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The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics

James A. Gardner[♦]

American federalism contemplates that states will retain a significant degree of autonomy so that state power can serve as a meaningful counterweight to national power. It is often said that states exercise this function through extraconstitutional processes centered on the political party system. That is, states influence the content of national law and protect themselves from undesirable exercises of national power by using the mechanisms of internal party processes. If this process is to work properly, however, states must retain considerable political autonomy, for the possibility of state objection to exercises of national power is merely theoretical if state political processes are not sufficiently independent of their national counterparts to enable the state to adopt and assert ends or interests different from those asserted by the national government.

The evidence, however, suggests strongly that the growth of national political parties during and since the early nineteenth century created a two-way street. Parties not only offered states a way to influence national politics, but also created a reverse pathway by which national politics could influence, and in many cases overawe, any independent state-level politics. As a result, the same extraconstitutional pathways that provided states a means to protect themselves from national domination simultaneously eroded the political autonomy necessary for states to maintain the kind of independent wills contemplated by the federal arrangement. As a result, the capacity of states to stand up to the federal

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government may be much more limited than the party theory supposes, suggesting in turn a much chastened conception of what it might mean for a subnational government to have the ability to “check” national power.

This article is organized as follows. Part I tells the conventional story of the collapse and refounding of American federalism. According to this story, the original federal plan contemplated that states would protect themselves through the exercise of raw power, deployed when necessary directly against the national government. In fact, however, federalism never worked as intended: the states rarely struggled against the federal government, cooperation quickly supplanted conflict as the principal mode of intergovernmental relations, and formal national power by the mid-twentieth century had come to vastly overshadow the reach of state power. What prevented the states from being wiped off the constitutional map, the story goes, was their ability to exploit an unforeseen adjustment to the constitutional plan – the emergence of national political parties that freely crossed formal constitutional boundaries. States used these channels to protect and press their interests and to influence the content of policy at the national level. By this mechanism, state power – and along with it the possibility of a meaningful federalism – was preserved, if not in the manner foreseen by the Framers.

This account, however, is naïve insofar as it seems to suggest that the party back-channel was a one-way conduit that served only to transmit state influence upward. To the contrary, it seems only logical to suppose that a mechanism capable of transmitting state influence upward and injecting it into national politics might be equally capable of transmitting national influence downward to the state level, thus introducing national agendas, national priorities, and national issue positions into – “colonizing” – state politics.

Part II tests this hypothesis by examining the historical evidence. It demonstrates, in brief, that the history of American political parties during the nineteenth century was a history of steady and powerful nationalization. From the beginning, the political parties were founded and operated principally to contest the presidency, orienting them toward national issues and problems. American politics itself became nationalized over the course of the nineteenth century as national issues came to dominate the agenda, and the political consciousness, of the citizenry. An examination of platforms drafted by state affiliates of the national parties shows that the priorities and positions of state political parties were strongly influenced by priorities and positions taken at the national level,

and that the agendas of state parties increasingly converged with those of national parties as the nineteenth century wore on.

Part III turns to the contemporary relationship between state and national politics, drawing on an extensive body of political science research. This body of work shows that the nationalization of American politics continued and strengthened in the late twentieth and early twenty-first centuries. Major institutions of politics, including the parties, lobbying organizations, and the media, have become more centralized and nationalized, contributing to a national orientation of American politics. The electorate too has become increasingly oriented toward national politics at the expense of state and local politics. Politicians and government officials likewise tend to be heavily influenced by national rather than state issues, often responding at the state level to political forces operating nationally.

Part IV begins by summing up the evidence, concluding that although state politics is capable of diverging from national politics, the parameters of state partisanship seem to be established largely by national political forces. State politics, in other words, may not enjoy any great autonomy from national politics, casting doubt on the capacity of states to maintain the kind of political autonomy necessary to develop positions different from those circulating at the national level, and thus to identify and assert a distinct set of interests and positions in the corridors of national power.

Part IV continues by suggesting several mechanisms that might explain the strong impact of national politics on its state counterpart, including discipline imposed by national political elites, discipline imposed by nationally-oriented voters, and the dominance in public political discourse of ideas generated and circulated at the national level. It goes on to offer a chastened conception of what it might mean for one level of government to "check" another, suggesting that meaningful checking may be found not only where governments are full and equal rivals, able to block unsatisfactory action on every occasion, but might also be said to exist where one government is able to thwart the other only upon a significant exertion undertaken on occasions of unusual urgency. Finally, the Article concludes by analyzing some potential measures that might strengthen the political autonomy of states, including limits on the national spending power, freeing states to regulate political parties more aggressively, and electoral system reform.

I. THE COLLAPSE AND REFOUNDING OF AMERICAN FEDERALISM

A. Subnational Autonomy in Federal Systems

Although it has been expressed in many different ways, the principal benefit of federalism as a form of political organization is generally said to be its ability to offer a democratic polity simultaneously the advantages of a large, centralized state and the benefits of localized, participatory governance.¹ The justifications offered for instituting such an arrangement vary considerably. In the classic Madisonian account, creating two levels of government secures liberty by instituting a form of permanent intergovernmental competition for popular respect and affection.² More modern accounts of federalism often justify it as an arrangement that grants national minorities the ability to secure the integrity of their ethnic, cultural, or religious identities.³ Some scholars hold that the value of federalism lies in its capacity to generate higher levels of overall public utility than a centralized state by authorizing geographically concentrated minorities to indulge preferences that they might be denied under a regime of centralized, nationwide lawmaking on every subject.⁴

Whatever the justification, however, the method of creating a federal system is the same; the critical design parameter – the one that distinguishes federal systems from ones that are merely decentralized⁵ – is the “autonomy” of subnational units.⁶ That is, a federal system is one in which each level of government is autonomous within some defined sphere of activity. The meaning of “subnational autonomy” in this context is not usually subjected to much examination, but it will become critical here. I

¹ As Montesquieu put it, a federal state “has all the internal advantages of a republican, together with the external force of a monarchical, government.” BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. IX 126 (Franz Neumann ed., Thomas Nugent trans., Hafner Books 1949) (1978).

² See *THE FEDERALIST* NO. 51 (James Madison) (Clinton Rossiter, ed., 1961) [hereinafter all citations to *THE FEDERALIST* are to this edition].

³ See Will Kymlicka, *Federalism, Nationalism, and Multiculturalism*, in *THEORIES OF FEDERALISM: A READER* 269 (Dimitrios Karmis & Wayne Norman eds., 2005).

⁴ See WALLACE E. OATES, *FISCAL FEDERALISM* (1972); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987).

⁵ On the distinction, see MALCOLM FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2008).

⁶ See, e.g., Arthur Benz, *Regionalization and Decentralization*, in *FEDERALISM AND THE ROLE OF THE STATE* 127, 129 (Herman Bakvis & William M. Chandler eds., 1987) (arguing that calls for regionalization and decentralization are calls for “regional autonomy and self-government”); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1261 (2009) (“Most theories of federalism rest upon an autonomy model that depicts states as sovereign policymaking enclaves.”). I stress that I am here using the term “autonomy” in the sense of the autonomy of governmental units within a system of governance, and consequently, the usage of the term here may not map precisely onto the way it may be understood to apply to individuals or other kinds of actors in other kinds of systems.

will have more to say on the subject, but for now it is sufficient to observe that what is typically meant by “autonomy” in theories of federalism is the freedom or ability of a subnational government – a state, province, canton, or *Land* – to do the things it wants to do; it is a principle of freedom of *action*. Thus, in the United States, some paradigmatic examples of the kind of subnational autonomy that federalism is said to provide include the authority to adopt locally desired policies on the provision of social services, tax burdens, recognition of marriage, and so forth.⁷ Elsewhere, exemplary exercises of subnational autonomy might include promoting the use of a local language, supporting local cultural institutions, or protecting certain religious observances.⁸ In each case, the critical variable is the ability of the state to *do* these things – to enact the legislation or take the action, and to make it stick.

Federal systems typically deploy two design strategies to secure the autonomy of their constituent units. The first involves the formal allocation of power between national and subnational governments. One of the distinguishing characteristics of federal systems is that they distribute to subnational governments, and constitutionally entrench, a substantial amount of power.⁹ By definition such an allocation must be sufficient to permit constituent units to exercise in some meaningful way the autonomy that federalism promises them. Many federal states also make use of a corresponding set of constraints on the exercise of national power. For example, powers granted to central governments may be limited in scope, or certain powers may be allocated exclusively to lower-level governments and thus expressly withheld from central governments.¹⁰ The *de facto* extent of subnational power may also turn on the details of a residual-

⁷ The classic statement of this proposition is that of Justice Brandeis: “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.” *New State Ice, Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

⁸ See, for example, the discussion of Quebec’s distinctive policies on the cultural integration of immigrants in JOSEPH H. CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* 107–39 (2000).

⁹ See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 124–25 (2005) [hereinafter GARDNER, *INTERPRETING STATE CONSTITUTIONS*]; G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 7–9 (1998).

¹⁰ In the United States, most state and national powers are concurrent, and constraints on central power are said to be inherent in the nature of the constitutional grant, which is limited. See *U.S. CONST. amend. X*; *McCulloch v. Maryland*, 17 U.S. 316 (1819). Many contemporary federal constitutions rely instead on specific allocations of competencies to each level of government. See, e.g., *CONSTITUCIÓN ESPAÑOLA* Dec. 19, 1978, arts. 148–150 (Spain) (parceling out the various competencies of the national and subnational governments into those that are exclusively national, those that may be exercised exclusively by subnational units, and those that may in certain circumstances be exercised concurrently at both levels).

powers clause or on constitutional principles of preemption and supremacy.¹¹

In most cases, federal systems also incorporate some kind of enforcement mechanism to stabilize the initial distribution of power, so that the system maintains its design equilibrium – that is, neither collapses into centralization nor fragments into its constituent parts. In some systems, notably that of the United States, enforcement is meant to be self-sustaining through a careful equilibration of powers such that each level is capable not merely of fending for itself, but of fighting off destabilizing encroachments by the other. This is the mechanism of checks and balances associated with the Madisonian account of separated powers.¹² Judicial review of constitutional boundaries can also serve as a primary or auxiliary line of defense against destabilization resulting from the appropriation by one level of powers allocated to the other.¹³

The second design strategy used in some, though not all, federal systems is to provide a forum in which subnational units can assert their interests and preferences directly in the national decision making process. Most commonly, this strategy is implemented by creating a second legislative chamber, such as a senate, in which constituent subnational units or regions are directly represented.¹⁴ The idea here is that the authority of subnational units to assert themselves on the national stage is not confined to an external sphere of intergovernmental relations, but may also be expressed intragovernmentally in a potent forum of national decision making. As a result, the autonomous will of the subnational unit may find expression not only within its own internal decision making apparatus, but also within that of the central government.

Because it offers subnational units an opportunity to shape or even perhaps to block national action, a regional chamber represents another form of restraint on national power, and one of potentially great potency.¹⁵

¹¹ See RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 39 (2d ed. 1999).

¹² See THE FEDERALIST NO. 51 (James Madison).

¹³ The contemporary positions on judicial review of federalism boundaries are nicely summarized in Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001). For an influential argument that judicial review in federalism cases is unnecessary, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

¹⁴ See Campbell Sharman, *Second Chambers*, in *FEDERALISM AND THE ROLE OF THE STATE* 82 (Herman Bakvis & William M. Chandler eds., 1987). Ivo Duchacek calls bicameralism one of the “ten yardsticks of federalism.” IVO D. DUCHACHEK, *COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS* 244–52 (1970).

¹⁵ The usual example of a powerful upper house in a federal state – perhaps too powerful – is the Australian Senate. For useful recent analyses see STANLEY BACH, *PLATYPUS AND PARLIAMENT: THE AUSTRALIAN SENATE IN THEORY AND PRACTICE* (2003); Richard Mulgan, *The Australian Senate as a “House of Review,”* 31 AUSTL. J. POL. SCI. 191 (2010).

Unlike restraints on national power implemented by formal constitutional limits and allocations, which apply only to specifically designated spheres of activity, and then only at the limits of authorized power, subnational representation in a regional legislative chamber often extends to the entire range of national powers and issues.¹⁶ By gaining a vote in such a chamber, subnational units thus obtain control not only over the exercise of powers that the constitution specifically allocates to them, but some measure of control over powers that the constitution allocates to the national government.

B. The Design Premises of U.S. Federalism

The U.S. Constitution makes use of – and pioneered – both of these mechanisms for establishing and maintaining the autonomy of subnational governments. Evidence of the first can be found in the basic design premises of federalism, which was conceived as a mechanism to protect liberty through the institutionalization of permanent intergovernmental competition for popular favor. Because, according to Madison, “[t]he accumulation of all powers . . . in the same hands may justly be pronounced the very definition of tyranny,”¹⁷ liberty can be secured only by dividing power. Yet power divided solely by means of constitutional endowment need not stay divided: “power is of an encroaching nature,” and cannot be confined by “parchment barriers.”¹⁸ Like the separation of powers horizontally into distinct legislative, executive, and judicial branches, federalism answers to this difficulty by giving each level of government, state and national, substantial powers sufficient to allow each to monitor and check the abuses of the other. “Ambition” in such a system is thus liberated to “counteract ambition”;¹⁹ “[t]he different governments will control each other, at the same time that each will be controlled by itself.”²⁰

¹⁶ This is clearly true of, for example, the United States Senate, which has substantive authority co-extensive with that of the House, and the Australian Senate. *See* U.S. CONST. art. I, § 1; AUSTL. CONST. part I, § 1. In some federations, the powers of the upper chamber are somewhat less extensive than those of the lower. For example, approval of the German *Bundesrat* is required for only some types of legislation. Simone Burkhart, *Reforming Federalism in Germany: Incremental Changes instead of the Big Deal*, 39 *PUBLICUS* 341, 349-50 (2008).

¹⁷ THE FEDERALIST No. 47, at 301 (James Madison).

¹⁸ THE FEDERALIST No. 48, at 308 (James Madison).

¹⁹ THE FEDERALIST No. 51, at 322 (James Madison).

²⁰ *Id.* at 323. In offering a fundamentally Madisonian account of the purpose and workings of federalism, I recognize that other accounts exist. *See, e.g.*, ALISON LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010) (arguing that founding-era thinking about federalism was complex and historically contingent, and continued to evolve in response to post-founding events); EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL*

So strongly did the Framers believe that the state and national governments would be not only inclined to oppose one another but capable of doing so effectively that they explicitly contemplated the possibility of armed conflict as a method of resolving intergovernmental disputes. In defending the constitutional plan, Madison thought it important to estimate the size of a military force the national government might plausibly field, arguing that it would be a small fraction of the armed militia forces available to the states.²¹ Hamilton went so far as to imagine possible strategies that state and national military forces might employ in a conflict, and to argue, as a point counting in favor of the proposed constitution, that the states would have important tactical advantages over any national army called up to suppress them.²²

In developing constitutional subsystems, the Framers apparently saw little distinction between the structure they were designing, which divided power internally within a single political society, and the structure of power relations among independent nations, such as rival European great powers. In each case, a sphere of power was conceived territorially, as something political actors would attempt to invade or defend.²³ That is why, according to Madison, internally divided powers could never remain divided unless "[t]he interest of the man [is] connected with the constitutional rights of the place."²⁴ Political actors must be given the same kind of stake in defending their allotted plot of power as monarchs have in defending their realms. When that is done, the behavior of a national or subnational government becomes just as predictable as the behavior of a prince, and therefore just as susceptible to containment through a precise initial allocation and balancing of power.²⁵

ENTERPRISE (2007) (arguing that there was no founding theory of federalism, and that its appearance resulted from an improvised, seat-of-the-pants compromise at the convention). Whatever its historical pedigree, the Madisonian account is not only the dominant one in the federal jurisprudence, but offers a normatively attractive and extremely powerful and useful account of federal institutional arrangements, so, following convention, I rely on it here.

²¹ THE FEDERALIST NO. 46, at 299 (James Madison) (arguing that reasonable assumptions about the ability of a nation to raise an army suggest that such efforts "would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia [in the several states] amounting to near half a million of citizens with arms in their hands.").

²² THE FEDERALIST NO. 28, at 181 (Alexander Hamilton).

²³ James A. Gardner, *Democracy without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 ST. JOHN'S L. REV. 293, 302–03 (2005) [hereinafter Gardner, *Democracy without a Net*].

²⁴ THE FEDERALIST NO. 51, at 322 (James Madison).

²⁵ Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1515–18 (1994) [hereinafter Kramer, *Understanding Federalism*].

Similarly, the design of the U.S. Senate also was conceived in part as a mechanism for securing the independence and autonomy of the states. According to Publius, representation in the Senate would “giv[e] to the State governments such an agency in the formation of the federal government as must secure the authority of the former.”²⁶ Even the equality of state representation in the Senate was understood in these terms: “the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty.”²⁷ Representation of states in the Senate was thus more than a method for influencing policy outcomes, although of course it was that as well; it was in addition a means by which states could ensure their own power, survival, and continuing autonomous role in the constitutional system.

C. The Collapse of the Design Premises

Despite these careful arrangements, the *practice* of U.S. federalism never comported with the original plan. Three deviations in particular seem noteworthy. First, with the catastrophic exception of the Civil War, open power contests between the national and state governments have been infrequent; the turf-encroaching and turf-defending skirmishes contemplated by the original design never materialized.²⁸ Instead, especially following the New Deal era, cooperation between state and national governments has been the norm. As Morton Grodzins, an early and leading student of modern federalism wrote nearly fifty years ago, “[n]o important activity of government in the United States is the exclusive province of one of the levels.”²⁹ Rather, Grodzins argued, “the system is, in effect, one government serving a common people for a common end.”³⁰ According to another leading theorist of federalism, Daniel Elazar, “[f]rom public welfare to public recreation, from national defense to local police protection, the system of sharing [responsibility] is so pervasive that it is

²⁶ THE FEDERALIST NO. 62, at 377 (James Madison).

²⁷ *Id.* at 378.

²⁸ The last use of force that even comes close is the federal government’s 1957 decision to send regular U.S. troops to desegregate the Little Rock school system. Those troops, however, were sent to suppress a mob that the state refused to use its own power to control; it was not an armed conflict between state and national military forces (although the state’s governor was instrumental in mobilizing the mob). In any event, nothing like this has occurred in more than half a century. Sometimes governors *threaten* to use force, but nobody takes these threats very seriously. See JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 9, at 88–94.

²⁹ MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 8 (1966) [hereinafter GRODZINS, THE AMERICAN SYSTEM].

³⁰ *Id.* at 10.

often difficult . . . to tell just who is doing what under which hat.”³¹ Cooperation, Elazar claimed, had by mid-century already become “part of the nation’s constitutional tradition.”³²

To be sure, state and national officials disagree from time to time, and those disagreements can grow heated. Sometimes such disagreements can escalate into conflict – a state may occasionally defy national authority, or withhold cooperation that it would normally provide³³ – but such disagreements rarely proceed past the point of a well-understood political theater of tough talk and posturing, and many end up being resolved to the rough satisfaction of the parties. As a leading expert on American executive-legislative relations has said of the analogous area of horizontal separation of powers, “[d]espite the heavy traffic, head-on collisions are rare. Instead, individual drivers merge safely at high speeds.”³⁴

Second, since ratification of the Seventeenth Amendment in 1917, the U.S. Senate no longer serves as a direct agent of state influence in the corridors of national power.³⁵ That provision replaced the system of selection of Senators by state legislatures with a system of direct popular election. As a result, Senators now respond to the same popular constituencies as do members of the House of Representatives, and the degree to which Senators feel obliged in Congress to press positions of interest to their states depends heavily upon the proclivities of their constituents, not the demands or preferences of state legislators.³⁶

³¹ DANIEL ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 51 (3d ed. 1984).

³² *Id.* For more on Elazar’s conception of “cooperative federalism,” see Daniel J. Elazar, *Cooperative Federalism*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* (Daphne A. Kenyon and John Kincaid eds., 1991).

³³ See Bulman-Pozen & Gerken, *supra* note 6, at 1274–83; GARDNER, *INTERPRETING STATE CONSTITUTIONS*, *supra* note 9, at 88–92; JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* 54 (2009); John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 *ALB. L. REV.* 1635, 1640–63 (2011).

³⁴ LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* xi (4th ed. 1998).

³⁵ If it ever did. It is not clear that states exercised a great deal of substantive control over Senators by the second half of the nineteenth century. Kramer, *Understanding Federalism*, *supra* note 25, at 1509. Moreover, the constitutional design concept of senators as representatives of the states in their corporate capacities came under severe pressure by popular demands for a say in how senators were selected, which was effectuated extra-constitutionally by the practice of party endorsements of senatorial candidates and by candidates for state legislature running on the basis of whom they would support for senatorial appointments. See *id.*; C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* 88 (1995).

³⁶ See Sean Gailmard & Jefferey A. Jenkins, *Agency Problems, the 17th Amendment, and Representation in the Senate*, 53 *AM. J. POL. SCI.* 324 (2009) (demonstrating that ratification of the 17th Amendment heightened the responsiveness of Senators to the state electorate).

Third, since the founding, and particularly over the course of the twentieth century, the extent of formal national power has grown tremendously, to the point that it overshadows considerably the scope of formal state power.³⁷ The commerce power has expanded well beyond its originally contemplated bounds, and is now understood to authorize the national government to regulate virtually any aspect of economic activity, and in so doing to displace conflicting state regulation through preemption.³⁸ Moreover, the national government's access to enormous wealth, and its authority under the spending power to make grants to states conditional upon their compliance with national programmatic and regulatory goals,³⁹ permits it to exert significant influence even in fields where it lacks direct regulatory authority.

All of these changes have altered the contemplated balance of power severely to the disadvantage of the states. On their face, these developments appear to threaten the ability of the states to enjoy a sphere of real autonomy and consequently to deprive them of the benefits federalism was created to produce. Indeed, these developments seem to suggest a threat of collapse into a functionally centralized state, a possibility that, on Madisonian assumptions, puts liberty itself at risk.

Nevertheless, the falsification of federalism's design premises has not resulted in a catastrophic implosion of the U.S. into a unitary state.⁴⁰ Although the balance of power no doubt has shifted over time, the American states have not been wiped off the constitutional map, nor have they been reduced to administrative satrapies of the national government.

³⁷ As Justice O'Connor observed,

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.

New York v. United States, 505 U.S. 144, 157 (1992).

³⁸ *Id.* at 158 ("The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power.").

³⁹ See *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁴⁰ It has been suggested that this has been the fate of some other states originally designed as federal, e.g., Germany and Austria. See Jan Erk, *Federal Germany and Its Non-Federal Society: Emergence of an All-German Educational Policy in a System of Exclusive Provincial Jurisdiction*, 36 CAN. J. POL. SCI. 295 (2003); Jan Erk, *Austria: A Federation without Federalism*, 34 *PUBLIUS* 1 (2004). As to the United States, some disagree, for example, ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* (2001), but for reasons explained in the text, this seems like an overreaction.

States continue to exercise significant and indeed primary authority over many areas of law, including those fields that most affect the lives of ordinary citizens – tort law, criminal law, contract law, property law, estate law, commercial law, and many others. States and localities today employ more than 87 percent of all government workers.⁴¹ The fields of criminal law enforcement and transportation, to name two prominent examples, are dominated by the states: 86 percent of all law enforcement officers and more than 99 percent of transportation workers are employed by a state or locality.⁴² The single largest government function in the United States, the provision of public education, is a state function; only ten thousand out of ten million teachers in the country are employed at the national level.⁴³

Besides directly exercising primary authority in many significant fields, states also regularly make their presence felt in the corridors of national policymaking. They have often succeeded in putting policy issues on the national map and in eliciting federal action. Both the Defense of Marriage Act⁴⁴ and the Unfunded Mandates Reform Act,⁴⁵ for example, were enacted by Congress in response to state agitation for federal legislation dealing with recognition of gay marriage and the imposition on states of federal regulatory requirements, respectively.⁴⁶ States have successfully persuaded Congress to exempt them from the operation of numerous national regulatory regimes, including the Sherman Act, the Federal Power Act, and the Occupational Safety and Health Act.⁴⁷ At the request of states, Congress has enacted legislation approving numerous interstate compacts.⁴⁸ In waiving federal sovereign immunity in tort, Congress did not displace but instead incorporated and actually subjected the national government to the tort law of the various states.⁴⁹ In many instances,

⁴¹ U.S. Census Bureau, *Census of Governments Table 1* (2007) available at http://www2.census.gov/govs/apes/emp_compendium.pdf.

⁴² *Id.* at Table 3.

⁴³ *Id.*

⁴⁴ 1 U.S.C. § 7 (2011).

⁴⁵ 2 U.S.C. § 1501, *et seq.* (2011).

⁴⁶ For additional recent examples, see John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1635 (2011) (discussing clashes over the REAL ID Act of 2005 and medical marijuana).

⁴⁷ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 553 (1985) (listing these and other statutes from which states “have been able to exempt themselves”).

⁴⁸ The website of the Council of State Governments lists hundreds of interstate compacts. See NATIONAL CENTER FOR INTERSTATE COMPACTS, <http://apps.csg.org/ncic/>.

⁴⁹ Federal Tort Claims Act, 28 U.S.C. § 2674 (2011).

Congress has acted to preserve state law and regulatory authority by limiting the preemptive reach of federal law.⁵⁰

But states have succeeded in obtaining more than legislation from Congress; they have succeeded in obtaining money as well, and in large sums. As of 2008, states derived nearly one-third of their budgetary revenues from federal transfers.⁵¹ Some funds are made available virtually at the discretion of the states; the Federal Emergency Management Act, for example, provides states with substantial sums for disaster relief essentially upon a representation by a governor to the President that a disaster has occurred.⁵²

What accounts for this record of subnational success? If the practice of federalism has diverged so thoroughly from the original design; if states do not invoke the tools of self-defense that the Constitution provides them; if the balance of power has shifted so far that the states could not possibly stand up to the national government if they were to invoke those tools; how, then, is it possible for states to exercise whatever degree of influence we now observe?

D. The Refounding of Federalism on the Party System

The by-now conventional answer to this question is that states assert their interests in the arena of national policymaking, and defend their autonomy against invasion by the national government, by way of the national political parties.⁵³ This is not, to be sure, the mechanism contemplated by the Constitution. The founding generation possessed a deep antipathy toward political parties.⁵⁴ Thomas Jefferson denounced party affiliation as “the last degradation of a free and moral agent.”⁵⁵ George Washington warned in his Farewell Address against “the baneful

⁵⁰ See, e.g., Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses’ Rocky Judicial Reception*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 144 (William W. Buzbee ed., 2009) (federal public health laws, environmental statutes, and laws sounding in tort typically include savings clauses designed to protect substantial state regulatory authority).

⁵¹ Urban Institute and Brookings Institution, *State General Revenue by Source*, TAX POLICY CENTER (2008), http://www.taxpolicycenter.org/briefing-book/state-local/revenues/state_revenue.cfm.

⁵² 42 U.S.C. § 5170 (2011) (“Based on the request of a Governor under this section, the President may declare under this Act that a major disaster or emergency exists.”). Although in principle discretionary, in practice such requests are almost never denied.

⁵³ See Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 275 (2000) [hereinafter Kramer, *Political Safeguards of Federalism*]; Kramer, *Understanding Federalism*, *supra* note 25.

⁵⁴ RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840*, at 9 (1970).

⁵⁵ Thomas Jefferson, *Letter to Francis Hopkinson, March 13, 1789*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 459, 460 (Adrienne Koch ed., 1972).

effects of the Spirit of Party.”⁵⁶ Parties, for the Founders, were merely “factions,”⁵⁷ the vehicles by which self-interested groups and individuals coordinate and press their efforts to seize political power and turn it to their own private benefit at the expense of the common good.⁵⁸

Political parties, then, were an unanticipated, extraconstitutional engraftment onto the structural design,⁵⁹ and a particularly unwelcome one at that, given their capacity, in the view of the founding generation, to damage the system of virtuous republican governance they aspired to create. It is a great irony, then, that when experience failed to confirm the assumptions upon which the Framers sought to found the institutional mechanics of federalism – thereby, on their premises, putting state autonomy, and in consequence liberty itself, at risk – political parties provided an improvised antidote. They offered, that is, an avenue by which states might exert the very kind of influence over federal officials and national policymaking that the Constitution’s carefully planned institutions failed to provide.

How did parties come to perform this function? According to Larry Kramer’s leading account, the American system of political parties is structured in such a way as to provide national officials with strong incentives to respect and to advance the interests and programmatic preferences of the states. First, American parties are *national* parties, meaning they compete for office simultaneously at all levels of government; there are no local parties in the U.S. that compete meaningfully for office solely in a particular geographical region or at

⁵⁶ George Washington, *Farewell Address*, in DOCUMENTS OF AMERICAN HISTORY 169, 172 (Henry Steele Commager ed., 8th ed. 1968).

⁵⁷ HOFSTADTER, *supra* note 54, at 24.

⁵⁸ THE FEDERALIST NO. 10 (James Madison). For a thorough account of the history of suspicion of parties, see NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 1–253 (2008).

⁵⁹ Today, the influence of parties on the operation of federal governance is understood to be a normal, and to some degree unavoidable, form of reciprocal institutional interaction. See R. Kenneth Carty & Steven B. Wolinetz, *Political Parties and the Canadian Federation’s Coalition Politics*, in CANADA: THE STATE OF THE FEDERATION, 2002: RECONSIDERING THE INSTITUTIONS OF CANADIAN FEDERALISM (J. Peter Meekison, Hamish Telford, & Harvey Lazar eds., 2004) (providing a comparative overview of relation between party structure and structure of federal governance); William M. Chandler, *Federalism and Political Parties*, in FEDERALISM AND THE ROLE OF THE STATE (Herman Bakvis & William M. Chandler eds., 1987) (analyzing the interaction of territorial divisions and political parties on social cleavages); MIKHAIL FILIPPOV, PETER C. ORDESHOOK, & OLGA SHVETSOVA, DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS 182 (2004) (“[I]t is the operative hypothesis of this volume that a properly designed political party system – or, more correctly, an institutional arrangement that has as its primary goal that of encouraging a party system of a particular type – is the most durable source of federal stability.”); WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 129 (1964) (arguing that the form of the party system is the chief variable in determining the degree of centralization in a federal state).

some particular level of governance, nor have there been since the election of 1860. Consequently, candidates and officials at all levels tend to work together to promote the party's electoral success at every level.⁶⁰ In this way, the fortunes of candidates are linked to some degree no matter what office they stand for. This creates a "mutual dependency that protects state institutions by inducing federal lawmakers to take account of (at least some) desires of state officials,"⁶¹ and, at a minimum, "assure[s] respect for state sovereignty" at the national level.⁶²

Indeed, the linkage runs even deeper. American parties are by global standards decentralized, meaning that state and local party organizations have often enjoyed considerable autonomy from the national organizations.⁶³ This has meant that for most of American history it has been all but impossible for a candidate to win national office without benefit of the local knowledge, support, and influence wielded by state and local party organizations.⁶⁴ The local power and influence of these organizations in turn has tended to induce a profound dependence of national officials on subnational party organizations, one that "gave state and local politicians and party leaders – who were and still are typically one and the same – enormous influence in Washington."⁶⁵

Another way in which the parties transmit state influence upward in the system is rooted less in the structure of incentives than it is in the nature of human experience and sociality. Common partisanship offers "a fraternal connection among officials that helps expedite the day-to-day affairs of governing."⁶⁶ The nature of this network of relationships is such that "Democrats give other Democrats a consideration they deny to Republicans – just because they *are* Democrats. Republicans do the same."⁶⁷ To say this is simply to repeat in more general terms the

⁶⁰ Kramer, *Political Safeguards of Federalism*, *supra* note 53, at 275. See Kramer, *Understanding Federalism*, *supra* note 25, at 1528. According to a leading work of positive political theory addressing federalism, there is "no clearer statement [than Kramer's] as to the role of parties in a federal constitutional system." FILIPPOV ET AL., *supra* note 59, at 179.

⁶¹ Kramer, *Understanding Federalism*, *supra* note 25, at 1523.

⁶² Kramer, *Political Safeguards of Federalism*, *supra* note 53, at 276.

⁶³ See RIKER, *supra* note 59, at 91.

⁶⁴ Kramer, *Political Safeguards of Federalism*, *supra* note 53, at 279–80.

⁶⁵ *Id.* at 280.

⁶⁶ Kramer, *Understanding Federalism*, *supra* note 25, at 1529.

⁶⁷ *Id.* at 1539. Kramer's intuitive point here is made somewhat speculatively, but recent research backs up the claim. See, in the Canadian context, Anna Lennox Esselment, *A Little Help from My Friends: The Partisan Factor and Intergovernmental Negotiations in Canada*, 43 PUBLIS 1 (2012), and Anna Lennox Esselment, *Fighting Elections: Cross-Level Political Party Integration in Ontario*, 43 CAN. J. POL. SCI. 871 (2010), which show that shared partisanship greases the wheels of inter-level cooperation even in a nation with a tradition of strong regional parties and much less vertical integration.

commonplace observation that when, for example, the Democratic governor of New York wants something done in Congress, he picks up the phone and calls the state's two Democratic senators and the leading Democratic members of its House delegation, who in most cases can be counted on to receive such requests attentively.⁶⁸

Finally, there is a strong and marked tradition in the U.S. of office-climbing within the ranks of the parties. Most elected federal officials previously held office at the state level, and most state officials have prior service in local government. This means not only that most federal officials retain a network of partisan colleagues and supporters in state government – individuals to whom they may turn regularly at election time – but that their prior service often sensitizes them to the interests and perspectives of the states.⁶⁹

The story, then, has a happy ending. Federalism is introduced into the Constitution as a foundational structural principle and a critical mechanism for the protection of liberty. Due to circumstances unforeseen – and surely unforeseeable – by the Framers, its assumptions prove to be faulty, and it fails almost immediately to operate as intended. Providentially, however, another, entirely different unintended alteration in the constitutional plan provides the solution to the problem of protecting state power and autonomy. Balance is restored, and federalism begins to operate as intended, albeit by an entirely different mechanism. As Morton Grodzins, writing in 1960, summed things up: “[w]hat the fathers abhorred – the parties – serves to produce what the fathers sought – devolved power. The path may be perverse, but the constitutional intent has been substantially fulfilled.”⁷⁰

E. Backwash through the Party Channel and the Meaning of State “Autonomy”

The tale of the collapse and refounding of federalism is cheery and uplifting, but it is just a bit too neat and tidy. In many respects, to be sure, the theory seems correct. States have had a good deal of success in adapting to drastic changes in national conditions that have seriously eroded their position, and national political parties have furnished an

⁶⁸ On the modes and efficacy of gubernatorial lobbying of Congress, see NUGENT, *supra* note 33, 115–67.

⁶⁹ Kramer, *Political Safeguards of Federalism*, *supra* note 53, at 285. For one example, see Morton Grodzins, *American Political Parties and the American System*, 13 W. POL. Q. 974, 976 (1960) [hereinafter Grodzins, *American Political Parties*].

⁷⁰ Grodzins, *American Political Parties*, *supra* note 69, at 998.

important set of mechanisms that states have without question exploited to assert their interests and to secure their freedom of action within the federal system. However, the theory seems a bit naive – or at least incomplete – insofar as it seems to suggest that the channels of influence created by the national political parties are unidirectional. In fact, a moment's reflection suggests that intergovernmental influence projected through extraconstitutional party channels may very well be capable of running in the opposite direction – that the national government may be able to use these channels on its own account to influence the activity of the states. As in one of the stock storylines of contemporary science fiction, those who defy nature's plan by opening up some kind of wormhole to another universe have to worry not only about where it may deliver them, but about who or what might step through from the other side.

This is precisely my thesis. In what follows, I argue that the rise of national parties not only offered the states a way to assert their interests within and against the national government, but also created a channel through which national politics, national agendas and priorities, and national policies could filter down and influence – “colonize” is the term I shall use – state politics.

If I am correct, this proposition is significant for the functioning of a meaningfully federal system. Even if states lack the power to stand up to the national government when push really comes to shove, if they are to play any independent role whatsoever in a recognizably federal system, they must maintain a significant degree of political autonomy. Subnational autonomy is, after all, the characteristic that defines the distinction between federalism and mere decentralized hierarchy. Yet it is precisely this foundational autonomy that may be threatened by the creation of a party-mediated back channel through which influence may run downhill. In fact, as I demonstrate below, state and national policy preferences and priorities have converged over time, a condition to which the national party system has greatly – though I hasten to add, not exclusively – contributed. The state and national governments, in other words, seem to agree a great deal about what issues are the important ones for governments to pursue at both levels, and the substantive positions officials at both levels take on these issues seem often to align with the positions of their parties.

This account raises an important ambiguity in the meaning of subnational “autonomy,” one with potentially significant consequences for theories of federalism. Such theories, as I suggested earlier, tend to conceive of governmental autonomy – and especially the autonomy of subnational governments – in terms of freedom of *action*. However, the

power to act is attached to a governmental will that chooses how to use, or not to use, constitutionally allocated powers and authority. Even the most minimal theory of federalism must contemplate that states have the capacity, if not actually to thwart national action, at least to dissent from the substance of national political decisions.⁷¹

However, national influence exerted at (or even prior to) the point at which the subnational political will is formulated has the capacity to affect subnational decisions about how available powers and capacities will be deployed. At the limit, such influence seems capable in principle of having an effect not much different from a reallocation of power from the subnational to the national level, something that of course has the capacity to undermine the possibility of reaching the kind of equipoise between centralization and decentralization that a well-functioning and sustainable system of federalism requires.⁷²

To be clear, and to avoid inadvertently overstating the argument, here is my claim. The rise in the United States of national political parties created an extraconstitutional channel of influence between the national and state governments, and influence flows through that channel in both directions. The states may use it to influence national decision making, and have done so, but national imperatives also get filtered down routinely through the party channel, exercising a significant influence over both the political agendas and the substantive positions of state decision makers.

Because influence can flow in either direction, however, the system is dynamic; the power to influence is not the power to determine. Accordingly, when an issue of particular salience to the states arises, states have the incentive, and experience suggests that they have the capacity, to formulate an independent position and to assert that position effectively as against the national government. Again, though, assertion is not the same as success. The powers of the national government have come to dwarf those of the states, and it is difficult in any circumstance for states to prevent a determined national government from having its way. But the possibility of raising an independent voice, a dissenting voice, exists, and that is all that a minimal theory of federalism would seem to require.

⁷¹ For example, this would be a feature of dialogic theories of federalism. For examples, see GARDNER, *INTERPRETING STATE CONSTITUTIONS*, *supra* note 9, at 100–10; ROBERT SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 92–120 (2009).

⁷² The ability to influence decisions by exerting influence at the stage of will-formation is of course recognized in the design parameters of federal systems in the form of second national legislative chambers populated by individuals directly representing subnational interests. There seems to be no reason not to acknowledge the possibility that a similar process could run in the opposite direction.

Nevertheless, state-level dissent does not appear to be the rule. Rather, the operation of the party channel, along with other factors that I shall describe below, seems to have contributed to a convergence of positions at both levels, especially regarding the content of the political agenda, and to a lesser degree concerning the substance of positions taken respecting the items on the agenda. The state and national governments, that is to say, do not often disagree, and thus do not often engage in the kind of struggle that contestatory theories of federalism contemplate.⁷³ Indeed, I would go further. It seems to me that whereas state exploitation of the party back-channel to intervene successfully in national affairs has been episodic, national influence arrives downstream at the state level constantly – it is essentially a permanent feature of the federal condition in the United States. As a result, the convergence of state and national political agendas and positions seems to have been one characterized primarily by state adoption of national political agendas and positions rather than the other way around. If this is correct, then there are grounds to wonder whether the extraconstitutional power of political parties has not, in the end, caused something that looks much like a collapse into political centralization, the result that party-channel theorists hold has been avoided by the establishment of those very same channels.

II. THE HISTORY AND DEVELOPMENT OF AMERICAN POLITICAL PARTIES

A. Politics Before Parties

By the time of independence Americans had already enjoyed a lengthy period of local, if limited, popular self-governance. Nevertheless, the practices of pre-revolutionary democratic politics, and the understandings of its participants, differed greatly from those of today.⁷⁴ Colonial Americans received a British tradition in which office-holding was understood to be a privilege of social rank. In this system, the selection of parliamentary candidates was managed by gentlemen in a way calculated to confirm the social order.⁷⁵ Indeed, for much of parliamentary history,

⁷³ But see Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. (forthcoming 2014). Bulman-Pozen argues that the dimensions of state-national conflict coincide fully with those of national partisan conflict. In her account, which she attributes to present and historically contingent circumstances, federalism today functions as an extension of national interparty conflict because it allows national partisan minorities to retain footholds in the states during periods of low national influence. As a result, partisan conflict is rechanneled into intergovernmental conflict, which inevitably occurs along the dimensions of national partisan conflict.

⁷⁴ This paragraph and the next two draw heavily on JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR? THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS* (2009).

⁷⁵ MARK A. KISHLANSKY, *PARLIAMENTARY SELECTION: SOCIAL AND POLITICAL CHOICE IN EARLY*

the contested legislative election was a selection procedure of *last* resort; its use acknowledged a failure of consensus that suggested a breakdown of social order in a represented locality.⁷⁶

In colonial America and the post-revolutionary United States, elections were generally conducted under similar circumstances. Americans of this period lived in a world of "intricate networks of personal loyalties, obligations, and quasi-dependencies."⁷⁷ In this world, politics was a gentlemen's avocation⁷⁸ in which candidates, typically from locally prominent, wealthy, and well-established families,⁷⁹ were "put forward" by their similarly situated backers.⁸⁰ Election to office constituted a kind of recognition of the station of local leading men and a reaffirmation of the social hierarchy,⁸¹ and therefore frequently went uncontested.⁸²

The demos, to the extent it makes sense to speak of one, played a highly circumscribed role in electoral processes. Even after the Revolution, in the democratically self-governing America of the eighteenth century, virtually no activity took place that contemporary voters would recognize as campaigning. Gentlemen did not "run," but "stood" for office.⁸³ To the extent that issues arose on the national scene, as they did by 1800, national politics consisted mainly of appeals not to the people, but to local elites, who then influenced local voters through traditional relations of hierarchy and deference.⁸⁴ In this world, then, politics took place within a long-standing, traditional web of local fiefdoms, privilege, and patronage.

Although these forms of political life were eclipsed early in the nineteenth century by more modern and overtly democratic ones,⁸⁵ the political understandings on which they rested did not disappear

MODERN ENGLAND 12, 29-30, 37-48 (1986).

⁷⁶ See *id.* at 16, 22, 25, 27, 37, 61-62, 73.

⁷⁷ GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 57 (1992).

⁷⁸ MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 31 (1998).

⁷⁹ *Id.* at 5.

⁸⁰ RICHARD P. MCCORMICK, *THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA* 20 (1966).

⁸¹ See J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* 151, 158-59 (1966); HARRY L. WATSON, *JACKSONIAN POLITICS AND COMMUNITY CONFLICT: THE EMERGENCE OF THE SECOND PARTY SYSTEM IN CUMBERLAND COUNTY, NORTH CAROLINA* 107 (1981); SCHUDSON, *supra* note 78, at 4, 20, 22.

⁸² RONALD P. FORMISANO, *THE TRANSFORMATION OF POLITICAL CULTURE: MASSACHUSETTS PARTIES, 1790S-1840S* 30 (1983); SCHUDSON, *supra* note 78, at 20.

⁸³ GIL TROY, *SEE HOW THEY RAN: THE CHANGING ROLE OF THE PRESIDENTIAL CANDIDATE* 7, 83-8 (rev. ed. 1996); see also RALPH KETCHAM, *PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789-1829* (1984).

⁸⁴ THOMAS BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* 102 (1978).

⁸⁵ See WOOD, *supra* note 77.

overnight.⁸⁶ As late as the 1890s, at least in rural America, it was still the case that local affairs simply were not understood to fall within the category of “the political.” Local newspapers provided coverage of national issues but devoted no attention to state and local affairs, a practice reflecting the view that local news was an inappropriate subject for political reportage because it was at bottom personal, not political.⁸⁷ A similar understanding of the nature of state politics is reflected in the business of state legislatures. During the colonial period, the matters that individual legislators brought to the state legislature were “basically the business of their fellow townsmen,” and the legislative agenda was set essentially by petitions from towns and individuals.⁸⁸ This changed surprisingly little over the course of the nineteenth century. During much of that period, state legislatures “spent most of their time responding to highly specialized demands like divorces or the settlement of local disputes and land titles.”⁸⁹ In mid-nineteenth-century Maryland, for example, no more than ten percent of state legislation took up matters affecting the entire people of the state, whereas one-third of state laws provided some kind of benefit to specific individuals and more than half affected only specific local communities and groups.⁹⁰ State politics was thus conceived primarily as an arena for satisfying demands made by individuals and communities, not as one for taking up programmatic initiatives, much less for adjudicating among competing conceptions of collective life or governance.

B. Party Politics in the Nineteenth Century

Over the course of the nineteenth century, American politics underwent a dramatic change. The source of this change was not the destruction of earlier forms of political life, but the appearance alongside them of a new kind of politics, impelled by different actors, pursuing different imperatives, and proceeding within different forms of organization. These

⁸⁶ See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 50–52 (2005); FORMISANO, *supra* note 82, at 107–27; MCCORMICK, *supra* note 80, at 343.

⁸⁷ Paula Baker, *The Culture of Politics in the Late Nineteenth Century: Community and Political Behavior in Rural New York*, 18 J. SOC. HIST. 167, 170 (1984).

⁸⁸ MICHAEL ZUCKERMAN, *PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY* 35 (1970).

⁸⁹ CHARLES A. KROMKOWSKI, *RECREATING THE AMERICAN REPUBLIC: RULES OF APPORTIONMENT, CONSTITUTIONAL CHANGE, AND AMERICAN POLITICAL DEVELOPMENT, 1700-1870*, at 363 (2002); see also J. MILLS THORNTON III, *POLITICS AND POWER IN A SLAVE SOCIETY, 1800-1860*, at 85–86 (1978); Gerald Gamm & Thad Kousser, *Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures*, 104 AM. POL. SCI. REV. 151 (2010).

⁹⁰ JEAN H. BAKER, *AMBIVALENT AMERICANS: THE KNOW-NOTHING PARTY IN MARYLAND* 94 (1977).

new forms of political life were national, their focal point was contestation for national office, and their principal organizational vehicle was the national political party. A national politics, that is to say, arose on the same landscape already occupied by the highly localized colonial and post-Revolutionary mode of politics, and interacted with it not by immediately displacing it, but instead by altering over time the workings of the older political system through a process of mutual contact and reciprocal recruitment and exploitation. Political parties were not the exclusive vehicle of change – all aspects of political organization, including the rise and behavior of parties, very likely responded together to dramatically changed conditions in the larger political environment – but they played an important role nonetheless, and it is that part of the story upon which I focus here.

1. *The National Orientation of the Earliest Parties*

Although historians disagree over when precisely political parties first appeared,⁹¹ there is no disagreement that the earliest parties in the United States were created and organized for the purpose of contesting national office.⁹² “It is a signal characteristic of the American system,” wrote Leon Epstein, “that the national parties have been organized primarily to seek the presidency.”⁹³ As a result, the presidential contest has been “the determining influence in the historical development of American national parties.”⁹⁴ This focus on the presidency drove how parties behaved and how they organized themselves, in turn influencing their effects on political experience.

The earliest parties (or proto-parties in some accounts)⁹⁵ appeared during the run-up to the presidential election of 1800. Competing

⁹¹ Some hold that parties, in their meaningfully modern sense, arose during the electoral contest of 1800 that pitted Jeffersonian Republicans against Federalists, while others argue that the label “party” cannot properly be applied until the appearance of the Jacksonian Democratic Party in the mid-1820s, or even until the establishment of routinized two-party competition between Democrats and Whigs in the 1830s. See *infra* note 92 for sources.

⁹² See JEAN H. BAKER, *AFFAIRS OF PARTY: THE POLITICAL CULTURE OF NORTHERN DEMOCRATS IN THE MID-NINETEENTH CENTURY* 112 (1983); LEE BENSON, *THE CONCEPT OF JACKSONIAN DEMOCRACY: NEW YORK AS A TEST CASE* 41 (1961); DANIEL KLINGHARD, *THE NATIONALIZATION OF AMERICAN POLITICAL PARTIES, 1880-1896*, at 18 (2010); Leon D. Epstein, *Party Confederation and Political Nationalization*, 12 *PUBLIUS* 67, 69–70 (1982).

⁹³ Epstein, *supra* note 92, at 69.

⁹⁴ *Id.* at 70. See also KLINGHARD, *supra* note 92, at 18 (quoting JESSE MACY, *PARTY ORGANIZATION AND MACHINERY* 3 (1912)) (“The American party system ‘has grown up around the Presidency, and its most manifest, most spectacular, and . . . most important purpose is that connected with the choice of the Chief Magistrate.’”).

⁹⁵ Although these organizations waged an ideological competition and utilized some techniques now associated with political campaigns, such as caucuses, rallies, and partisan newspapers, their

organizations coalesced around prominent individuals – most notably Jefferson and Hamilton – and did something new: they engaged in open and ideological contestation for the presidency.⁹⁶ Two decades later, the first truly well-organized and institutional party, the Democratic Party, emerged to support the candidacy of Andrew Jackson for the presidency. Significantly, partisans did not first organize into voluntary associations and then choose to enter the political arena; instead, insightful politicians deduced how the presidency might best be won, leading them to create party organizations to support the effort: “[t]he creation of the Jacksonian system in the 1830s and 1840s turned explicitly on the need to achieve coordination in the electoral college.”⁹⁷ As a result, Jacksonian Democrats “organized the Jackson party from the top down. Central committees in Nashville and Washington corresponded voluminously with politicians around the country, who in turn established Jackson clubs and committees at the county and local levels.”⁹⁸ In this way, local party organizations focused from the beginning on contests for national office and the issues upon which presidential candidates competed.⁹⁹

The Whig Party, which first coalesced around opposition to Jackson’s presidency, likewise organized itself from the top down. Although Whig leaders began by 1836 deliberately to build state-level organizations, they did so not to compete effectively for state office but to facilitate effective national competition: “Whigs . . . had begun to build state organizations, but primarily because state legislatures chose United States senators and because each state’s citizens picked a slate of presidential electors.”¹⁰⁰ Their “top priority was to control the national government.”¹⁰¹ Thus, from the beginning, “the party labels under which organizations could win (or lose) state and local offices derived electoral value from their national association.”¹⁰²

reliance on older methods of political influence revolving around local elites renders ambiguous whether they ought to be counted as parties in any modern sense. See, e.g., ROBERT J. DINKIN, *CAMPAIGNING IN AMERICA: A HISTORY OF ELECTION PRACTICES* 11–30 (1989); FORMISANO, *supra* note 82, at 24–54; WILENTZ, *supra* note 86, at 40–98.

⁹⁶ See EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA’S FIRST PRESIDENTIAL CAMPAIGN* (2007).

⁹⁷ KLINGHARD, *supra* note 92, at 18.

⁹⁸ MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 9 (1999) [hereinafter HOLT, *RISE AND FALL*].

⁹⁹ See BENSON, *supra* note 92, at 41.

¹⁰⁰ HOLT, *RISE AND FALL*, *supra* note 98, at 49.

¹⁰¹ *Id.*

¹⁰² Epstein, *supra* note 92, at 71.

2. *The Nationalization of American Politics*

The national focus and goals of American parties would have been less consequential had they not evolved alongside another development of considerably broader scope: the gradual emergence over the course of the nineteenth century of a national orientation to American political life. As Joel Silbey puts it, "a national structure, dominated by national political parties and giving rise to national outlooks, was a major aspect of American politics for much of the antebellum period."¹⁰³ This is not to say that local ways of life, local forms of civic organization, and local conflict ceased to exercise any influence on the political life of Americans. In fact, state and local interests and outlooks continued to play an important role in the give and take of what quickly became – consistent with the constitutional plan – an extremely complex system of cross-cutting politics linking different polities and levels of government.¹⁰⁴ I take up the continuing influence of the local in the next subsection. For the moment, though, I want to focus on the rise of a far-reaching national orientation to nineteenth-century American political life. The parties, it must be stressed, did not cause the nationalization of politics, but they did provide a structure that to some degree may have facilitated, and most assuredly helped to organize and give meaning to, its expression in politics.

The Revolution delivered an initial blow to the traditionally local orientation of colonial life, which had previously focused almost exclusively on the town or village. After the outbreak of war, local authority diminished, and statewide and national issues began to appear on the political agenda.¹⁰⁵ Afterwards, "no New England town would remain the sole source of value for its inhabitants."¹⁰⁶ As the eighteenth century drew to a close, Americans found their attention drawn repeatedly to national affairs and national conflicts:

In the early days of the republic, identification with Jefferson and Hamilton forced provincial Americans to look beyond local affairs, and because national leaders embodied collective opinion and intended programs on a variety of public issues, the use of their names as party labels served as a shorthand method of understanding

¹⁰³ JOEL H. SILBEY, *THE PARTISAN IMPERATIVE: THE DYNAMICS OF POLITICS BEFORE THE CIVIL WAR* 35 (1985) [hereinafter SILBEY, *PARTISAN IMPERATIVE*].

¹⁰⁴ BENDER, *supra* note 84, at 84 (dual not unitary political culture).

¹⁰⁵ ZUCKERMAN, *supra* note 88, at 220.

¹⁰⁶ *Id.* at 221.

national policy. . . . Associations with [national] notables thus expanded local loyalties, channeling parochial allegiances into a larger framework.¹⁰⁷

This change of focus had a lasting impact on the nature and salience of political issues, which tended to become “national, ongoing, and extremely significant” rather than “local, temporary, and not overly consequential.”¹⁰⁸ Not long afterwards, the concept of Union became a focal point of sentimental nationalism, manifested locally in patriotic rituals of national affirmation, such as Fourth of July celebrations.¹⁰⁹ Attention to national issues was reinforced, and to some extent rendered habitual, by the national focus of news providers: “In villages, small towns, large cities, and State capitals, newspapers predominantly focused on national politics.”¹¹⁰

By the time regular competition between mature political parties emerged in the 1830s and 1840s, this focus on national affairs had begun to play out systematically in politics. “National alignments,” Richard McCormick reports, “established a framework for conducting party politics within the states, and even within counties and townships.”¹¹¹ Although the American party system remained decentralized, with control over local organizations often lodged firmly in the hands of powerful local elites,¹¹² coalitions of such organizations nevertheless found themselves forming around national issues,¹¹³ resulting in decisions by such coalitions to align themselves with national parties.¹¹⁴

National issues, according to Silbey, “dominated political debate.”¹¹⁵ Contemporary politicians were well aware of this phenomenon. The 1849 party platform of the Massachusetts Whigs admitted bluntly that “[a]ll our elections . . . are in a great degree influenced by national questions, and for many years the respective parties have selected their candidates for State offices with as much reference to their opinions on general politics, as to

¹⁰⁷ BAKER, *supra* note 92, at 112.

¹⁰⁸ DINKIN, *supra* note 95, at 6.

¹⁰⁹ BENDER, *supra* note 84, at 88.

¹¹⁰ JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION, 1838-1893*, at 87 (1991) [hereinafter SILBEY, *AMERICAN POLITICAL NATION*].

¹¹¹ MCCORMICK, *supra* note 80, at 22.

¹¹² KLINGHARD, *supra* note 92, at 27, 31, 33, 45, 51; RIKER, *supra* note 59, at 91, 101; JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 10 (rev. ed. 1983).

¹¹³ THORNTON, *supra* note 89, at 44.

¹¹⁴ WATSON, *supra* note 81, at 108.

¹¹⁵ SILBEY, *AMERICAN POLITICAL NATION*, *supra* note 110, at 86.

their views on State policy.”¹¹⁶ State legislatures during this period “routinely passed resolutions on national affairs at the beginning of their sessions.”¹¹⁷ As the nineteenth century wore on, the national outlook sometimes became so dominant that candidates “focus[ed] on national issues in races where national problems had no bearing. Candidates for state and local office were more likely to take stands on the tariff than on local taxation.”¹¹⁸ In short, “the debate over national issues was the glue that bonded all levels of the American political nation” during much of the nineteenth century.¹¹⁹

Political parties did not cause this change of outlook, but they played a role, and almost certainly facilitated it. It is often said that one of the main beneficial functions of political parties is to help make the world intelligible in political terms. Parties translate for their membership the course of events into an intelligible language of the political, thereby helping not only to organize political thought itself, but to make it widely accessible to a democratic public.¹²⁰ Nineteenth-century parties performed these tasks: they “played a primary role in organizing, shaping, and giving life to antebellum politics.”¹²¹ Critically, however, the political understanding promoted by nineteenth-century parties was one that stressed unity over difference, and elided to some extent the barriers that the designers of American federalism had hoped to erect: “Each party created an intellectual and emotional framework for interpreting politics which allowed voters to recognize all local, state, and national events as unfolding aspects of a single struggle.”¹²²

This worldview seems to have had a profound impact on the nineteenth-century electorate. During that period (and unlike today) “[m]ost people . . . voted for or against parties, not particular candidates.”¹²³ Moreover, the

¹¹⁶ *Id.* at 87 (quoting Address and Resolutions Adopted at the Whig State Convention, Worcester, Oct. 3, 1849 (Eastburn’s Press 1849)).

¹¹⁷ *Id.* at 87.

¹¹⁸ RICHARD JENSEN, *THE WINNING OF THE MIDWEST: SOCIAL AND POLITICAL CONFLICT, 1888-1896*, at 8 (1971). See also RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900*, at 102 (2000) (“[I]ssues related to [national] economic development . . . dominated party competition at the state level where, in fact, few opportunities to shape national development existed.”).

¹¹⁹ SILBEY, *AMERICAN POLITICAL NATION*, *supra* note 110, at 87.

¹²⁰ See, e.g., AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE* 12–13 (1962); ROSENBLUM, *supra* note 58, at 7, 103, 105 (2008).

¹²¹ SILBEY, *PARTISAN IMPERATIVE*, *supra* note 103, at xv.

¹²² WATSON, *supra* note 81, at 152.

¹²³ MICHAEL F. HOLT, *POLITICAL PARTIES AND AMERICAN POLITICAL DEVELOPMENT FROM THE AGE OF JACKSON TO THE AGE OF LINCOLN* 30 (1992) [hereinafter HOLT, *AMERICAN POLITICAL DEVELOPMENT*].

parties were successful in recruiting voters, politicians, and officials to this view: "Members of a particular party wanted their team to win no matter what arena it was playing in: elections for state legislatures, roll-call votes in Congress, debates on the hustings, or the allocation of government jobs."¹²⁴ As a result, partisans at all levels worked hard at every level to ensure the success of the party, binding its parts together in casual disregard of the boundaries of sovereignty created by the Constitution.

As the nineteenth century unfolded, forces favoring the nationalization of politics only strengthened. The disputes leading up to the Civil War, and the war itself, dominated the political attention of Americans for years, focusing attention intently on national issues.¹²⁵ To prosecute the war successfully, the national government was required to assume powers that it had not previously exercised, on a scale previously unimagined, and its success in so doing permanently raised its profile in the public consciousness and cast it thereafter as a plausible and attractive agent of beneficial collective action.¹²⁶ The idea of "Union" emerged from the war as a focal point of American identity.¹²⁷ On the economic front, the knitting together of the United States into a national economy made it difficult to distinguish where state and national responsibilities began and ended, and in consequence, what constituted a distinctive state or national political issue.¹²⁸ A national middle class began to form, prosperous, mobile, and less tied to locale.¹²⁹ Ultimately, by the end of the century, the "nationalized citizen" appeared,¹³⁰ along with an emerging ideology designed to appeal to him by offering the transcendent promise of a "national rationality [that] would assure consensus on the big issues, the

¹²⁴ *Id.*

¹²⁵ See GLENN C. ALTSCHULER & STUART M. BLUMIN, *RUDE REPUBLIC: AMERICANS AND THEIR POLITICS IN THE NINETEENTH CENTURY* 152–83 (2000).

[The War] provided an utterly novel and compelling focus to public affairs. These were issues . . . of . . . immediate and profound significance to far greater numbers of people. . . . How could anyone now abstain? Americans who ordinarily allowed themselves to be mobilized by political parties now mobilized themselves, not to vote, but to pay attention, to argue and discuss, and in many cases to go off to war.

Id. at 157.

¹²⁶ See MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 1–237 (1977).

¹²⁷ See generally, PAUL C. NAGEL, *ONE NATION INDIVISIBLE: THE UNION IN AMERICAN THOUGHT, 1776–1861* (1964).

¹²⁸ HOLT, *AMERICAN POLITICAL DEVELOPMENT*, *supra* note 123, at 153–54, 167–68; KLINGHARD, *supra* note 92, at 68–69.

¹²⁹ SCHUDSON, *supra* note 78, at 175.

¹³⁰ KLINGHARD, *supra* note 92, at 11.

matters of principle.”¹³¹ As the new century approached, nationwide civic organizations began to compete with parties as vehicles for organizing political opinion and intervening in public affairs, and these groups, unbound to constitutionally embedded structures of governance, “resisted the . . . notion of the fundamental coherence of community identities, defending and demonstrating a politics of national aspirations and self-interested policy pursuits.”¹³²

Again, the parties adapted themselves to the new environment, and in a way that reinforced the new, nationalizing structure of politics. They adopted many of the methods of the new breed of civic associations, strengthening their nationwide organization and subjecting it to a tighter degree of central control.¹³³ Perhaps more importantly, their mode of campaigning shifted from one based on simple mobilization of loyal partisans to one based on public education.¹³⁴ Such a campaign required a level of funding and continuity of operation that local party organizations were unable to match, providing the national party with a greater degree of control. Moreover, because the principal strength of local party organizations lay in mobilizing the faithful, and the educational campaign was based, at least in principle,¹³⁵ on persuasion, national parties began to reach out directly to voters, cutting local organizations out of the transaction¹³⁶ and necessarily nationalizing the message. In sum, according to Michael Schudson, “the national political party was an instrument for nationalism itself, helping to lift public attention to national issues and national identity.”¹³⁷

3. *State Politics in a Dynamic System*

To say that national issues, national conflicts, and national parties came to occupy a central role in the political landscape of nineteenth-century America is not, however, to say that state political life was correspondingly effaced. State politics never disappeared; it was instead subsumed into a

¹³¹ ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at 162 (1967).

¹³² KLINGHARD, *supra* note 92, at 66.

¹³³ *Id.* at 99.

¹³⁴ *Id.* at 106; DINKIN, *supra* note 95, at 95-126; MICHAEL E. MCGERR, *THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH, 1865-1928*, at 69-106 (1986).

¹³⁵ The educational campaign quickly evolved at the beginning of the twentieth century into what some historians call the “merchandising” campaign, one characterized by cynical manipulation of voters through appropriation of newly invented techniques of mass commercial marketing. JENSEN, *supra* note 118, at 155-77; DINKIN, *supra* note 95, at 95-126. Thus, although some reformers clearly believed sincerely in popular education as the foundation of a modern campaign, it is not entirely clear that this belief was shared among party professionals.

¹³⁶ KLINGHARD, *supra* note 92, at 109.

¹³⁷ SCHUDSON, *supra* note 78, at 173.

new, dynamic system in which both kinds of politics existed side by side, linked together in a complex web of mutual interdependence, in which each was capable of influencing the other in ways and to degrees that varied according to the circumstances.

Americans may have acquired a national perspective on politics during the early nineteenth century, but that did not mean they abandoned local political life. Even as voters oriented themselves toward one or another of the national political parties, they “defined themselves and sorted themselves out politically because of perceptions growing out of beliefs, experiences, and memories rooted in their home communities.”¹³⁸ This did not mean that nationally important issues like the national bank, the tariff, and slavery were unimportant to them, but rather that

such matters were often filtered through the prism of local outlooks, or took secondary place to local issues among many voters or, on occasion, while present, were not crucial in the political decision making of a large number of Americans. It also means that Americans constantly made connections between their local perspectives and community anxieties and their perception of national issues and the framework of national political conflict.¹³⁹

As a result, national parties could not simply take for granted that appeals to voters based on national issues would automatically elicit a favorable response. The challenge for the parties, especially earlier in the development of the two-party system, lay in finding plausible ways to make national issues resonate for voters – and often, for politicians and officials¹⁴⁰ – embedded in their state and local communities.¹⁴¹

A vivid example of the cost of failing to learn this lesson can be found in the floundering of the Whigs in 1834 and 1835. As indicated earlier, the Whig Party came into existence to contest the presidency, and began to build organizations in the states almost entirely for the instrumental purpose of improving its position in presidential elections. Whigs found, however, that “[t]ransplanting a nationally oriented party to the states required more than the nutrient of national issues To sink permanent roots in the states, the Whig party had to address matters of state political

¹³⁸ SILBEY, *PARTISAN IMPERATIVE*, *supra* note 103, at xiv.

¹³⁹ *Id.* at xv.

¹⁴⁰ FORMISANO, *supra* note 82, at 27.

¹⁴¹ See WATSON, *supra* note 81, at 152, 164–73.

concern so that citizens would vote Whig in state as well as presidential elections.”¹⁴² Focused as they were on purely national issues and conflicts, Whigs sometimes found this difficult to accomplish, with poor results: “Where Whigs relied solely on the presidential question in campaigns for state offices or took unpopular stands on state issues, they made their poorest showings, no matter how well their presidential candidates ran.”¹⁴³

Complicating matters even further, the texture of local politics often varied considerably from place to place and time to time, with the result that the relative salience of state and national issues ebbed and flowed depending upon the context at both levels. In his study of the emergence of stable, two-party competition between 1828 and 1840, McCormick found great local variation in the extent to which national or state issues predominated in electoral politics. In New England, for example, state politics settled readily into the template created by the newly-organized, national, presidentially-oriented parties.¹⁴⁴ In New York, in contrast, state politics were not so easily linked to presidential politics due to the significant control exercised by state leadership.¹⁴⁵ In Pennsylvania, state politics “took precedence” over national politics until 1840.¹⁴⁶ After 1842, however, when major state issues had been resolved, Pennsylvania’s state parties came to be defined by their national identities.¹⁴⁷ Georgia politics were state-oriented before 1834, then underwent a period of instability until 1840, at which point the state completed “the transition from a state-centered to a nationally-oriented politics.”¹⁴⁸

The political independence of state electorates from national political cleavages was frequently matched by an equivalent degree of independence of state-level parties from their national counterparts. Throughout the nineteenth century, national parties were composed primarily of “relatively autonomous state and local party organizations.”¹⁴⁹ Their autonomy enabled these organizations “to ignore or dissent from national party declarations when the latter impaired their competitiveness

¹⁴² HOLT, RISE AND FALL, *supra* note 98, at 33.

¹⁴³ *Id.* at 49.

¹⁴⁴ See MCCORMICK, *supra* note 80, at 35–99.

¹⁴⁵ *Id.* at 122, 124.

¹⁴⁶ *Id.* at 141–42.

¹⁴⁷ *Id.* These issues were “the state program of internal improvements, antimasonry, public education, banking policy, and constitutional reform.” *Id.* at 142.

¹⁴⁸ *Id.* at 236–43.

¹⁴⁹ JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 124 (1995).

in local elections.”¹⁵⁰ During the Jacksonian period these tendencies were particularly pronounced:

Subnational leaders often failed to mount credible national campaigns, preferring to devote more effort and resources to state and local campaigns, which might be more tightly contested or more central to their interests. On occasion they negotiated elaborate trades with their local opposition to swap votes on the national ticket for votes on the local ticket. To make good on threats, they might sit out campaigns or conduct them listlessly. In the Jacksonian mode, national leaders had few tools with which to combat this and no choice but to work with the regular local organizations.¹⁵¹

The national parties adapted to these complex conditions by cultivating a kind of loose flexibility, in which they tailored their message and their emphasis to different audiences depending on the circumstances: “The Jacksonian party system derived considerable strength from the capability of parties to emphasize national, state, or local issues as their situation dictated.”¹⁵² Despite the capacity of local party organizations to act from time to time with considerable autonomy, the parties were nevertheless internally connected at all levels. Party members for the most part tended to work for their party’s success at every level.¹⁵³ And although national party officials were interested primarily in the presidency, they took seriously the outcomes of off-year electoral contests for state office: “political leaders in Washington and state capitals regarded them as the nineteenth-century equivalent of public opinion polls, as running tabulations of public attitudes toward their parties and their own performance in office,”¹⁵⁴ and often changed their behavior on account of what they learned.¹⁵⁵ In some sense, then, the organization of nineteenth-century political parties tracked the structure of nineteenth-century federal governance, with semi-autonomous yet always connected, and often

¹⁵⁰ BENSEL, *supra* note 118, at xvii.

¹⁵¹ KLINGHARD, *supra* note 92, at 53.

¹⁵² William E. Gienapp, “*Politics Seem to Enter into Everything*”: *Political Culture in the North, 1840-1860*, in *ESSAYS ON AMERICAN ANTEBELLUM POLITICS, 1840-1860*, at 49 (William E. Gienapp et al. eds., 1982).

¹⁵³ *Id.*

¹⁵⁴ HOLT, *AMERICAN POLITICAL DEVELOPMENT*, *supra* note 123, at 31.

¹⁵⁵ *Id.* at 31-32.

mutually dependent, national and state party organizations engaged in an ongoing relationship of alternating struggle and cooperation.¹⁵⁶

4. National Colonization of State Issue Agendas and Positions

To make these propositions more concrete, it is useful to examine briefly the evolution and content of nineteenth-century state party platforms. The national parties, of course, routinely draft and adopt elaborate platforms describing the issue positions and commitments on which party members will run, a practice that dates back as far as the election of 1840.¹⁵⁷ Less well-known is that *state* party organizations have long been doing the same thing – adopting platform statements of the commitments upon which their candidates intend to run for governor, the state legislature, and other statewide offices. Although modern Americans have an understandable tendency to think of party platforms more as propaganda than as statements of genuine principle binding party candidates,¹⁵⁸ in the nineteenth century such statements were taken much more seriously than they are today. State party platforms, according to historian Richard Bense, were “complex political tracts” that “conferred both identity and purpose” on party organizations.¹⁵⁹ Parties took these documents seriously, and worked hard to implement their platform commitments in legislation; candidates who won election “often viewed their party’s state platforms as binding, even in Congress.”¹⁶⁰

A comparison of state and national party platforms during the nineteenth century reveals the extent to which state parties attended to national issues, took positions on them, and in general followed the lead of the national parties both in setting their campaign agendas and taking substantive positions. This tendency is evident from the very beginning. The first national party platform, drafted by the national Democrats in May 1840, was a terse, nine-paragraph statement, couched in broad terms, of the principles for which Democrats believed themselves to stand. One

¹⁵⁶ On the federal structural analogy, see, for example, Gary D. Wekkin, *Political Parties and Intergovernmental Relations in 1984: The Consequences of Party Renewal for Territorial Constituencies*, 15 *PUBLIUS* 19, 35 (1985).

¹⁵⁷ See NATIONAL PARTY PLATFORMS 1840-1968 (Kirk H. Porter & Donald Bruce Johnson eds., 1970).

¹⁵⁸ No doubt one reason for this is the decline of party discipline and the corresponding rise of the candidate-centered campaign. See ALDRICH, *supra* note 149, at 245, 86-97; MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952-1992* (1994). Although partisanship has recovered somewhat since these authors wrote, it is less clear that party discipline has also rebounded.

¹⁵⁹ BENSEL, *supra* note 118, at 101. Bense notes that on the occasions when disagreements within a party became so profound as to cause a faction of the party to split off and found its own party, the cause was invariably disagreement over issues arising at the national level. *Id.* at 110.

¹⁶⁰ *Id.* at 110-11.

provision of this document asserts: “*Resolved*, That congress has no power to charter a national bank” on the ground that “such an institution [is] one of deadly hostility to the best interests of the country, dangerous to . . . the liberties of the people, and calculated to place the business of the country within the control of a concentrated money power.”¹⁶¹ The platform of the Virginia Democratic Party, drafted four months later, similarly provides:

We are averse to a National Bank . . . because such an institution finds no warrant in the Constitution, . . . and because . . . [w]e want no colossal moneyed institution established . . . to control at pleasure the business and prosperity of our wide and diversified country.¹⁶²

Another paragraph of the 1840 national Democratic platform provides: “*Resolved*, That it is the duty of every branch of the government, to enforce and practice the most rigid economy, . . . and that no more revenue ought to be raised, than is required to defray the necessary expenses of the government.”¹⁶³ The Virginia Democratic platform echoes this sentiment: “We believe that no money should be levied from the people, which is not required for the legitimate purposes of revenue, and that the amount thus raised should be as moderate as is consistent with an enlightened economy.”¹⁶⁴ And again, the national Democratic platform asserts: “*Resolved*, That the constitution does not confer upon the general government the power to commence and carry on, a general system of internal improvements.”¹⁶⁵ Its Virginia counterpart provides: “We are opposed to the system of Internal Improvement by the General Government, because it is not sanctioned by the Constitution.”¹⁶⁶

Although the national Whigs did not adopt a platform in 1840 – the first national Whig platform appeared in connection with the election of 1844 – state Whig affiliates did adopt platforms between those elections, and their focus on national issues is startling. The 1842 platform of the New York Whigs, for example, opens its substantive issue commitments with this announcement:

¹⁶¹ *Democratic Party Platform of 1840*, ¶ 6, in NATIONAL PARTY PLATFORMS (Kirk H. Porter & Donald Bruce Johnson eds., 1970).

¹⁶² Proceedings of the Democratic State Convention Held at Charlottesville, Va. 8 (Sept. 9-10, 1840) (on file with the University of Virginia Library).

¹⁶³ *Democratic Party Platform of 1840*, *supra* note 161, at ¶ 5.

¹⁶⁴ Proceedings of the Democratic State Convention, *supra* note 162, at 8.

¹⁶⁵ *Democratic Party Platform of 1840*, *supra* note 161, at ¶ 2.

¹⁶⁶ Proceedings of the Democratic State Convention, *supra* note 162, at 8.

[T]he principles of government for which we now contend [are] Retrenchment in the expenses of the General Government; Curtailment of Executive Patronage; Limitation of Executive Power; Regulation and Equalization of the Currency and Exchanges of the Country; Restriction of the Veto Power within Constitutional limits; Protection to Home Industry by Import Duties; the Distribution of the Surplus Revenues of the General Government after payment of the National Debt; Distribution of the Proceeds of the Sales of Public Lands...and the liberal prosecution of a comprehensive system of Internal Improvement by the State Governments

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....

With the exception of the last item, all are national issues, and even that one is in direct conversation with a national debate on the scope of federal power.

As time passed, state parties began to find it convenient merely to endorse rather than to restate the substance of national party commitments. Thus, the Massachusetts Democratic platform of 1853 states that "we most cordially endorse the policy of the national administration [of Democrat Franklin Pierce],"¹⁶⁸ and the 1857 Massachusetts Democratic platform provides: "*Resolved*, That the platform of principles annunciated and established by the national democratic convention at Cincinnati [in 1856] meets our entire approval; it is a chart which may safely be followed by democrats in every section of the Union."¹⁶⁹

Comprehensive studies of state party platforms demonstrate that these kinds of similarities were routine, and that over the course of the nineteenth century state and national party agendas and positions tended to converge. In a study of state party platforms between 1877 and 1900, Bensei found that "issues related to economic development dominated national party platforms in the late nineteenth century. While this should not be surprising, such issues also dominated party competition at the state level where, in fact, few opportunities to shape national development

¹⁶⁷ *Address of the Whig State Convention*, N.Y. DAILY TRIBUNE, Sept. 15, 1842, at 1.

¹⁶⁸ *Address of the Democratic State Central Committee to the People of Massachusetts*, BARNSTABLE PATRIOT (Mass.), Oct. 11, 1853, at 1.

¹⁶⁹ *Democratic State Convention*, BARNSTABLE PATRIOT (Mass.), Sept. 29, 1857, at 1.

existed.”¹⁷⁰ This phenomenon, Bensel argues, “underscores the deep penetration of competing visions of national development into local politics.”¹⁷¹ Parties emphasized “issues associated with national economic development” year after year, “often relegating local problems to a rather desultory, secondary role among partisan concerns.”¹⁷²

The only comprehensive study of state party platforms over the entire duration of the nineteenth century of which I am aware – an unpublished 2011 dissertation by Adam Silver¹⁷³ – confirms Bensel’s conclusions. In that study, Silver argues that “nationalization” of a state party is demonstrated when “the state party affiliates . . . mirror the stances of their national counterparts in their platforms.”¹⁷⁴ After comparing state and national party platforms in every presidential election year between 1840 and 1896, Silver identifies a pattern of convergence along several dimensions. For example, “state parties endorsed their national parties’ platform in more of their platforms over time.”¹⁷⁵ Also, parallel reductions in the length of state and national platforms, and their convergence on substance during the period studied “suggest the predominance of national issues and the exertion of the national parties’ agenda over their state affiliates as the nineteenth century progresses.”¹⁷⁶ The findings, Silver concludes, “suggest that over the course of the nineteenth century state parties yielded to national party positions and adopted them in their platforms.”¹⁷⁷

As we have already seen, however, it does not follow from the fact that state parties frequently adopted platform positions taken by their national counterparts that they were incapable of acting with some degree of independence. One of the principal ways that state parties asserted their autonomy in drafting platforms was by making strategic decisions about what to include, omit, or emphasize.¹⁷⁸ This form of state adaptation of

¹⁷⁰ BENSEL, *supra* note 118, at 102.

¹⁷¹ *Id.*

¹⁷² *Id.* These issues included railroads, “trusts,” regulation of rail fares, antitrust legislation, the tariff, monetary policy and the national financial system, immigration, the disposition and distribution of national land, a federal income tax, the power of the U.S. Supreme Court, federal civil service reform, and international diplomacy and war. *Id.* at 117–78.

¹⁷³ Adam M. Silver, *Platforms and Party Development: Regional Diversity, Party Platforms, and the Institutionalization of the Two-Party System in Nineteenth Century America* (2011) (unpublished Ph.D. dissertation, Boston University) (on file with author).

¹⁷⁴ *Id.* at 104.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 105.

¹⁷⁷ *Id.* at 107.

¹⁷⁸ *Id.* at 86–87; Daniel J. Coffey, *Variation in State Party Agendas: A Computer-Assisted Analysis of State Party Platforms*, presented at Annual Meeting of the Southern Political Science Association 7–

national issues occurs even today: "The [2000] Massachusetts GOP [platform] does not devote a single sentence to its position on abortion out of a total of 169 [sentences], while the North Carolina Republican [Party] devote[s] an entire section of its platform and 17 out of 246 sentences to its strong opposition to abortion."¹⁷⁹ This form of autonomy, however, is obviously quite limited. Even if state parties can deviate from the national party in what they emphasize, or can adjust their appeal to state voters through omission and inclusion of national positions, such a practice seems to reflect virtually no state capacity to resist the national party *agenda*. Given the power of agenda-setting to determine outcomes,¹⁸⁰ national politics in this setting appears to exercise a very strong influence over the content of state politics.

III. THE CONTEMPORARY RELATIONSHIP BETWEEN STATE AND NATIONAL POLITICS

Thus far, we have looked mainly at the nineteenth century, using the tools of historical inquiry. It does not necessarily follow, however, that the relationship between state and national politics that prevailed at the dawn of the twentieth century is the one that prevails now, more than a century later. The distinction is important: whether states enjoyed the kind of political autonomy contemplated by federalism during the nineteenth century may say little about whether they enjoy it now. To address this question, I turn in this section to the contemporary relationship between state and national politics, and I do so with the benefit of being able to draw on a considerable body of work by political scientists related to this question. By and large, the data tend to show that the relationship established in the nineteenth century has continued up to the present – national politics has a strong tendency to set the political agenda, and often the substantive positions, of actors in state politics. If anything, the impact of national politics on its state-level counterpart appears only to have intensified since the end of the nineteenth century.

8 (Jan. 8, 2004) (on file with author).

¹⁷⁹ Coffey, *supra* note 178, at 7.

¹⁸⁰ Probably the most dramatic account of the power of agenda-setting is Arrow's Impossibility Theorem. See KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 98 (2d ed. 1963). For a political science account of how agenda-setting shapes decision making, see SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION* 16–33 (1987).

A. Introduction: The Autonomy of State Politics

The idea that federalism presupposes an autonomous state politics meaningfully distinct from its national counterpart has long been well-understood by political scientists. In his path-breaking book on American state politics, V.O. Key put the premise succinctly:

The practical yearning for a state politics uninfluenced by external forces does not diverge markedly from the theoretical presupposition about how a federal governmental arrangement ought to operate. Federal theory, at least tacitly, assumes the feasibility of a more or less autonomous politics within each unit of the system. . . . In a word, federal theory, by its inner logic, must presuppose a political capacity congruent with the constitutional competence of each federated unit. Otherwise, political means do not exist for the exercise of the autonomous sphere of constitutional power held by the units of the system.¹⁸¹

Key, however, writing in 1956, was deeply skeptical, on both structural and empirical grounds. The structure of American federalism, he argued, is to some degree at war with its own premises. “[T]he American states operate,” he wrote, “not as independent and autonomous political entities, but as units of the nation.”¹⁸² From this it necessarily follows that “public attention cannot be focused sharply on state affairs undistracted by extraneous factors; political divisions cannot occur freely on state questions alone: national issues, national campaigns, and national parties project themselves into the affairs of the states.”¹⁸³

Empirically, Key was skeptical based on what was then known about the behavior of voters. Americans, he argued, simply are not that interested in the states,¹⁸⁴ nor do they typically make the kinds of fine distinctions an understanding of federalism would seem to demand: “Evidently in the public mind . . . no sharp differentiation between state and national affairs prevails The governmental system may be federal but the voter in the

¹⁸¹ V.O. KEY, JR., *AMERICAN STATE POLITICS: AN INTRODUCTION* 19 (1956).

¹⁸² *Id.* at 18.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 3.

polling booth usually is not.”¹⁸⁵ Voters, Key maintained, do not adequately “differentiat[e] between state and federal politicians,”¹⁸⁶ with the result that “the issues, cleavages, and loyalties of national politics push themselves powerfully into the politics of states.”¹⁸⁷ At the same time, however, Key was willing to contemplate the possibility that the federal system might be sufficiently complex, and the politics it produced sufficiently contingent, to furnish state politics with some degree of autonomy in at least some circumstances. For all its influence, he allowed, national politics does not completely determine state party fortunes, and the leading evidence of this for him was that different parties succeed from time to time at different levels within a state.¹⁸⁸

Later commentators have reached much the same conclusion. In his detailed ethnographic study of mid-twentieth-century Pennsylvania state politics, Frank Sorauf concluded that “in the long run no state’s political system can long isolate itself from the national political life. So pervasive are presidential and Congressional politics that they inevitably color and define the politics of the states.”¹⁸⁹ Duane Lockard argued for a similar proposition: “Does it make sense to speak of the politics of the states as independent of the tides of national politics? In one sense, the answer must be no. The states are not . . . independent governments but units of the federal system.”¹⁹⁰ “Important debates on domestic politics,” Lockard explained, “almost invariably result in mixing national and state politics The tides of national party popularity which elect and defeat presidential aspirants simultaneously determine the fates of local candidates.”¹⁹¹ Nevertheless, he warned, “it is wrong to conceive of the states as completely tied to the national political system.”¹⁹² State parties have “a considerable range of discretion.”¹⁹³

James Sundquist staked out what may be the strongest position. “In the nineteenth century,” Sundquist observed, “a man who was a Whig, a Democrat, or a Republican in presidential politics belonged automatically to the same party in state and local politics, and vice versa.”¹⁹⁴ He

¹⁸⁵ *Id.* at 30–33.

¹⁸⁶ *Id.* at 33.

¹⁸⁷ *Id.* at 38.

¹⁸⁸ *Id.* at 38–39.

¹⁸⁹ FRANK J. SORAUF, *PARTY AND REPRESENTATION: LEGISLATIVE POLITICS IN PENNSYLVANIA* 40 (1963).

¹⁹⁰ DUANE LOCKARD, *THE POLITICS OF STATE AND LOCAL GOVERNMENT* 164 (2d ed. 1969).

¹⁹¹ *Id.* at 165.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ SUNDQUIST, *supra* note 112, at 228.

conceded that ticket-splitting had increased greatly over the course of the twentieth century – in the language of political science, a pattern of “divergence between voting behavior in presidential elections and behavior in state and local elections has appeared” – but he viewed this behavior as “inherently unstable” because it entangles the voter in a “contradiction” which the voter “normally feels some degree of pressure to resolve.”¹⁹⁵ In Sundquist’s view, there was no question which way the contradiction would typically be resolved: in favor of the national partisan orientation, leading to the “conformity of state and local with national patterns.”¹⁹⁶ For Sundquist, then, state politics might achieve moments of autonomy from its national counterpart, but those moments would be transitory, as state divergences gradually fell into line with national political trends.¹⁹⁷

These are, of course, broad-brush conclusions. The next section examines in greater detail some of the key findings of political science that tend to support the preceding account of the contemporary influence of national politics on the agenda and substance of state-level political decision making. In particular, I focus on nationalizing trends in three areas: political institutions, the political orientation of voters, and the attention of politicians.

B. The Continuing Nationalization of American Politics

1. Nationalization of political institutions

As we have seen, American political parties were nationally oriented from their inception, and the relative power of local party organizations generally waned over the course of the nineteenth century. Nevertheless, using the relative positions of national and local parties during the early twentieth century as a baseline – a baseline that political scientists typically consider to be one of extreme party decentralization¹⁹⁸ – contemporary

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 229.

¹⁹⁷ For a confirming account of Sundquist’s contention, see RICHARD M. VALELLY, *RADICALISM IN THE STATES: THE MINNESOTA FARMER-LABOR PARTY AND THE AMERICAN POLITICAL ECONOMY* (1989) (describing the rise during the early twentieth century of the Minnesota Farmer-Labor Party as a vehicle for the assertion of a radical redistributive politics and its subsequent demise after the national government launched a similar but more modest set of policies).

¹⁹⁸ This appears to be the conventional understanding among political scientists. See, e.g., SAMUEL J. ELDERSVELD, *POLITICAL PARTIES: A BEHAVIORAL ANALYSIS* 24–44 (1964) (describing political parties at mid-century as a “stratarchy” in which elites attempt to bind together a congeries of semi-autonomous local party fiefdoms); Austin Ranney, *The Political Parties: Reform and Decline*, in *THE NEW AMERICAN POLITICAL SYSTEM* 224–25 (Anthony King ed., 1978) (“Up to the mid-1970s almost every political scientist writing on the structure of American parties stressed *decentralization*.”); RIKER, *supra* note 59, at 91 (“[P]olitical parties are highly decentralized in the United States.”); John S. Jackson, III & Robert A. Hitlin, *The Nationalization of the Democratic Party*, 34 W. POL. Q. 270, 285

students of American parties are united in believing that the parties have become even more centralized over the last forty years.

In a series of articles written over two decades, John Bibby has documented the growing dominance of national party organizations over their state counterparts. During the late 1970s, Bibby observed, the Republican National Committee (RNC) began to pay the salaries of state party officials to "enlarge and professionalize their staffs," and began to divert substantial funds to state races.¹⁹⁹ In so doing, it provided financial contributions directly to the candidates' campaigns, bypassing state party organizations altogether.²⁰⁰ The RNC also hired consultants for campaigns, paid for surveys, provided technical support, and created a local elections unit headed by experienced operatives with strong ties to the national organization.²⁰¹

In a follow-up study of party behavior during the 1980s, Bibby found that "the national parties' expanded rule-making and enforcement authority, increased fundraising capabilities, enlarged professional staffs and support services, and intensified efforts to assist state and local candidates and organizations" had reached a point where "the parties ha[d] become increasingly characterized by a flow of power from the national party organizations to their state and local affiliates."²⁰² Some of the intensified interest of national party organizations in the fate of state party candidates during the 1980s resulted from the realization that the 1990 congressional redistricting would be performed by state legislatures, making party control of those bodies a high priority in order to advance national goals.²⁰³

Finally, by the 1990s, Bibby concluded, the national committees had "achieved a degree of autonomy and power" unforeseeable at mid-century

(1981) ("The Democratic party is no longer the totally decentralized state and locally based confederation it was for the first 150 years of its life."). Mayhew argued that it is possible "to see the last quarter of the nineteenth century as a time between the high watermarks of two rather different party organizational forms – a nationally centered system at the start and a collection of state-oriented systems at the close." DAVID R. MAYHEW, *PLACING PARTIES IN AMERICAN POLITICS: ORGANIZATION, ELECTORAL SETTINGS, AND GOVERNMENT ACTIVITY IN THE TWENTIETH CENTURY* 223 (1986). This account might explain how political historians could find a pattern of party nationalization over the course of the nineteenth century and political scientists could then document a similar trend over the course of the twentieth.

¹⁹⁹ John F. Bibby, *Political Parties and Federalism: The Republican National Committee Involvement in Gubernatorial and Legislative Elections*, 9 *PUBLIUS* 229, 231 (1979).

²⁰⁰ *Id.* at 231–32.

²⁰¹ *Id.* at 232–33.

²⁰² John F. Bibby, *Political Party Trends in 1985: The Continuing but Constrained Advance of the National Party*, 16 *PUBLIUS* 79, 79 (1986).

²⁰³ *Id.* at 87.

by providing financial and technical assistance to state organizations, which in Bibby's view had become dependent on national resources and expertise.²⁰⁴ The state and national parties, he also found, had become much more integrated, in part as an unintended consequence of campaign finance reform. Under the Federal Election Campaign Act,²⁰⁵ ceilings on political contributions applied only to elections to national office; federal law placed no prohibitions on the amounts that could be contributed to state party organizations for the purpose of influencing state elections.²⁰⁶ As a result, the national parties started funneling money to their state counterparts²⁰⁷ "in a manner designed to implement a national strategy geared to winning critical states in the presidential race and maximizing the parties' seats in the House and Senate."²⁰⁸ Thus, Bibby concluded, "the national party has been using its superior resources to nationalize campaigns and integrate the national and state parties to an unprecedented extent."²⁰⁹ State organizations obtained resources and expertise, but at the cost of autonomy.²¹⁰ As Leon Epstein has perceptively observed, the relationship between national and state parties had begun to "resembl[e] the grant-in-aid relationship of national and state governments,"²¹¹ a relationship often associated with centralization and national dominance.

Parties, however, are not the only institutions of politics to undergo nationalization. Lobbying of government by private interest groups also has become more nationally oriented over the last several decades. Like parties, private interest groups can link state and national political agendas by pressing for similar kinds of action at each level of government. In this process of "vertical policy diffusion," attention to an issue displayed by one level of government may cause the other level to pay attention to the

²⁰⁴ John F. Bibby, *Party Networks: National-State Integration, Allied Groups, and Issue Activists*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 72 (John C. Green & Daniel M. Shea eds., 3d ed. 1999) [hereinafter Bibby, *Party Networks*].

²⁰⁵ Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 11 (1972) (codified as amended at 2 U.S.C. § 431, *et seq.* (2011)).

²⁰⁶ See *McConnell v. FEC*, 540 U.S. 93 (2003).

²⁰⁷ This is the contribution of so-called "soft money," a practice that was restricted in the Bipartisan Campaign Reform Act of 2002. For an account, see JAMES A. GARDNER & GUY-URIEL CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* 691-97 (2012).

²⁰⁸ Bibby, *Party Networks*, *supra* note 204, at 73.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 75. On the subject of party nationalization during the same period, see also Epstein, *supra* note 92, at 74-77 and Joel Paddock, *Inter-Party Ideological Differences in Eleven State Parties: 1956-1980*, 45 W. POL. SCI. Q. 751 (1992). The centralization of national party control continued during the 2000s. See Sidney M. Milkis & Jessie H. Rhodes, *George W. Bush, the Party System, and American Federalism*, 37 *PUBLIUS* 478 (2007) (detailing the RNC's assertion of control over candidate selection and campaigning during the mid-2000s).

²¹¹ Epstein, *supra* note 92, at 101.

same issue, often through the influence of private interest groups working in tandem.²¹² In a recent pair of studies, Baumgartner, Gray and Lowery found that lobbying at the state level has “become more nationalized” in the sense that state affiliates of national organizations appear to play a “key role . . . in linking state and national interest systems.”²¹³

The main question in these studies was the direction of influence. The first study examined whether legislative attention to an issue at the national level might mobilize interest groups to press the same issues at the state level – whether, that is to say, state political activity can be “kick-started by federal activity.”²¹⁴ The study, which compared state lobbying registrations with the timing and content of congressional hearings, showed “strong linkages . . . between federal policy activities and the subsequent activities of groups in the states.”²¹⁵ In other words, “attention in the national agenda-setting process has considerable influence on policy attention in the states.”²¹⁶ The second study looked at influence in the other direction: “do patterns of policy attention at the state level . . . influence agenda setting in Washington over the short term?”²¹⁷ Here, though, the authors found little evidence that attention to policy issues at the state level had any impact on the national policy agenda, at least through the intermediating offices of private lobbying organizations.²¹⁸ Thus, the authors concluded,

while federal funding and regulatory activity ensure that the national government can exercise influence over policy making in the states . . . the obverse is not nearly so clear. The states can rarely compel the national government to pay attention to issues that concern them or to avoid dealing with issues that they wish to keep under the rug.²¹⁹

Third, the media has also become nationalized; voters tend to receive their news and political information from similar or identical sources with a more national outlook. This story is by now a familiar one: “We live in

²¹² Frank R. Baumgartner, Virginia Gray, & David Lowery, *Federal Policy Activity and the Mobilization of State Lobbying Organizations*, 62 POL. SCI. Q. 552, 553 (2009).

²¹³ *Id.*

²¹⁴ *Id.* at 553.

²¹⁵ *Id.* at 564.

²¹⁶ David Lowery, Virginia Gray, & Frank R. Baumgartner, *Policy Attention in State and Nation: Is Anyone Listening to the Laboratories of Democracy?*, 41 PUBLIS 286, 287 (2010).

²¹⁷ *Id.* at 288.

²¹⁸ *Id.* at 300.

²¹⁹ *Id.* at 304.

an age when we all see and hear about the same events on national television at the same time [and in which] the Internet gives those who have some interest in politics a chance to explore an enormous variety of specialized materials....”²²⁰ Trends such as these “are so obvious and powerful that they are likely to overshadow the more subtle, underlying, traditional forces that continue to distinguish state political cultures.”²²¹ As a result, the kinds of local outlooks that might in the past have underwritten the assertion, even the very formulation, of a distinctive state political agenda may be disappearing, along with the capacity of states to dissent from or to affect in any meaningful way the course of national policy making.

Finally, it is possible that the Supreme Court’s recent decision in *Citizens United*²²² may introduce yet another source of nationalization into state politics. The Court’s ruling authorizes wealthy individuals and advocacy groups funded by the wealthy to spend unlimited amounts of money in election campaigns. This opens the possibility of well-funded, coordinated campaign interventions that cross state boundaries to deliver the same message in different jurisdictions. There is evidence that this has been occurring. For example, in the most recent election cycle American Crossroads/Crossroads GPS, the Super PAC run by Republican operative Karl Rove, spent about \$76 million on House and Senate races in 19 different states.²²³ Cross-state funding has been occurring not only in races for elective office, but in contests over ballot initiatives, an arena that in principle offers state politics the opportunity to adopt policies that depart significantly from national norms. Nowadays, however, national advocacy groups frequently pour money into mounting or opposing initiative campaigns on identical issues in multiple states. A notorious example occurred in 2008 when the Mormon Church, based in Utah, raised \$5 million in donations to support California’s Proposition 8, a measure prohibiting recognition of gay marriage.²²⁴

²²⁰ MALCOLM E. JEWELL & SARAH M. MOREHOUSE, *POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES* 19 (4th ed. 2001).

²²¹ *Id.* at 20.

²²² *Citizens United v. FEC*, 558 U.S. 310 (2010).

²²³ *American Crossroads/Crossroads GPS Recipients, 2012*, CENTER FOR RESPONSIVE POLITICS, POLITICIANS & ELECTIONS, <http://www.opensecrets.org/outsidespending/recips.php?cmte=American+Crossroads%2FCrossroads+GPS&cycle=2012> (last visited Apr. 11, 2013).

²²⁴ Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES (Nov. 14, 2008) http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?pagewanted=all&_r=0.

2. Nationalization of voter orientation

Like the major institutions of politics, voters too have adopted an increasingly national orientation in their political attention and decision making. Presidential politics continues to be “the principal rallying point for the great public interests of the nation.”²²⁵ Perhaps the most visible manifestation of this phenomenon is the “coattail effect.” This occurs when “[s]trong support in a district for a particular party’s candidate for higher office . . . enhance[s] the vote margin for that same party’s candidates running lower on the ballot.”²²⁶ In other words, voter enthusiasm for a candidate at the top of the ticket, such as a presidential candidate, may spill over into votes for candidates of the same party for lower-level offices. Although some of the best-developed evidence documents the effect of presidential coattails on congressional contests,²²⁷ there is considerable evidence that the performance of a national party in contests for national office influences its performance in contests for state offices.²²⁸

Several studies have attempted to analyze this effect more closely, and although the results have been mixed, partly as the result of methodological disagreements,²²⁹ some conclusions seem relatively reliable. One undisputed finding is that voter turnout increases in presidential elections,²³⁰ a clear indication that many voters find national

²²⁵ E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 206 (Transaction Publishers ed., 2002). See also David B. Truman, *Federalism and the Party System*, in *FEDERALISM, MATURE AND EMERGENT* 116 (Arthur W. Macmahon ed., 1955).

²²⁶ Robert E. Hogan, *Gubernatorial Coattail Effects in State Legislative Elections*, 58 *POL. RES. Q.* 587, 587 (2005).

²²⁷ See, e.g., Hogan, *supra* note 226, at 587–88; Jeffrey J. Mondak, *Determinants of Coattail Voting*, 12 *POL. BEHAVIOR* 265, 266 (1990).

²²⁸ Dennis M. Simon, Charles W. Ostrom, Jr. & Robin F. Marra, *The President, Referendum Voting, and Subnational Elections in the United States*, 85 *AM. POL. SCI. REV.* 1177 (1991). In an earlier study, Tomkins found that the independence of gubernatorial elections from presidential ones had increased in the late twentieth century, suggesting that voters use different, and presumably more state-oriented criteria in voting for governor, but an effect was still detectable. Mark E. Tomkins, *Have Gubernatorial Elections Become More Distinctive Contests?*, 50 *J. POL.* 192 (1988). See also Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 *U. ILL. L. REV.* 363 (2013) (documenting tandem movement of party seats in the U.S. House and lower chambers of state legislatures, and describing the related phenomenon of “second-order elections”).

²²⁹ See, e.g., Adam R. Brown, *Are Governors Responsible for the State Economy? Partisanship, Blame, and Divided Federalism*, 72 *J. POL.* 605 (2010) (arguing that different results in prior studies can be explained by a failure to attend to partisan biases of voters); Laura L. Vertz, John P. Frendreis, & James L. Gibson, *Nationalization of the Electorate in the United States*, 81 *AM. POL. SCI. REV.* 961 (1987) (criticizing data used by prior studies).

²³⁰ William Claggett, William Flanigan & Nancy Zingale, *Nationalization of the American Electorate*, 78 *AM. POL. SCI. REV.* 77, 90 (1984); Donald E. Stokes, *Parties and the Nationalization of Electoral Forces*, in *THE AMERICAN PARTY SYSTEMS* (William Nisbet Chambers & Walter Dean Burnham eds., 1975).

politics considerably more salient and motivating than state politics, in turn suggesting a meaningfully national orientation. It is somewhat less clear, however, what voters who are drawn to the polls by an interest in presidential politics do once they get there. Just because voters respond to a national-level political stimulus does not imply that they will react in the same way: “there may . . . be nonuniform responses to national stimuli,”²³¹ and variance in the ways voters respond to such stimuli might depend on a host of factors, including voters’ attentiveness to state and local politics. Thus, the critical question is whether voters cast votes for state offices using essentially the same decision-making apparatus they employ when voting for federal office, or whether they apply different criteria to choices for different offices with some sensitivity to the particular functions of each office and the local political context. Do they, in other words, “treat subnational politicians as an extension of the national government”?²³²

This is methodologically a difficult question to answer, and attempts to do so have yielded conflicting results. Nevertheless, although researchers disagree on the precise weight that voters give to national and state issues when voting in state-level races, there are some areas of agreement. No study, for example, finds that voters pay attention solely to state-level issues when voting for state offices; every study finds voters’ evaluation of national issues to play at least some role in their decisions about how to vote for state offices, and there is little disagreement that in some circumstances this influence can be significant.

Aggregate-level studies tend most consistently to find a strong national influence on voting patterns for state office. One such study, for example, found that “presidential races influence legislative races at the state level . . . by affecting not only the direction of voter choices but the number of people who show up at the polls to make them.”²³³ In particular, “when it comes to assigning responsibility for economic performance, state voters have generally and increasingly looked outside of the state – to the national economy and the president’s imputed performance in managing it.”²³⁴ Another aggregate study concluded that elections at all levels – U.S. House, U.S. Senate, governor, and the upper and lower chambers of state legislatures – “are influenced by the same systematic forces,” i.e., respond

²³¹ Claggett et al., *supra* note 230, at 83.

²³² Kevin Arceneaux, *The Federal Face of Voting: Are Elected Officials Held Accountable for the Functions Relevant to Their Offices?*, 27 POL. PSYCHOL. 731, 734 (2006).

²³³ John E. Chubb, *Institutions, the Economy, and the Dynamics of State Elections*, 82 AM. POL. SCI. REV. 133, 138–39 (1988).

²³⁴ *Id.* at 145.

in tandem to general considerations such as economic prosperity,²³⁵ and that “the impact of presidential approval is evident throughout the electoral system.”²³⁶ Finer-grained studies, however, have sometimes reached results that either conflict with the aggregate studies,²³⁷ or qualify their findings.²³⁸

The best research suggests two satisfactory ways to explain these varying results. One explanation is offered in a clever analysis by Adam Brown that introduces into the mix the concept of partisan bias – the tendency of voters to treat officials of their own party indulgently and officials of the opposite party harshly. According to Brown, voters in presidential and gubernatorial elections have a tendency to “assign blame in a partisan manner.”²³⁹ This means that when the president and governor are of different parties, “voters will overestimate the policy success of whichever level of government is controlled by their preferred party.”²⁴⁰ This tendency, in turn, influences whether voters blame poor economic performance on the president or the governor,²⁴¹ which helps determine their decisions. Prior studies that failed to account for the influence of partisan bias may thus be of questionable reliability. This is an explanation, it must be noted, that assigns a very strong role in state-level voting decisions to national forces, though they are the forces not of issue salience but of partisanship. Because partisanship in the United States has from the beginning been defined mainly by reference to national political cleavages and cues, “partisan bias” is a force with an inherently national valence.

The second appealing explanation for conflicting findings concerning the role of national forces in state-level voting is one that treats voter decision making as dynamic and contextual – on this account, voters are open to influence at any time by either state or national issues, whichever happen contingently to be of greater salience at election time. Thus, Vertz et al. argue that “responses to national, state, and local forces . . . are race specific.”²⁴² According to their analysis, “the electorate has the *potential* to respond to electoral forces in a highly nationalized fashion if national forces are relevant to the contest in question. However, if [national

²³⁵ Simon et al., *supra* note 228, at 1183.

²³⁶ *Id.* at 188.

²³⁷ See, e.g., Lonna Rae Atkeson & Randall W. Partin, *Economic and Referendum Voting: A Comparison of Gubernatorial and Senatorial Elections*, 89 AM. POL. SCI. REV. 99 (1995); Vertz et al. *supra* note 229.

²³⁸ See, e.g., Arcenaux, *supra* note 232.

²³⁹ Brown, *supra* note 229, at 607.

²⁴⁰ *Id.* at 613.

²⁴¹ *Id.*

²⁴² Vertz et al., *supra* note 229, at 964.

considerations] are irrelevant to a race, . . . then the electorate responds to the more constituency-related, localized forces.”²⁴³

Arceneaux, using an approach sounding more in political psychology, reaches a similar conclusion. Citizens, he contends, are capable of making distinctions between the performance of different levels of government, but “these distinctions only affect voting behavior at different levels within the federal system under specific conditions.”²⁴⁴ He identifies two such conditions: “[1] the issue upon which voters are attributing responsibility must be highly accessible and [2] the level of government perceived to be functionally responsible for that issue should coincide with the level of government that is actually responsible.”²⁴⁵ If these conditions do not obtain, voters will be more likely to hold state-level officials accountable for phenomena that are within the control of national actors – that is, to act like nationalized voters.²⁴⁶

In sum, the political science literature seems to support the contention that the American electorate is to some degree national in its outlook, even when making voting decisions concerning state offices, although the strength of that effect is a subject of some disagreement. The strongest possible conclusion supported by the literature is that the electorate is highly nationalized in that it applies to elections for state offices more or less the same criteria it applies in elections for national offices, and holds state officials and their parties accountable for events occurring on the national level regardless of state officials’ lack of influence over those events. An intermediate possibility is that voters understand the difference between state and national office and attempt, when voting, to make judgments appropriate to each office, but have great difficulty doing so because of the mediating influence of their partisanship, which biases their judgments. Since partisanship in the United States generally means national partisanship, this explanation likewise gives a prominent place to

²⁴³ *Id.* at 965 (emphasis in original).

²⁴⁴ Arceneaux, *supra* note 232, at 748.

²⁴⁵ *Id.*

²⁴⁶ This account is consistent with the European body of literature on “secondary elections.” Elmendorf and Schleicher describe this literature as supporting the proposition that “voters respond to candidates, and candidates appeal for votes, on the basis of political developments in a different arena.” Elmendorf & Schleicher, *supra* note 228, at 40 (emphasis in original). While that is true, it seems to me somewhat more accurate to say that works like Karl H. Reif & Hermann Schmitt, *Nine Second-Order National Elections*, 8 EUR. J. POL. RES. 3 (1980), more fully support the proposition that voters in multi-level systems respond on the basis of political developments in *whichever arena is more politically salient* at the time of voting. Relatedly, there is also evidence of a steady nationalization of outlook among European voters across time that parallels the one described here. See DANIELE CARAMANI, *THE NATIONALIZATION OF POLITICS: THE FORMATION OF NATIONAL ELECTORATES AND PARTY SYSTEMS IN WESTERN EUROPE* (2004).

national political cleavages and issues, though indirectly. Finally, the weakest possible conclusion is that Americans approach elections for state offices contingently, voting sometimes on the basis of state-level issues and at other times as though state elections were basically referenda on the performance of the president's party, depending on whichever set of issues seems to them most salient at the time. Given the findings of many of the relevant studies, this kind of referendum voting appears to occur with some frequency.

3. *Nationalization of orientation of politicians and officials*

If the major institutions of politics and the voters themselves have come to adopt a national outlook on politics, to some degree and at least some of the time, it stands to reason that politicians and elected officials will share this characteristic. Politicians, after all, are the ones who inhabit political institutions, and in a properly functioning democracy politicians should be at least somewhat responsive to the preferences of the electorate on the issues that voters deem important. Although the political science literature has yet to tackle this question directly, some recent research provides suggestive evidence of such an effect.

In what is treated within the political science community as a definitive study, Ansolabehere, Snyder, and Stewart examined the ideological positions of candidates for the U.S. House of Representatives and asked whether those positions corresponded more closely to the positions of the candidates' parties – indicating a candidate orientation toward national issues and party positions – or to the policy preferences of voters in their districts – indicating a candidate orientation toward state and local issues and positions.²⁴⁷ Their findings were unequivocal: they found that “when candidates . . . balance the broad policy views of the local district and the national party, the national party dominates.”²⁴⁸ Although the evidence showed that candidates did feel some pressure “to fit with their constituents,” the effect was “minor compared to the weight of the national parties' ideologies.”²⁴⁹ Using historical estimates of candidate ideology, the authors extended the study as far back as 1874, and found that “the results show clearly that candidate positioning over the past century largely reflects the ideological terrain staked out by the two parties. Candidates

²⁴⁷ See Stephen Ansolabehere, James M. Snyder, Jr. & Charles Stewart III, *Candidate Positioning in U.S. House Elections*, 45 AM. J. POL. SCI. 136 (2001).

²⁴⁸ *Id.* at 136.

²⁴⁹ *Id.* at 136–37.

have adapted their stances only slightly in response to local conditions.”²⁵⁰ The results were decisive enough to permit the authors to state their conclusion in extremely strong terms: “[P]olitical pundits are fond of saying that all politics is local . . . but the opposite appears more apt in describing the broad policy positions that candidates take. . . . The choices voters face locally mainly reflect national positions of the parties.”²⁵¹

The study by Ansolabehere, et al., however, deals with the ideological positioning of congressional candidates, not candidates for state office. Just because candidates for federal office display some discipline in toeing the national party line does not necessarily imply that candidates for state office will do so, or if they do, that they will do so to the same extent. Although no one has attempted to replicate the Ansolabehere study at the state level, mainly for lack of available data, a recent study by Schor and McCarty makes some suggestive findings in a closely related area. Schor and McCarty’s project is to produce a metric of legislator ideology that will allow them to compare the ideological leanings of legislators in every state legislature and in Congress on the same scale.²⁵² In a recent article advancing the project considerably, they reached three principal conclusions. First, they found that “political parties below the national level are quite heterogeneous. Although no Republicans in Congress are more liberal than the most conservative Democrats, we find that many states have Republican state legislative contingents that are more liberal than the Democratic caucuses of many states.”²⁵³ Second, they concluded that “[i]n the aggregate, state legislative medians correlate highly with voter ideology measures. Party medians correlate with the preferences of moderates. At a more disaggregated level, the ideal points of state legislators correlate highly with presidential vote in their districts.”²⁵⁴ Finally, again at the aggregate level, they found that “the states appear to follow the national pattern of high and growing [party] polarization.”²⁵⁵

Taken together, these findings suggest two propositions relevant here. First, there is clearly some linkage between the political ideologies of state and national legislators of the same parties. Broad variations in the

²⁵⁰ *Id.* at 147.

²⁵¹ *Id.* at 152.

²⁵² Boris Shor, Christopher Berry & Nolan McCarty, *A Bridge to Somewhere: Mapping State and Congressional Ideology on a Cross-institutional Common Space*, 35 LEGIS. STUD. Q. 417 (2010).

²⁵³ Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. J. POL. SCI. 549, 549 (2011).

²⁵⁴ *Id.* at 549. This appears to be consistent with the findings of state legislative responsiveness in ROBERT S. ERICKSON, GERALD C. WRIGHT & JOHN P. MCIVER, *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* (1993).

²⁵⁵ Shor & McCarty, *supra* note 253, at 550.

ideologies of state legislators appear to track national trends, an unsurprising finding given that state and national legislators in any given place must be responsive to the same voter populations.²⁵⁶ This is consistent with a view that national politics exercises some degree of influence over the development and content of state politics. On the other hand, there appears to be more play in the joints at the state level: being a Democrat or a Republican in a statehouse can mean something different than being a Democrat or Republican in Congress, as well as something different from what it might mean in some other statehouse. This is consistent with the proposition that state politics can, and sometimes does, enjoy a degree of autonomy from national politics. Both propositions may be true at once.

4. Openings for state political autonomy

Given these findings, it is worth contemplating briefly what political scientists have found concerning the circumstances in which state politics might diverge from national politics in a way that demonstrates its potential for autonomy. In *National Elections and the Autonomy of American State Party Systems*, James Gimpel argues that "it is difficult, but possible, to maintain a state politics organized differently from national politics."²⁵⁷ The condition in which state political autonomy can be maintained, Gimpel contends, is what he calls "electoral incongruence," a condition that arises when "local electoral coalitions are constituted differently from national coalitions."²⁵⁸ Electoral incongruence, according to Gimpel, can occur in three situations. The first is where the state electorate matches up closely with the national electorate in its partisan preferences, but a local issue cuts across these cleavages, creating split-ticket voters in both parties along the dimension of the local issue.²⁵⁹ A second situation is the converse: the state and national electorates have similar policy preferences, but for locally contingent or historical reasons do not belong to the same parties in the same proportions, leading to different results at different levels.²⁶⁰ Finally, both forms of incongruity may exist at once.²⁶¹ In these instances, Gimpel argues, party competition

²⁵⁶ JAMES GIMPEL, *NATIONAL ELECTIONS AND THE AUTONOMY OF AMERICAN STATE PARTY SYSTEMS* 5 (1996) ("The state electorate and national electorate of a given party consist of the same people. State elites take positions very much like their national counterparts.").

²⁵⁷ *Id.* at 3.

²⁵⁸ *Id.* at 4.

²⁵⁹ *Id.* at 6-7.

²⁶⁰ *Id.* at 7-8.

²⁶¹ *Id.* at 8.

may be equally intense at the state and national levels, but it occurs along different dimensions, leading to a state politics that is substantively distinct from its national counterpart.²⁶²

A classic study of state politics by Erikson, Wright, and McIver also provides support for the proposition that state politics enjoys some degree of autonomy from national politics. In this study, the authors establish a strong link, previously doubted by political scientists, between the substantive content of state policy and the opinions and preferences of state electorates.²⁶³ What confused prior researchers, they argue, was that the link between state policy outcomes and state *partisanship* was weak: "Presumably, Republican states would have the most conservative policies and Democratic states the most liberal politics. But this is not the case."²⁶⁴ In a complex analysis, the authors show that state electorates effectively manage political competition between the parties to produce public policies of which they generally approve. However, which party an electorate of any given ideological composition will select to produce the policies it desires can vary from state to state.²⁶⁵ This, in turn, is because state affiliates of the national parties do not inevitably occupy precisely the same point on the ideological spectrum as their national counterparts; they can be more liberal or more conservative than the corresponding national party (or its other state affiliates), a phenomenon made possible by "the ideological flexibility" of major American parties.²⁶⁶

When they turn to elections for national office, the authors find a similar phenomenon. State voters tend to vote consistent with their political ideology,²⁶⁷ but because the ideological location of the parties

²⁶² *Id.* at 8–9. Proceeding to examine the politics of nineteen states over much of the twentieth century, Gimpel concludes that the political systems of some states display greater autonomy from national politics than those of others. In most of the "old-party" states of the east and midwest, he finds, state cleavages match up closely with national ones, creating a congruence of electoral politics. *Id.* at 20–21. In the west, on the other hand, "[t]he dominant national cleavages have been crosscut by one or more regional cleavages that elites and electors see as more important in campaigns for major offices." *Id.* at 14. In these states, at least, "the two national political parties at the state level are not always merely shadows of their national counterparts." *Id.* at 207. In a later work, Gimpel and a collaborator examined state-by-state variation in the *presidential* vote, finding for similar reasons that terms like "conservative," "liberal," "Democrat," and "Republican" "vary according to local interest, demography, and custom." JAMES G. GIMPEL & JASON E. SCHUKNECHT, PATCHWORK NATION: SECTIONALISM AND POLITICAL CHANGE IN AMERICAN POLITICS 3 (2003). Nevertheless, in the context of an exclusively national politics, they reach the more sober conclusion that "[t]he political institutions that force everyone to live with the same two major parties impose order on what might otherwise be political chaos." *Id.* at 33.

²⁶³ See ROBERT S. ERICKSON ET AL., *supra* note 254, at 73–95.

²⁶⁴ *Id.* at 120–21.

²⁶⁵ See *id.* at 120–211.

²⁶⁶ *Id.* at 123.

²⁶⁷ *Id.* at 182.

may differ at the state and national levels, a constant voter ideology may be better expressed by votes for candidates of different parties at the state and national levels. As the authors put it, “state partisanship is shaped by state as well as national politics [S]tate party ideology exerts an independent effect on presidential voting.”²⁶⁸ In this way, then, state politics and state partisanship may enjoy some autonomy from national politics and national partisanship. It must be stressed, however, that nothing in the study suggests that this autonomy is without limit – that a state politics might emerge beyond the outer boundaries established by national partisanship and national political understandings. More likely is that the range of variance of state partisanship is bounded by parameters established at the national level.²⁶⁹

IV. IMPLICATIONS FOR FEDERALISM POLICY

If these findings are correct, what do they mean? Is federalism disabled? If not disabled, is it fatally imbalanced? Should we be worried? Should we consider reforms to rebalance the system? How we answer these questions depends heavily on how we understand the relevant risks, and how those risks are implicated by the facts. In this part, I offer a summary of what I think the evidence shows; a brief analysis of the risks posed by national colonization of state politics; and a quick tour of some possible policy responses.

A. What Does the Evidence Show?

In the two previous parts, we took a long tour of the history and contemporary analysis of the relation between state and national politics. The historical account and the political science literature reinforce each other closely, and together tend to support three basic conclusions. First, American politics has for the most part a strongly national focus. The parties are organized and most strongly motivated to contest national office; the major institutions of politics focus on national races and success at the national level; and voters pay closer attention to national than to state politics and orient themselves for most purposes around issues and cleavages defined nationally. As a result, national politics exercises a

²⁶⁸ *Id.* at 187–88.

²⁶⁹ Cf. Jacob T. Levy, “States of the Same Nature”: *Bounded Variation in Subfederal Constitutions*, in *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS* 25 (James A. Gardner & Jim Rossi eds., 2011) (arguing that one of the virtues of a federal system is to permit states to make decisions that vary from national norms, but not too much).

strong and continuous influence over what issues appear on the state political agenda, the way such issues are defined and understood, and, perhaps to a somewhat lesser extent, the substantive positions taken up by state political actors on those issues.

Second, despite this effect, state politics is not a dependency of national politics. Although strong forces link state and national parties and state and national politics, they are not identical; at the level of individual issues there is play in the joints. In consequence, state parties, and the state politics they help sustain, have the capacity to diverge in substance and in focus from their national counterparts. In such cases state politics may unfold with some degree of autonomy from nationally defined agendas, issue cleavages, and substantive positions.

Third, the relationship of state to national politics is dynamic rather than static. It is neither completely and continuously dependent nor completely and continuously autonomous. Instead, the similarity of state to national politics varies with the circumstances. If in many cases state politics is parasitic on national politics, in some cases, when the conditions are right, it is capable of setting its own priorities and taking up issues and developing positions distinct from those that define politics at the national level.

Finally, let us return to the propositions about federalism with which we began. The conventional argument, it will be recalled, is that the emergence of national political parties provided states with an extraconstitutional back channel through which they were able to influence decision making by the national government, thereby defending their interests in a way demanded by federalism, albeit through different mechanisms. I argued, however, that such a channel cannot plausibly be supposed to run in one direction only; if influence can be transmitted up from the state level, surely it can also be transmitted down from the national level. This colonization of state politics, I suggested, might pose a threat to the autonomy of state politics, thereby undermining a critically important design premise of any federal system.

Although none of the evidence reviewed here constitutes hard proof of these propositions, it does tend to provide strong support for the hypothesis. Extraconstitutional influence within the American federal system, propagated through the parties, does seem to flow in both directions. Even more importantly, the evidence suggests that the direction of the stronger and more consistent flow is downhill, from the national to the state level.

Although it is not entirely clear how precisely parties induce these effects, the evidence points toward several mechanisms that seem to work in tandem to produce a convergence of state and national political discourse on predominantly national terms. First, the growing dominance of national parties over their state counterparts suggests some form of disciplining among political elites. State political actors who wander too far from the national party line may risk losing the support, attention, and resources of national party leaders and of national elected officials who display more party loyalty. This is essentially the same mechanism proposed by Kramer, though in reverse. In Kramer's account, national officials and party leaders depend on state parties for vital logistical support in the electoral ground game, and retain fraternal bonds of partisanship to which state elites can appeal.²⁷⁰ The evidence adduced here is not inconsistent with this possibility, but it suggests that the same elite connections can be exploited in the other direction, and that this happens routinely.

A second mechanism producing convergence appears to be electoral disciplining imposed by voters. Here, the electorate simply is more interested in national affairs than in state affairs, and voters consequently tend to orient their political beliefs toward issues and partisan cleavages defined along national dimensions. When they approach state politics, then, voters often seem to rely upon the same nationally-oriented templates. This leaves candidates for state office and other state political elites with little choice but to appeal to voters, and to implement state policies, along those same dimensions. As a result of this electoral pressure, state politics tends to conform to national politics in its agendas and in the dimensions along which partisan issues cleave.

Finally, and most fundamentally, American public political discourse itself may simply be dominated by ideas framed and generated at the national level for national political purposes. No doubt the causes are complex. Perhaps such ideas are more appealing than those arising from state and local politics, or more persuasive, or more salient to contemporary life. Perhaps political ideas developed at the national level are disseminated more loudly than ideas generated locally, or in greater numbers, or more ubiquitously. Perhaps shifts in cultural norms make a life oriented around national citizenship seem more attractive and valuable than one oriented around local citizenship and local participation.²⁷¹ In this

²⁷⁰ See *supra* Part I.D.

²⁷¹ See KLINGHARD, *supra* note 92; NAGEL, *supra* note 127; WIEBE, *supra* note 131.

sense, the phenomenon of national colonization of state politics may operate at a deep level of ideas, making it not only all the more difficult to resist, but difficult even to observe.²⁷² The effect of this kind of influence, then, may be not so much to crowd out from the political sphere some category of “unique” or “authentically local” state positions that might otherwise be introduced into the public sphere by state political actors,²⁷³ but to suppress the diversity of ideas and positions that might otherwise be generated within the dominant political framework by state actors in the course of intergovernmental relations.²⁷⁴

If so, then the constitutional premises of federalism as a liberty-protecting mechanism appear to some extent undermined. As indicated in Part I, theories of federalism generally contemplate that states will in appropriate circumstances identify issues and interests other than those featured on the federal agenda and demand either national action or restraint on those issues; or that they will dissent from unmeritorious national positions, demand a change of course from the national government, and use whatever avenues of influence are available to them to resist such national actions. If state actors are unable even to generate these kinds of ideas – if they operate essentially as consumers and redisseminators of ideas well-represented at the national level – then it is hard to see how federalism can operate consistently with its own theoretical premises.

B. The Significance of National Colonization of State Politics

How, then, should we understand this particular slippage between theory and empirical fact? Perhaps a good place to begin is with Madison.

²⁷² Social theory offers a variety of potentially helpful concepts and analogies. See, e.g., 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 332–73 (Thomas McCarthy trans., 1984) (describing a process of “colonization of the lifeworld”); STEVEN LUKES, *POWER: A RADICAL VIEW* 23–24 (1974) (describing a conception of power that operates on agents by limiting the beliefs they are capable of formulating); Thomas R. Bates, *Gramsci and the Theory of Hegemony*, 36 J. HIST. IDEAS 351, 352 (1975) (describing Gramsci’s conception of hegemony, and explaining that it “means political leadership based on the consent of the led, a consent which is secured by the diffusion and popularization of the world view of the ruling class.”).

²⁷³ I have expressed my skepticism of this possibility in GARDNER, *INTERPRETING STATE CONSTITUTIONS*, *supra* note 9, at 53–70, and in James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219 (1998).

²⁷⁴ As Habermas puts it, “[a] collective self-understanding can be authentic only within the horizon of an existing form of life.” JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 156 (William Rehg trans., 1996). Or, as Gadamer articulates a similar idea, our actual, historical situation “determines in advance both what seems to us worth inquiring about and what will appear as an object of investigation.” HANS-GEORG GADAMER, *TRUTH AND METHOD* 300 (2d rev. ed. 1989).

If, as Madison maintained, "the accumulation of all powers . . . in the same hands" is "the very definition of tyranny,"²⁷⁵ and such an accumulation has occurred as a result of national colonization of state politics, then clearly we are in trouble. The facts might well be taken to lend themselves to such an interpretation, which might go something like this. Although Congress holds only some powers on account of its initial constitutional endowment, that endowment, with the collaboration of the U.S. Supreme Court, has been vastly strengthened by the expansion of national power over the course of the twentieth century. Whatever measure of power still remained with the states has for all intents and purposes come under national control through the medium of the party back-channel. By effectively yoking the state agenda and state politics to their national counterparts, the parties have succeeded in sapping the states not of their remaining formal powers, but of something much more important: their autonomous political will. Contrary to the assumptions underlying American federalism, the party system ensures that states work from a political agenda and set of positions and understandings developed at the national level, to serve national needs. An institution that might have served as a vehicle by which to redress the gross imbalance favoring national over state power has thus done nothing of the kind. Instead, the national party system has functioned as a kind of Trojan horse, the very means by which the national government has finally appropriated any last vestige of state autonomy, and consequently of any possibility of meaningful state resistance to national initiatives and national desires.

Although it contains a good deal of truth, I believe such an account overstates the case. The reason is that any account of the federal division of power that includes back-channel influences deployed through the offices of a political party is necessarily one that rests on a much more complex conception of "power" than the one the Framers possessed, and this in turn introduces an important ambiguity into Madison's formulation. Ironically for men who lived in a world of such subtle and complex forms of social control,²⁷⁶ the Framers' notion of political power was highly formal and surprisingly unsubtle. Their conception of state power rested on an eighteenth-century model of strong imperial power, wielded by positive command, and backed by a real and immediate threat of force.²⁷⁷ This was the lens through which the Framers foresaw intergovernmental relations

²⁷⁵ THE FEDERALIST NO. 47, at 301 (James Madison).

²⁷⁶ See BENDER, *supra* note 84; WOOD, *supra* note 77.

²⁷⁷ See Gardner, *Democracy without a Net*, *supra* note 23; Kramer, *Understanding Federalism*, *supra* note 25.

unfolding in a federal United States.²⁷⁸ As we now know with the benefit of two centuries of experience of federal organization and governance, power in a federal system can be and is exercised in a wide variety of ways, sometimes formal and sometimes informal, sometimes direct and sometimes indirect. Indeed, the rise and influence of the party channel shows not just the possibility, but the potential force of improvised and extraconstitutional modifications to the original blueprint.

If we acknowledge the existence and potential power of informal and extraconstitutional channels of intergovernmental influence, then it becomes hard to imagine what it would look like for the national government truly to accumulate “all” powers in its own hands, or to interpret the facts described here as fitting that description. Instead, we must conceive of intergovernmental relations as consisting of multiple methods and channels of influence, along many dimensions of political relations.²⁷⁹ From that point of view, surely states retain “some” power, even today, and the prospect of depriving them altogether of power and influence in the national political arena seems remote. If the modern history of federalism shows anything, it shows that power finds a way to influence power.

In light of this analysis, we might assess the situation in the following manner. The state and national governments are not, as the original constitutional plan would have had it, co-equal rivals; the national government clearly is the dominant partner in the relationship. This we know if for no other reason than the great expansion of power the national government enjoyed over the course of the twentieth century. However, the way in which the national party system delivers to the state level a continuous stream of federal political agendas, priorities, understandings, and positions seems to make the imbalance worse. In these circumstances, the possibility that a state might even formulate, much less press, an alternative agenda, or even formulate a will to dissent from federal positions within the framework of a dominant federal agenda, seems compromised, or at least potentially so.

²⁷⁸ See *supra*, Part I.B.

²⁷⁹ Among the many works making this point are MARTHA DERTHICK, *KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM* 28 (2001); DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3d ed. 1984); GARDNER, *INTERPRETING STATE CONSTITUTIONS*, *supra* note 9; GRODZINS, *THE AMERICAN SYSTEM*, *supra* note 29; NUGENT, *supra* note 33; Dinan, *supra* note 46; John Dinan, *Shaping Health Reform: Government Influence in the Patient Protection and Affordable Care Act*, 41 *PUBLIUS* 395 (2011); James A. Gardner & Antoni Abad i Ninet, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain*, 59 *AM. J. COMP. L.* 491 (2011).

Nevertheless, none of this means that the states are entirely incapable of acting in these ways. The historical and political science evidence suggests that the interaction between state and national politics is dynamic. Circumstances exist, in other words, in which states may act independently; they can develop their own political agendas and issue positions if the right conditions come together. What might these conditions be? The evidence is far from clear, but perhaps it is reasonable to suppose that the relevant conditions include at least some of the following: (1) a very strong independent state interest; (2) a high degree of state motivation to act on that interest; (3) the existence of some channel through which the state might either make its wishes known at the national level, or act on them independently; and (4) a lack of very strong will at the national level.

Even if such conditions align rarely, they point toward a different way of thinking about the Madisonian model: the more pertinent aspect of the model may not be its conceptions of governmental power and the modes in which such power is deployed, but its conception of intergovernmental checking. A power that “checks” another need not be a fully rivalrous power in the sense of having the ability to stand against the other successfully on each and every occasion. Another possible understanding of checking, albeit a chastened one, is that a checking power is one that may be invoked on occasion, perhaps after an unusual degree of exertion, to thwart or impede the worst excesses of the power it seeks to constrain. Although opposing and equal powers clearly are ones that may check each other, perhaps the concept of checking is capacious enough to include, without loss of integrity, relations among powers that are, for many purposes, unequal.

If we modify our expectations in this way to focus less on the presently unattainable standard of states as sufficiently powerful to fight the federal government to a draw on every occasion, and more on the idea of states as institutional backstops against the worst abuses of national power,²⁸⁰ then we need not conclude that national colonization of state politics renders states so thoroughly impotent that the goals of a federal system are no longer served. If so, then in the current context the pertinent question may be not whether states are as powerful as the national government, or

²⁸⁰ Consider in this regard Jefferson’s words in the Declaration of Independence: “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

whether they are nearly as powerful, or whether they possess some theoretically optimal fraction of the power wielded by the national government, but simply whether they are capable of thwarting, or even meaningfully impeding, exercises of national power when they feel it is sufficiently urgent for them to do so. The answer seems to be: apparently so. The modern record of state victory, influence, delay, obstruction, programmatic capture, and so on, suggests that states have some ability to act in the way that we might expect an autonomous subnational unit to act, at least some of the time, in at least some circumstances.²⁸¹

I think it worth emphasizing that the phenomenon I have described is a kind of national *colonization* of state politics, not appropriation of or integration with it. At the risk of overextending the metaphor, this suggests both that the relevant dangers are those associated with colonial occupation, and that the potential avenues of recourse might resemble those available to colonials, in all their complexity. In the case of American federalism, the national colonizers occupy the states with the uneasy assent of the populace; some support the occupation, others oppose it, and some support the colonizers only some of the time, in only certain circumstances. Some may resent the occupation, others may welcome it. Nevertheless, a strong-willed, disputatious, and especially a united colonial population can be extremely difficult to control, particularly when many of the colonials are well-connected at the imperial court; such control can be asserted, but only at great cost to the colonizer.²⁸²

The irony of the story of American federalism, then, may be double. The Framers thought they were replicating one aspect of the world they inhabited and understood – a system of carefully balanced, Westphalian great powers – but instead intergovernmental relations came to be mediated by the political parties that the Framers so disdained. At the same time, the nationalization of those parties inadvertently replicated an aspect of the world the Framers knew, but a very different one than they set out to reproduce: a complex but distinctly colonial relationship among co-nationals.

²⁸¹ As Martha Derthick has written in a slightly different context: “Despite two centuries of national development, states remain the central polities of the United States in form. Under some conditions and for some functions, form becomes fact.” DERTHICK, *supra* note 279, at 28.

²⁸² See, e.g., Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 35–44 (2010) (describing the “power of the servant” and analogizing it to the power of “a street-level bureaucrat”).

C. Potential Policy Responses

Suppose nonetheless that a federal system in which the states have no more than a minimal, backstop capacity to check the worst abuses of national power is not an adequate federal system in the sense that it does not provide sufficient protection for liberty. If rebalancing the federal relationship is important, what must be shored up more than anything is the *political* autonomy of the states. How might this be accomplished?

Let us begin with some of the more conventional possibilities. The Supreme Court's "anti-commandeering" doctrine, which prohibits Congress from directing state legislatures to enact legislation that Congress cannot enact itself but wishes states to enact as its surrogates,²⁸³ seems like a useful step under these circumstances. However, whatever protection it may provide for state autonomy, the doctrine does not get at the problem identified here because it deals only with formal exercises of congressional power. The problem with the party back-channel is precisely that it represents a way by which political forces arrayed at the national level can get states to do things *without* a formal exercise of power. The party back-channel provides a means of inducing states to act by making them *want* to act – by furnishing the agenda for state legislative activity, and at times by providing strong cues as to the substance of state legislation.

Seen from this perspective, the federal spending power, normally thought of as among the weakest forms in which national power may be deployed,²⁸⁴ looks much more powerful and threatening. Unlike powers that authorize direct federal legislation, which when invoked result in displacement of conflicting state laws and often cut states out of participation in policy implementation, the spending power relies on inducement of state action through incentives. In so doing, it simultaneously maintains a role for states in policy making and renders

²⁸³ *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997) (executive branch counterpart).

²⁸⁴ As Rebecca Zeitlow has observed, the Supreme Court has typically viewed uses of the spending power as less intrusive and less offensive to state dignity than direct legislation displacing state authority. Rebecca E. Zeitlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 146, 167 (2002). See *Alden v. Maine*, 527 U.S. 706, 755 (1999) (offering spending incentives to enforce the Federal Labor Relations Act as less intrusive than subjecting the state legislatively to private lawsuits); *New York v. United States*, 505 U.S. at 188 (offering the spending power as an alternative to legislative commandeering as a means to secure state compliance). Similarly, it has been argued that congressional use of spending incentives is more respectful of state autonomy because it prevents Congress from exporting the cost of federal regulation to the states. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 38 (2004).

their participation voluntary.²⁸⁵ For these reasons, congressional use of the spending power in lieu of direct legislation with preemptive effect is ordinarily understood as a form of congressional self-restraint.

However, there is another way to look at uses of the spending power – as a form of federal control over state political agendas. If states are charged by federalism with monitoring uses of national power, then any time the federal government acts states may need at least to take note, and in this sense the federal government is constantly placing items somewhere on the state agenda.²⁸⁶ An exercise of the spending power, on the other hand, places items on the state agenda in a much sharper and more urgent way. A state may be offered a very large sum of money – often larger than the state itself could generate for a similar purpose – and a deadline by which to decide whether to accept the money, along with the conditions that frequently accompany such offers. In this sense, when the federal government uses its power of conditional spending it inserts an item directly at the top of the state legislative agenda, potentially displacing other items that the state might, if left to its own devices, think more worthwhile subjects of contemplation and legislative activity.²⁸⁷

This suggests that one possible way to protect state political autonomy would be to place restraints on the use of the federal spending power. Perhaps the circumstances in which it may be used, or the kinds of conditions the national government may place on transfers of funds, might

²⁸⁵ At least in principle. States seem rarely to refuse federal money, and when they do they seem rarely to hold out for very long, prompting some debate about whether state acceptance of federal financial inducements is ever “voluntary” in the usual sense. For a time- and program-limited study of the frequency of state refusals of conditional federal grants, see Sean Nicholson-Crotty, *Leaving Money on the Table: Learning from Recent Refusals of Federal Grants in the American States*, 42 *PUBLIUS* 449 (2012).

²⁸⁶ Of course, the reverse is also true: the states through their actions place items on the national agenda. This is normal in a federal system based on mutual checking. Much federal legislation has its source in congressional reaction to activity of the states. The Voting Rights Act is an obvious example. 42 U.S.C. § 1973 (2011).

²⁸⁷ As Justice O'Connor has said,

The power to make decisions and set policy, however, embraces more than the ultimate authority to enact laws; it also includes the power to decide which proposals are most worthy of consideration, the order in which they should be taken up, and the precise form in which they should be debated.

FERC v. Mississippi, 456 U.S. 742, 779 (1982) (O'Connor, J., concurring and dissenting). See also Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 *COLUM. L. REV.* 847, 882-83 (1979) (describing how state participation in federal conditional grant programs can distort its fiscal priorities and decisions). See *supra* note 180 for sources on the power of agenda-setting. Lynn Baker has also argued that exercises of the spending power impinge on state autonomy, but on very different grounds than those offered here. See Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 *CHAP. L. REV.* 195 (2001).

be narrowed. Until the Court's decision last year in *Sibelius*,²⁸⁸ there were no such limits as a practical matter,²⁸⁹ but regardless of the ultimate reach of *Sibelius*, it does not go very far – it raises only the possibility at the margin that some uses of the spending power may, on extraordinary occasions, amount to coercion of state legislative activity, in much the way that direct congressional “commandeering” of state legislatures is said to coerce state capitulation to federally imposed terms. Although there is an obvious overlap between coercion of state action and coercion of state attention – a state cannot act on matters to which it declines to attend – many, and probably most, matters that are placed squarely on the state agenda by uses of the federal spending power would thus coerce state attention without necessarily coercing state action. Such matters would, moreover, continue to displace from state attention other, locally-generated agenda items, federalizing the state agenda, if not always the ultimate state legislative response.

The difficulty here is that any doctrine limiting uses of the spending power to matters of sufficiently low significance to permit states to decline even to take up whether to accept federal money – to ignore the federal overture altogether – is one that will limit use of the power, almost by definition, to matters of such slight utility to Congress that it is hard to see why it would bother invoking the power. This could be a development in the right direction if it would decrease the scope of national activity and leave more issues to the states, but an equally plausible consequence is that on matters of importance Congress will simply be driven to legislate directly, cutting states out of any involvement whatsoever in the decision making or implementation processes.²⁹⁰

In addition, an adjustment to the scope of the spending power still does not address the real problem created by the party back-channel: its capacity

²⁸⁸ *Nat'l Fed'n of Indep. Bus. v. Sibelius*, 132 S. Ct. 2566 (2012).

²⁸⁹ *Dole* established a principle that the spending power may not be used so as to coerce state action, but in the twenty-five years between *Dole* and *Sibelius*, no federal court had ever found an instance of such coercion. Thus, the limitation was at best purely theoretical.

²⁹⁰ This is an argument that has long been made by justices dissenting from the Court's recent federalism decisions. See, e.g., *New York v. United States*, 505 U.S. 144, 210 (1992) (White, J., concurring and dissenting) (“The ultimate irony of the decision today is that in its formalistically rigid obedience to ‘federalism,’ the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems.”); *Printz v. United States*, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting) (“Perversely, the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies.”).

to set the state agenda through informal pathways of national political activity rather than as a consequence of formal national governmental action. Indeed, this will be a problem with any solution that seeks to rely on judicial policing of the constitutional boundary between state and national power. It is by no means clear that more aggressive judicial enforcement of the constitutional allocation of powers is capable of addressing a problem that has its roots in an unintended and extraconstitutional *modification* to the constitutional plan.²⁹¹ Courts engaged in judicial review under a constitution are confined by definition to enforcing the constitutional plan, but where that plan has been subverted by private actors standing outside the constitutional framework, the ability of courts to bring about meaningful change may be limited.²⁹²

All this suggests that it is worth considering how the problem might be attacked more directly – how, in other words, the national party channel might be blocked or impeded so as to free state parties and political actors from the sometimes suffocating weight of national politics. The goal would be to encourage some degree of dissociation between state and national parties, and in so doing to encourage state parties to adopt a more local orientation.²⁹³ If they were really successful, such measures might even create conditions conducive to the emergence of distinct local and regional parties focused on state-level issues and free of constraining ties to the national parties.²⁹⁴ How might this be accomplished?

One possibility might be to allow states enhanced regulatory authority over the structure and practices of state political parties. By altering the

²⁹¹ See Kramer, *Political Safeguards of Federalism*, *supra* note 53, at 278–93 (arguing against the Supreme Court’s new federalism decisions restricting the power of Congress).

²⁹² Cf. GERALD ROSENBERG, *THE HOLLOW HOPE* (1991) (arguing against the efficacy of social reform through litigation and judicial decisions).

²⁹³ Interestingly, FILIPPOV ET AL., *supra* note 59, argue that integrated national parties serve a vital stabilizing role in federal systems by forcing regional interests into a national template. *Id.* at 187–96. In their terms, my argument is that such parties are actually destabilizing in the sense that they create conditions favoring a collapse into centralization. The difference may depend upon the conception of centralization. Filippov may be correct that such a system conduces to the continued separate existence of the states, and a preservation of their formal powers, but my analysis here suggests that the system that is left may be more formal than functional. Thus, the underlying question is what benefits federalism is meant to provide, and whether different kinds of party systems provide those benefits to the same degree. I am inclined to think that there is more of a tradeoff than Filippov acknowledges between stability and differentiation of political positions. Stability can always be encouraged by creating structural incentives toward uniformity of political opinion. For a concrete example of how activity by national political parties can squelch the emergence of distinctively regional parties, see VALELLY, *supra* note 197, which discusses the decline of the Minnesota Farmer-Labor Party.

²⁹⁴ See David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J. LAW & POL. 419 (2007) (arguing that there is a mismatch between partisan cleavages at the national and local levels, and that party labels serve only the former, thereby misleading voters needlessly in the latter).

way that state parties operate, it is conceivable that a state might alter their incentive structure in a way that makes them more attentive and responsive to state politics and less so to national politics. A state might, for example, prohibit the same party from running candidates for both state and national office,²⁹⁵ or prohibit state parties from accepting financial and professional support from national parties, or ban political contributions to state parties from out-of-state donors.

The problem, of course, is that all of these measures are blatantly unconstitutional under the U.S. Constitution as construed by the Supreme Court.²⁹⁶ In fact, the Court has been exceedingly hostile to even minor attempts by states to influence the way the parties do business. The Court has, for example, invalidated state laws establishing qualifications for leadership positions in state party organizations;²⁹⁷ regulating the way state parties select delegates to national party conventions;²⁹⁸ and prescribing the procedures parties must use to select their nominees.²⁹⁹ The Court has taken a particularly hostile attitude toward state laws that might have just the effect of disengaging state political processes from their national counterparts. In a case challenging an Ohio law setting an earlier filing deadline for presidential candidates wishing to run as independents than for candidates running for the nomination of national parties, the Court invalidated the law partly on the ground that it placed "a significant state-imposed restriction on a nationwide electoral process."³⁰⁰ Yet that is exactly what would need to happen if state regulation were successfully to loosen the ties of a state party to its national organization. Thus, any reform of this type would require a significant shift in approach by the U.S. Supreme Court.³⁰¹

²⁹⁵ Schleicher makes a similar proposal. *Id.* at 470–71.

²⁹⁶ Prohibiting parties from competing at some levels would almost certainly infringe the associational rights of parties and their members as construed by the Supreme Court. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). A prohibition on state parties accepting financial and logistical support from national parties would also violate associational rights, as well as first amendment rights of free speech. *See Citizens United v. FEC*, 130 S. Ct. 876 (2010). Bans on out-of-state campaign contributions have already been ruled unconstitutional. *See Vannatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998); *Whitmore v. FEC*, 68 F.3d 1212 (9th Cir. 1995).

²⁹⁷ *See Eu v. S. F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214 (1989).

²⁹⁸ *See Cousins v. Wigoda*, 419 U.S. 477 (1975); *Democratic Party of Wis. v. La Follette*, 450 U.S. 107 (1981).

²⁹⁹ *See Tashjian*, 479 U.S. at 217 (invalidating state law regulating eligibility to vote in party primaries); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (same). *But see Clingman v. Beaver*, 544 U.S. 581 (2005) (upholding such a law).

³⁰⁰ *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983).

³⁰¹ This analysis shows yet again the incompleteness of the Supreme Court's rights-based view of the constitutional status of political parties. In fact, parties are much more than private associations; they are integrally important supplements to the basic constitutional scheme of governance. For a

One reform that could work, however, and seems to be within the power of a state, would be to switch from a two-party to a multiparty system. Presumably, the introduction of a multiplicity of new parties would weaken the ties of any state party to the existing major national parties. Conventional wisdom holds that such a change would follow automatically from the adoption of a system of proportional representation,³⁰² especially if paired with a switch to a unicameral, parliamentary-style legislature, the format in which proportionality makes the most immediate difference in how the legislature is populated.³⁰³ But of course this would involve a massive change to the basic infrastructure of American state self-governance.

As long as we are speculating about massive structural change, it may be possible that a very significant decentralization of power from the national to state governments might create conditions more favorable to the emergence of genuinely regional parties.³⁰⁴ The more independent power a subnational unit possesses, the less it needs to rely on national power to satisfy local preferences. This in turn makes it more likely that the issues that are salient locally will differ from those that are salient nationally, and thus the more likely that parties will orient themselves toward local issues without relying on ideological templates produced nationally. Although it is difficult to distinguish cause and effect, this has been the experience of Canada, where distinctly regional parties exist in a federal system of extremely powerful provinces.³⁰⁵

critique of the rights-based approach, see James A. Gardner, *The Dignity of Voters – A Dissent*, 63 U. MIAMI L. REV. 435 (2010).

³⁰² This is the effect of “Duverger’s Law,” according to which winner-take-all electoral systems tend to produce two-party systems, whereas proportional forms of representation tend to produce multipartyism. Maurice Duverger, *Political Parties: Their Origins and Activity in the Modern State* (1954). See also William H. Riker, *Duverger’s Law Revisited*, in *ELECTORAL LAWS AND THEIR CONSEQUENCES* (Bernard Grofman & Arend Lijphart eds., 1986).

³⁰³ In the U.S., retention of the Senate would inevitably undermine the proportionality of representation in Congress because of its fixed constituencies and the winner-take-all character of Senate seats. The effect on national party integration of retaining bicameralism but converting the House to proportional elections is difficult to predict. One possibility is that the U.S. could end up like Australia, where the House is elected through a winner-take-all process, resulting in a two-party system in House elections, and the Senate is elected proportionally, resulting in multipartyism in senatorial elections. In consequence, “[t]he country effectively now has two distinct national party systems made up of the same parties.” R. Kenneth Carty & Steven B. Wolinetz, *Political Parties and the Canadian Federation’s Coalition Politics*, in *CANADA: THE STATE OF THE FEDERATION, 2002: RECONSIDERING THE INSTITUTIONS OF CANADIAN FEDERALISM* 60 (J. Peter Meekison, Hamish Telford & Harvey Lazar eds., 2004).

³⁰⁴ See PRADEEP K. CHHIBBER & KEN KOLLMAN, *THE FORMATION OF NATIONAL PARTY SYSTEMS: FEDERALISM AND PARTY COMPETITION IN CANADA, GREAT BRITAIN, INDIA, AND THE UNITED STATES* (2004).

³⁰⁵ Chandler, *supra* note 59, at 153. See also VALELLY, *supra* note 197.

Of course, all these reforms would require very significant alterations of basic constitutional architecture, and are therefore not especially realistic. Moreover, obstructing the party back-channel would presumably hurt states as well as help them by depriving them of a channel of influence at the national level – perhaps the most important such channel – that they can presently exploit to get their way.

One final possibility is that there is no need to do anything because the system is inherently self-correcting. Alexander Hamilton, writing as Publius, took the view that the balance of power between state and national governments is something that always lies ultimately within the control of the people:

Power being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.³⁰⁶

If we take this proposition seriously, perhaps it follows that we should not worry if national power overshadows state power, whether it gains that power openly, by dint of favorable judicial rulings, or quietly and perhaps even inadvertently, through political back-channels. Should the people come to find the arrangement unsatisfactory, they can correct it at any time; the system, on this view, is flexible enough to accommodate virtually any distribution of power.

CONCLUSION

American federalism was inspired by, and designed around, a romantic conception of the states as tribunes, champions standing ready to assert the interests of their people when necessary against the indifference, or in extreme cases the tyranny, of the national government. Although states have from time to time acted in ways that are consistent with this model, for the most part things have not turned out according to plan. Over the course of American history, not only has formal state power been

³⁰⁶ THE FEDERALIST NO. 28, at 181 (Alexander Hamilton).

thoroughly eclipsed by an expansion of national power, but states have largely cooperated with the national government, even serving frequently as agents and facilitators of national power, in an arrangement more closely resembling a partnership,³⁰⁷ if at times a testy one. This deviation from the constitutional design calls into question the efficacy of federalism as a mechanism capable of checking national power.

Nevertheless, a widely accepted account of how intergovernmental relations in the American federal system function on the ground argues that national political parties operate, informally and extraconstitutionally, as the medium through which states exert influence on the substance of national policy making. However, as we have seen, this party back-channel operates in both directions: just as it allows states to influence national policy making, it also allows national policies, priorities, and positions to flow downward to the state level.

This downstream flow has resulted in a kind of national colonization of state politics. National politics tends to set the agenda of state politics, frames the way political issues are understood at the state level, and influences the content of substantive positions taken by state political actors. This does not mean that states are nothing more than hierarchically inferior agents of the national government. When the conditions are right, states are capable of dissenting from national positions, identifying and pressing issues that do not appear on the national agenda, and resisting national influence and power. But these conditions probably do not arise with great frequency, and in the normal course of affairs it is probably much more common that state politics reflects national politics in the issues deemed important, and in the substantive positions that contesting political actors take.

Thus, even if federalism has been refounded on the back of the national party system, it still faces a similar threat. A minimal condition of a properly-functioning federalism is subnational political autonomy – the capacity of subnational units to formulate and express within the system a will sufficiently independent of that of the national government to enable them to dissent, protest, and if necessary resist exercises of national power.

³⁰⁷ As Governor Jack Markell of Delaware, chair of the National Governor's Association, recently remarked: "[O]n a lot of areas of governance, we're partners. . . . We just want to make sure that we have a voice [in congressional deliberations] as these [federal budgetary] decisions are being made." Michael Cooper, *States Want to Have Say During Talks over Budget*, N.Y. TIMES (Nov. 25, 2012), http://www.nytimes.com/2012/11/25/us/politics/states-want-to-have-say-during-talks-overbudget.html?_r=0.

If subnational units are unable to formulate such a will, their capacity to exercise influence in the national political arena is severely undermined.

Under present circumstances, the most effective way to ensure the autonomy of state political will would be to weaken the linkage between state and national party organizations, but the solutions of the greatest potential efficacy either are almost certainly unconstitutional, or would require such a significant restructuring of the way power is organized at the state level as to be unrealistic. In the end, we may simply need to have faith that the federal structure is sufficiently adaptable and flexible to permit states to reach autonomous decisions and to act on those decisions in the face of national power when it is truly urgent for them to do so, or when state power is reinforced by tides of popular support on occasions when the people adopt state power as the best vehicle to achieve their goals.