

Dear Duke Faculty,
Please find below a paper I am working on concerning the relationship between federalism and party politics. For those short on time, I recommend skimming or skipping Part I (which describes how partisanship leads states to challenge federal government action) and Part IV (which considers some doctrinal applications). I'm looking forward to the workshop,
Jessica

PARTISAN FEDERALISM

Forthcoming 127 Harv. L. Rev. __ (2014)

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Among the questions that vex the federalism literature are why states check the federal government and whether Americans identify with the states as well as the nation. This Article argues that partisanship supplies the core of an answer to both questions. Competition between today's ideologically coherent, polarized parties leads state actors to make demands for autonomy, to enact laws rejected by the federal government, and to fight federal programs from within. States thus check the federal government by channeling partisan conflict through federalism's institutional framework. Partisanship also recasts the longstanding debate about whether Americans identify with the states. Democratic and Republican, not state and national, are today's political identities, but the state and federal governments are sites of partisan affiliation. As these governments advance distinct partisan positions, individuals identify with them in shifting, variable ways; states loom particularly large when they are controlled by the party out of power in Washington.

States also serve as laboratories of national partisan politics by facilitating competition within each political party. In so doing, they participate in national political contest without forfeiting the particularity and pluralism we associate with the local. By instantiating different partisan positions, moreover, states generate a federalist variant of surrogate representation: individuals across the country may affiliate with states they do not inhabit based on their partisan commitments. Attending to the intersection of partisanship and federalism has implications for a number of doctrinal controversies, such as campaign finance across state lines and access to state public records. The analysis here suggests that porous state borders may enhance states' ability to challenge the federal government and to serve as sites of political identification.

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INTRODUCTION

We cannot fully understand our federal system today without taking account of partisan competition. Consider a few recent snapshots:

In the spring of 2010, Republican officials in twenty-seven states filed lawsuits arguing that the Patient Protection and Affordable Care Act unconstitutionally intruded on state sovereignty. The Act was the signature achievement of a Democratic President and Congress; not a single Republican member of Congress voted for the law. And no Democratic state officials joined the federalism challenge. Instead, they defended the Act as a valid exercise of national authority.¹

Several years earlier, Democratic officials in eight states passed laws to encourage and fund embryonic stem cell research in response to a Republican President's executive directive prohibiting the use of

¹ See *infra* notes 67-71 and accompanying text.

federal funds for such research. When a Democratic President assumed office, he brought federal policy in line with these state laws.²

Throughout 2011 and 2012, the Wisconsin gubernatorial recall election attracted financial contributions from across the country. Individuals nationwide saw the race as a contest between a burgeoning Republican “right to work” movement and a labor-friendly Democratic agenda. Both the incumbent Republican Governor and his Democratic challenger received contributions from all fifty states, with out-of-state contributions rivaling in-state contributions.³

In each episode, states functioned as important sites of partisan conflict, and partisanship, in turn, shaped state governance. Republican state officials challenged decisions by Democratic federal officials. Democratic state officials challenged decisions by Republican federal officials. And individuals from Alaska to Florida, Maine to Hawaii, saw the states as fora for national partisan fights.

Without an appreciation of partisanship’s influence, dynamics considered fundamental to our federal system are obscure. Take, for example, the widely assumed role of states in checking the federal government. There is nothing essential about the nature of state governments that leads them to oppose their national counterpart, and courts and commentators are more likely to tout state contestation than to explain why it occurs.⁴ Yet we do see substantial opposition. States argue that the federal government is exceeding its proper bounds and infringing state autonomy. States pass laws to prod the federal government into action or to resist its policy choices. States push back against federal directives in carrying out federal programs. In recent years, states have challenged federal law regulating marriage as an intrusion on state sovereignty, adopted their own versions of failed federal legislation regarding greenhouse gas emissions and the funding of Planned Parenthood, administered federal immigration law in a decidedly uncooperative manner, and more.

A key, yet largely neglected, reason for these state challenges is partisanship. Put in only slightly caricatured terms, Republican-led states

² See *infra* notes 89-96 and accompanying text.

³ See *infra* note 243 and accompanying text.

⁴ See, e.g., Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 48 (2010) (“For most theories of federalism to have any bite, different majorities must control at the state and national level. But surprisingly little is written about the precise source of variation.”); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 944 (2005) (arguing that courts and many commentators wrongly personify “the state and federal governments as self-interested political actors with empire-building ambitions, pitted against each other in a competition for power”).

challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans. States oppose federal policy because they are governed by individuals who affiliate with a different political party from those in charge at the national level, not because they are states as such. And the fact that there are fifty states and many actors composing state and federal governments is critical. Because it is party politics that draws the battle lines, some state and some federal actors line up on the side of the federal government, while a separate group of state and federal actors line up on the side of the states. Federalism provides the institutional terrain for disputes that are substantive in nature.

Partisanship also sheds new light on an old debate in the federalism literature: whether Americans have state as well as national political identities. Scholars have long argued about whether the states have unique cultures that command citizen loyalty,⁵ but identification with states may be more contingent than the debate suggests. As recent work in political theory and psychology has shown, partisanship is an important aspect of personal identity and source of community.⁶ Democratic and Republican, not state and national, are today's political identities. But the state and federal governments are important sites of partisan affiliation. As these governments advance competing partisan positions, individuals identify with them in shifting, variable ways. Americans are especially likely to feel loyal to the states when they are controlled by the party out of power in Washington, as some number of them always will be.

Partisan federalism, as this Article defines it, involves political actors' use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and the affective individual understandings of state and national identification that accompany this dynamic. Attending to partisanship reveals that our contemporary federal system generates a check on the federal government and fosters divided citizen loyalties, as courts and scholars frequently assume. But it does so for an unexplored reason—because it provides durable and robust scaffolding for partisan conflict.⁷

⁵ Compare, e.g., DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3d ed. 1984) (arguing they do), with MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* (2011) (insisting they do not).

⁶ See, e.g., DONALD GREEN ET AL., *PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS* (2002); NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* (2008).

⁷ This Article argues that partisanship is critical to understanding contemporary American federalism, but, to be clear, the claim is not that partisanship is the only basis for state action, (continued next page)

Part I examines how party politics drives states to contest federal government action. Existing scholarship describes how the parties breed cooperation among state and national politicians,⁸ but the rise of ideologically coherent, polarized parties means that partisanship matters more for the competition it generates than for the cooperation it inspires. States make demands for autonomy, they enact shadow policies rejected by the federal government, they fight federal programs from within—and they do all of this because of partisan commitments. They thus check the federal government by channeling partisan conflict through federalism’s institutional framework.

Turning from politicians to their constituents, Part II argues that partisanship provides an ingredient many find missing in contemporary American federalism: a reason for individuals to identify with and feel loyal to states rather than the nation alone. People may identify with the states not because they represent something essentially different from the nation, but rather because they represent competing Democratic and Republican visions of the national will. Focusing on partisanship suggests that state-based identification may be fluid and partial—and, perhaps paradoxically, a means of expressing national identity—but nonetheless an important buttress of American federalism.

Part III considers the horizontal dimensions of partisan federal contestation and identification. Our political parties are themselves federated entities, and states flesh out both interpartisan and intrapartisan competition in diverse ways. In so doing, they serve as “laboratories” of national partisan politics; they participate in national political contest without forfeiting the particularity and pluralism we associate with the local. By advancing different partisan positions, moreover, the states become distinct from the federal government and from each other in ways likely to resonate with individuals throughout the nation. Insofar as state identification is driven by partisanship, individuals may affiliate

state identity, or the like. No one claim about federalism can have such all-embracing descriptive power. Moreover, although the Article is principally descriptive, it offers a sympathetic rendering of partisan federalism. One could, however, accept this descriptive account and conclude that partisan federalism is a pernicious phenomenon. Consideration of the many tradeoffs that inform a complete normative assessment must await future work.

⁸ See MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (transaction ed. 1984); WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* (1964); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

with states they do not inhabit, realizing a federalist form of surrogate representation.⁹

Part IV takes up a few doctrinal questions prompted by the notion of cross-state affiliation. While courts have largely held, on First Amendment grounds, that states may not bar nonresidents from making campaign contributions and expenditures in connection with state elections, the legitimacy of the practice is a federalism question as well. Perhaps counterintuitively, this Part suggests that porous state borders may facilitate states' ability to serve as counterweights to the federal government and sites of political identification. As it rationalizes aspects of campaign finance jurisprudence, however, this understanding calls into question the Supreme Court's recent decision upholding state limits on nonresident access to public records.

Ultimately, partisan federalism highlights the mutual entailment of nationalism and federalism in the early twenty-first century. States participate in controversies that are national in scope and do so on behalf of the nation's people at large. Yet the states are not simply agents of the federal government or administrative units of a homogenous polity. As they advance national partisan positions different from those advanced by the federal government and one another, they challenge and disrupt national policy and give rise to meaningful political identification. Partisan federalism underscores the centrality of states to our political order even as it destabilizes conceptions of states as self-contained communities.

I. STATES AS SITES OF PARTISAN OPPOSITION

Courts and scholars frequently celebrate state-federal contestation, but they rarely focus on why it occurs. Party politics offers a powerful explanation. States controlled by one party challenge the federal government when it is controlled by the other party.¹⁰ They argue that it is exceeding its authority and trampling on state prerogatives. They enact their own legislation to dissent from federal policy and chart a different course. And they administer federal laws in ways not intended or welcomed by the federal administration. While all of these actions depend on federalism's structure, they are motivated by partisan conflict.

⁹ See Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 522 (2003) (defining a surrogate representative as one "with whom one has no electoral relationship—that is, a representative in another district").

¹⁰ On some complications related to the notion of party control, see *infra* text accompanying notes 62-63.

Today's partisan federalism reflects the convergence of two trends. First, our two political parties, which compete at both the state and the national level, have grown ideologically cohesive and polarized. Second, the states and the federal government increasingly regulate in overlapping areas rather than separate spheres. Independently, each of these developments has been much discussed;¹¹ their interaction is what I consider here. Section A critiques how leading federalism scholarship conceptualizes political parties and state-federal competition. Section B illustrates how states serve as critical fora for partisan conflict insofar as they occupy the same regulatory terrain as the federal government while being governed by representatives of polarized political parties.

A. *Parties as a Safeguard of Federalism*

To understand what partisan federalism is, we first have to see what it is not. Partisan federalism represents a departure from both the federalism literature's description of American political parties and its depiction of state challenges to the federal government. The leading account of the relationship between federalism and partisan politics casts the parties as noncentralized and nonprogrammatic, and it effectively denies the possibility of vigorous partisan competition. Meanwhile, distinct strands of federalism doctrine and scholarship understand state opposition to the federal government to be a core value of federalism, but they tend not to question why it occurs. Today's ideologically cohesive, polarized parties help to explain state challenges to the federal government, while also expanding our conception of state opposition. Partisan federalism's challenges follow from state-federal overlap and integration, and they involve state and federal actors alike turning to state governments to articulate and stage partisan competition.

¹¹ On today's cohesive, polarized parties, see, for example, ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010); JOHN H. ALDRICH, *WHY PARTIES? A SECOND LOOK* 163-323 (2011); Geoffrey Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83 (2006); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011). On the rise of overlapping spheres of state and federal authority, see, for example, ELAZAR, *supra* note 5; GRODZINS, *supra* note 8; ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011); ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* (2009); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 NYU L. REV. 1 (2007).

1. Parties

If you asked informed Americans what features are most notable about today's two-party system, you would likely be told that the parties are ideologically cohesive and polarized. Yet legal scholarship's leading account assimilating federalism and party politics, Larry Kramer's revitalization of process federalism, describes the parties in almost opposite terms.¹²

Instead of focusing on the composition of the federal government,¹³ Kramer found his political safeguards in unplanned structures that link the fortunes of state and federal officials, especially the political parties. Drawing on the work of political scientists including Morton Grodzins and William Riker, who had emphasized the decentralized and nonideological character of American parties,¹⁴ Kramer cast the weakness of the parties as key to his account in two respects. First, he maintained, the parties are not programmatic. Their primary purpose is to get candidates elected, not to advance an agenda. As a result, party platforms are not taken seriously, parties switch ideological positions with ease, and there is substantial intraparty disagreement on fundamental issues.¹⁵ Second, according to Kramer, American parties are noncentralized—they are “confederations of national, state, and local cadres whose most conspicuous features are flabby organization and slack discipline.”¹⁶ Ultimately, for Kramer, parties' nonprogrammatic and noncentralized nature yields a political climate in which federal officials depend on their state co-partisans to get, and stay, elected, and this dependency leads federal lawmakers to respect state autonomy.¹⁷

¹² See Kramer, *supra* note 8; Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

¹³ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

¹⁴ See GRODZINS, *supra* note 8, at 254 (“[T]he parties are responsible for both the existence and form of the considerable measure of decentralization that exists in the United States.”); RIKER, *supra* note 8, at 91-96 (describing decentralization as the key feature of American political parties).

¹⁵ Kramer, *supra* note 12, at 1524-26.

¹⁶ Kramer, *supra* note 8, at 279.

¹⁷ *E.g.*, *id.* at 282. As others have noted, there is a missing link in Kramer's account: even if one accepts his premise that federal lawmakers will defer to state politicians' interests, it is not clear why these interests will include respect for the autonomy of state government. See, e.g., Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 798 (1995). Daryl Levinson has suggested that this critique is misplaced because Kramer is “agnostic about the interests of state officials,” believing that federalism is successful as long as “state representatives can force the national government to

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While there is much to be said for Kramer's account, his characterization of the parties as decentralized, ideological hodgepodes misses key features of our contemporary parties that have become only more pronounced since he wrote. Some scholars quarreling with Kramer's view argue that the parties are highly centralized, with national elites driving presidential nominations, fundraising, and the formulation of party agendas at both the national and state levels.¹⁸ But characterizing the parties as centralized entities still seems to miss the mark. Today's parties are best understood as networks of individuals and organizations, including elected representatives and party officials, but also allied interest groups, issue activists, PACs and Super PACs, candidates' personal campaign organizations, political consultants, and the like.¹⁹ While national party committees may be more powerful than their state counterparts, this does not mean the parties are fully centralized. To the

take account of the interests of their constituents, whatever those interests might be." Levinson, *supra* note 4, at 940 n.89. While Levinson's argument is in keeping with Kramer's general sensitivity to the contingency of state-federal relations, *see, e.g.*, Kramer *supra* note 8, at 292-93, it does not capture Kramer's argument about political parties. Indeed, Kramer takes Wechsler to task for the very move Levinson attributes to Kramer—focusing on state interests rather than institutions. After insisting that Wechsler has wrongly conflated state-based interests and the governance prerogatives of state institutions, Kramer continues, "So far as I am aware, no one defends federalism on the ground that it makes national representatives sensitive to private interests organized along state or local lines. Rather, federalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices." *Id.* at 222; *see also* Kramer, *supra* note 12, at 1523 (arguing that parties "protect[] state institutions by inducing federal lawmakers to take account of (at least some) desires of state officials" (emphases added)). Kramer's revision of process federalism assumes state politicians will defend state government autonomy but does not explain why this would be so. For a safeguards account that defines federalism in terms of interests rather than institutions, see Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395 (2012), and Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859.

¹⁸ *See, e.g.*, Paul Frymer & Albert Yoon, *Political Parties, Representation and Federal Safeguards*, 96 NW. U.L. REV. 977, 980 (2002) ("Today, national party leaders bear far less of a relationship to local or state party organizations, and instead shape the nomination process and raise the money to mount national campaigns that are in many ways divorced from local concerns and political pressures."); *see also, e.g.*, ALDRICH, *supra* note 11, at 269-74 (describing nationalization of both parties and arguing that flow is "top down"); Thomas M. Holbrook & Raymond J. La Raja, *Parties and Elections*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 63, 78-80, 98 (10th ed. 2012) ("State parties have also come into the orbit of the national party organizations, which, through massive transfers of funds plus supplies of personnel and expertise, now use the state parties to implement national campaign strategies."). Kramer himself appreciated that state parties had lost strength as elections became more candidate-centered and national committees began to assume greater control over party operations. Kramer, *supra* note 12, at 1527-28, 1536-38.

¹⁹ *See, e.g.*, DAVID KAROL, *PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT* (2009); SETH E. MASKET, *NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES* (2009); Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSPS. ON POLS. 571 (2012).

contrary, there is a strong argument that the parties have become more decentralized over time, just not along a federalism axis. State and local power has been replaced by decentralization to private individuals and organizations.²⁰ In a recent publication defending its role, for instance, the Republican National Committee barely attempts to conceal anxiety about its control over the “multitude of third-party groups that we will refer to as ‘Friends and Allies.’” While “applaud[ing] the efforts of these organizations to augment the traditional political party infrastructure,” the report insists, “it is clear that the RNC has a central and critical role to play in leading our Party forward.”²¹

If the networked nature of contemporary parties complicates claims of centralization, it also points to what is in fact notably absent from, and in tension with, Kramer’s account: the two parties’ increasing ideological coherence and polarization. If in the mid-twentieth century, party affiliation and ideology traveled separately, in the early twenty-first century they travel together, and the parties have grown ever-more polarized.²² Much of this transformation follows from the party realignment of the South, a decades-long shift initiated as early as the New Deal and spurred in particular by the 1965 Voting Rights Act, during which conservative Southern Democrats moved to the Republican Party and liberal, mostly Northern, Republicans embraced the Democratic Party.²³ The alignment of partisanship and ideology—and

²⁰ See generally MASKET, *supra* note 19 (arguing that local party organization is quite powerful if we understand local parties as informal networks of office holders, interest group leaders, activists, consultants, and the like).

²¹ REPUBLICAN NATIONAL COMMITTEE, GROWTH & OPPORTUNITY PROJECT 44 (2013); see also *id.* at 49 (“Chairman Priebus should call for a command performance meeting of the leadership of our friends and allies and not allow anyone to leave the room until it’s determined, to the extent allowed by law, who is doing what that can be divided legally.”).

²² See, e.g., Pildes, *supra* note 11, at 275 (“American democracy over the last generation has had one defining attribute: the rise of extreme partisan polarization.”). See generally ABRAMOWITZ, *supra* note 11; ALDRICH, *supra* note 11; NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006); Bawn et al., *supra* note 19, at 582 fig. 3; Layman et al., *supra* note 11.

²³ See, e.g., EARL BLACK & MERLE BLACK, THE RISE OF SOUTHERN REPUBLICANS (2002); GREEN ET AL., *supra* note 6, at 140-63; Pildes, *supra* note 11, at 287-97; see also Paul Frymer, *Debating the Causes of Party Polarization in America*, 99 CAL. L. REV. 335 (2011) (tracing the Southern realignment following the Voting Rights Act to a broad set of historical forces from the civil rights movement). From the late nineteenth century until the late twentieth century, the South had a one-party system. Laws and practices that disenfranchised large portions of the electorate locked the Democratic Party in power, and even after the Voting Rights Act increased access to the vote, robust two-party competition did not emerge until the 1980s and 1990s. During the century of artificial one-party rule, Southern Democrats differed significantly from Northern Democrats, and, largely because of the Democratic Party’s lock on the South, the Republican Party was also more ideologically diverse. Liberal and moderate Democrats thus often had more in common with liberal and moderate Republicans than with conservative

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the concomitant reduction, if not elimination, of regional party difference²⁴—occurred with respect to both state and national parties.²⁵ Today’s party networks are also both a cause and an effect of party cohesion and polarization. The rise of allied interest groups has made the parties more ideologically distinct, as these groups have pushed the parties to take positions on divisive issues, such as abortion, global warming, and gay rights,²⁶ that have shaped both national and state elections.²⁷ And the ideological distinctiveness of the parties has, in turn, fostered interest group alliances with them.

The relationship between centralization and ideological coherence is thus quite different from that posited by Kramer and his predecessors. In an era of “antiparties,”²⁸ intraparty difference facilitated decentralization, while decentralization amplified difference.²⁹ But in today’s world of more ideologically cohesive, polarized parties, decentralization does not yield the same marked divergence: individuals and organizations throughout the networked party advance similar ends.

Although understanding the parties as ideologically cohesive and polarized is in tension with Kramer’s view of them as nonprogrammatic, it bolsters his claim that partisanship generates thick ties between state and national politicians. Kramer argued that party affiliation creates a sense of comradeship among fellow partisans, yet his account of

Democrats. *See generally* ALAN I. ABRAMOWITZ, *THE POLARIZED PUBLIC? WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL* 13-15, 42-45 (2013); ALDRICH, *supra* note 11, at 209, 248, 253, 311-12; GREEN ET AL., *supra* note 6, at 163.

²⁴ *See generally* NICOLE MELLOW, *THE STATE OF DISUNION: REGIONAL SOURCES OF MODERN AMERICAN PARTISANSHIP* (2008) (exploring how regional divisions shape national partisan politics).

²⁵ *See, e.g.*, Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 550 (2011) (“[T]he states appear to follow the national pattern of high and growing [party] polarization.”); *see also* Robert S. Erikson et al, *Public Opinion in the States: A Quarter Century of Change and Stability*, in *PUBLIC OPINION IN STATE POLITICS* 229, 238, 246 (Jeffrey E. Cohen ed., 2006) (“During the late 1970s, there is little obvious connection between the partisanship of American states and their ideological preferences. . . . Today ideology and partisanship generally reinforce each other, so that states are either Democratic and liberal or Republican and conservative.”).

²⁶ *See, e.g.*, Bawn et al., *supra* note 19, at 580-81; Layman et al., *supra* note 11; *see also* Frymer, *supra* note 23, at 339-40; A. James Reichley, *The Rise of National Parties*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 175, 197 (John E. Chubb & Paul E. Peterson eds. 1985).

²⁷ *See, e.g.*, Calabresi, *supra* note 17, at 798. These issues have even shaped officially nonpartisan municipal elections. Sarah Palin notoriously won election as the Mayor of Wasilla by brandishing her “passion for Republican ideology,” including on such hot-button issues as abortion, gun rights, and the place of religion in public life. William Yardley, *Palin’s Start in Alaska: Not Politics as Usual*, N.Y. TIMES, Sept. 2, 2008.

²⁸ GRODZINS, *supra* note 8, at 284.

²⁹ *See, e.g., id.* at 255-70 (arguing that, because members of Congress could not be corralled by party solidarity or discipline to focus on a party agenda, they often deferred to local concerns).

nonprogrammatic, nonideological parties raises questions about the strength of intraparty camaraderie.³⁰ Cohesive, polarized parties furnish a stronger basis for such camaraderie. They might, however, raise a new question: Is partisanship still the relevant variable? In Kramer's account, the role of partisanship was clear; if a politician's party ID did not correspond to her views on particular issues or her overarching ideology, it was partisanship as such that led her to respect the desires of her co-partisans. But once parties are ideologically identified, the work of partisanship is less obvious. Perhaps politicians cooperate—and, as I will discuss below, compete—because of particular ideological commitments, and partisanship simply maps onto this deeper-seated motivation?

Although ideology matters too, partisanship is not epiphenomenal. As I will describe further in Part II, once individuals associate with a political party—whether because of their ideological predispositions, their membership in particular social groups, or, often, the overlap between the two³¹—partisanship is a powerful, stable identification that shapes how they process information and what they believe.³² Today's cohesive parties inform people's "most abstract and enduring beliefs about society and public affairs,"³³ as well as their short-term political evaluations and views on discrete issues.³⁴ Studies have shown, for example, that attitudes toward social policies depend on the stated position of the political parties even when these positions run counter to individuals' ideological beliefs.³⁵ And as party positions on

³⁰ Kramer, *supra* note 12, at 1539; *see also id.* at 1542.

³¹ The debate in the political science literature about the causes of partisan identification, *compare, e.g.*, ABRAMOWITZ, *supra* note 11 (ideology), *with* GREEN ET AL., *supra* note 6 (social groups), is often overstated insofar as social groups and ideologies are overlapping, mutually constitutive sources of party identification. *Cf.* MICHAEL WALZER *POLITICS AND PASSION: TOWARD A MORE EGALITARIAN LIBERALISM* 93 (2006) ("Socialization in the family, the earliest form of political education, is just agitprop with love").

³² *See generally* GREEN ET AL., *supra* note 6; ROSENBLUM, *supra* note 6; Thomas M. Carsey & Geoffrey C. Layman, *Changing Sides of Changing Minds? Party Identification and Policy Preferences in the American Electorate*, 50 AM. J. POL. SCI. 464 (2006).

³³ Paul Goren, *Party Identification and Core Political Values*, 49 AM. J. POL. SCI. 881, 895 (2005) (noting that these include beliefs about equal opportunity, limited government, and moral tolerance).

³⁴ *See, e.g.*, Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 POL. BEHAVIOR 117 (2002); Carsey & Layman, *supra* note 32; Holbrook & La Raja, *supra* note 18, at 74-75.

³⁵ *See, e.g.*, Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCH. 808 (2003) (showing, for example, that liberal Democrats supported a harsh welfare program when told Democrats supported it, and conservative Republicans supported a very generous one when told Republicans supported it).

issues crystallize, individuals' partisanship can reshape even their preexisting beliefs.³⁶

At the level of groups and institutions, moreover, partisanship has distinct organizational force. There is, as an initial matter, a corollary of partisanship's role in shaping individuals' beliefs: parties do not simply reflect cleavages that already exist in society; they make issues salient at particular points in time, and they connect issues to generate related fronts of policy disagreement.³⁷ Moreover, state and federal politicians are readily identifiable to themselves and others as members of political parties, and this membership makes it easy to affiliate, including across the state-federal divide. Perhaps most critically, party organizations and their "Friends and Allies" work throughout the nation to elect fellow partisans—and to raise and distribute funds—in furtherance of party agendas.³⁸ There are, thus, calculating and strategic, as well as affective and identity-based, reasons why partisanship shapes elected officials' positions and generates intraparty camaraderie.

If party politics undergirds cooperation between state and federal officials of the same party, however, so too does it undergird competition between state and federal officials of different parties—a dynamic absent from, and in some tension with, Kramer's account. In a time of ideologically cohesive, polarized parties, state governments furnish a critical platform for the party out of power to fight the party in power at the national level.

³⁶ As the parties assumed distinct positions on abortion after *Roe v. Wade*, for instance, a significant number of elected officials and voters changed their views to align with their party's position. See, e.g., Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and Conflict Extension in the American Electorate*, 46 AM. J. POL. SCI. 786 (2002). The reverse can also occur: policy preferences may lead one to identify with a different party if the issue is significant enough. But the influence of partisanship on policy preferences is usually greater than the reverse. See, e.g., Carsey & Layman, *supra* note 32, at 474 (“[W]e find: issue-based party conversion on some particularly powerful, emotional, and polarizing issues only among individuals who are aware of party differences on the issue and who attach particular salience to it. Yet, even in this group, there is evidence of individuals changing their policy attitudes in response to their party affiliations. Furthermore, among those aware of party differences on an issue but for whom the issue is not salient, the only observable effect is of party-based change in issue attitudes.”); see also GREEN ET AL., *supra* note 6, at 141 (noting that the Voting Rights Act was an “exogenous shock to the electoral system” that ultimately produced a party realignment, but stressing that half of the Southern realignment followed from cohort replacement, and individual changes in party affiliation occurred very gradually).

³⁷ See ROSENBLUM, *supra* note 6, at 365-66.

³⁸ See, e.g., Pildes, *supra* note 11, at 325; Ciara Torres-Spelliscy, *The \$500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs Under Buckley's Major Purpose Test?* 15 NYU J. LEG. & PUB. POL'Y 485, 502-05 (2012); Republican State Leadership Committee, REDMAP 2012 Summary Report (Jan. 4, 2013), http://rslc.com/_blog/News/post/REDMAP_2012_Summary_Report; see also *infra* Section IV.A.

2. Federalism

State challenges to the federal government are a staple of federalism doctrine and scholarship. In its oft-quoted catalogue of federalism's values, for instance, *Gregory v. Ashcroft* invokes such state checks as “[p]erhaps the principal benefit of the federalist system.”³⁹ While, as in *Gregory*, the literature usually focuses on how states may stop the federal government from overreaching, it recognizes the force of states' affirmative challenges as well. States, on this view, check the federal government not only by obstructing its actions but also by formulating opposing policies and putting them into practice.⁴⁰

As Daryl Levinson has argued, however, our classic accounts fail to describe why states would check the federal government.⁴¹ Today's polarized parties furnish an explanation. The state and federal governments may not themselves be “self-interested political actors with empire-building ambitions, pitted against each other in a competition for power,” as Levinson criticizes federalism doctrine and scholarship for assuming, but this is a decent description of the partisan officials who populate them.⁴² And as Democratic and Republican politicians compete to gain power and implement partisan agendas, federalism provides critical infrastructure for their conflict. With fifty states, a sizeable number are always governed by the party out of power at the national level.⁴³ Currently, twenty-four states have Republican governors and legislatures, while thirteen have Democratic governors and legislatures.⁴⁴ States governed by the party out of power in Washington seek both to obstruct federal policy and also to challenge it through their affirmative acts. With ideologically cohesive, polarized parties that operate at both

³⁹ 501 U.S. 452, 458 (1991); *see also, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1493-1506 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 4 (1988).

⁴⁰ *See, e.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (stating that federalism serves individual liberty both by limiting the power of the federal government and by empowering states to enact their own “positive law”).

⁴¹ Levinson, *supra* note 4, at 944.

⁴² *See id.* at 944. While Levinson addressed the role of polarized political parties with respect to the separation of powers, *see id.* at 959; *infra* note 49, he did not consider how they affect our federal system, even as he argued that “contingent empirical characteristics of the political process” determine the “allocation of policy space between the federal and state governments.” *Id.* at 943.

⁴³ *See infra* text accompanying notes 62-63 (discussing complications of deeming one party “in power” or “out of power”).

⁴⁴ *See Stateside Associates, Governors and Partisan Splits* 2013, <http://www.stateside.com/governors-partisan-splits-2013/>. In addition, twenty-five states have veto-proof legislative supermajorities, including three states with divided government. *See One-Party Dominance Grows in States*, USA TODAY, Dec. 13, 2012.

the state and national level, federalism furnishes a consistent forum for party conflict, and such conflict need not involve all fifty states for its effects to be felt nationwide.

If partisanship motivates state challenges that conventional federalism doctrine and scholarship often take for granted, however, it also affects the nature of these challenges. The same accounts that paint states and the federal government as empire-building, self-interested actors tend to cast state checks as emanating from states' distinctiveness and distance from the federal government. The centrality of partisanship instead points to contestation grounded in overlap and integration. Party politics means that state opposition need not be based on something essentially "state" rather than "national." Instead of representing distinctively state interests against the distinctively national interests of the federal government, states may participate in substantive controversies that are national in scope. Partisan federalism underscores that "the national" is not defined by Washington alone.⁴⁵

This nationalist dimension of partisan federalism informs both the nature of state actions and the actors involved. It means, first, that state opposition does not necessarily arise from or insist upon dual sovereignty, the idea that the states must enjoy a legally defined sphere of exclusive authority. To be sure, states sometimes contest federal policy by arguing that the federal government has acted in excess of its powers and encroached on state prerogatives, and partisanship offers a

⁴⁵ In a recent paper, James Gardner argues that the national parties have "colonized" state politics and this undermines the states' ability to dissent from national political decisions. James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics* (2012) (draft at 18), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191150. But partisanship, which Gardner invokes only as a source of convergence, is also a powerful source of disagreement. Party politics means there is not one national political agenda that exists either at the federal level or, through colonization, at the state level. There are competing political agendas. And the states provide a forum for partisan competition, as states controlled by one party push back against the federal government controlled by the other. This is not a disagreement based on something specifically "state" versus something specifically "national," but American federalism has always been, in part, about presenting different, competing versions of the national will. The absence of "a distinctive state political agenda" need not, as Gardner suggests, interfere with states' ability to "dissent from or to affect in any meaningful way the course of national policy making." *Id.* at 46. When states disagree with the federal government's policy decisions and advance a different national position, that, too, is federalism at work. Gardner's related concern—that the colonization of state politics inhibits the range of positions that state actors are capable of imagining and advancing—seems to me a deeper one, but one that has to do less with values of contestation and checking and more with values such as diversity and self-determination. I offer some tentative thoughts about partisanship's intersection with these values in Part III. While not denying the possibility that if states give effect to a vision of the national will, their ability to represent more particularistic interests may be concomitantly reduced, I suggest that partisan federalism need not entail top-down colonization and centralization.

good clue to when state actors make these claims. But states also contest federal policy by enacting competing laws in the same regulatory area and administering federal law uncooperatively.⁴⁶ This point does not reduce federalism to simple decentralization—such actions depend on state officials elected and appointed independently of the federal government—but it does call attention to the ways states level challenges while governing in domains also occupied by the federal government.

Second, partisanship disaggregates support for state versus federal power from state versus federal actors. If partisanship, not something about states qua states, motivates state challenges to the federal government, it follows that both state and federal actors may support these challenges. Party politics thus helps explain why, at any given time, we see some states cheerleading exercises of federal power and some of the staunchest proponents of state power sitting in Washington—and why this does not mark the end of federalism. Doctrine and scholarship often gloss over the way in which debates about state versus federal power function as proxies for substantive policy disputes,⁴⁷ but partisanship suggests that a derivative, contingent attachment to state power need not diminish the force of federalism's check. For federalism to facilitate opposition, only some states must challenge the federal government, and partisanship suggests both why some states will cast their lot with the federal government and why others will oppose its actions. Partisanship similarly helps explain why some federal politicians will be enamored of state authority: their party is in the minority at the national level.⁴⁸

In this sense, Kramer's insight that party affiliation aligns the interests of federal politicians with their state counterparts remains a powerful one. But there is a twist: state and federal politicians alike will champion state or federal action depending on the partisan composition of Congress and the presidency. While Kramer understood partisanship to serve state officials' inherent interest in protecting state power, this account suggests that federalism serves both some state and some federal

⁴⁶ See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

⁴⁷ But see Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277 (2004) (defending opportunistic federalism); cf. Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) (critiquing process federalism for allowing a majority of states to impose their policy preferences on a minority of states).

⁴⁸ See generally George A. Krause & Ann O'M. Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L., ECON. & ORG. 359, 363 (2005) (“[A]s partisan congruence among national level political institutions increases, the incentive to shift power to subnational counterparts decreases . . .”).

officials' interest in advancing partisan goals. Certain federal representatives favor the states not simply because they have connections to state officials (who may themselves welcome national intervention), but also because they cannot achieve their partisan objectives at the national level.

Indeed, federalism offers more opportunities for each party to affirmatively advance its objectives than does the separation of powers, which has received attention as a framework for partisan competition.⁴⁹ While the national separation of powers hinges on the assent of multiple actors who constitute a single government, federalism depends on the diversity of multiple actors who constitute different governments. The same partisan dynamics that yield gridlock in Washington may thus yield differentiated action in the states. If the minority party can more readily veto the majority's choices from within the federal government, it can more readily instantiate an opposing view from the states.⁵⁰ Comparing federalism and the separation of powers in this way, however, threatens to obscure a more significant point: federalism and the separation of powers are interlocking systems.⁵¹ National and state actors alike turn to both national and state institutions to advance their partisan agendas.

⁴⁹ Daryl Levinson and Richard Pildes have argued that our cohesive, polarized parties, not constitutional structures, are the real force behind the separation or unification of legislative and executive powers in our system. Whether at any point in time we have a system that involves competition (for better or worse) between the President and Congress or instead cooperation depends on whether these branches are unified or divided by party. *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). Today's partisanship, in fact, seems to yield perpetually divided government, as even party-unified government generates gridlock in an era of the filibuster and other minority-empowering procedural tools.

⁵⁰ To be sure, unilateral action is possible at the national level. Faced with legislative gridlock, for instance, the President can act on his own. But in so doing, he is generally understood to be eschewing, if not violating, a tenet of constitutional checks and balances—that the assent of multiple branches is required before the government may act. Oppositional, affirmative acts by states, in contrast, are widely understood as a component of federalism's check. At the same time, state governments face their own separation-of-powers-related obstructionism; even unified party government does not ensure the dominant party's ability to enact its agenda. But the prevalence of unified party government and legislative supermajorities, and the varying configurations of 50 different state governments, mean affirmative acts are relatively easier at the state level.

⁵¹ *See generally* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012). My previous work focused on how the states may limit federal executive power in an era of executive dominance, though some recent developments—in particular, the use of waivers in cooperative federalism programs, which seems likely only to increase in the wake of *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), *see* Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 227 (2013)—raise important questions about collusion between states and the federal executive. *Cf.* Bulman-Pozen, *supra*, at 503.

3. Origins

Before exploring contemporary examples of partisan federalism, a very brief historical note is in order. I have suggested that political actors' use of state and federal governments together to articulate and amplify competition between the political parties is a recent phenomenon. It follows, in particular, from the rise of ideologically cohesive, polarized parties in the late twentieth-century—parties that did not define twentieth-century politics. Yet partisan federalism has deep roots. In the early Republic, two emergent, polarized parties similarly used state governments to stage national partisan conflict. Consider, for instance, the Virginia and Kentucky Resolutions responding to the Alien and Sedition Acts of 1798.⁵² Often invoked as a seminal moment in American federalism, this state resistance reflected, as much as anything, the use of state governments by national and state actors alike to wage partisan conflict.⁵³

The Acts were Federalist legislation opposed by Republicans at both the national and state levels and supported by Federalists at both the national and state levels.⁵⁴ While the Republican position was most clearly advanced by Virginia and Kentucky, even their Resolutions were spearheaded by national politicians. They were ghostwritten by James Madison and Thomas Jefferson at a time when Jefferson was Vice President and Madison had recently retired from Congress (and was soon

⁵² James Madison, Virginia Resolutions of 1798, *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1907) [hereinafter ELLIOT'S DEBATES]; Thomas Jefferson, Kentucky Resolution of 1798, *reprinted in id.*, at 540.

⁵³ Cf. Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1111 (2011) (book review) ("Ultimately, the debate over the Kentucky and Virginia Resolutions was a debate over the ability and authority of the states to serve as loci of protest against unconstitutional and oppressive federal laws. The political branches of the states, serving as a competing power source to the federal political branches, organized opposition using the rhetoric of sovereignty.")

⁵⁴ See, e.g., RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 112 (1969) ("The [Virginia and Kentucky] resolutions were, above all, party propaganda, but propaganda resting on a regional power base . . ."). As Hofstadter's framing underscores, party positions have themselves been informed by regional interests. Moreover, because regions have no legal existence as such, regional interests have been advanced in state fora. A main cleavage between the Federalists and Republicans thus concerned the respective power of state and national governments. But, importantly, this commitment became a matter of party identification rather than an actor's state or national role. Cf. DAVID WALDSTREICHER, IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM, 1776-1820, at 246-93 (1997) (arguing that regional political identities emerged together with party politics in the early Republic, and that New England, the South, and the West each contested particular federal policies while claiming to represent the real United States, rendering regionalism a nationalist form of dissent).

to become Jefferson's Secretary of State). And while Virginia and Kentucky maintained that the national government had overreached, the other states—governed by Federalists—declined to join the cry against federal usurpation and sided with the national government.⁵⁵

Although some have chalked up Madison's role in the Alien and Sedition Act controversy, in particular, to his conversion from a nationalist to a states' rights supporter, this dichotomous framing risks overstating the tension between nationalism and federalism. Madison's turn to the state legislatures gave concrete meaning to his suggestion, at the time of the Constitutional Convention, that the states were sites for articulating a competing vision of the national will.⁵⁶ Many of the means by which he envisioned the American people using the states to check the national government sound in shared authority and mutual dependence rather than separation, and he argued that the states would be most effective when they acted together, as the Virginia and Kentucky Resolutions urged without success.⁵⁷ In his *National Gazette* essays, Madison similarly resisted viewing the states as sites of distinct "interests and affections," but he insisted that maintaining the states as separate sites of government power was necessary to preserve the accountability of the national government to the people.⁵⁸

Madison's role in drafting the Virginia Resolution and the later Virginia Report underscores not only American federalism's

⁵⁵ See, e.g., Answer of the State of Delaware, in 4 ELLIOT'S DEBATES, *supra* note 52, at 532 (arguing that the Resolutions constituted an "unjustifiable interference with the general government").

⁵⁶ See THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 46, *supra*, at 294 (James Madison); SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 21 (1993) ("[On this Madisonian view the] states are not rival communities carved out of the greater jurisdiction which. . . seek to act on an exclusive and inward-looking concern for their distinct interests. Like the federal government, state governments also express the national will."); Larry D. Kramer, "The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 VAL. U.L. REV. 697, 706-07 n.19 (2006); see also BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 185-86 (1991); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 403 (1997).

⁵⁷ See, e.g., THE FEDERALIST NO. 46, *supra* note 56, at 297 (James Madison); BEER, *supra* note 56, at 387-88; James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 909-12, 957-62 (2004).

⁵⁸ James Madison, *Consolidation*, NATIONAL GAZETTE, Dec. 3, 1791, *reprinted in* 14 THE PAPERS OF JAMES MADISON 137 (Robert A. Rutland et al. eds., 1983). Recognizing the inevitability of political parties, Madison's contemporaneous writings suggest that their evil could be combated by "making one party a check on the other"—an idea not dissimilar to his view of state-federal relations. See James Madison, *Parties*, NATIONAL GAZETTE, Jan 23, 1792, *reprinted in* 14 PAPERS OF JAMES MADISON, *supra* note 58, at 197. This is not, however, to suggest that Madison cheerfully welcomed the actual party competition he saw unfolding. See, e.g., James Madison, *A Candid State of Parties*, NATIONAL GAZETTE, Sept. 22, 1792, *reprinted in* 14 PAPERS OF JAMES MADISON, *supra* note 58, at 370.

longstanding nationalist dimension, but also its longstanding opportunistic dimension.⁵⁹ Federalism divides power and offers a structure for substantive views to compete. It does not specify what the recipients of divided power will use it for, nor does it equate particular views with one level of government or the other.⁶⁰ Claims that political actors undermine federalism by marshaling arguments for state power in an opportunistic way and treating federalism as a convenient arrangement through which to pursue policy agendas indict our Founders as well as contemporary politicians. More deeply, they overlook the significance of federalism in establishing loci of political conflict, whether such conflict is driven by state institutional interests, partisanship, or something else. While the specifics of the arrangement are mutable, the fact that states exist as separate sites of governance means political conflict will be channeled through them.⁶¹

B. *State Opposition to the Federal Government*

If the account of partisan federalism I have offered so far is correct, we can expect that party politics will lead states to challenge the federal government. Not all the states, and not the whole federal government—rather, those states that have a partisan affiliation different from the dominant party at the federal level. These states will likely find allies within the federal government along party lines, and they will themselves be opposed not only by portions of the federal government but also by other states. Is this, in fact, what we see? While partisanship cannot explain all state opposition, it captures a good deal of what happens on the ground. Below, I outline three main ways that states and their federal allies contest national policy: they argue that the federal

⁵⁹ See Young, *supra* note 47, at 1308-09 (“[O]pportunism seems to be exactly what our Founders expected—and counted upon. . . . The most reliable ‘political safeguard of federalism’ in the Founders’ scheme . . . is that whenever a particular federal measure is proposed, the people opposed to that measure on its policy merits will have an incentive to argue that the matter should be left to the States.”). See generally David M. Potter, *The Historian’s Use of Nationalism and Vice Versa*, in HISTORY AND AMERICAN SOCIETY 99 (1973) (“Scratch a spokesman of state sovereignty and you find . . . almost invariably a man who sees that he is outnumbered; look beneath the rhetoric which exalts federal supremacy and you discover a motive on the part of a majority group to remove some irksome restriction upon the use of power.”).

⁶⁰ Young, *supra* note 47, at 1311.

⁶¹ See, e.g., Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 386-88; David B. Truman, *Federalism and the Party System*, in AMERICAN FEDERALISM IN PERSPECTIVE 115, 123 (Aaron Wildavsky ed., 1967); cf. Chafetz, *supra* note 53, at 1124 n.242 (maintaining that the virtue of the separation of powers scheme is that it “creates opportunities within the governing structure for the representation of different interests, thus allowing for the possibility of conflict” (emphases omitted)).

government is exceeding its authority and encroaching on state autonomy; they enact their own legislation to prod the federal government into action or set a different course; and they administer federal programs in ways that interfere with federal goals.

Before describing such challenges, an important caveat is in order. I have suggested here that state and federal governments are “controlled” by one party or the other. That simple formulation, of course, obscures a very messy reality, especially during periods of divided government. Which party is deemed dominant varies not only across time, but also across issues and forms of governance. For the national level, while I sometimes address the partisan composition of Congress, my discussion focuses on the President. This is not only for purposes of narrative economy. Although the President’s control over the federal government is far from complete, his relative power over the administrative apparatus and ability to push (or veto) a legislative agenda matter, as do media-fed popular perceptions that the President is in charge. The public’s tendency to overstate the President’s power itself shapes partisan competition in important ways.⁶² Similar questions arise about which party is dominant at the state level; depending on the type of state action involved, I focus on both executive and legislative actors.⁶³ To make the broad strokes argument, I do not always address these details in the text, but the footnotes provide a little more texture.

1. Litigation: State Sovereignty

The classic account of state power hinges on sovereignty, the power of the state to govern in its own sphere without federal interference. Although sovereignty is not a necessary predicate for state resistance,⁶⁴ it is nonetheless a powerful resource for resistance; indeed, claims of dual sovereignty may have expressive value in preserving the states as counterbalances to the federal government even when they

⁶² See also *infra* Part II (discussing the relevance of this perception for state-based identification).

⁶³ At the state level, unified party government is currently prevalent. See, e.g., Stateside Associates, *supra* note 44 (showing that a supermajority of states have unified government as of 2013). States do, however, present an additional possibility of divided government: an attorney general of a different party from the governor. Compare *id.*, with Stateside Associates, Attorneys General, <http://www.stateside.com/attorneys-general-2013/> (showing that eleven states—including six states with otherwise unified government—currently have attorneys general and governors from different parties).

⁶⁴ See, e.g., Bulman-Pozen & Gerken, *supra* note 46.

fail.⁶⁵ It is not obvious why state officials would defend state sovereignty,⁶⁶ but partisanship explains why at least some state officials—and some federal officials—are motivated to do so: their party is outnumbered at the national level. Even for state actors who might often have incentives to embrace national policymaking, that is, state sovereignty looks good when their party is out of power in Washington. And their co-partisans in the federal government may similarly find themselves defending state power from federal encroachment. Sovereignism is, on this account, an epiphenomenon of partisanship.

The Patient Protection and Affordable Care Act offers a clear illustration of this dynamic. The Act passed Congress along a straight party-line vote.⁶⁷ Upon its enactment, Republicans instantly called for repeal, with one Republican Congressman glossing over his national office and threatening to “meet the federal government at the state line to keep them from mandating this bill upon us.”⁶⁸ A group of states also quickly sued to enjoin the law on the ground that it exceeded Congress’s powers and intruded on state sovereignty. While this was a classic federalism argument, not all states signed on. The split was perfectly partisan. Republican officials representing twenty-seven states argued that the law violated state sovereignty, while Democratic officials representing thirteen states defended the exercise of federal power.⁶⁹ Federal officials also made claims about state sovereignty versus national power by party affiliation. Most notably, Republican Senators joined Republican state officials in arguing that the Act’s individual mandate intruded on state sovereignty.⁷⁰ The Supreme Court’s ruling upholding the Act has not ended the debate but simply moved it to the

⁶⁵ See, e.g., Adam Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule*, 33 LOY. L.A. L. REV. 1309 (2000); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2218-28 (1998).

⁶⁶ See, e.g., Levinson, *supra* note 4; *supra* note 17.

⁶⁷ For a detailed partisan history, see Vincent L. Frakes, *Partisanship and (Un)Compromise: A Study of the Patient Protection and Affordable Care Act*, 49 HARV J. ON LEGIS. 135, 136-41 (2012).

⁶⁸ Lee Fang, *Extreme Right Wing of GOP Leads Health Reform Repeal Effort, Pledges To Repeal “The Whole Thing,”* THINK PROGRESS, Mar. 23, 2010 (quoting then-Tennessee Congressman Zach Wamp).

⁶⁹ See Robert N. Weiner, *Much Ado: The Potential Impact of the Supreme Court Decision Upholding the Affordable Care Act*, in THE HEALTH CARE CASE, *supra* note 51, at 69, 69-72 (describing the partisan lineup and discussing intra-state disputes between Democratic attorneys general and Republican governors and vice versa); see also Kevin Sack, *In Partisan Battle, Clashes Over Health Lawsuits*, N.Y. TIMES, Mar. 27, 2010 (describing intra-state conflicts between governors and attorneys general of different parties).

⁷⁰ Brief of Members of the United States Senate as Amici Curiae in Support of Respondents at 8, U.S. Dep’t of Health & Human Services v. Florida, No. 11-398 (U.S. 2012) (arguing that the law “inval[ues] the legitimate province of the States”).

legislative and administrative realms: House Republicans have voted repeatedly for repeal and denials of funds to administer the Act,⁷¹ and Republican Governors and, especially, Republican state legislators are refusing to set up insurance exchanges and to participate in the Medicaid expansion on partisan grounds.⁷²

The constitutional debate over Obamacare encapsulates partisan federalism. We see a fight about federalism involving both state and federal actors, but arguments for state versus federal authority map not onto the actor's state or federal office but rather his or her party affiliation. Insofar as partisanship is motivating positions on state sovereignty, the resulting federalism is contingent. But because there is significant party division across the states and within the federal government, the contingency is not a fragile one.

To be sure, a different way to tell the Obamacare story is a more standard federalism narrative: Republicans favor states' rights while Democrats favor national power. Especially because the states' rights position is often a no-government-should-do-it rather than a state-government-should-do-it position, Republicans have more often been associated with arguments for state power than Democrats. But federalism doesn't have a consistent partisan bent. On some issues, and during certain periods, Republicans favor the states; other times, Democrats do.⁷³

Consider, then, the most prominent federalism fight to reach the Supreme Court in the Term after the health care case. With respect to the federal Defense of Marriage Act (DOMA), Democratic states, and some federal Democratic officials, argued that the federal government had interfered with a sovereign state prerogative, while Republican state and federal officials defended national power.⁷⁴ In some respects, particularly

⁷¹ See, e.g., Jeremy W. Peters, *House to Vote Yet Again on Repealing Health Care Law*, N.Y. TIMES, May 14, 2013.

⁷² See, e.g., FoxNews.com, *GOP Governors Reject ObamaCare Health Exchange Partnerships*, Feb. 17, 2013, <http://www.foxnews.com/politics/2013/02/17/gop-governors-stand-ground-on-obamacare-health-exchanges/>; Kyle Cheney & Jason Millman, *Medicaid Expansion Stalls in Red States*, POLITICO, May 2, 2013. On the many roles for states in the Patient Protection and Affordable Care Act, see Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011).

⁷³ See, e.g., David J. Barron, *Foreword: Blue State Federalism at the Crossroads*, 3 HARV. L. & POL'Y REV. 1 (2009); Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY 37 (2012); Young, *supra* note 47.

⁷⁴ The Supreme Court struck down section 3 of DOMA, which defined marriage for purposes of federal law as being between one man and one woman. *United States v. Windsor*, No. 12-307 (June 26, 2013). Section 2, which concerns state recognition of same-sex marriages performed in other states, remains in effect.

a temporal one, the fight over same-sex marriage is not a partisan story. DOMA was enacted not long ago with bipartisan support, and same-sex marriage seems certain in the future to become a national right, supported by Democrats and Republicans alike. The partisan valence of same-sex marriage in general and DOMA in particular is far from stable; indeed, now that the Supreme Court has invalidated section 3 of DOMA, Democrats will likely focus on establishing a national right to same-sex marriage, while Republicans will double-down on states' right not to recognize same-sex marriage.

But in recent years, same-sex marriage has been a partisan issue, and state sovereignty has been attractive to Democrats as a vehicle for its recognition. At both the state and the national level, Democratic officials denounced the federal government's definition of marriage as an unwarranted intrusion on the states, while Republicans at both the state and the national level supported it as a valid exercise of national power.⁷⁵ After a circuit court struck down the relevant portion of DOMA, fifteen states governed by Republicans sought certiorari, supporting a "national" interest in "conferring exclusive benefits on traditional marriage."⁷⁶ Massachusetts, with its Democratic Governor, Attorney General, and legislature, meanwhile, urged the Supreme Court to recognize "the substantial impairment of State sovereignty wrought by DOMA" and to hold section 3 of the Act unconstitutional as a violation of the Tenth Amendment and the Spending Clause.⁷⁷

While red states have generally been more likely than blue states to champion state sovereignty against exercises of federal power, DOMA highlights that this alignment is not inevitable. And, though a striking recent example, it is not the only case in which Democratic states have made arguments for state sovereignty or Republican states have made

⁷⁵ Some Republicans have also advocated more sweeping national prohibitions on same-sex marriage. See, e.g., Shailagh Murray, *Gay Marriage Amendment Fails in the Senate*, WASH. POST., June 8, 2006 (describing Republican support for federal constitutional amendment banning same-sex marriage).

⁷⁶ Brief of Indiana et al. in Support of the Petition at 3, Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill, No. 12-13 (U.S. Aug. 2, 2012). The brief represented fourteen states with Republican governors and attorneys general and one state with a Republican attorney general and Democratic governor.

⁷⁷ Response of the Commonwealth of Massachusetts in Support of Certiorari at 16, *Gill*, Nos. 12-13 & 12-15 (U.S. July 2012); see also, e.g., *id.* at 20 (calling DOMA "a sweeping and unprecedented federal incursion into an area that, for centuries, has been a domain of exclusive State regulation"). A group of states governed predominantly by Democrats made similar sovereignty arguments after the Supreme Court granted certiorari in a related case. See Brief for Amici Curiae States of New York et al. at 2, *Windsor v. United States*, No. 12-307 (U.S. Mar. 1, 2013) ("[T]he amici States object to Congress's unprecedented act of rejecting the decisions of sovereign States to authorize same-sex marriage.").

arguments for national power.⁷⁸ Depending on the issue and the broader context, some states champion state autonomy while others welcome national action. State status as such does not tell us when states will make arguments sounding in sovereignty and oppose the federal government. Party politics offers a better, if still necessarily imperfect, guide. And it becomes only more powerful as we move from the realm of litigation to the realm of legislation.

2. Legislation: Institutional Isomorphism

States frequently challenge the federal government by using their own lawmaking capacity to enact policies disfavored by the majority at the national level. The institutional isomorphism of the state and federal governments—the fact that state governments have the same structure as the federal government, including legislative, executive, and judicial branches—is an oft noted feature of our federal polity.⁷⁹ Party politics calls attention to a particular possibility following from legislative isomorphism: states may not only pass laws that generally address the same issues as the federal government, but also adopt legislation that has been rejected, or not taken up, on partisan lines at the federal level. Often working together directly or through allied interest groups like the American Legislative Exchange Council, state and federal politicians shuffle ideas and even bill text back and forth, seeking friendly partisan ground in which to plant their policies. The resulting policies are only “state” or “national” in the sense of their site of enactment, not their purposes or intended audiences.

When President Bush took office in 2001, for example, the states began to enact legislation furthering the Democratic agenda.⁸⁰ In many instances, states enacted policies that Democrats in Congress had pushed for without success and that they then helped to defend from national preemption. Most notably, after the Environmental Protection Agency took no action on climate change, and Democrats in Congress were

⁷⁸ For example, in *McDonald v. Chicago*, a case concerning incorporation of the Second Amendment, only Democratic attorneys general made arguments about state sovereignty. See Brief for the States of Illinois, Maryland, and New Jersey as Amici Curiae in Support of Respondents, *McDonald v. Chicago*, No. 08-1521 (Jan. 6, 2010); see also, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁷⁹ E.g., FEELEY & RUBIN, *supra* note 5, at 13-14.

⁸⁰ See generally Barron, *supra* note 73; Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33 (2009). In addition to passing new laws, Democratic state actors also interpreted existing state laws more aggressively than the federal administration read complementary federal law. See, e.g., Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 725-26 (2011).

unable to enact legislation regulating greenhouse gas emissions,⁸¹ Democratic-controlled legislatures in California, Hawaii, and New Jersey passed laws to reduce greenhouse gas emissions, succeeding where their national counterparts failed.⁸² California's efforts were most significant because of its leadership role under the Clean Air Act.⁸³ The state enacted laws authorizing a cap-and-trade program and imposing emissions standards on motor vehicles.⁸⁴ Sixteen other states, with mostly Democratic legislatures, announced that they would adopt these standards.⁸⁵ California required a Clean Air Act preemption waiver for its emissions standards, however, and the Bush EPA denied the waiver.⁸⁶ Democratic members of Congress accordingly turned their attention from pushing federal solutions to supporting state efforts. The House Oversight Committee, for instance, spent five months investigating the EPA's waiver denial.⁸⁷

The question of state versus federal regulation thus played out as a partisan issue. Democrats in the federal and state legislatures alike championed state authority and cast state legislatures as continuous with the national legislature. California took up approaches that had been broached, without success, in Congress, and both state and federal actors saw California's actions as the best route to generating nation-wide action on climate change because, in the short term, collective adoption by other states of California's standards could effectively create national

⁸¹ See, e.g., CONG. RES. SERV., RL 43067, JONATHAN L. RAMSEUR & BRENT D. YACOBUCCI, CLIMATE CHANGE LEGISLATION IN THE 110TH CONGRESS (2007); BRENT D. YACOBUCCI, CONG. RES. SERV., RL 32955, CLIMATE CHANGE LEGISLATION IN THE 109TH CONGRESS (2005); Jennifer Lee, *The Warming Is Global But the Legislating, in the U.S., Is All Local*, N.Y. TIMES, Oct. 29, 2003, at A21.

⁸² See JONATHAN L. RAMSEUR, CONG. RES. SERV., RL 33812, CLIMATE CHANGE: ACTION BY STATES TO REDUCE GREENHOUSE GAS EMISSIONS 8 (2008).

⁸³ See 42 U.S.C. § 7543(b) (granting California, as the only state to have adopted its own standards prior to March 30, 1966, a possible waiver from federal preemption of federal vehicle emissions standards); 42 U.S.C. § 7507 (permitting other states to adopt California's standards in lieu of federal standards).

⁸⁴ Cal. Assemb. Bill 32 (2006); Cal. Assemb. Bill 1493 (2002).

⁸⁵ Twelve of the states had Democratic legislatures, and one had a divided legislature. See RAMSEUR, *supra* note 82, at 12 (listing states).

⁸⁶ Notice of Decision Denying a Waiver of Clean Air Act Preemption, 73 Fed. Reg. 12,156 (Mar. 6, 2008); see 42 U.S.C. § 7543(b).

⁸⁷ See Memo from the House Oversight and Government Reform Committee to Members of the Committee on Oversight and Government Reform Regarding EPA's Denial of the California Waiver (May 19, 2008), <http://oversight-archive.waxman.house.gov/documents/20080519131253.pdf>. The waiver was only granted when President Obama assumed office. Notice of Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. 32,743 (Jul. 8, 2009).

policy and, over time, California's law could "lead the way" to new national legislative and administrative action.⁸⁸

A similar partisan divide erupted around the same time with respect to embryonic stem cell research. In 2001, President Bush issued an executive directive preventing federal agencies from using federal funds for research on new embryonic stem cell lines.⁸⁹ With overwhelmingly Democratic support, Congress passed a law that would permit federal funds to be used in research on new stem cell lines, but the President vetoed the law.⁹⁰ As with climate change, the states thus became the focus of Democratic policymaking for both state and federal actors. In response to the federal restrictions, eight states enacted laws between 2004 and 2008 to encourage and fund embryonic stem cell research.⁹¹ California again played a leading role; following 2002 legislation authorizing embryonic stem cell research, Proposition 71 in 2004 authorized \$3 billion to support it.⁹² While the state's use of a ballot initiative might seem to bring its actions outside of party politics—direct democracy was, after all, designed to avoid the corrupting party influence⁹³—it underscores the opposite point: the increasing involvement of the parties in initiative contests.⁹⁴ A main architect of the proposition was a Democratic state senator who had sponsored prior stem-cell legislation, while California's Republican Party generated the

⁸⁸ Press Release, Welch Leads Congressional Effort on Auto Standards (Sept. 20, 2007), <http://www.cleancarscampaign.org/web-content/cleanairact/docs/welch-waiver-9-20-07.pdf> (quoting Rep. Peter Welch).

⁸⁹ Press Release, President Discusses Stem Cell Research, White House (Aug. 1, 2001), <http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html>. The Dickey-Wicker Amendment, in effect between 1998 and 2008, further prevented federal funds from being used for any activity that endangered, destroyed, or created embryos for research purposes. Pub. L. No. 104-99, § 128.

⁹⁰ See Stem Cell Research Enhancement Act of 2005, H.R. 810.

⁹¹ California, Connecticut, Illinois, Maryland, Massachusetts, and New Jersey had Democratic-controlled legislatures when they enacted the relevant laws; New York's two Houses were divided, and Iowa's two Houses were each almost perfectly split. See Nat'l Conf. State Legislatures, Stem Cell Research, Jan. 2008, <http://www.ncsl.org/issues-research/health/embryonic-and-fetal-research-laws.aspx>.

⁹² California Stem Cell Research and Cures Bond Act, Cal Health & Safety Code § 125290 (West 2004).

⁹³ See, e.g., THOMAS CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 46-48 (1989) (quoting Nathan Cree as stating in 1892 that direct democracy was intended "to break the crushing and stifling power of our great party machines . . . [and] to relieve us from the dominance of partisan passions").

⁹⁴ See generally Dan Smith, *The Initiative to Party: The Role of Political Parties in State Ballot Initiatives*, in INITIATIVE-CENTERED POLITICS: THE NEW POLITICS OF DIRECT DEMOCRACY 97 (2005) (arguing that parties are increasingly involved in ballot measures because they may increase voter turnout, serve as wedge issues, or promote party platforms); *id.* at 105-06 (discussing California initiatives).

primary opposition to the measure.⁹⁵ State lawmaking remained the leading tool for Democratic policy on embryonic stem cells until President Obama assumed office and brought national policy in line with these state actions.⁹⁶

During the Obama Administration, the tables have turned, and now it is the Republican Party seizing on the power of state legislatures to advance its national agenda. Across the country, Republican state legislatures have adopted strict voter ID laws after congressional Republicans have been unable to enact similar laws.⁹⁷ So, too, Republican state legislatures have responded to failed congressional attempts to repeal Obamacare by enacting numerous laws seeking to limit implementation of the Act⁹⁸—efforts that Republican members of Congress have goaded.⁹⁹

As the stem cell debate during the Bush years anticipated, one of the sharpest sites of partisan federal conflict remains abortion. In 2011, for instance, Republicans in the House voted to cut off federal funding for Planned Parenthood because the organization provides abortion services.¹⁰⁰ After the Democratic-controlled Senate rejected the rider, state legislatures took up the cause. In 2011 and 2012, six states with Republican legislatures passed laws defunding Planned Parenthood,¹⁰¹ while two states took similar executive action on party lines.¹⁰² While

⁹⁵ See Joel W. Adelson & Joanna K. Weinberg, *The California Stem Cell Initiative: Persuasion, Politics, and Public Science*, 100 AM. J. PUB. HEALTH 446, 448 (2010).

⁹⁶ See Exec. Order No. 13505, 74 Fed. Reg. 10,667 (March 11, 2009) (revoking President Bush's directive).

⁹⁷ See Nat'l Conf. State Legislatures, Voter Identification Requirements, 2013, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#Legislation>.

⁹⁸ Nat'l Conf. State Legislatures, State Legislation and Actions Challenging Certain Health Reforms, 2013, http://www.ncsl.org/issues-research/health/state-laws-and-actions-challenging-ppaca.aspx#2011_bills.

⁹⁹ E.g., Letter from Senator Jim DeMint et al. to the National Governors Association (June 29, 2012), http://bachmann.house.gov/sites/bachmann.house.gov/files/UploadedFiles/congresslettertonga_070212.pdf (urging governors to resist setting up affordable health insurance exchanges in their states to “assist . . . Congress to repeal this violation”). The conservative American Legislative Exchange Council (ALEC) has drafted model legislation for the states. See, e.g., ALEC, Press Release, State Legislatures Last Line of Defense Against ObamaCare (Mar. 22, 2012), <http://www.prnewswire.com/news-releases/state-legislators-last-line-of-defense-against-obamacare-88817322.html>.

¹⁰⁰ House Republicans voted in favor 230 to 10, while Democrats voted against 178 to 7. H. Amt. 95, Final Vote Results for Roll Call 93, <http://clerk.house.gov/evs/2011/roll093.xml>.

¹⁰¹ AMERICANS UNITED FOR LIFE, DEFENDING LIFE 2012, at 37-39 (2012) (discussing laws in Indiana, Kansas, Montana, North Carolina, Texas, and Wisconsin).

¹⁰² New Jersey Republican Governor Chris Christie vetoed funding for Planned Parenthood approved by the state's Democratic legislature, AMERICANS UNITED FOR LIFE, *supra* note 101, at 38, while New Hampshire's Republican-controlled Executive Council rejected Planned Parenthood's state contract, Jason McClure, *New Hampshire Planned Parenthood Stops*

(continued next page)

Republican state legislators have relied on their autonomous lawmaking powers to defund Planned Parenthood, their actions are continuous with federal efforts. As the leader of Americans United for Life noted, the House's vote to defund Planned Parenthood "both reflected similar actions in the states and encouraged similar state actions."¹⁰³

Ultimately, whether the states are taking up the Republican or Democratic policy agenda, their laws have a variety of different aims vis-à-vis the federal government. Sometimes they seek to push the federal government into action. Sometimes they keep issues in the national spotlight that would have faded from public view when the minority party in Congress could not enact legislation or even get it onto the floor, or the majority party had insufficient numbers to defeat a filibuster or presidential veto. Sometimes they motivate other states to take similar actions, creating a sort of national law without Congress.¹⁰⁴ What unites these laws is that, while they rely on state autonomy in one sense—the state's ability to enact its own legislation—this is not autonomy as separation. States are using their lawmaking abilities to take stands on national issues, working in direct cooperation with national figures who are not able to achieve their ends in Washington or more diffusely following contours of party agendas. Institutional isomorphism becomes a vehicle not for dual federalism but for state-federal interaction and contestation.

3. Administration: Uncooperative Federalism

States also oppose federal policy from within federal schemes, using the authority conferred on them to carry out federal law to push back against federal policy. Party politics plays a critical role in motivating such uncooperative federalism.¹⁰⁵

Sometimes states act uncooperatively by refusing to take part in programs that the federal government has designed intending state participation. Partisanship can trump even strong financial interests. During the Bush Administration, Democratic states widely refused funding for sex-education programs that required abstinence-only

Providing Birth Control, REUTERS, Jul. 8, 2011, <http://www.reuters.com/article/2011/07/08/us-planned-parenthood-new-hampshire-idUSTRE7675Z820110708>.

¹⁰³ Nat'l Conf. State Legislatures, *For the Record: Charmaine Yoest*, April 2012, <http://www.ncsl.org/issues-research/health/for-the-record-charmaine-yoest-april-2012.aspx>.

¹⁰⁴ See *infra* Section III.A.

¹⁰⁵ On uncooperative federalism generally, see Bulman-Pozen & Gerken, *supra* note 46. On uncooperative federalism with respect to national executive power in particular, see Bulman-Pozen, *supra* note 51.

instruction.¹⁰⁶ More recently, many Republican states have declined the opportunity to expand Medicaid or set up their own health insurance exchanges pursuant to the Patient Protection and Affordable Care Act.¹⁰⁷

In other instances, partisanship leads states to tweak or generate internal opposition to federal programs they administer. During Bill Clinton's presidency, for example, Republican state governors including Tommy Thompson and John Engler used their role in administering federal welfare to push back against policies they regarded as cultivating dependency rather than work and marriage.¹⁰⁸ These governors also leveraged their administrative knowhow—and their leadership of the Republican Governors' Association—to work with Republicans in Congress to devolve still more power to the states.¹⁰⁹ Their push to convert welfare into a block-grant program was at once a push to devolve power to the states and a push to move the substantive commitments of welfare policy in a Republican direction.¹¹⁰

A decade later, the national debate about eligibility requirements for the State Children's Health Insurance Program (SCHIP) also had a partisan-inflected federalism dimension. Taking advantage of the opportunity the statute had provided for states to create their own insurance schemes, Democratic state legislatures had significantly expanded coverage—for instance, to certain adults and to children of families with incomes at three and four times the poverty level.¹¹¹ When SCHIP came up for reauthorization in 2007, President Bush and

¹⁰⁶ Alesha E. Doan & Deborah R. McFarlane, *Saying No to Abstinence-Only Education: An Analysis of State Decision-Making*, 42 PUBLIUS 613 (2012) (finding partisanship was the most decisive variable in whether states accepted or rejected federal abstinence-only funds).

¹⁰⁷ See, e.g., FoxNews.com, *supra* note 72; see also Sean Nicholson-Crotty, *Leaving Money on the Table*, 42 PUBLIUS 449, 462 (2012) (“Between 2009 and 2011, over 40 percent of Republican governors publicly rejected or refused to apply for funds being offered by the Obama administration.”). See generally Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875 (2008) (exploring why state officials decline federal grants).

¹⁰⁸ See, e.g., MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 83-103 (2001); LEARNING FROM LEADERS: WELFARE REFORM POLITICS AND POLICY (Carol S. Weissert, ed. 2000); Bulman-Pozen & Gerken, *supra* note 46, at 1274-76.

¹⁰⁹ See JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* 146-47 (2009).

¹¹⁰ See, e.g., Patty Edmonds, *States Turn Values Rhetoric into Legislative Action*, USA TODAY, Aug. 8, 1996, at 7A (“The states ‘have become very much activists in trying to reform social programs, to . . . set a moral tone for our society,’ says Wisconsin Gov. Tommy Thompson, a Republican.”). While President Clinton ultimately signed the Republican-House-generated Personal Responsibility and Work Opportunity Act, he resisted other state attempts to further devolve welfare policy in the service of Republican ends. See, e.g., Garry Wills, *The War Between the States . . . and Washington*, N.Y. TIMES MAGAZINE, July 5, 1998.

¹¹¹ Colleen M. Grogan & Elizabeth Rigby, *Federalism, Partisan Politics, and Shifting Support for State Flexibility: The Case of the U.S. States Children's Health Insurance Program*, 39 PUBLIUS 47, 61 (2008).

congressional Republicans sought to impose federal restrictions on such state experimentation, while congressional Democrats argued vigorously for state flexibility.¹¹² As with welfare, a partisan debate about the substance of SCHIP played out in significant part as a question of national versus state control. In both instances, state actors seized on their administrative role to push against federal policy, and they enjoyed the backing of partisan allies in Congress. In both instances, partisanship was the motivating force, but federalism was a critical currency.

With respect to immigration, state and federal actors have similarly advanced different views, and different rhetoric, about state versus federal power depending on which party holds the presidency. During the George W. Bush Administration, several blue states resisted aggressive enforcement of federal immigration law. Some prevented their law enforcement officers from carrying out federal immigration laws concerning unlawful presence,¹¹³ while particular Democratic state officials, including the Massachusetts and New York attorneys general, staged confrontations with federal agencies around the rights of undocumented workers.¹¹⁴

During the Obama Administration, Republican-controlled states have deployed their role as administrators of federal immigration law to call for more aggressive enforcement.¹¹⁵ Arizona's controversial S.B. 1070, for example, marshals state law in an effort to increase immigration-related arrests and deportations. While the Supreme Court held several provisions of the law preempted before they took effect, the litigation was notable for bolstering uncooperative federalism as a means of resistance and for the partisan lines that were drawn. First, the single challenged section of the law the Supreme Court upheld rested on a U.S. Code provision giving states a role in carrying out federal law. While the federal provision assumes federal-state "cooperation," however, Arizona's reliance on the provision is decidedly uncooperative with

¹¹² *Id.* at 60-62.

¹¹³ *See, e.g.*, Or. Rev. Stat. § 181.850 (2007); S.J. Res. No. 19, 59th Leg., Reg. Sess., 2005 Mont. Laws 3042; Exec. Order. No. 2005-019 (N.M. 2005).

¹¹⁴ Peter Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 63-64. *See generally* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

¹¹⁵ *See generally* Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 NYU L. REV. (forthcoming 2013) (providing a partisan-based account for the recent rise of subnational immigration policies). State rhetoric, at least, has insisted that the Obama Administration has been lax in deporting individuals, though in fact it has deported more people per year than any prior administration. *See, e.g.*, PolitiFact.com, *Has Barack Obama Deported More Popel than Any Other President in U.S. History?*, <http://www.politifact.com/truth-o-meter/statements/2012/aug/10/american-principles-action/has-barack-obama-deported-more-people-any-other-pr/>.

respect to the Obama Administration: the state is using the power given to it within a federal scheme to oppose the federal executive's policy choices about how that scheme is carried out.¹¹⁶ Second, partisanship again trumped politicians' state or federal office in shaping their positions on the law. Republican state attorneys general argued in support of the state law, while Democratic state attorneys general insisted federal law preempted Arizona's scheme.¹¹⁷ Meanwhile, congressional Democrats argued that the law was preempted, while congressional Republicans sided with Arizona.¹¹⁸ In contrast to the immigration federalism debate of the early 2000s, the immigration federalism debate of the 2010s aligned Republicans with state power and Democrats with national authority.¹¹⁹

* * *

Many state challenges of the type discussed in this Section are effective, but a significant number fail in important ways. The Supreme Court, for example, largely rejected state arguments against Obamacare and deemed most of Arizona's immigration law preempted, while lower courts have invalidated as unconstitutional several laws seeking to defund Planned Parenthood. For those focused solely on the short-term effects on the federal government, such challenges may be of little utility. But, as the next Part argues, even these challenges are important to federalism's vitality because they help maintain individuals' commitment to states as sites of opposition—a commitment that ultimately gives the states power to launch successful as well as failed

¹¹⁶ See Bulman-Pozen, *supra* note 51, at 484-86.

¹¹⁷ See Brief of Amici Curiae Michigan et al. in Support of the Petitioners, *Arizona v. United States*, No. 11-182 (U.S. Feb. 13, 2012) (representing thirteen states with Republican attorneys general and two states, West Virginia and Wyoming, with Democratic attorneys general); Brief for New York et al. as Amici Curiae in Support of Respondent, *Arizona*, No. 11-182 (U.S. March 26, 2012) (representing eleven states with Democratic attorneys general). Five states with Republican governors and legislatures—Alabama, Georgia, Indiana, South Carolina, and Utah—also adopted copycat laws modeled on Arizona's.

¹¹⁸ See, e.g., Amici Curiae Brief of Members of Congress and the Committee To Protect America's Border in Support of Petitioners, *Arizona*, No. 11-182 (U.S. Feb 13, 2012); Amici Curiae Brief of Members of Congress in Support of Respondent, *Arizona*, No. 11-182 (U.S. March 26, 2012).

¹¹⁹ This partisan mapping followed not only from state action but from the federal response to state action. While states have enacted both pro- and anti-immigrant laws during both Democratic and Republican Administrations, see *infra* Section III.A (discussing state diversity), the Bush Administration visibly attacked sanctuary jurisdictions while turning a blind eye to anti-immigrant laws, while the Obama Administration has visibly attacked anti-immigrant laws while turning a blind eye to sanctuary jurisdictions.

challenges and that connects individuals to the polity even when they are alienated from the federal government.

II. PARTISAN IDENTIFICATION WITH STATES

Federalism critically depends not only on the relationship between the state and federal governments, but also on the relationship of the people to the states and the nation. For federalism to work, much doctrine and scholarship insists, the people must politically identify with the states as well as the nation. Yet contemporary federalism scholars are skeptical that most Americans have state-based identities. Countering arguments that the fifty states are discrete civil societies, these scholars have suggested our political identity is national only.

This Part does not attempt to defend a notion of state identity as such, but instead argues we may be missing a powerful form of identification with states because our understanding of what constitutes political identity is too rigid. Americans need not regard states as distinctive civil societies for states to be meaningful sites of identification, nor must they consistently prize their membership in the state polity. When we expand our inquiry to encompass more fluid and contingent forms of state identity, partisanship emerges as a key variable, a reason for individuals to channel loyalty and affiliation toward states rather than to the nation alone. After Section A describes debates about state identity, Section B argues that partisanship is a powerful sociopolitical identification, and Section C illustrates how states serve as sites of partisan identification. Ultimately, a focus on partisanship suggests that state-based identification may be shifting and partial—and, perhaps paradoxically, a means of expressing national identity—but nonetheless a significant buttress of American federalism.

A. *Problems of Identity and Loyalty in American Federalism*

An animating premise of much federalism doctrine and scholarship is that states command political loyalty and identity.¹²⁰ For many federations, state-based affiliations are understood as prior to and necessitating federalism in the first instance. The point of federalism, on

¹²⁰ See, e.g., FEELEY & RUBIN, *supra* note 5; RIKER, *supra* note 8, at 136 (“[F]ederalism is maintained by the existence of dual citizen loyalties to the two levels of government.”); Sujit Choudhury, *Citizenship and Federations: Some Preliminary Reflections*, in *THE FEDERAL VISION* 377, 387 (2001) (“It is often asserted that the existence of divided or multiple allegiances is one of the defining features of federalism”); John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 *CAL. L. REV.* 485, 525-26 (2002) (arguing that successful federalism requires “citizens’ emotional attachments to their states”).

this view, is to accommodate diversity, to allow individuals who are different from each other in some important respect to live together and yet apart.¹²¹ In other instances, commentators consider state-based loyalty a means to distinct ends that federalism aspires to guarantee. Federalism is said to preserve liberty, for example, by placing two governments in competition, but these two governments have power to compete only insofar as individuals identify with both; individuals' attachments to their states, in particular, hold centripetal forces in check.¹²² Such accounts are often agnostic about the cause of state-based identity, recognizing that state borders may create, rather than simply reflect, political identities.¹²³ But they, too, posit states as necessary sites of identification.

What, then, generates state-based loyalties and identities in the United States? The answer suggested for many polities—ethnically, linguistically, or religiously identified communities—cannot be given.¹²⁴ In its place, some of the staunchest defenders of American federalism cast the states themselves as diverse cultural communities. On Daniel Elazar's influential account, for instance, each state is a “distinct societ[y]” associated with a particular character and set of fundamental values.¹²⁵ Thus, for Elazar and his many successors, state borders may not map neatly onto race, language, religion, or the like, but states themselves reflect different American ethnocultural identities.¹²⁶ Instead of the Flemish and Walloons, we have Floridians and Washingtonians.

¹²¹ See, e.g., Will Kymlicka, *Federalism, Nationalism, and Multiculturalism*, in THEORIES OF FEDERALISM 269 (Dimitrios Karmis & Wayne Norman eds., 2005).

¹²² The classic account is Madison's in *Federalist 45* and *46*. For a contemporary account, see Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459 (2007); cf. Gregory v. Ashcroft, 501 U.S. 452, 459 (1991) (arguing that the federal and state governments will act as mutual restraints “only if both are credible”).

¹²³ See, e.g., Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994); Levy, *supra* note 122, at 475.

¹²⁴ This is not to endorse the idea that identity and loyalty necessarily follow from territorial divisions mapped onto ethnocultural cleavages, nor to suggest this is desirable. See, e.g., DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (1985) (noting benefits of ethnically heterogeneous federal units).

¹²⁵ ELAZAR, *supra* note 5, at 14-25; 109-4; Daniel J. Elazar, *Foreword: The Moral Compass of State Constitutionalism*, 30 RUTGERS L.J. 849, 861 (1999).

¹²⁶ For simplicity's sake, I am here counting as Elazar's successors a broad array of scholars, ranging from Richard Briffault—who focuses on states' fixed boundaries, territorial integrity, and inherent lawmaking capacity rather than inherent differences among their populations as underlying their status as “relatively distinctive ‘civil societies’”—to Joel Lieske—who has drilled down further on Elazar's conception of state cultures. Briffault, *supra* note 123, at 1306 (quoting ELAZAR, *supra* note 5); Joel Lieske, *American State Cultures: Testing a New Measure and Theory*, 42 PUBLIUS 108 (2011); see also, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 150 n.335 (inviting skeptics of state identity to come live in Texas for six months); Peter J. Spiro, *The Citizenship* (continued next page)

But accounts that treat state identities as distinctive, deep-seated, and fixed face a host of complications. Although the United States is not a homogenous polity, American heterogeneity does not well track state borders. Today, individuals from Montana to Mississippi to Maine can eat at the same restaurant chains, shop at the same stores, read the same publications, and listen to the same music.¹²⁷ And these individuals in Montana, Mississippi, and Maine might be just one person: half of Americans age 25 and older do not live in their state of birth, and more than a quarter of American adults have lived in three or more states.¹²⁸ To the extent the states reflect cultural differences, regional rather than state distinctiveness is likely to be what matters. And urban/rural cleavages may generate both intrastate division and interstate unity. Moreover, many of our major metropolitan areas cross state lines. Are residents of Gary or Hammond culturally identified with Indiana over Chicago?¹²⁹ Even those commentators who have attempted to trace distinct American cultures within the U.S. have thus tended to find state borders both over- and under-inclusive.¹³⁰ Indeed, Elazar's own moralistic-individualistic-traditionalistic typology reveals significant intrastate differentiation and interstate commonality.¹³¹

In light of these and other complications, most recent federalism scholarship has rejected the notion of state identity altogether, at least for the majority of states.¹³² In particularly strong terms, Malcolm Feeley and Edward Rubin insist that because Americans do not identify with

Dilemma, 51 STAN. L. REV. 597, 621 n.120 (1999) (arguing that distinctive state-based identities are on the rise).

¹²⁷ See, e.g., JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 69-72 (2005); SCHAPIRO, *supra* note 11, at 25-26.

¹²⁸ See U.S. Census Bureau, Lifetime Mobility in the United States: 2010, at 4 tbl. 2 (Nov. 2011); Pew Research Center, American Mobility: Who Moves? Who Stays Put? Where's Home? (2008), <http://pewsocialtrends.org/files/2010/10/Movers-and-Stayers.pdf>. A substantial percentage of Americans who move consider "home" a place other than where they currently live. Pew Research Center, *supra*, at 25 (finding that, of U.S.-born adults who have lived in more than one community, 38% say they consider home some place other than where they live now). For some thoughts on cross-state affiliation, see *infra* Section III.B.

¹²⁹ Cf. Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 320-30 (1993) (exploring individuals' attachments to places other than their residence).

¹³⁰ See, e.g., JAMES GIMPEL & JASON SCHUKNECHT, PATCHWORK NATION: SECTIONALISM AND POLITICAL CHANGE IN AMERICAN POLITICS (2004); COLIN WOODARD, AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA (2011).

¹³¹ See, e.g., ELAZAR, *supra* note 5, at 124-25. One recalls also Samuel Beer's quip: "Look at the map. It must make you wonder whether there could have been a United States, if the rectangle had not been invented." Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9, 16 (1978).

¹³² Some carve out states like Utah and Hawaii whose majorities can be identified by some other characteristic, such as ethnicity or religion, and Texas is often placed in a category of its own. See, e.g., Levy, *supra* note 122, at 468.

states, the United States cannot be said to have a federal system.¹³³ In their view, federalism responds to divided political loyalties, but “the American people . . . have a unified political identity. Not only do they identify themselves primarily as Americans, but they insist on normative uniformity throughout the nation.”¹³⁴ Jacob Levy similarly argues that “American federalism today may not be very effective” because “[c]leavages that cut across states are the rule.”¹³⁵ Without dismissing American federalism, other accounts similarly reject the idea of state identification. Robert Schapiro argues that our polity is a thoroughly national one and scholars should focus on how federalism works without succumbing to “an outdated focus on local variation” and “nostalgia for lost community.”¹³⁶ Heather Gerken finds it “odd” that we bother even to discuss whether Americans identify with the states.¹³⁷

In their persuasive debunking of essentialist conceptions, however, these scholars risk throwing out the baby with the bathwater. They undervalue how individuals may identify with states even if state boundaries do not demarcate distinct ethnocultural communities. It is possible, that is, to posit meaningful state identification without embracing what James Gardner calls “romantic subnationalism.”¹³⁸ A handful of scholars have indeed invoked thinner conceptions of state identity. Most notably, Vicki Jackson has argued that American federalism promotes national accord because state-based civic identities crosscut deeper-seated racial, ethnic, or religious identities.¹³⁹ But what generates state civic identities?¹⁴⁰

¹³³ See FEELEY & RUBIN, *supra* note 5; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

¹³⁴ FEELEY & RUBIN, *supra* note 5, at 15, 115.

¹³⁵ Levy, *supra* note 122, at 468; *see also* Jacob T. Levy, *Federalism and the New and Old Liberalisms*, 24 SOC. PHIL. & POL’Y 306, 317 (2006) (“[L]oyalty to states . . . has dwindled to almost nothing in most parts of the United States.”); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL’Y REV. 187, 217 (1996) (arguing that the value of states today “lies not in their role as a focus of citizen loyalty and identification, but rather in the fact that they do not play that role”).

¹³⁶ SCHAPIRO, *supra* note 11, at 7; *see id.* at 16-30, 82-85; *see also, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 830 (1992) (noting “the general absence of public identification with the polity defined by the state”).

¹³⁷ Gerken, *supra* note 4, at 16-17.

¹³⁸ GARDNER, *supra* note 127, at 53.

¹³⁹ Jackson, *supra* note 65, at 2221-22 & n.189. While Jackson emphasizes identities that Americans do *not* associate with states, the crosscutting allegiances she champions follow from individuals’ state-oriented “civic identities” that do not align with their more deeply felt identities. *Id.* at 2221; *see also* Calabresi, *supra* note 17, at 765-69 (“[N]ationwide crosscutting cleavages make American federalism stable because they give it a Madisonian plurality of interest groups, no one of which is likely to terrorize the others on a permanent basis.”); Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 1243 (arguing that state

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As the remainder of this Part explains, in the United States today, partisanship motivates individuals to identify with and feel loyal to the states as well as the nation in complicated and shifting but nonetheless significant ways. In seeking to locate state identification in ways in which the states are different from the nation, we miss how similarity may undergird identification. Individuals may identify with the states not because they represent something essentially different from the nation, but rather because they articulate competing visions of the national will.¹⁴¹ Partisan identification with states thus underscores the nationalism of American federalism—yet this is a nationalism in which the states are not beside the point, as commentators like Feeley and Rubin suggest, but instead key players in national politics and individuals’ understanding of themselves as Americans.

B. *Partisanship as Identity*

As an ever-growing body of social science work demonstrates, partisanship is a powerful political and social identification.¹⁴² Most American adults understand themselves as Democrats or Republicans, and even most self-proclaimed Independents process information and take positions on issues in ways indistinguishable from their partisan-identified peers.¹⁴³ Party identification is quite stable over time,¹⁴⁴ and it

constitutions can further state-based communities of interest that are contingent but nonetheless meaningful).

¹⁴⁰ Some have read Jackson as agreeing with Elazar that the states are “integral communities of value.” SCHAPIRO, *supra* note 11, at 88. Yet Jackson represents as similar to her account Mark Gordon’s claim that American stability follows from the absence of state identification. I think it most likely that she has a thin conception of civic identity in mind. *See, e.g.*, Jackson, *supra* note 65, at 2222 (describing states as “useful loci toward which to direct political activism and organizing”). My account may therefore be complementary to hers insofar as partisanship is a mechanism that translates political activism into identification. *Cf.* Ernest A. Young, *What Does It Take To Make A Federal System? On Constitutional Entrenchment, Separate Spheres, and Identity*, 45 TULSA L. REV. 831, 843 (2011) (book review) (suggesting that state identity might be revived by focusing on “critical political commitments” rather than distinctive cultural, ethnic, or religious patterns).

¹⁴¹ *Cf.* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1166 (1993) (“[E]ach state constitution represents, in large measure, an effort to realize within the bounds of a particular time and space a common ideal of American constitutionalism. The states share a common aspiration for constitutional governance.”); GARDNER, *supra* note 127, at 122 (positing an interdependence of state and national constitutionalism and suggesting that state power exists not only to ensure state self-government but also “for the benefit of the people of the nation”).

¹⁴² *See, e.g.*, GREEN ET AL., *supra* note 6; ROSENBLUM, *supra* note 6; Carsey & Layman, *supra* note 32.

¹⁴³ Many Americans who call themselves Independents are “leaners,” *see* BRUCE E. KEITH ET AL., *THE MYTH OF THE INDEPENDENT VOTER* (1992), and a still greater number have strong implicit Democratic or Republican leanings that shape their political judgments in ways they do

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is much more than a series of discrete actions, such as votes for particular candidates. It colors how we process information and what we believe about particular issues and fundamental questions alike.¹⁴⁵ It is, moreover, a social, as well as political, identification. As Donald Green and his colleagues write, “[i]dentification with a political party is analogous to identification with religious, class, or ethnic groups.”¹⁴⁶ This is not to say that partisanship follows from and expresses these other social identities. While individuals may become partisans in part by virtue of their membership in other social groups,¹⁴⁷ party identification is not reducible to these other memberships.¹⁴⁸ It is a distinct social identity, serving, in psychological terms, as “part of an individual’s self concept which derives from his knowledge of his membership of a group . . . together with the value and emotional

not expressly report, see Carlee Beth Hawkins & Brian A. Nosek, *Motivated Independence? Implicit Party Identity Predicts Political Judgments Among Self-Proclaimed Independents*, 38 PERSONALITY & SOC. PSYCH. BULL. 1437 (2012). It is notable that these individuals refuse to visibly identify with a political party, but given that most Americans are party-identified and most Independents are closet, or at least subconscious, partisans, I do not address that curiosity further here.

¹⁴⁴ E.g., ROGERS SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 493 (1999) (“Few findings in political science are as heavily supported as the tenacity of party identification . . .”). On the formation of partisan identity, see *supra* notes 31-36 and accompanying text.

¹⁴⁵ See, e.g., Bartels, *supra* note 32, at 117 (presenting evidence of partisan bias in political perception); Cohen, *supra* note 35 (finding party identification shapes individuals’ views on social policies); Goren, *supra* note 32, at 895 (2005) (finding party identification shapes individuals’ core political values, their “most abstract and enduring beliefs about society and public affairs”).

¹⁴⁶ GREEN ET AL., *supra* note 6, at 78. Although this is not Green and his colleagues’ point, it may be that these identities are similar not only because the former is more durable and meaningful to individuals than commonly assumed, but also because the latter is more fluid and contingent. A significant body of work has destabilized understandings of racial, ethnic, and religious identities as given and fixed, rather than constructed and continuously negotiated, and has emphasized that ethnicity is better understood not as preceding and standing outside politics but rather as being activated and mobilized by it. See, e.g., ROGERS BRUBAKER, ETHNICITY WITHOUT GROUPS (2006). If purportedly strong forms of identity are weaker than often assumed, however, something that may not even seem to be an identity—partisanship—has a stronger force than often assumed. Without positing equivalence, it seems fair to understand both ethnic and partisan identifications as not fixed but nonetheless quite powerful once mobilized. If drawing on our assumptions about ethnicity helps us to understand the power of partisanship, as Green and his colleagues would have it, it also seems that drawing on our assumptions about partisanship could yield new thinking about federal politics divided along ethnic lines.

¹⁴⁷ See *supra* note 31.

¹⁴⁸ That said, there is a worrisome racialization of the parties underway in the United States. See, e.g., Kerry L. Haynie & Candis S. Watts, *Blacks and the Democratic Party: A Resilient Coalition*, in NEW DIRECTIONS IN AMERICAN POLITICAL PARTIES 93, 105 (Jeffrey M. Stonecash, ed., 2010) (arguing current trends could “leave us with one party that is overwhelmingly white and one that is mostly made up of racial and ethnic minorities”).

significance attached to the membership.”¹⁴⁹ Partisanship generates both personal understandings and communal attachments.

Three related points about partisanship as a sociopolitical identity bear particular emphasis. First, our sense of what it means to be an American, our national identity, is mediated by partisanship. In the words of two social psychologists, “Red and Blue have become distinct ways of being ‘American.’”¹⁵⁰ The Democratic and Republican parties offer competing narratives about triumphs and challenges in all realms of public life—the economic, the social, the moral.¹⁵¹ When they do so successfully, their “normative vision also becomes part of the sense of identity of their allegiants.”¹⁵² Democrats and Republicans thus understand both the national polity and themselves as Americans through the lens of partisanship.¹⁵³

Second, as with all social identities, partisan identity generates, and relies upon the existence of, both an in-group and an out-group. The partisan in-group is a big one; for Democrats and Republicans alike, it includes nearly half of the nation’s population. Largely for this reason, commentators frequently discuss partisanship as a source of crosscutting identity in the United States.¹⁵⁴ By cementing ties among a large and

¹⁴⁹ H. Tajfel, *Social Categorization, Social Identity, and Social Comparisons*, in DIFFERENTIATION BETWEEN SOCIAL GROUPS 27 (H. Tajfel ed., 1978); see, e.g., GREEN ET AL., *supra* note 6, at ix (“[P]arty identification is a genuine form of social identification.”); ROSENBLUM, *supra* note 6, at 344 (“[P]artisanship is a distinct identity, and participation as a partisan is a form of identity politics.”).

¹⁵⁰ Abraham M. Rutchick & Collette P. Eccleston, *Ironic Effects of Invoking Common Ingroup Identity*, 32 BASIC & APPLIED SOC. PSYCH. 109, 111 (2010).

¹⁵¹ ROSENBLUM, *supra* note 6, at 358, 459.

¹⁵² SMITH, *supra* note 144, at 495; cf. Anthony D. Smith, *Gastronomy or Geology? The Role of Nationalism in the Reconstruction of Nations*, 1 NATIONS & NATIONALISM 3, 19 (1995) (arguing that nationalists are “political archaeologists rediscovering and reinterpreting the communal past in order to regenerate the community”).

¹⁵³ See, e.g., Zachary P. Hohman et al., *Identity and Intergroup Leadership: Asymmetrical Political and National Identification in Response to Uncertainty*, 9 SELF & IDENTITY 113 (2010); Rutchick & Eccleston, *supra* note 150, at 113; cf. Penelope Sheets et al., *God and Country: The Partisan Psychology of the Presidency, Religion, and Nation*, 32 POL. PSYCH. 459 (2011) (finding that Democrats rated Obama as more “American” than McCain, while Republicans rated McCain as more “American” than Obama); Mary E. Stuckey, *One Nation (Pretty Darn) Divisible: National Identity in the 2004 Conventions*, 8 RHETORIC & PUB. AFFAIRS 639 (2005) (arguing that Democrats and Republicans presented very different visions of American national identity during the 2004 conventions). Partisanship is not, of course, the only mediating variable in defining national identity. See, e.g., Jack Citrin et al., *The Meaning of American National Identity*, in SOCIAL IDENTITY, INTERGROUP CONFLICT, AND CONFLICT REDUCTION 71 (2001) (suggesting black and white Americans have different beliefs about what constitutes American identity).

¹⁵⁴ See, e.g., Ethan J. Leib & Christopher S. Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 CAL. L. REV. 69, 89 (2012) (arguing that parties “allow Southerners and Northerners, rich and poor, whites and minorities, and Christians and Muslims to feel that they are connected in a shared or overlapping political narrative”); see

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diverse group of individuals who will never meet face to face, partisanship helps to foster a sense of national community.¹⁵⁵ But the out-group is just as important as the in-group, and just as substantial. Precisely because it involves “the choice of comrades,”¹⁵⁶ partisan identity “is defined in terms of ‘the other.’”¹⁵⁷ Partisanship divides us even as it unites us, and the division between Democrats and Republicans has only grown more pronounced in recent decades. While polarization is most apparent among elected officials, it extends across the polity.¹⁵⁸ Ideology and partisanship have grown more aligned across the electorate, and the more Americans are engaged in the political process, the more polarized they are; the more they care about divisive issues, like abortion, same-sex marriage, and health care, the more polarized they are.¹⁵⁹ Especially as Americans increasingly associate with fellow partisans, the line between the partisan in-group and out-group breeds mutual suspicion, not just a friendly contest in even-numbered years.¹⁶⁰

Third, many political activities are fundamentally acts of identification. When Americans vote, work for campaigns, and otherwise engage politically, they seek not only to achieve particular policy outcomes, but also to support their “team.”¹⁶¹ In reaffirming their partisan group, Americans also reaffirm their personal identity and

also ROSENBLUM, *supra* note 6, at 356-57; *cf.* Jackson, *supra* note 65, at 2221-23 (discussing federalism in similar terms).

¹⁵⁵ *Cf.* BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6 (1983) (positing nations as *imagined* communities because “the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion,” and as imagined *communities* because “the nation is always conceived as a deep, horizontal comradeship”).

¹⁵⁶ WALZER, *supra* note 31, at 128.

¹⁵⁷ ROSENBLUM, *supra* note 6, at 365.

¹⁵⁸ Even those who dispute mass polarization agree that liberals and conservatives have increasingly been sorting into the “correct” parties. *See* MORRIS P. FIORINA ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* XIII, 9, 61-69 (3d ed. 2011). But there is, in addition, evidence of polarization among the electorate. For instance, while Fiorina argues that Americans are not divided on abortion because most Americans believe abortion should be available in some but not all cases, 88% of active Democrats who care about abortion consider themselves pro-choice, while 84% of active Republicans who care about abortion consider themselves pro-life. ABRAMOWITZ, *supra* note 23, at 73; *see also* Layman et al., *supra* note 11, at 89-90.

¹⁵⁹ ABRAMOWITZ, *supra* note 23, at 8; *see also* Erikson et al., *supra* note 25.

¹⁶⁰ *See, e.g.*, BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 14 (2009).

¹⁶¹ GREEN ET AL., *supra* note 6, at 83, 219; *see also id.* at 206 (“Elections affirm and empower the social groups that comprise the winning party. . . . [E]lections represent more than simply a competition between candidates and rival platforms. Elections are also forums for intergroup competition.”).

belonging in a political community. But this makes the stakes of elections particularly high. Losing the presidency, especially, may mean not only living under policies one does not favor, but also a deeper sense of alienation that may threaten the security of our national identity, our feelings of belonging to and affinity with the nation.¹⁶²

C. *Identifying with States*

Consider, to make that last point a little more concrete, the secession talk that followed President Obama's reelection. Texas led the charge.¹⁶³ As a petition asking permission for the Lone Star State to withdraw from the United States gathered signatures, "Secede" bumper stickers started selling like hotcakes, and a 2014 gubernatorial candidate changed his middle name to "SECEDE."¹⁶⁴ While the fever ran hottest in Texas, residents of other red states including Alabama, Georgia, Louisiana, Oklahoma, and Tennessee also evinced secession ambitions.¹⁶⁵

Whether one regards such activity as tragic, comic, or tragicomic,¹⁶⁶ it gestures toward something important about the relationship among partisanship, federalism, and political identity. Note that when Republican President Bush won reelection, there was no talk of Texas's seceding. There were, though, Democrats across the country who made the case for joining their states to Canada.¹⁶⁷ Note, too, that with a Democratic President's reelection, petition signatories and bumper-sticker bearers are not turning their backs on government

¹⁶² See, e.g., CHRISTOPHER J. ANDERSON ET AL., *LOSERS' CONSENT: ELECTIONS AND DEMOCRATIC LEGITIMACY* 82 (2005) (showing pronounced effect on trust in government of losing presidential election, especially among strong partisans); Hohman et al., *supra* note 153, at 122-23 (finding that Democrats disidentified from the nation when asked to read a speech by Republican President Bush that made them feel uncertain, while Republicans identified more strongly with the nation under the same condition); cf. Rutchick & Eccleston, *supra* note 150, at 115 (showing that being encouraged by a member of the opposing party to think about national identity emphasizes partisan differences).

¹⁶³ Peacefully Grant the State of Texas to Withdraw from the United States of America, Nov. 9, 2012, <https://petitions.whitehouse.gov/petition/peacefully-grant-state-texas-withdraw-united-states-america-and-create-its-own-new-government/BmdWCP8B>

¹⁶⁴ Manny Fernandez, *With Stickers, a Petition and Even a Middle Name, Secession Fever Hits Texas*, N.Y. TIMES, Nov. 23, 2012.

¹⁶⁵ See Petitions, <https://petitions.whitehouse.gov/>. Meanwhile blue cities like Austin counter-petitioned to secede from these red states and remain a part of the Union. See *id.*

¹⁶⁶ Compare, e.g., FEELEY & RUBIN, *supra* note 5, at 39 ("[F]ederalism is connected with the tragic aspect of politics."), with Fernandez, *supra* note 164 (noting that Texas's secession talk provides "comic relief" for some).

¹⁶⁷ See, e.g., Cartoon, *United States of Canada/Jesusland*, reprinted in ANDREW GELMAN ET AL., *RED STATE, BLUE STATE, RICH STATE, POOR STATE* 112 (2008).

altogether or focusing on emigration as an individual matter. Instead, they are looking to the states. Eight years ago, after President Bush won reelection, it was Democrats who felt alienated from the federal government and, in looking to “secede emotionally,” focused on a different group of states.¹⁶⁸

In short, such activity illustrates how states function as sites of partisan identification.¹⁶⁹ When one’s party holds power at the national level, states may seem relatively unimportant, but when the other party takes over, they become salient. Federalism matters both for furthering policy ends and for anchoring political identity. While secession is a noteworthy trope, the actions that states and their inhabitants take while remaining squarely within the Union are more powerful than rhetoric. When President Bush held office, Democrats sought to protect same-sex marriage, provide safe harbors for undocumented immigrants, and expand health care at the state level. With President Obama in office, Republicans are working to curtail same-sex marriage, limit unlawful immigration, and hinder the implementation of Obamacare at the state level.¹⁷⁰

Related, but running deeper, when one’s party is out of power at the national level, federalism offers an institutional framework for partisan identification.¹⁷¹ Americans who feel alienated from the national government can turn to the states and know that there are government institutions controlled by their team.¹⁷² In Feeley and Rubin’s terms, when Americans are alienated from the national government because the other party is in control, federalism enables them to “divide loyalty and rechannel action” and motivates them to remain involved in the political arena.¹⁷³ The states are not, for these Americans, something different in kind from the federal government; instead, they represent the “real”

¹⁶⁸ Franklin Foer, *The Joy of Federalism*, N.Y. TIMES, Mar. 6, 2005. Foer argued that liberal federalists had turned to the states to obtain “psychic relief from the alienation” they felt upon Bush’s reelection. *Id.*

¹⁶⁹ For empirical evidence supporting this assertion, see *infra* notes 179-186 and accompanying text.

¹⁷⁰ See generally *supra* Part I.

¹⁷¹ Despite suggestions that Americans may identify differently with the political parties at the state and national level, surveys show almost no discrepancy between state and national party identification. GREEN ET AL., *supra* note 6, at 44-46.

¹⁷² See generally ANDERSON ET AL., *supra* note 162, at 138-39 (arguing electoral losers on the central level in a federal system are more satisfied than losers in unitary systems because they can win in states); GREEN ET AL., *supra* note 6, at 206, 219 (emphasizing “partisans’ sense that they are part of a team”).

¹⁷³ FEELEY & RUBIN, *supra* note 5, at 15.

America at a time when the federal government fails to do so.¹⁷⁴ As a different popular bumper sticker—the one sold in Massachusetts after President Nixon was reelected with the Electoral College votes of every other state—put it, “Nixon 49, America 1.” This rendering captures a more pervasive phenomenon: on partisan grounds, states become stand-ins for the nation.

Partisan state identification thus does not inhere in something categorically distinctive about the states vis-à-vis the federal government. Instead, it follows from their shared ability to represent the political parties—but the divergence in how they do so at any given time. The significance of partisanship to state identification suggests a different read on a worry often noted in legal and political science commentary: that voters rely on their national partisan preferences in state elections.¹⁷⁵ V.O. Key’s quip that “[t]he government system may be federal but the voter in the polling booth usually is not”¹⁷⁶ and David Schleicher’s more recent work on “mismatch,”¹⁷⁷ among other accounts, might seem to furnish powerful evidence for Feeley and Rubin’s claim that state identification is illusory and our federalism vestigial: If Americans do not conceptualize state and national governance as distinct and attend to unique currents of state politics, how can we say they identify with the states?

But the very fact that states are fungible in voters’ minds with the nation may make them powerful independent sites of identification. Key’s “non-federal” voters pose a challenge to views of state identity grounded in ethnocultural uniqueness, but they undergird partisan federalism. Given the role of the states in staging partisan competition, individuals may reasonably regard state elections as outlets for their

¹⁷⁴ Cf. Mark Tushnet, *What Then Is the American?*, 38 ARIZ. L. REV. 873, 877 (1996) (suggesting that state-based identifications are often rejections of alternative identities associated with other states and thus serve as assertions “of a desired alternative universalist culture”).

¹⁷⁵ See, e.g., DUANE LOCKARD, *THE POLITICS OF STATE AND LOCAL GOVERNMENT* 165 (2d ed. 1969); Thomas M. Carsey & Gerald C. Wright, *State and National Factors in Gubernatorial and Senatorial Elections*, 42 AM. J. POL. SCI. 994, 1001 (1998); Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law* 2013 U. ILL. L. REV. 363 (2013); Steven Rogers, *Accountability in a Federal System: How Parties Perform in Office and State Legislative Elections* (2012), <http://www.princeton.edu/~rogerssm/Statements/Rogers-JobMarketPaper-Web.pdf>.

¹⁷⁶ V.O. KEY, *AMERICAN STATE POLITICS* 33 (1956).

¹⁷⁷ See, e.g., David Schleicher, *Why Is There No Partisan Competition in City Council Elections?*, 23 J.L. & POL. 419 (2007); David Schleicher, *From Here All The Way Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV. 401 (2013); see also Elmendorf & Schleicher, *supra* note 175. Schleicher argues that the political parties are national coalitions that do not compete for local voters based on issues specific to state and local government, yet voters nonetheless rely on their national partisan preferences in casting state and local ballots, creating what he calls a “mismatch problem.”

national political preferences.¹⁷⁸ Moreover, insofar as political activity is driven by a broader desire to support one's partisan team, state as well as federal elections enable Americans to reaffirm both their political group and their own identities. And the states may loom particularly large in these individuals' minds when their party is out of power at the national level.

It is not surprising, then, that polls on Americans' views of federalism show that support for state and federal governments varies depending on which party holds office. When Democrats control the federal government, for instance, Republicans view the states much more favorably—but only when Republicans are in charge at the state level.¹⁷⁹ Indeed, partisanship drives whether Americans blame their state governor or the president for economic problems.¹⁸⁰ So, too, individuals' beliefs about whether the state or federal government is the proper government to “run . . . things” depend on which party is in control at both levels.¹⁸¹ Particularly for Democrats, state autonomy is much more

¹⁷⁸ See generally *supra* Part I. In other words, voters are not necessarily “oblivious” or “confused” if they base their state-level vote on the parties' national positions. Elmendorf & Schleicher, *supra* note 175, at 5-6. They may be responding to the states' vital role in national partisan conflict. I certainly don't mean that no voters are oblivious or confused. Elmendorf, Schleicher, and others are quite persuasive about voter apathy and ignorance. But while apathetic and ignorant voters may be a democratic problem, they are not necessarily a federalism problem in particular. So too, I don't mean to deny that there are state-specific political questions that voter attention to national currents may elide. My point is the narrower one that voters' focus on national questions is not incompatible with federalism even as it does not capture all of federalism's dimensions. Indeed, if voters instead focused only on state-specific issues, they also would be missing key aspects of our federalism.

¹⁷⁹ Pew Research Center, Growing Gap in Favorable Views of Federal, State Governments, Apr. 26, 2012, <http://www.people-press.org/2012/04/26/growing-gap-in-favorable-views-of-federal-state-governments/?src=prc-headline> (showing Republican support for the federal government declining from 53% to 20% with the Presidency changing hands from Republican Bush to Democratic Obama, and Republican support for state government standing at 70% when Republicans control their states but at only 33% when Democrats do so); Pew Research Center, State Governments Viewed Favorably as Federal Rating Hits New Low, Apr. 15, 2013, <http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/> (showing Republican support for the federal government declining further to 13% and Republican support for Republican-led states at 71% but for Democratic-led states at 30%). see also J. Wesley Leckrone, Federalism and Public Opinion, June 15, 2012, <http://theamericanpartnership.com/2012/06/15/federalism-and-public-opinion/> (“Following previous public opinion polling, there is a partisan divide on which level of government is viewed more favorably. Satisfaction is related to congruence between individual partisan affiliation and the partisan composition of the level of government.”).

¹⁸⁰ Adam R. Brown, *Are Governors Responsible for the State Economy? Partisanship, Blame, and Divided Federalism*, 72 J. POL. 605 (2010).

¹⁸¹ Pew Research Center, 2012 American Values Survey, June 4, 2012, at 53, <http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf>.

attractive when a Republican president holds office.¹⁸² In the words of one commentator, Americans are “prone to vary their support for different levels of government depending on the congruence between officials in power and their own partisanship.”¹⁸³

While such partisan identification with states is contingent, it is not, in this respect, different from other forms of identification, as illuminated by social psychological work on social identity threat. Michael Hogg and others have shown that one way group members of all kinds respond to threat¹⁸⁴ is to disidentify with the superordinate group and identify more strongly at a subgroup level.¹⁸⁵ Multiple social categorization is most often studied with respect to social identities such as race, ethnicity, and religion, but it has implications for nationalism, federalism, and partisanship as well. Democrats’ national identity is threatened when Republicans control the federal government, and vice versa; their prototype of “American” is destabilized, and they may question their membership in the national group. Hogg and his colleagues, for example, found that Democrats’ national identification was diminished after they read a speech by Republican President Bush and focused on those aspects of the speech that made them feel uncertain. Republicans’ national identification was enhanced under the same conditions.¹⁸⁶ States are, for Americans whose national identity is threatened, a readily available subgroup with which to politically identify. Even for those who signed Texas’s secession petition, it seems,

¹⁸² During the Reagan and second Bush presidencies (in 1987 and 2007), more than seventy percent of Democrats agreed that “The federal government should run only those things that cannot be run at the local level.” During the Obama presidency, Democrats’ support for this statement dropped by nearly twenty points. *Id.* While Republicans are generally more supportive of local governance, their support varies according to party control as well. *See id.*; cf. Richard Cole & John Kincaid, *Public Opinion on U.S. Federal and Intergovernmental Issues in 2006: Continuity and Change*, 36 *PUBLIUS* 443, 455 (2006) (showing that under a Republican President, 78.2% of Republicans, but only 37.4% of Democrats, had a “great deal” or “fair amount” of trust in the federal government).

¹⁸³ Leckrone, *supra* note 179. For thoughts on the individual whose party is out of power at both the national level and in her state, see *infra* Section III.B.

¹⁸⁴ They consider both valence threat and entitativity threat—that is, a threat to the group’s status and prestige and a threat to the group’s cohesiveness and distinctiveness.

¹⁸⁵ Michael A. Hogg & Matthew J. Hornsey, *Self-Concept Threat and Multiple Categorization Within Groups*, in *MULTIPLE SOCIAL CATEGORIZATION: PROCESSES, MODELS, AND APPLICATIONS* 112, 120 (Richard J. Crisp & Miles Hewstone eds., 2006).

¹⁸⁶ Hohman et al., *supra* note 153. Hogg and his colleagues summarize one implication of their study as follows: “Democrats do not view the president as representing their party subgroup or wider ideological viewpoint, and so they will resolve their uncertainty by distancing themselves from nation and from the president and identifying with their party. In contrast, Republicans view the president as representing their party and their ideological viewpoint, so they will resolve their uncertainty by identifying strongly with the president and with both nation and party.” *Id.* at 122-23.

state identification does not require actual departure from the United States. Instead, the possibility of state identification mitigates the threat to national identity. The secession petition performs the solution to the problem it diagnoses.

As this further suggests, Americans who experience a partisan-based threat to their national identity may identify with their state as a way of retaining a sense of belonging to the national group. Hogg and his colleagues note that if a superordinate group values diversity, identifying with a subgroup need not yield schism.¹⁸⁷ Federalism renders diversity a defining structural feature of the United States.¹⁸⁸ Because being an American necessarily means belonging to a state as well as national polity, identification with the state may be at once oppositional vis-à-vis the nation and a mediated way of identifying with the nation even in the face of partisan threat.¹⁸⁹ In this sense, partisanship adds a motivational, individually-oriented element to accounts that cast difference and discord as potentially integrative aspects of national democracy.¹⁹⁰ In contrast to Charles Fried's pithy suggestion that "[i]f we became more Virginian, we would be less American,"¹⁹¹ this understanding casts becoming more Virginian as a way of being more American: when one's national identity is threatened by partisan division, states are a site of identification that admits of both immediate opposition and higher-order allegiance to the nation. Americans can affiliate with states governed by their political party as a means of engaging with national politics rather than turning away from it. And partisan identification always holds open

¹⁸⁷ *Id.* at 128. In other words, entitativity need not be homogeneity; a group may embrace internal diversity as part of its distinctive identity.

¹⁸⁸ *See id.* at 118. There are other ways in which the United States is defined by diversity and pluralism, but federalism is the governance structure that evidences this commitment, even as it does not map onto other forms of diversity. *Cf.* Tushnet, *supra* note 174, at 876 ("Federalism has its attractions as a principle of government almost entirely because it provides an almost unassailable base for value-pluralism."). *See generally* Juan J. Linz, *Democracy, Multinationalism, and Federalism*, in *DEMOKRATIE IN OST UND WEST* 382, 394 (1999) ("A multinational state has to be based on pluralism, on the recognition of the value of diversity, rather than just on an acceptance of the plurality of the society as a fact.").

¹⁸⁹ *Cf.* MORTON GRODZINS, *THE LOYAL AND THE DISLOYAL* 40 (1956) (arguing that non-national loyalties not only compete with national loyalty but also promote and strengthen national loyalty).

¹⁹⁰ *See, e.g.*, ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 76-77 (2001); Gerken, *supra* note 4, at 9-10; *cf.* Robert M. Cover & Alexander T. Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *YALE L.J.* 1035 (1977); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 *WM. & MARY L. REV.* 639 (1981).

¹⁹¹ Charles Fried, *Foreword: Revolutions*, 109 *HARV. L. REV.* 13, 13 (1995); *cf.* RIKER, *supra* note 8, at 104-05 (suggesting individuals choose between state and national identification).

the future prospect of identifying more strongly with the national government than the state.

Ultimately, partisanship underscores both the possibility and the significance of a fluid form of state identification. Loyalty to the states need not, on this view, be primordial, stable, or felt equally by the entire population. Taking partisanship as a primary mechanism of state-based identification suggests that at any given time only a subset of the population will be focused on the states and that the members of this subset will change over time depending on national political developments. But some individuals will always direct affinity and loyalty toward the states, and most politically engaged Americans should at some point find themselves among these individuals.

III. HORIZONTAL NATIONALISM

If partisan federalism involves political actors' use of the state and federal governments to wage competition between the political parties and individuals' attendant identification with the states, this Article has thus far advanced a top-down, vertical conception of the phenomenon. Partisan competition, Part I suggested, involves lines drawn by national party politics and transmitted to the states. State-based identification, Part II suggested, follows from alienation from the federal government, as Americans' political allegiances shift from the nation to their states of residence. This Part complicates both claims by bringing additional possibilities inherent in federal diversity into view. Supplementing the vertical and top-down with the horizontal and bottom-up, I argue that contemporary American federalism involves slippage between state and federal authority and affiliation with a variety of states as discrete sites of national governance.

Section A elaborates on Part I, noting how federalism shapes and bolsters our political parties, and not just the reverse. Taking "the national" to be formulated through both state and federal politics, this Section argues that states can serve as sites of national political contest without forfeiting—even if they complicate understandings of—the particularity and pluralism for which we value the local. Section B elaborates on Part II, suggesting that insofar as partisanship motivates state-based identification, individuals may meaningfully affiliate with states in which they do not reside. The states are different from both the federal government and each other, but they participate in controversies that are national in scope on behalf of the nation's people at large.

A. Federalism as a Safeguard of Parties

By motivating both state-federal contestation and individual identification with the states, I have argued, partisanship serves federalism. But if our two political parties help perpetuate American federalism, the reverse is also true: federalism helps perpetuate the Democratic and Republican parties. The coexistence of fifty-one governments means that neither party is ever wholly out of power and that each party's internal diversity may be expressed in governance decisions. In a time of party polarization, federalism bounds the loss of political losers. In a time of party cohesion, federalism means there is still some play in each party's joints.

1. Keeping the Losing Side Alive

First, as others have noted, the United States' federal structure helps each party survive when it is out of power at the national level.¹⁹² When Republicans rule in Washington, Democrats can build a record in state capitals, positioning themselves to regain federal power, and vice versa.¹⁹³ State politicians have a ready springboard into national office; many of our presidents have come to the White House from the governor's mansion.¹⁹⁴

The states, however, are not merely "refueling stations"¹⁹⁵ that allow parties to establish their bona fides before returning to the national stage. State governance is, as I have argued, itself a means of participating in national partisan politics. The coexistence of state and federal governments ensures that the party out of power in Washington may continue to participate in national politics not only through minority

¹⁹² See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 115 (1995) (describing states as "refueling stations" for the party out of power at the national level); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 504 (1991) ("[S]tates furnish opponents of national policy with an opportunity to secure actual hands-on experience running government, thereby strengthening their credibility as qualified candidates in the next set of national elections."); Merritt, *supra* note 39, at 7 ("Political parties that are out of power on the federal level can maintain their constituencies in the states."); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 60-61 (2004) ("Because the loyal opposition can not only oppose but actually govern at the state level, the opposition party can develop a track record of success that enhances its prospects in subsequent national elections.").

¹⁹³ See, e.g., Amar, *supra* note 192, at 504; Young, *supra* note 192, at 60-61.

¹⁹⁴ Recent examples include George W. Bush, Bill Clinton, Ronald Reagan, and Jimmy Carter. Barack Obama got his start as a state legislator.

¹⁹⁵ SHAPIRO, *supra* note 192, at 115.

opposition in Congress but also through affirmative acts of state governance.¹⁹⁶

Just as partisanship bolsters federalism by making Americans invested in states,¹⁹⁷ moreover, federalism bolsters partisanship by providing infrastructure for partisan allegiance. Nancy Rosenblum's defense of partisanship as "*the* political identity of representative democracy," for instance, argues that partisanship furnishes the comfort of solidarity to political losers and the knowledge of contingency and temporariness to political winners and losers alike.¹⁹⁸ States provide an institutional mechanism for partisanship to do this work.¹⁹⁹ Federalism enables party actors to keep the "losing side alive" by carrying out their party platform through state governments. So, too, federalism means partisans on the losing side of a national election need not see their "minority status as irreversible" in part because they are not a minority everywhere.²⁰⁰ Federalism helps make visible and concrete that neither party speaks for the whole, and it ensures that there are, at all times, multiple government fora for partisan affiliation.

2. States as Laboratories of Partisan Politics

These multiple government fora point to a second way federalism serves the political parties: it offers scope for intraparty, as well as interparty, competition and variation. The Democratic and Republican parties look strikingly uniform throughout the country compared to their historical incarnations.²⁰¹ If it is an overstatement today to characterize our two-party system as "more like a hundred-party system,"²⁰² however, there remain disagreements about policies and priorities within each party. Federalism makes it easier for the parties to accommodate such internal diversity, whether or not it is ultimately rooted in differences

¹⁹⁶ See *supra* Part I.

¹⁹⁷ See *supra* Part II.

¹⁹⁸ ROSENBLUM, *supra* note 6, at 363 ([U]nlike minorities in other areas of majority decision making, partisans do not see minority status as irreversible. . . . 'Elections are not followed by waves of suicide.' Partisans keep the losing side alive, in public view" (quoting E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 91 (1977)).

¹⁹⁹ *Cf. id.* at 458 (suggesting "institutional arrangements" as one area for future research).

²⁰⁰ See also ANDERSON ET AL., *supra* note 162 at 138 (considering the "dispersion of the effects of winning and losing across different levels of government in the United States").

²⁰¹ See, e.g., ABRAMOWITZ, *supra* note 23, at 4; ALDRICH, *supra* note 11, at 308; Erikson et al., *supra* note 25, at 238, 246.

²⁰² Nelson W. Polsby, *The American Party System*, in *NEW FEDERALIST PAPERS* 37, 40 (1997).

between the states as such. Even without regional parties,²⁰³ that is, federalism renders the parties more supple in shaping and advancing their agendas and in attracting and maintaining individuals' loyalty.

Return, for instance, to the examples of state-federal contestation recounted in Part I. The main axis of conflict is interpartisan: working through both the states and the federal government, Democrats and Republicans fight over Obamacare, same-sex marriage, abortion, global warming, stem-cell research, welfare, and immigration. But there are finer-grained intrapartisan debates with respect to these issues as well. While the most visible conflicts are spurred by states governed by the party out of power in Washington, states governed by the party in power in Washington also offer opposing views of that party's position. As Arizona and copycat red states attacked President Obama's Democratic administration on immigration, Massachusetts, New York, and Illinois engaged in uncooperative federalism from the left, resisting the administration's Secure Communities program.²⁰⁴ As the Republican Governor of Wisconsin fought with President Clinton's Democratic administration about the contours of welfare, the Democratic Governor of Washington was resisting existing federal commitments from a more liberal direction.²⁰⁵ As blue states encouraged embryonic stem cell research in the face of Republican President Bush's federal ban, Republican state actors who were aligned with business interests dissented from the Christian conservative position adopted by the President.²⁰⁶ Intraparty disputes about abortion, environmental protection measures, and other controversial issues also play out in the states, even as they are frequently overshadowed by interparty disputes.

Perhaps more important than offering platforms for outright intrapartisan conflict, the states offer platforms for a greater variety of party positions to take root. Even a party that controls the Presidency and Congress will only accomplish, and attempt to accomplish, so much at the national level. Partisan obstruction generates substantial gridlock even in periods of unified government. Floor time and other temporal constraints limit what proposals get attention. Federal politicians lack

²⁰³ See, e.g., Wolfgang Renssch, *Bifurcated and Integrated Parties in Parliamentary Federations: The Canadian and German Cases*, in *POLITICAL PARTIES AND FEDERALISM: AN INTERNATIONAL COMPARISON* (Rudolf Hrbek ed., 2004) (comparing Canada's regional parties to Germany's integrated parties).

²⁰⁴ See, e.g., Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES, May 5, 2011.

²⁰⁵ See, e.g., Susan R. Eachus, *Implementing Welfare Reform in Massachusetts and Washington State* 81-82 (2004), <http://repository.upenn.edu/dissertations/AAI3138004/>.

²⁰⁶ See, e.g., James W. Fossett et al, *Federalism and Bioethics: States and Moral Pluralism*, 37 HASTINGS CENTER REP. 24, 29 (2007).

interest in or appetite for taking on a host of issues. By multiplying sites of governance, states enable a greater number of partisan positions to be advanced, and to be formulated in the first place. In federalism parlance, states serve as “laboratories” of national partisan politics.²⁰⁷

Some might resist this characterization as oxymoronic. The very notion of laboratories, the argument goes, inheres in organic local difference and grassroots problem-solving, and these features are absent from state experimentation framed by national partisan struggle.²⁰⁸ But the laboratory metaphor always presupposes the national: what makes the states laboratories is the hope that a successful experiment will spread nationwide or that a dangerous one will not.²⁰⁹ Partisanship expands the metaphor’s national reference point back in time, casting state actions as national actions in the present moment.²¹⁰ States implement a variety of governmental visions that emerge from national political contest yet cannot all be instantiated at the national level. In its starkest form, this is a laboratories account of the Republican-Democratic contestation described in Part I: the Republican and Democratic positions on particular issues cannot both be implemented at the national level, and so states contesting national policy on a particular issue are often serving simultaneously as competitors to the federal government and laboratories of national partisan politics. But attention to the formation of positions within the parties themselves offers a richer account of states as laboratories. While still hinging on national political contest, it underscores that such contest is not an exclusively top-down, Washington-centric affair; in an era of networked parties, a variety of actors—politicians, interest groups, activists, consultants, and others—push competing partisan agendas through state and national sites.²¹¹

²⁰⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting).

²⁰⁸ See, e.g., Ronald Brownstein & Stephanie Czekalinski, *How Washington Ruined Governors*, NAT’L JOURNAL, Apr. 12, 2013 (quoting former Arizona Governor Bruce Babbitt as arguing that “[t]he divergences in the laboratory-of-democracy idea ought to grow out of grassroots experience”).

²⁰⁹ *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting) (arguing that denying states the right to experiment “may be fraught with serious consequences to the nation” and that permitting such experimentation enables states to “try novel social and economic experiments without risk to the rest of the country”); see Robert C. Post, *Chief Justice William Howard Taft and the Concept of Federalism*, in *FEDERALISM AND THE JUDICIAL MIND* 53 (Harry N. Scheiber, ed. 1992) (suggesting Justice Brandeis saw state experimentation as opening the possibility of genuinely new social arrangements, while Chief Justice Taft saw state experimentation as a way of showing dangers to the nation and forestalling widespread change).

²¹⁰ Cf. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (advocating for subnational experimentation with regional and national coordination and oversight); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

²¹¹ See *supra* Section I.A.1 (discussing networked parties).

States are critical laboratories for national party struggle because they differ from both the federal government and each other in a variety of respects. Some relevant differences can be traced to ways in which cultural and regional distinctiveness mediate partisanship. Still today, the West Virginia Democratic Party is not the Massachusetts Democratic Party (even as it is not the West Virginia Republican Party), nor is the New York Republican Party the Oklahoma Republican Party (even as it is not the New York Democratic Party).²¹² But a host of more contingent phenomena are also important. Some states have unified party government, while others have divided party government. Some state governors and legislators have ambition for national political office, while others do not. Variation that only tentatively relates to partisanship also influences the kinds of policies state actors will embrace. A state's population size and composition, its geography and natural resources, its professional or citizen legislature—these and other characteristics all shape state decisionmaking even in a time of nationalized politics.²¹³ Especially insofar as state diversity reflects crosscutting forms of national diversity and contingent practical differences, it is best understood as enlarging the scope of national action. States need not be organically distinct to experiment or to differ from one another; national heterogeneity is reflected in state decisions.

States often serve as laboratories, for example, by giving concrete form to a position that has a national partisan valence but is not embodied in federal policy. Sometimes a handful of states, or even a single state, define and promote a party's stance on a particular issue. California has advanced the Democratic position with respect to global warming and emissions standards, while Arizona has been the standard-bearer for the Republican Party on immigration.²¹⁴ Other times, a wide variety of states participate in developing the national vision with respect to a particular issue. For many years now, the Democratic and Republican positions on guns have been framed by the states in the absence of federal action. Certain states require background checks, limit bulk purchases of firearms, ban assault weapons, or regulate large capacity magazines. Other states require employers to allow guns in the workplace, authorize school employees to carry guns, or limit law

²¹² See, e.g., Shor & McCarty, *supra* note 22, at 537, 549.

²¹³ See generally VIRGINIA GRAY ET AL., *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* (10th ed. 2012).

²¹⁴ See *supra* Part I.

enforcement discretion to deny concealed carry permits.²¹⁵ The national partisan cleavage is clear, but it is principally state, not federal politicians who have shaped it. And while the main divide is between the two parties, states governed by the same party also differ in their substantive policies and the relative attention they pay to gun-related issues.²¹⁶

More generally, many issues that are branded “state” rather than “national” questions—insofar as state governments rather than the federal government are addressing them—are best understood as national experiments carried out within state fora. From fracking to in-state tuition for undocumented immigrants; from charter schools to tax rates; from public sector unions to takings for economic development—states serving as laboratories for these issues are participating in national partisan struggle. Even as they undertake discrete actions, state actors are motivated by partisan commitments that transcend state borders. And their experiments are often adopted by other states along partisan lines, as organizations like the Republican and Democratic Governors Associations and the American Legislative Exchange Council cross-pollinate. As multiple states flesh out one party’s position, composite subnational action comes to define the national. States generate a horizontal nationalism that is no less national for being bottom-up rather than top-down.²¹⁷

In time, moreover, such bottom-up partisan activity can force federal politicians’ hands or make it attractive for them to take a position that they feared might amount to political suicide. State decisions at once fuel and reflect proposed lines of partisan division, and there is slippage between state and federal politics, as both state and federal actors self-

²¹⁵ See generally Brady Campaign, State Scorecard, <http://bradycampaign.org/sites/default/files/2011%20Final%20state%20scoresA3-2%20Sheet1.pdf>; Brownstein & Czekalinski, *supra* note 208.

²¹⁶ See, e.g., Nat’l Rifle Assoc., Right To Carry Laws, <http://www.nraila.org/gun-laws.aspx> (showing, among other intrapartisan differences, that Democratic Vermont allows individuals to carry concealed firearms with no permit, while neighboring Democratic Massachusetts generally does not allow individuals to carry concealed firearms, and that Republican Mississippi denies law enforcement discretion to withhold conceal-carry licenses, while neighboring Republican Alabama grants law enforcement offers discretion as to the issuance of such permits). See generally Nat’l Rifle Assoc., State Legislation, <http://www.nraila.org/legislation/state-legislation.aspx>.

²¹⁷ Cf. Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 726-28 (2008) (recognizing states as a “collective national force”). In a narrower set of circumstances, a particular state’s actions may effectively generate nationwide policy because of its market share. When Texas adopts curriculum changes, for instance, effects are felt across the country. See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism* (draft at 20) (on file with author).

consciously treat states as testing grounds for national policies.²¹⁸ Today, for instance, the national Democratic Party embraces same-sex marriage, but only following a partisan contest in the states. As a small and then growing number of blue states adopted marriage equality, same-sex marriage became a Democratic issue at the national level. For some federal politicians, state politics forced the issue. For others, state politics provided cover for a position they already favored. They could cautiously advance the mantra of federalism, rather than support for same-sex marriage as such, and, when it turned out their constituents supported same-sex marriage, move to a fuller-throated endorsement of equality. As same-sex marriage has become a Democratic issue at the national level, moreover, additional blue states are taking up the cause, shoring up the base of national support, and, at least for now, the national partisan valence.

Debates about the legalization of marijuana also have something of this character. Recent ballot initiatives in Colorado and Washington have legalized recreational marijuana under state law, a number of mostly blue states have decriminalized possession of small amounts of marijuana, still more have decriminalized medicinal marijuana, and a growing number of state Democratic parties and politicians now endorse legalization.²¹⁹ Such state activity puts pressure on the national Democratic Party to follow suit, or—more likely at least in the short term—to adopt a *modus vivendi* approach to state legalization.²²⁰ As with same-sex marriage, federalism gives national politicians who favor

²¹⁸ See e.g., REPUBLICAN NATIONAL COMMITTEE, *supra* note 21, at 4 (“It is time for Republicans on the federal level to learn from successful Republicans on the state level.”); Brownstein & Czekalinski, *supra* note 208 (quoting Kansas Governor Sam Brownback as saying, “My focus is to create a red-state model that allows the Republican ticket [in 2016] to say, ‘See, we’ve got a different way, and it works.’”).

²¹⁹ See, e.g., Gavin Newsom, *Time for California To Decriminalize, Tax, & Regulate Marijuana*, HuffPost, Apr. 22, 2013, http://www.huffingtonpost.com/gavin-newsom/time-for-california-to-de_b_3134929.html; NORML, *Iowa Democrats Add Medical Cannabis & Industrial Hemp to Party Platform*, June 20, 2012, <http://blog.norml.org/2012/06/20/iowa-democrats-party-add-medical-cannabis-and-industrial-hemp-to-party-platform/> (noting that the Colorado, Washington, and Texas Democratic Parties have called for legalizing or decriminalizing marijuana). See generally NORML, *State Info*, <http://norml.org/states>.

²²⁰ In 2009, the Obama Administration suggested it would not devote resources to enforcing the federal prohibition on marijuana with respect to medical uses in states authorizing such uses, see David W. Ogden, Deputy Attorney General, Memorandum for Selected United States Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, Oct. 19, 2009, but it subsequently backtracked from this position, see James M. Cole, Deputy Attorney General, Memorandum for United States Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking To Authorize Marijuana for Medical Use, June 29, 2011. While a few Democrats in Congress are beginning to advocate for outright legalization, see, e.g., *Bills Take Aim at Federal Marijuana Ban*, USA TODAY, Mar. 14, 2013, focusing on respect for state law seems a more likely route to legalization.

legalization a lower-stakes way to advance this substantive position: calling for respect for state decisionmaking has a different ring than calling for outright legalization.²²¹ If popular support for legalization continues to grow, national politicians can transform arguments for federalism into arguments about ending the United States' war on drugs, but they will not have committed to this position if popular support wanes. Marijuana has an emerging, if still contested, national partisan valence—but it is one that is being generated by state, not national, action.

B. *Identifying with Other States*

The ways in which states serve as pluralistic sites of national political contest raises an intriguing possibility: that state-based identification need not be limited to one's own state of residence. While federalism scholarship often seeks state identification in exceptionalism, I have argued that it is in some sense the unexceptional—the ways in which the states and the federal government occupy the same political space—that generates today's state-based identification. By fomenting and embodying different national partisan positions, the states become distinct from the federal government and from each other, but they become distinct in ways likely to resonate with individuals throughout the nation. No state has a homogenous population, in partisan terms or otherwise, and no state's instantiation of the national will successfully represents all of its residents. The fact that the states and the federal government articulate different answers to the same questions thus raises the possibility that Americans may find in federalism multiple sites for their national allegiance.

Start with the simplest case from Part II: an individual whose party is out of power at the national level. If states are a key site of partisan attachment for these people, as I have argued, our map is poorly drawn. We speak of blue states and red states, but, as often quipped, all of the states are purple.²²² Even in those states that give “landslide”

²²¹ Cf. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) (suggesting that, for better and worse, deterrence serves as a discourse management function that mutes expressive conflict).

²²² See, e.g., SCHAPIRO, *supra* note 11, at 30 (“Federalism is not an answer to the problem of how a blue and red nation can inhabit the same country in peace. That problem does not exist because a blue and red nation do not exist.”). Contra Schapiro, I am suggesting that federalism is an answer to this problem—not because blue states are perfectly blue and red are perfectly red, but instead because there are both blue and red states, and blue and red people inhabiting all the states, and people in any given state can look to multiple states as well as the federal government for representation.

victories to Republican presidential nominees, at least a quarter of voters cast their ballot for the Democratic nominee, and vice versa.²²³ California and Massachusetts may be deep blue states in popular consciousness, but each gave almost 40% of the vote to Romney in 2012.²²⁴ Likewise, Texas and Oklahoma may strike us as crimson, but more than a third of their votes went to Obama.²²⁵ Gubernatorial races, too, are often closely contested,²²⁶ and every state legislature contains representatives from both parties.²²⁷ Throughout the country, cities tend to be blue, while rural areas tend to be red.²²⁸ And on and on.²²⁹

Among other things, this means that a substantial minority of any state's population will not identify politically with the party in power at the state level. While many residents may look to their own state as a site of partisan affiliation and identity, for others, doing so will yield little solace, and may even compound a sense of political alienation if they find themselves in both the state and national minority.²³⁰ I have suggested, for instance, that the Democrat living in Massachusetts during the Bush Presidency and the Republican living in Texas during the Obama Presidency have particular reason to identify with their states.²³¹ But what comfort is federalism for the Republican in Massachusetts and the Democrat in Texas? While the Republican in Massachusetts during the Bush Presidency and the Democrat in Texas during the Obama Presidency enjoy one level of government controlled by their political party and may ground their political identity more firmly in the nation than the state,²³² there is also the Democrat in Texas during the Bush

²²³ In the 2012 presidential election, the most lopsided vote for Romney was Utah's 73%, compared to 25% for Obama. The most lopsided vote for Obama was Hawaii's 71%, compared to 28% for Romney. President Map, <http://elections.nytimes.com/2012/results/president>. Ninety-one percent of Washington D.C.'s vote went to Obama—one reason why D.C.'s quest for statehood is a nonstarter in a hyperpolarized U.S.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See, e.g., Politico, 2012 Governor Races, <http://www.politico.com/2012-election/map/#/Governor/2012/>; N.Y. Times, Governor Map—Election Results 2010, <http://elections.nytimes.com/2010/results/governor>.

²²⁷ With the arguable exception of Nebraska, but only because it has a nonpartisan legislature.

²²⁸ See, e.g., Josh Kron, *Red State, Blue City: How the Urban-Rural Divide is Splitting America*, THE ATLANTIC, Nov. 30, 2012.

²²⁹ See, e.g., FIORINA, *supra* note 158, at 57 (“California is a blue state, but most of the state's counties are red. Similarly, Texas is a red state, but there is considerable blue in its large cities and along its border with Mexico.”).

²³⁰ See ANDERSON ET AL., *supra* note 162, at 138 (showing that electoral losers, especially strong partisans, distrust their state government if their party is out of power).

²³¹ See *supra* Part II.

²³² Cf. D. Conor Seyle & Matthew L. Newman, *A House Divided? The Psychology of Red and Blue America*, 61 AM. PSYCH. 571, 574-75 (2006) (noting that the Democratic or Republican

(continued next page)

Presidency and the Republican in Massachusetts during the Obama Presidency. What of them?

In one sense, this is a variation on the minorities-within-minorities problem that recurs in all federations. But partisan federalism suggests a possible answer to this conundrum—those individuals may affiliate with states they do not inhabit. The same forces that amplify national partisan conflict and provoke political alienation provide multiple sites for political attachment. Some states are always controlled by the party out of power at the national level. Some states are more deeply and consistently blue or red over time. As these states wage national, partisan fights with the federal government, they may become focal points not only for their own residents, but for individuals throughout the country. Democrats living in Texas during the Bush Presidency could look to California’s fight with the federal government over greenhouse gases. Republicans living in Massachusetts during the Obama Presidency could seize on Arizona’s fight with the federal government over immigration.

I am positing, in short, a federalist variant of surrogate representation. As Jane Mansbridge has argued, many Americans are represented in Congress through a surrogate representative “with whom one has no electoral relationship—that is, a representative in another district.”²³³ Surrogate representation is particularly important in the United States, she suggests, because, with single-member districts and first-past-the-post, winner-take-all majority elections at both the state and national level, many voters lose in their own district. Surrogate representation plays the “normatively critical role of providing representation” to these voters.²³⁴ While voters who lose in their own districts could theoretically be bereft of representation in the federal

majority in a state is likely to exaggerate its representativeness of the state’s population as a whole, while members of the minority party may overestimate their minoritarian status within the state).

²³³ Mansbridge, *supra* note 9, at 522; *see id.* at 523 (“In the United States, surrogate representation—a noninstitutional, informal, and chance arrangement—is the preeminent form of non-territorial representation.”); *see also* Robert Weissberg, *Collective vs. Dyadic Representation in Congress*, 72 AM. POL. SCI. REV. 535 (1978) (considering “collective representation”—the extent to which Congress as an institution represents the American people). Surrogate representation is frequently invoked with respect to race, sex, and sexual orientation, *see, e.g.*, Mansbridge, *supra* note 9, at 523; CAROL M. SWAIN, *BLACK FACE, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 217-19 (1993); *but cf.* Claudine Gay, *Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government*, 46 AM. J. POL. SCI. 717 (2002) (finding that black constituents place less significance on descriptive representation than do white constituents, though they are more likely to contact black representatives), but the phenomenon extends to partisanship as well.

²³⁴ Mansbridge, *supra* note 9, at 523.

legislature, the number of elected officials in the national legislature, coupled with geographical clustering of interests and partisan affiliations, ensures that the losers in one district will be represented by legislators from other districts.²³⁵ Because the Republican living in a Democratic district may feel better represented by a Republican member of Congress than her elected representative, surrogate representation “focuses not on the dyadic relation between representative and constituent but on the systemwide composition of the legislature.”²³⁶

Federalism suggests an even broader terrain for surrogate representation. The Democrat living in a Republican state, on this account, can look not only to Democratic members of Congress, but also to states that are governed by Democrats. And this broader terrain may be particularly important when Democrats are in the minority at the federal level. One might object that the premise of representation is defeated by this extension: Congress is a national lawmaking body that relies on aggregated representation. Even if the Democratic Tennessean looks to a senator from California as her surrogate representative, that representative is part of the same body as the senators from Tennessee. The Tennessean is simply shifting her focus of allegiance and interest within a single decisionmaking body. When she looks to the state of California, however, she is not finding representation; she might as well be trumpeting French social policies or advocating for the British National Health Service. Yet this response sells short the way states are key players in national politics.

The Tennessean’s connection to California may be much deeper than supposed because states regularly act not as separate polities but as platforms for national political struggle. States with Democratic governments take affirmative actions to further a national partisan agenda during a time of Republican federal governance. They push back against federal programs, enact competing policies, establish new

²³⁵ *Id.*; see also Weissberg, *supra* note 233 (arguing that Americans will often be best represented in Congress by someone with whom they have no direct electoral relationship, and that one’s best representative may change across time and issue areas). Mansbridge offers the following example: “A member of Congress from Minnesota . . . may lead the Congressional opposition to a war opposed by significant numbers of voters in Missouri and Ohio whose own representatives support the war.” Mansbridge, *supra* note 9, at 522.

²³⁶ Mansbridge, *supra* note 9, at 524-25; cf. SWAIN, *supra* note 233, at 219 (“[O]ften people who are Democratic party members are reluctant to request casework from a Republican representative and thus contact a Democratic representative from outside of their district for assistance.”); Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409 (suggesting partisan gerrymandering’s harms occur at the level of Congress as a whole and not at the level of individual state redistricting).

approaches that realign federal policy over time.²³⁷ When states oppose national policy, they often provide a more visible, affirmative version of the congressional minority's statements on the House or Senate floor. As a way of participating in national politics, then, the Tennessean may choose to participate in another state's politics by donating money or otherwise becoming active in a political campaign, as I will discuss in Part IV. Even if she does not actively engage in these ways, she may enjoy the psychic comfort of knowing that her team is in control somewhere.²³⁸ The fact of fifty states means, moreover, that she may look to a variety of states. Because states governed by a single party advance national partisan stances in different ways and attend to different issues, multiple states may furnish surrogate representation. While she looks to California on environmental questions, the Tennessean may simultaneously look to Massachusetts on same-sex marriage and New York on gun control.²³⁹ She can identify with these other states not as separate polities but as national political actors that speak for her.

As this suggests, it is not only the American whose party is out of power who may seek out other states for surrogate representation. Individuals whose states are controlled by their political party may also affiliate with other states, and they may do so even when their political party is in power in Washington as well. Federalism's fifty states enable intraparty, and not only interparty, differences to yield policy variegation, and they create a platform for the national without Washington.²⁴⁰ Democrats across the country may take California's environmental leadership to represent their views, while Republicans across the country may take Virginia's ban on same-sex marriage and civil unions to represent theirs. And individuals throughout the country

²³⁷ See generally *supra* Part I.

²³⁸ See GREEN ET AL., *supra* note 6, at 206, 219.

²³⁹ As my repeated invocation of particular states suggests, not all fifty states are identical for purposes of partisan affiliation. Some states are truer blue or deeper red than others. And some have greater resources, larger populations, bolder politicians. But the foregrounding of a few states is not inconsistent with federalism. Cf. Levy, *supra* note 118, at 469 (“[I]t perhaps need not be the case that all provinces in a successful federation can successfully command loyalty against the center. . . . [A] few such provinces, or even one, might serve as an anchor of the whole system.”). The focus on particular states also underscores the degree of compatibility between my account and those that treat states as distinct cultural enclaves or civil societies. While many states are not distinctive in this way, states with certain types of cultural, ethnic, or religious distinctiveness may be particularly powerful carriers of partisanship. That said, cultural or other forms of identification may impede individuals' partisan-based identification with other states, making the fact of fifty states (rather than one red and one blue alternative) all the more important.

²⁴⁰ See *supra* Section III.A.

may actively seek to mold the politics of other states, focusing on states that have a stronger partisan lock on government or that prioritize issues differently. Democratic residents of blue states unlikely to pass to gun control measures may push for such legislation in New York. Republican residents of red states that recognize union shops may push for “right to work” policies in Wisconsin. When they seek to further partisan agendas across state lines, these individuals adopt other states as microcosms of their national community. As federalism maps out national partisan divisions, it encourages individuals to affiliate beyond state borders.

IV. STATE ELECTIONS AND POLITICAL COMMUNITY

If the partisan dimension of contemporary federalism prompts individuals to affiliate with states in which they do not reside, what form might that affiliation take? This Part surveys a few doctrines and practices concerning cross-border engagement and considers how they may be rationalized or called into question by the partisan aspect of today’s federalism. Section A considers Americans’ engagement in electoral contests outside their states of residence, focusing on campaign finance. Section B considers state freedom of information acts that limit nonresident access to public records. With respect to both questions, I suggest that porous, rather than impervious, borders may facilitate states’ ability to serve as counterweights to the federal government and sites of political identification.

A. *Bluman v. FEC: Political Engagement Across State Lines*

In recent years, political engagement across state lines has increased dramatically. This engagement is not limited to out-of-state spending for federal representatives,²⁴¹ but extends as well to state electoral contests and referenda.²⁴² In the 2012 Wisconsin gubernatorial recall election, for instance, out-of-state contributions made up a majority of Scott Walker’s arsenal and nearly a third of Tom Barrett’s funds.²⁴³ For South Dakota’s 2006 referendum on abortion, a substantial

²⁴¹ There is plenty of that, too. *See, e.g.*, Center for Responsive Politics, Top In-State vs. Out-of-State (2012), <http://www.opensecrets.org/overview/instvsout.php> (showing many congressional candidates receiving more funds from out-of-state than in-state).

²⁴² *See* data compiled for the fifty states from the National Institute on Money in State Politics (on file with author).

²⁴³ 2012 *Gubernatorial Recall: Compare Campaign Contributions to Committees*, MILWAUKEE-WISCONSIN J. SENTINEL, July 7, 2012, <http://www.jsonline.com/watchdog/dataondemand/140931763.html>. The ensuing spate of 2012 gubernatorial races also involved considerable out-of-state spending. *See, e.g.*, Paul Abowd, (continued next page)

majority of the funds for both sides came from other states.²⁴⁴ As one commentator puts it, “Means of communication, fundraising and also campaigning are becoming national—and it’s affecting state and even local races.”²⁴⁵

Cross-state engagement furnishes powerful evidence of partisan federalism. For one thing, party organizations are among the most active cross-state participants; the Democratic and Republican Governors Associations have poured hundreds of millions of dollars into state races in the past decade.²⁴⁶ Party actors recognize the power of the states as platforms for national conflict. But so, too, do individuals, who get involved directly in out-of-state politics for many reasons. In some cases, a donor might contemplate moving to a different state to take advantage of a new policy or visiting to benefit from the policy during a briefer stay. In other cases, one state’s policy may effectively set policy for the entire nation. But in perhaps the largest number of cases, Americans do not stand to benefit immediately or directly. Instead, they seek to create momentum for a policy or political party, to build a real-life example to inform national debate, or simply to take comfort in knowing their preferences are actual policy—and their partisan group is in control—somewhere.²⁴⁷ By channeling money toward states other than their own and embracing the kind of surrogate representation I have explored in Part III, these individuals are enacting partisan federalism.

If we see cross-state political participation, however, it is not because existing federalism doctrine or theory supports the practice.

North Carolina Governor’s Race Awash in Out-of-State Funds, Sept. 5, 2012, <http://www.publicintegrity.org/2012/09/05/10793/north-carolina-governors-race-awash-out-state-funds>; Andrew Garber, *Tab for Governor’s Race: \$46 Million*, SEATTLE TIMES, Nov. 3, 2012, http://seattletimes.com/html/localnews/2019600162_money04m.html.

²⁴⁴ Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect a Small State’s Political Autonomy*, 55 S.D. L. REV. 35 (2010) (showing 90% of the funds for opponents of ban and 65% for proponents came from out of state). Everywhere they have been on the ballot, same-sex marriage questions have likewise attracted significant out-of-state money. For California’s Prop. 8, for instance, both proponents and opponents raised more than a quarter of their total money from out of state. *Proposition 8, Tracking the Money: Final Numbers*, L.A. TIMES, Feb. 3, 2009, <http://www.latimes.com/news/local/la-moneymap,0,2198220.htmlstory>.

²⁴⁵ Big Donors Give Far and Wide, Influencing Out-of-State Races and Issues, Oct. 8, 2012, http://openchannel.nbcnews.com/_news/2012/10/08/14291297-big-donors-give-far-and-wide-influencing-out-of-state-races-and-issues (quoting Michael J. Malbin, Director of the Campaign Finance Institute).

²⁴⁶ Torres-Spelliscy, *supra* note 38, at 502-05.

²⁴⁷ See, e.g., Big Donors, *supra* note 245 (“Some Republicans, in say, California, will donate to help the Republican Party [in Iowa] because they feel it will go further than if they donate where they live in a more Democratic state,” said Megan Stiles, spokesperson for the Iowa Republican Party.”).

Instead, it is because such activity has been protected as expression under the First Amendment. Today, only Alaska and Hawaii impose any limits on out-of-state contributions, and no state limits out-of-state expenditures.²⁴⁸ Although the Alaska Supreme Court upheld the state's residency-based limits, citing "deep suspicions of the motives and wisdom of those who, from outside its borders, wish to remold Alaska,"²⁴⁹ federal courts have rejected, on First Amendment grounds, attempts by other states to impose similar restrictions.²⁵⁰ Courts have also largely rejected as inconsistent with the First Amendment state attempts to require petition circulators to be state residents.²⁵¹

While these courts have focused on the expressive dimensions of cross-border contributions and expenditures and not considered their validity from a federalism perspective,²⁵² a recent case raises the question whether such expressive activity undermines American federalism and may accordingly be proscribed. In *Bluman v. FEC*, a three-judge panel of the D.C. District Court took up a loose end left by the Supreme Court's holding in *Citizens United v. FEC*: "whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."²⁵³ In a decision summarily affirmed by the Supreme Court, the court upheld a provision

²⁴⁸ Alaska Stat. § 15.13.072 (prohibiting candidates from receiving contributions from out-of-state individuals exceeding specified amounts, and prohibiting political parties from raising more than ten percent of contributions from out-of-state individuals); Hawaii Rev. Stat. § 11-362 (providing that contributions from out-of-state individuals other than candidates' family members shall not exceed thirty percent of a candidate's contributions). A good number of states limit public matching funds to in-district residents or voters.

²⁴⁹ *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 617 (Ala. 1999).

²⁵⁰ *See, e.g. Landell v. Sorrell*, 382 F.3d 91, 146 (2d Cir. 2004) (striking down portion of Vermont law that would have limited out-of-state contributions to twenty-five percent of a candidate's contributions), *rev'd and remanded on other grounds sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006); *VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998) (striking down Oregon constitutional amendment prohibiting state candidates from using out-of-district contributions).

²⁵¹ The Supreme Court has not directly addressed the issue. In *Buckley v. American Constitutional Law Foundation*, the Court struck down a state requirement that petition circulators be registered voters as inconsistent with the First Amendment, though it suggested a residency requirement would be more narrowly tailored. 525 U.S. 182, 211 (1998). Several circuit courts have invalidated residency requirements for petition circulators on First Amendment grounds. *See Libertarian Party of Virginia v. Judd*, No. 12-1996 (4th Cir. May 29, 2013); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). *But see Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 616-17 (8th Cir. 2001) (upholding North Dakota requirement that petition circulators be state residents).

²⁵² The federalism angle has sometimes been pressed by litigants or the dissent. *See, e.g., VanNatta*, 151 F.3d at 1222-25 (Brunetti, J., dissenting).

²⁵³ *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010); *see id.* at 948 n.51 (Stevens, J., dissenting).

of federal law that prohibits foreign nationals from making contributions or expenditures in connection with federal, state, or local elections.²⁵⁴ The court reasoned that the case did not turn on the First Amendment questions that have dominated campaign finance jurisprudence but rather a “foundational question about the definition of the American political community.”²⁵⁵ “It is fundamental to the definition of our national political community,” the court maintained, “that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”²⁵⁶ Recognizing political contributions and expenditures as an integral part of electoral processes, the court proceeded to define them as both speech and participation in democratic self-government.²⁵⁷ Accordingly, it reasoned, limitations on foreign contributions and expenditures are “all ‘part of the sovereign’s obligation to preserve the basic conception of a political community.’”²⁵⁸

By moving from the speech-based logic of *Citizens United* and its precursors to a speaker-based logic, *Bluman* has recast the question of whether states may ban contributions and expenditures by nonresidents. After *Bluman*, it is no longer sufficient to define such activity as speech. It is also necessary to define who is speaking and how the speaker relates to the political community. Is it true, as an amicus brief in an earlier case argued, that “from Oregon’s constitutional perspective, a citizen of Florida, Texas, or Vermont has no more of an interest or stake in . . . making campaign contributions in Oregon than does a citizen of Montreal or Mexico City”?²⁵⁹ Or is it fundamentally misguided to treat Americans from different states as foreigners to one another?

Bluman itself sends mixed signals on this question. In purely doctrinal terms, *Bluman* makes a strong case for limiting out-of-state financial participation. The opinion cites *Gregory v. Ashcroft* in support of the proposition that the government may exclude foreigners from activities intimately related to the process of democratic self-

²⁵⁴ 2 U.S.C. § 441e(a) (2006).

²⁵⁵ *Bluman v. FEC*, 800 F. Supp. 2d 281, 286 (D.D.C. 2011), *summarily aff’d*, 132 S. Ct. 1087 (Jan. 9, 2012).

²⁵⁶ *Id.* at 288 Looking to cases holding that foreign citizens may be denied certain rights and privileges of United States citizens, such as voting, serving as jurors, or working as public school teachers, the court discerned this test: “The government may exclude foreign citizens from activities ‘intimately related to the process of democratic self-government.’” *Id.* at 287.

²⁵⁷ *Id.* at 288; *see also id.* at 289 (“When an expressive act is directly targeted at influencing the outcome of an election, it is both speech and participation in democratic self-government.”).

²⁵⁸ *Id.* at 288 (quoting *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978)).

²⁵⁹ Brief of National Voting Rights Institute at 17-18, *Miller v. VanNatta*, Nos. 95-35998, 95-35999 (9th Cir. Jan. 2, 1996).

government.²⁶⁰ Relying in part on the resident alien precedents subsequently cited in *Bluman*, *Gregory* maintained that state citizens must be able to determine the qualifications of their government officials free from federal interference in order “to preserve the basic conception of a political community.”²⁶¹ Moreover, to the extent *Bluman* treats spending money as a form of participation in the process of democratic self-government, Article IV Privileges and Immunities doctrine suggests that states might permissibly restrict nonresidents from making contributions and expenditures.²⁶² Although the Privileges and Immunities jurisprudence is a nationalist strand of federalism jurisprudence,²⁶³ the Court has long reserved to state residents the right to vote and to hold elective office,²⁶⁴ justifying these restrictions as preserving the states as separate “political communities”²⁶⁵ and fostering individuals’ “identification with a particular State.”²⁶⁶ If contributions and expenditures are also forms of democratic participation that shore up political community, this doctrine suggests they, too, might be activities reserved to state residents.

But if the doctrinal logic of *Bluman* casts cross-state political participation as a form of foreign participation that may be proscribed, the opinion seems eager to head off just such claims. Responding to the plaintiffs’ argument that contributions and expenditures are not democratic participation akin to voting, as evidenced by the fact that Americans do not vote but do make contributions and expenditures

²⁶⁰ *Bluman*, 800 F. Supp. 2d at 287.

²⁶¹ *Gregory v. Ashcroft*, 501 U.S. 452, 462-63 (1991).

²⁶² This point has not been lost on litigants seeking to defend the regulation of out-of-state contributions and expenditures. *See, e.g.*, Brief in Opposition at 22-24, *American Tradition Partnership v. Bullock*, No. 11-1179 (U.S. May 18, 2012).

²⁶³ *See, e.g.*, *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (“It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as [the Privileges and Immunities Clause].”).

²⁶⁴ *See, e.g.*, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 282 (1985); *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972); *see also Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978).

²⁶⁵ *E.g.*, *Piper*, 470 U.S. at 282; *Sugarman*, 413 U.S. at 647.

²⁶⁶ *Baldwin*, 436 U.S. at 383. The emphasis on state political communities as sites of individual identification finds an echo in *U.S. Term Limits, Inc. et al. v. Thornton*. *See* 514 U.S. 779, 823 n.32 (1995) (“[T]he voters of Arkansas, in adopting [a term-limits amendment], were acting as citizens of the State of Arkansas, and not as citizens of the National Government”); *id.* at 838 (Kennedy, J., concurring) (discussing citizens’ discrete state and federal “political capacities”); *id.* at 849 (Thomas, J., dissenting) (discussing state citizens’ “separate political identities”). *Thornton* might offer doctrinal support for Americans’ participation across state lines with respect to federal elections, but not with respect to state elections. *Cf. Oregon v. Mitchell*, 400 U.S. 112 (1970 (Black, J.) (holding that Congress could fix voting age for national, but not state, elections).

related to elections in states other than their own, the court insisted that citizens of other states are “members of the American political community.”²⁶⁷ Given particular concerns about “foreign influence,” the court further reasoned, “a law that is justified as applied to aliens may not be justified as applied to citizens of the United States.”²⁶⁸ In so framing the issue, the court appeared to reject the sort of federalism argument made in litigation about out-of-state contributions and expenditures—namely, that if states are discrete political communities, out-of-state donors *are* exerting “foreign influence.” Even as its reasoning points the way to restricting cross-state political participation in order to protect state political communities, then, *Bluman* suggests that the relevant political community is the United States, not the fifty states as such.

Bluman and existing doctrine ultimately point to two different approaches to cross-state political participation on federalism grounds: Either, on a strong federalist logic, states are meaningful political communities and cross-border activity may be proscribed to preserve them as such, or, on a strong nationalist logic, cross-border activity must be permitted because the United States is one national community.

We might instead eschew such dichotomous thinking and understand cross-border participation to be consistent with federalism insofar as political participation across state lines reflects and reaffirms the states’ significance as governments and sites of political community. Most narrowly, such participation allows individuals who feel alienated from their own state government to affiliate with another state government. More broadly, it underscores that states serve as opponents of and counterbalances to the federal government for the nation at large. In keeping with *Bluman*’s dicta, this understanding casts all Americans as members of a national political community. Moving beyond *Bluman*, it recognizes the states as discrete political communities—but ones that are, in critical respects, discrete national political communities.

One might raise a variety of objections to this defense of cross-border participation. A critique internal to the argument I have offered might run as follows: for states to serve as political counterweights to the federal government and sites of individual partisan identification, they must be meaningfully different from the federal government, but if state elections are shaped by individuals across the nation, we will not see significant divergence. To bolster partisan federalism, we should instead

²⁶⁷ *Bluman*, 800 F. Supp. 2d at 290.

²⁶⁸ *Id.*

restrict political participation to state residents so as to distinguish the states from the federal government and one another.²⁶⁹

This objection has force. But, I submit, partisan federalism is more consistent with cross-border participation than its prohibition. Given the restriction of the franchise to state residents and a population unevenly distributed across fifty states, cross-state engagement may reduce, but does not eliminate, partisan diversity across states and the federal government.²⁷⁰ Already today Americans participate in political contests beyond their states of residence, and the states do not mirror either the federal government or one another. On the other side of the balance, allowing people across the nation to contribute money and time

²⁶⁹ One can also imagine a pragmatic objection, emphasizing that restricting out-of-state contributions and expenditures could more generally tame campaign finance—and in particular, the huge sums flowing from corporations, Super PACs, and extremely wealthy individuals. It is this sort of logic that seemed to animate the federalism-based arguments for Montana’s Corrupt Practices Act, which was invalidated by the Supreme Court in *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012). See, e.g., Brief in Opposition, *Bullock*, No. 11-1179 (U.S. May 18, 2012); Brief of New York et al. as Amici Curiae in Support of Respondents, *Bullock*, No. 11-1179 (U.S. May 18, 2012). But there are costs to framing the problem in terms of engagement by “foreign” out-of-state residents. The arguments advanced in this Article do, however, underscore the importance of individuals’ identification with the polity, and thereby embrace *Bluman*’s recognition of campaign spending as democratic participation—a recognition that supports equality, participation, and integrity values that the Supreme Court has dismissed or defined in a crabbed way. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (holding that “equalizing the relative ability of individuals and groups to influence the outcome of elections” is not a constitutionally permissible purpose); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (articulating a narrow view of corruption as quid-pro-quo corruption).

²⁷⁰ One might argue that the logic advanced here further requires allowing individuals throughout the nation to vote in state elections. Similar proposals have been made in the local government literature. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1909-10 (1994) (proposing opening local elections to all members of a metropolitan region or state); Frug, *supra* note 129, at 329-30 (proposing a plan “in which everyone gets five votes that they can cast in whatever local elections they feel affect their interest,” including elections outside their immediate region); see also Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1156-62 (1996) (critiquing such proposals); Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173 (1996) (responding to the critique). While cross-state voting merits additional consideration, the argument here does not push that far. This Article has suggested that individuals throughout the nation have a stake in other states’ politics and should have a means of influencing these politics and channeling their energies toward the states. But measures short of voting suffice for these purposes. Indeed, even as *Bluman* blurs the line between voting and campaign contributions by casting both as forms of political participation, it does not suggest that the two must be treated identically.

Frug’s proposal might also suggest that cross-border contributions and expenditures should be permitted only within limits—for example, individuals might give in connection with only a certain number of races. This would allow the alienated individual of Section III.B to reaffirm her political identity and community while impeding any particular individual’s or organization’s effort to shape every state election. See *supra* note 269 (noting equality, integrity, and participation concerns). While this sort of proposal is fanciful given the state of First Amendment jurisprudence, it is intriguing from a federalism perspective.

to political contests in states other than their own enables them to affiliate with these states.²⁷¹ The law shapes as well as reflects our political identities; because cross-border political participation is permitted under existing law, it is relatively easy for individuals to identify with other states as they seek to influence their politics.²⁷² If the law proscribed such engagement, Americans' identification with other states would likely decline accordingly. More broadly, recognizing the legitimacy of cross-border participation underscores the role of the states as significant political actors in our national polity. The very fact that individuals from Texas seek to influence California politics, and vice versa, indicates that the states are critical actors on the national stage. Cross-state political participation demonstrates states' importance as sites of governance and identification, not their lack thereof.

B. *McBurney v. Young: State Freedom of Information Acts*

The question of political participation across state lines concerns whether Americans may seek to shape the government composition and policies of states they do not inhabit. The flip side of this question concerns what obligations states owe to residents of other states, the classic province of Article IV Privileges and Immunities doctrine. Just last Term, the Supreme Court rejected one possible obligation: to share information about state governance with nonresidents and residents on equal terms. In *McBurney v. Young*, residents of Rhode Island and California challenged the citizens-only provision of Virginia's Freedom of Information Act (VFOIA), which limits access to public records to Virginia citizens and media with circulation in the state. In a terse opinion, the Court rejected both the Privileges and Immunities and Dormant Commerce Clause challenges to the law, including the argument that a right of access to public information should be considered fundamental for purposes of the Privileges and Immunities Clause.²⁷³ Here I want to focus on one slice of the case—the Court's supposition that Virginia has a federalism-based interest in preventing, in

²⁷¹ See generally WALZER, *supra* note 31, at 100 (“[P]eople who have given money and people who have helped to get it are more loyal to the cause, or loyal longer, than those who merely have reason to think that the cause is just”).

²⁷² Cf. Jonathan D. Varat, *State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487, 518 (1981) (“Decreasing the significance of state residence tends to strengthen interstate attachments”).

²⁷³ *McBurney v. Young*, No. 12-17, slip op. at 10-12 (U.S. Apr. 29, 2013). The Third Circuit had previously concluded that access to public records is necessary to be able to “engage in the political process with regard to matters of national political and economic importance.” *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006), *overruled by McBurney*.

the colorful formulation of Justice Scalia, “outlanders [from] mucking around in . . . Virginia government.”²⁷⁴

Throughout the litigation, Virginia defended the citizens-only provision as a safeguard of political community.²⁷⁵ Shying away from an economic defense of the law, the state insisted that the “purpose of the law is political” and, as such, “its benefits are logically and properly bestowed on those directly affected by [the state’s] political process—i.e., citizens” and kept from “noncitizens with no direct stake in Virginia politics and governance.”²⁷⁶ As foreshadowed by questions from the bench at oral argument,²⁷⁷ a unanimous Court accepted this justification for the citizens-only provision, noting in its opinion that the law “represents a mechanism by which those who ultimately hold sovereign power (*i.e.*, the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power.”²⁷⁸

Such claims about sovereign power and political community echo the federalism arguments about out-of-state contributions and expenditures canvassed above.²⁷⁹ This is unsurprising: questions concerning the flow of money into state politics and the flow of information out of state government are two sides of the same coin. Both turn on the relationship of Americans to other states’ political sphere; for the former, nonresidents seek to participate in state politics, while for the latter they seek to learn about state politics. The symmetry of the two questions suggests we might think similarly about them in federalism terms. If states may, after *McBurney*, exclude nonresidents from obtaining information about state government’s workings, so too is the

²⁷⁴ Transcript of Oral Argument at 21, *McBurney v. Young* (U.S. Feb. 20, 2013).

²⁷⁵ See, e.g., Brief of Respondents at 31, *McBurney*, No. 12-17 (U.S. Jan. 24, 2013).

²⁷⁶ *Id.* at 19. Virginia’s amici similarly argued that “the relevant audience for State government consists of State citizens.” Brief of the National Conference of State Legislatures et al. at 15-16, *McBurney*, No. 12-17 (U.S. Jan. 30, 2013); see also *id.* at 4 (“The central purpose of Virginia’s open-records law is to enable Virginia citizens to observe their government in operation and to hold their public officials accountable. This Court has made clear that States may properly determine membership in their own political community.”).

²⁷⁷ See, e.g., Transcript of Oral Argument at 8, *McBurney* (U.S. Feb. 20, 2013) (Scalia, J.) (“It seems to me entirely in accord with that purpose of these [sunshine] laws to say it’s only Virginia citizens who . . . are concerned about the functioning of Virginia government, and ought to be able to get whatever records Virginia agencies have); *id.* at 9 (Ginsburg, J.) (“Now, Virginia doesn’t allow people from out of State to vote. They’re not part of Virginia’s political community. So . . . if you’re not part of the political community, then you don’t fall under FOIA . . .”); *id.* at 47-48 (Breyer, J.) (“[Y]ou say, well, but look, there must be something left that the States can reserve to their own citizens. . . . This is just an interest in trying to find out how State institutions work, and the voters have the main interest there . . .”).

²⁷⁸ *McBurney* slip. op. at 6.

²⁷⁹ See *supra* Section IV.A.

case bolstered for states to restrict “outlanders” from making contributions and expenditures in connection with state elections. Indeed, reserving information about state government to residents seems more attenuated from maintaining a state political community than prohibiting out-of-state contributions and expenditures.²⁸⁰ In any event, both arguments suggest that the United States is composed of discrete state political communities, and nonresidents may be denied access to state records and political campaigns so as to recognize and preserve these political communities.

As I have argued with respect to cross-border contributions and expenditures, however, porous state borders are not inconsistent with federalism. Nonresidents may have a “stake in Virginia’s politics and governance”²⁸¹ precisely insofar as they are Virginia’s politics and governance. Virginia, for example, helped lead the Republican charge against the Patient Protection and Affordable Care Act, and individuals throughout the country looked to the state for surrogate representation in this fight.²⁸² While most FOIA-disclosed information likely would not bear on partisan conflicts, and certainly not on partisan conflicts of this magnitude, some of it would—and it is very hard if not impossible to draw these lines *ex ante*.²⁸³ The fact that Mark McBurney, a Rhode Island resident, was able to receive information pertaining specifically to his child-support dispute with his ex-wife through other channels open to nonresidents thus does not lessen the concern that he was unable to receive “any general policy information” from the state.²⁸⁴

To the extent the federalist value of fostering political community is said to justify the citizens-only provision, partisan federalism suggests this same value may cut in favor of more open state borders. A VFOIA for all Americans would—as with cross-border contributions and expenditures—recognize states as political communities, but discrete national political communities. And allowing individuals throughout the country to “muck around” in Virginia government could thus reaffirm

²⁸⁰ Cf. *Lee v. Minner*, 458 F.3d 194, 201 & n.5 (3d Cir. 2006), *overruled by McBurney* (“[T]he State has offered no reason why permitting noncitizens to access public information would diminish its ability to define its political community. There is no evidence that allowing noncitizens to directly obtain information will weaken the bond between the State of Delaware and its citizens.”).

²⁸¹ Brief of Respondents, *supra* note 275, at 31.

²⁸² See *supra* notes 67-72 and accompanying text.

²⁸³ The fact that the Democratic and Republican Parties may, through local offices and liaisons, make FOIA requests even in states with citizens-only provisions does not undercut this claim given that a variety of individuals and organizations not directly associated with the party apparatus as such may have partisan interests in information. See *generally* Section I.A.1; Part II.

²⁸⁴ *McBurney*, slip. op. at 2.

the significance of states, highlighting, in particular, their role as a counterbalance and alternative to the federal government for all Americans. In short, we should be skeptical of the claim recently accepted by the Court that “the relevant audience for State government consists of State citizens.”²⁸⁵

CONCLUSION

Partisanship is critical to understanding contemporary American federalism. The states challenge the federal government, as doctrine and scholarship assume they will, because some number of them are governed by members of a different political party. Individuals identify with the states and not only the federal government, as federalism theory suggests they must, because the states represent different political parties and different partisan possibilities. Partisan federalism also sheds new light on doctrines and practices, such as cross-state contributions and expenditures, that we tend not to think of in federalism terms.

The account offered here is in critical respects a particular story about federalism at the turn of the twenty-first century. Partisan federalism has emerged with the decline of dual federalism and the rise of ideologically cohesive, polarized parties, and, because these phenomena are historically contingent, the story will no doubt change in the future. Yet aspects of the account have both deep roots and staying power. Since Virginia and Kentucky’s opposition to the Alien and Sedition Acts, states have presented a vision of the national will different from that offered by the federal government. As our partisan landscape continues to change, states will serve as discrete sites of national governance and participate in nationwide controversies on behalf of people both within and outside their borders.

Partisan federalism not only helps to explain enduring features of the relationship among the states, the federal government, and the people, but also opens up new lines of inquiry. While I have suggested that partisanship and federalism are mutually constitutive in the United States today, my focus has been on how partisanship shapes our federalism. Much more could be written about how federalism shapes our partisanship, a question with both theoretical and doctrinal import.²⁸⁶ Such an exploration might, for instance, lead to a new justification for, or critique of, the law regarding state regulation of political parties. Partisan federalism might also enrich our thinking about local government law.

²⁸⁵ Brief of the National Conference of State Legislatures, *supra* note 276, at 15-16.

²⁸⁶ For some initial thoughts, see Section III.A.

We could consider, for example, how some cities, such as Atlanta, Austin, and Nashville, stage state-local partisan conflicts, while others, such as New York and San Francisco, function as partisan actors on the national stage. As these and other questions underscore, partisan federalism inspires a fresh look at federalism and partisanship alike.