasons to care about the access to power of big national minorities that are majorities in some states (like, say, the Republican Party between 2008 and 2010)<sup>253</sup> and the power of small national minorities who yet dominate some small local governments (like Muslims in Dearborn, Michigan,<sup>254</sup> or supporters of marriage equality in New Paltz, New

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249. See *supra* note 99 and accompanying text.

250. Gerken, *supra* note 240, at 1898; Rodríguez, *supra* note 84, at 2127–29.

251. “[W]e could look to local institutions as sites for minority rule. Those institutions are small enough to benefit two groups that are generally too small to control at the state level: racial minorities and dissenters, both objects of constitutional solicitude.” Gerken, *supra* note 84, at 47.

252. Bulman-Pozen, *supra* note 37, at 1123–24.

253. See FED. ELECTION COMM’N, FEDERAL ELECTIONS 2008 (2009).

254. Nancy Kaffer, *Dearborn, MI: Where Muslims Are . . . Americans*, DAILY BEAST (Feb. 2, 2015), <http://www.thedailybeast.com/articles/2015/02/02/dearborn-mi-where-muslims-are-americans.html> [https://perma.cc/BX84-5JAJ].

York in the early 2000s).<sup>255</sup> At the national level, power is frequently divided among parties, and a number of aspects of our constitutional structure allow a majority-turned-minority to retain power (e.g., life tenure for judges, six-year terms for senators, etc.). Minority parties also have some access to the national agenda even without control over state governments, either through the press or through legislative horse trading. In contrast, smaller minorities cannot force national majorities to respond to their concerns without being given control over some governmental entity.

And it might not be possible to protect *both* large national minorities *and* smaller, more local minorities. The very things that make partisan federalism work may prevent smaller national minorities from using local power to affect national discussions. For instance, reforms that give more power to state officials vis-à-vis local ones may make state officials more effective at developing a national opposition, as they will be able to enact a fuller platform at the state level. But this will also reduce the ability of smaller national minorities to have any access to the national or even state agenda. Further, when state and local officials seek to help their national party, they frequently do so by suppressing the power of embarrassing allies. For example, rank-and-file Democrats (then the minority party) did not engage in much “uncooperative federalism” on marriage equality in the early 2000s, as it almost certainly would not have helped them win the elections at the time.<sup>256</sup> Instead, it was figures like mayors with independent, non-national platforms in nonpartisan or heavily-one-party cities (like Gavin Newsom of San Francisco and Jason West of New Paltz) who did so.<sup>257</sup> A more effective partisan federalism, one in which state officials want to serve their national party to a greater degree, will almost surely result in the squashing of local irregularities that do not help the party brand, and may well lead to monotone parties. Whether nationalist federalists embrace second-order elections and partisan federalism may turn on whether they are more concerned with the power of massive, national-level political losers or tiny idiosyncratic groups—Karl Rove or Jason West?<sup>258</sup>

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255. Shaila Dewan, *Awaiting a Big Day, and Recalling One in New Paltz*, N.Y. TIMES (June 19, 2011), <http://www.nytimes.com/2011/06/20/nyregion/gay-couples-recall-a-pivotal-day-in-new-paltz.html> [<https://perma.cc/2QHV-CBUK>].

256. See Mark Carl Rom, *Introduction*, in THE POLITICS OF SAME-SEX MARRIAGE 1, 29 (Craig A. Rimmerman & Clyde Wilcox eds., 2007) (noting that public opinion in 2004 was solidly against same-sex marriage and that both presidential candidates that year, although issuing “equivocating statements,” opposed it as well).

257. See Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148–49 (2005) (describing the role of mayors in the marriage equality movement in the mid-2000s).

258. Or, to reverse the politics, Jerry Brown or Joe Arpaio.

## V. Conclusion: Reforming State Politics as a Means of Achieving the Ends of Federalism

This paper has veered (mostly) from suggesting reforms. But the arguments above do suggest new avenues for those in favor of “more federalism.” Rather than focusing solely on devolving more power *to* states, proponents of federalism ought to consider political reform *within* states—to increase responsiveness to state voters, creating more experimentation, opportunities to vote with the feet, and the like. In short, proponents of federalism should seek to make state politics less second order.

This Conclusion will provide a quick sketch of what such reforms might look like. There are two types of political reforms at the state level that might help to differentiate state politics: constitutional or organizational changes, and electoral changes.

It should be said that these reforms are not a free lunch. Our current, heavily-second-order state electoral scheme does achieve a backdoor nationalism. If states adopt either Republican or Democratic policies with no variation (not quite where we are, as discussed above), we reduce to some extent the problems of patchwork policy making.

But even if these reforms are not a free lunch, they are a cheap one. Second-order state elections produce solutions that don’t quite fit for many states—states that might prefer middle-ground answers get right- or left-wing ones.<sup>259</sup> And the lack of retrospective accountability is hard to justify by any means. Promoting federalism by reforming state politics would generate more state variation and experimentation without requiring the federal government to abandon national resolutions where appropriate.

### A. *State Reorganization*

One of the lessons of the literature on second-order elections is that, the higher profile the office, the easier it is for voters to develop independent preferences about office holders. Elections for Governor are less second order than elections for state auditor or for the state legislature. Big-city mayoral elections are more competitive than city council races. And so forth.

If reformers want more differentiated state politics, there is a good argument that they should seek to grant more authority to state and local chief executives—figures more easily monitored by voters. This can be done in a number of ways. One would be by passing statutes authorizing the Governor (or mayor) to wield greater administrative authority. Courts would have to play along, however, by overruling decisions like *Boreali* and *Statewide Coalition* that handicap state and local administrative lawmaking.

Another route might be state-constitutional reform that rebundles the state executive branch. While the President truly heads the federal Executive

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259. And states that might want truly radical answers may get ordinary partisan ones.

Branch, state executive authority is notably “unbundled.”<sup>260</sup> Voters elect a wide variety of state executive officers—attorneys general, most notably, but also lieutenant governors, treasurers, insurance and public-utility commissioners, and others. (On average, states have about 6.7 directly elected state officers.)<sup>261</sup> County executive power is quite divided, with general executives, elected district attorneys, sheriffs, and many others, and cities frequently have several directly elected officials as well.<sup>262</sup> Christopher Berry and Jacob Gersen laud this aspect of American political development, arguing that unbundled executives allow voters to exercise greater control over specific issues without having to compromise, reducing slack between voter opinion and public policy.<sup>263</sup> But they also note that the case for unbundling gets weaker as monitoring costs increase.<sup>264</sup>

Second-order elections can only occur in the presence of high monitoring costs. Or rather, they are evidence of high monitoring costs. If voters can't figure out who the insurance commissioner is, what she does, or how to hold her accountable for facts on the ground, they vote for the candidate from the party they prefer on issues of war and peace. There is an irony here. In America, we unbundle executives more at the state level, where the lack of media coverage makes monitoring costs higher than at the national level. This excessive unbundling for officials often produces bad policy outcomes where monitoring costs are high. For instance, borrowing costs in California cities with appointed treasurers are nineteen to thirty-one percent lower than in ones where those officials are elected.<sup>265</sup>

Bundling executive authority in governors, county executives, and mayors—at least when that authority is taken back from those elected officials that voters have the least capacity to directly monitor—would, perhaps counterintuitively, seem to produce more accountability and greater fit to voter preferences within states. It also would, for the reasons discussed

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260. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1399 (2008).

261. *Id.* at 1434.

262. Berry and Gersen also offer empirical data suggesting that unbundling leads to better representation in counties. *See generally* Christopher R. Berry & Jacob E. Gersen, *Fiscal Consequences of Electoral Institutions*, 52 J.L. & ECON. 469 (2009). They find that own-source revenue (roughly, how much taxes are raised) at first decreases as the number of elected executive officials in a county increases, and then in turn increases as that number gets higher. *Id.* at 482–87. They interpret this as suggesting that some diffusion of power leads to a more accountable government, but that too much does not. *Id.* at 490. But they simply assume that voters want less local government rather than more, which is surely true in some places—but not in others. *See id.* at 472. Even so, the basic structure of their argument fits with the discussion here: Where monitoring costs are too high, executive power should be “rebundled.”

263. Berry & Gersen, *supra* note 260, at 1394.

264. *Id.* at 1395–96.

265. *See* Alexander Whalley, *Elected Versus Appointed Policy Makers: Evidence from City Treasurers*, 56 J.L. & ECON. 39, 42 (2013) (using close elections to create natural experiments).

in Part III, likely produce more innovation, variation, and all the other ends of federalism.

### B. *State Electoral Reform*

Another possibility is to reform state electoral procedures. The idea would be to change election rules to make state elections more responsive to state opinion and less responsive to preferences about national politics. This would produce better fits on state-specific issues, greater variation, and more experimentation.

This is not an entirely new idea. However, the central reform that states employ—holding elections “off-cycle”—does not seem to work, and, in any case, it produces negative collateral effects. Five states hold gubernatorial elections in odd years.<sup>266</sup> Many counties and municipalities hold elections in non-November months during years without presidential or gubernatorial races.<sup>267</sup> The only real justification for this is to get voters to focus on state or local elections rather than on more prominent national ones.<sup>268</sup>

However, there is no evidence that voters do in fact focus on state issues in off-cycle elections.<sup>269</sup> And there is substantial evidence that holding elections off cycle radically reduces turnout, even in cities with high turnout in presidential election years.<sup>270</sup> In fact, as Zoltan Hajnal finds, “election timing is the most important factor in explaining local voter turnout.”<sup>271</sup>

This has negative effects on the representation of local opinion. Hajnal finds that the economic and racial composition of electorates in on- and off-cycle elections differs tremendously; off-cycle electorates are, on balance,

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266. Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. U. L. REV. 1181, 1222 n.167 (2013).

267. SARAH F. ANZIA, *TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS* 6–10 (2014); see also Christopher R. Berry & Jacob E. Gersen, *The Timing of Elections*, 77 U. CHI. L. REV. 37, 50–52 (2010) (discussing election timing and finding that off-cycle elections depress turnout).

268. See ANZIA, *supra* note 267, at 41–49 (showcasing Progressive Era arguments that off-cycle local elections would keep local politics pure of national partisan influence, and arguing in contrast that the question was in fact largely driven by political factors).

269. For instance, New York City Council races are held off cycle and are almost perfectly second order. See Schleicher, *supra* note 6, at 458–59 (describing one district’s perfectly second-order city council race, where the mayoral race went entirely in the opposite direction).

270. See ANZIA, *supra* note 267, at 2–3 (illustrating the pattern of substantially decreased voter turnout in off-cycle election years with the example of Palo Alto, which had 82% voter turnout in 2008 but only 38% in 2007).

271. ZOLTAN L. HAJNAL, *AMERICA’S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS* 159 (2010); see also *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 444 (S.D.N.Y. 2010) (“[H]olding local elections ‘off-cycle’ in March and staggering . . . [t]rustee elections combines to enhance the opportunity for discrimination against the Hispanic voting population.”). Anzia finds that cities where one would expect high turnout based on demographics have far lower turnout than comparable cities when their elections are off cycle. See ANZIA, *supra* note 267, at 2–3 (comparing Berkeley and Palo Alto).



whiter and richer.<sup>272</sup> According to Hajnal (and as one might expect), this substantially affects public policy.<sup>273</sup> And organized interest groups also fare better in off-cycle elections. For example, Sarah Anzia has shown that off-cycle school board elections lead to higher teacher salaries, since teachers have more influence when no one else shows up to vote.<sup>274</sup>

The “mismatch” theory that I have offered in the past predicts these negative effects of off-cycle local elections.<sup>275</sup> Information deficits form the core of local-election problems. Even if voters bother to show up, they simply do not know enough about local politics to do anything but use national-party preference—an only weakly useful heuristic—to guide their votes.<sup>276</sup> And voters without knowledge will lack incentives to show up at all.

Election reforms should be aimed at changing the information available to local voters—preferably, on the ballot itself. For instance, states could publish on the ballot which party controls the state legislature. Those voters who have no idea who is in control, but know the state of the roads, could punish or reward the right legislators.<sup>277</sup> Alternatively, the state could allow independent groups to make on-ballot endorsements during primaries, providing voters with information about candidates that would truly matter in some jurisdictions.<sup>278</sup> States could also reform the process by which candidates get on the state or local ballot to encourage locality-specific rebranding by minority parties. For instance, states could force parties to earn their way on to local ballots rather than granting them that right on the basis of up-ballot performance. Minority parties could remove the stink of unpopular national figures by filing under a different, locality-specific party name (“Reform” instead of “Republican” in New York City, perhaps).<sup>279</sup>

272. See HAJNAL, *supra* note 271, at 2, 166–67 (noting that disadvantaged persons are less likely to vote overall, and that on-cycle elections increase turnout substantially, necessarily making for a more representative electorate).

273. See *id.* at 176, 183 (noting that “[l]ow and uneven participation [by racial and ethnic minorities] is . . . a culprit in the skewed nature of local government spending priorities” and that “the skew in participation in local elections by class is almost as severe as it is with race”).

274. ANZIA, *supra* note 267, at 166.

275. See *supra* notes 68–69 and accompanying text.

276. See Schleicher, *supra* note 6, at 451 (noting implications of voter ignorance on local partisan competition).

277. See Elmendorf & Schleicher, *supra* note 9, at 411–14 (suggesting reforms to improve party accountability).

278. See *id.* at 409–11 (preferring partisan to interest-group cues).

279. See Schleicher, *supra* note 6, 468–70 (discussing party requalification and “fusion” platforms). This goes both ways. Local Democratic Party branches in Republican areas might choose to rebrand themselves as “Southern Mother\*%&#ing Democratic-Republicans” in order to appeal to Republican voters and theater geeks. Cf. LESLIE ODOM, JR. ET AL., *Washington on Your Side, on HAMILTON: AN AMERICAN MUSICAL (ORIGINAL BROADWAY CAST RECORDING)* (Atlantic Recording Corp. 2015).

I have provided a menu of reforms elsewhere, from the quotidian to the fanciful.<sup>280</sup> Whether any of these would work is hard to say; few have been tried, so there's little evidence. But the regrettable condition of state and local elections cries out for experimentation. The focus of these reforms should be to provide voters with state-specific information about policy, politicians, and parties. This information would allow voters to focus on state politics when voting in state elections. Representative state and local governments are central to the promise of our federalism. Achieving them will take work.

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280. Elmendorf & Schleicher, *supra* note 9, at 409–24.