



MAKE POLITICS LOCAL AGAIN: THE CASE FOR PRO-LOCALIZATION STATE CONSTITUTIONAL REFORM

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## I. INTRODUCTION

“Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.”

Seymour Martin Lipset, *Political Man* (1960)<sup>1</sup>

Americans are more “American” than ever. We are very much a nation. We think of our political selves as Americans—not Pennsylvanians, or New Jerseyans, or Montanans. But our national political identity has not produced national amity. The mutual contempt that defines our partisan politics has precipitated violence—see the shameful events at the Capitol of January 6<sup>th</sup>, for example. Moreover, astute political observers like David French of *The Dispatch* now see national disintegration as a real possibility for the United States in the decades ahead.<sup>2</sup> Despite powerful forces of national cohesion like the “flattening” of society via technology,<sup>3</sup> standardized consumer options, and enhanced economic interdependence, our politics strike the casual observer and the close follower alike as worrisomely dysfunctional, divisive, and sickly. We are left with unified discord.

1. SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 77 (1960).

2. *See generally* DAVID FRENCH, *DIVIDED WE FALL: AMERICA’S SECESSION THREAT AND HOW TO RESTORE OUR NATION* (2020).

3. Neal Lawson & Uffe Elbaek, *Technology Has Created a Flat Earth Where We Can Participate as Equals*, *GUARDIAN* (Mar. 4, 2014, 1:35 PM), <https://www.theguardian.com/commentisfree/2014/mar/04/technology-flat-earth-democracy>.

This article aims to think structurally about such unified discord out of a concern for the future of the American republic, its commitments to democratic self-governance and individual liberties, and in particular, its sustained popular legitimacy.

A central driver of America's unified discord is the disconnect between our nation's formal structures of government and the on-the-ground, contemporary socio-political life of the country. Americans constitute a national political community marked by partisan divisions, but we still govern ourselves via structures that were originally designed to respond to an entirely different political reality—one in which subnational political communities, states, were joining together under a national government while sharing only a very thin sense of nationhood. The real fault line in American political identity today no longer runs between states; it runs between two nationalized parties and the fraught social divisions over race, religion, culture, and worldview which the two parties increasingly capture.<sup>4</sup> As a result, our formal structures of government—geared towards bringing the loosely knit states together in 1787 rather than coping with the nationalized partisanship of 2021—are not channeling our political needs and desires in constructive ways. In molding a system of government, the Framers of the Constitution responded to the political reality of 1787. We should do the same in the context of 2021.

In the words of E. E. Schattschneider: “political research is never better than the theory of politics on which it is based.”<sup>5</sup> The guiding theory of this article is as follows. James Madison wrote in *Federalist No. 45* that “the supreme object” of government is to pursue “the public good, the real welfare of the great body of the people.”<sup>6</sup> I assume here that a citizenry's acceptance of the government as legitimate—as exercising rightful rule—is a key ingredient of the public good or at least an essential step towards the attainment thereof. In the modern era, it seems that meeting two conditions in particular help governments achieve legitimacy. The first condition is democracy, and the second is institutional alignment with relevant political identities—“that aspect of identity,” in the words of Malcolm Feeley and Edward Rubin, “that connects the individual . . . with some group that exercises governance in a given area or competes for the ability to exercise governance.”<sup>7</sup>

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4. See generally LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2018).

5. E. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 133 (1960).

6. *THE FEDERALIST NO. 45* (James Madison).

7. MALCOLM FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 8–9 (2008).

Resting on some majoritarian basis greatly assists a governing authority in its quest to be accepted as legitimate by its citizenry. Democracy alone, however, is not enough. Governing structures must also right themselves with the reality that we humans are social animals. We live and have our being in communities, in groups. To be successful—to engender a citizenry’s compliance and satisfaction with the law and pride in government—governmental structures must sufficiently align themselves with citizens’ relevant socio-political group attachments and identities.<sup>8</sup> To foster the attainment of the public good and governmental legitimacy—whatever the level of government—ballots must be cast by individuals who feel themselves to be part of an organic, meaningful community.

Currently, many Americans do not feel that the country’s political system is attaining the Madisonian objective of securing the public good.<sup>9</sup> That continued failure leads to questions regarding the government’s legitimacy. The pages to come imply that the American political system’s current failure to align governmental structures with the relevant socio-political group identities of today may be partially to blame for our widespread disappointment.

In the modern era, the state-based political identities upon which our constitutional structure was first premised have been replaced with nationalized, partisan political identities. From the standpoint of legitimacy, the lack of alignment between our state-based constitutional schema and our party-based, nationalized socio-political reality would not be a problem if the parties were neatly sorting themselves into “red” and “blue” states. If that were the case, the states would still capture our most salient subnational political identities and divisions. This would be a boon to the cause of legitimacy and the securing of the ever-elusive public good. Unfortunately, this is not the reality in which we live. Although we often talk about red states and blue states, the fact is that most states are conglomerations of deep blue urban cores, conflicted purple suburbs, and deep red rural stretches. Whether a state emerges as “red” or “blue” simply depends on whether the rural reds and their suburban allies outnumber the urban blues and their own suburban co-partisans.

Thus, our most salient political identities—our partisan ones—have attained their geographic embodiment on the level of the locality more so than the state. Today, counties and townships are more often where the

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8. *See generally* FRANCIS FUKUYAMA, *IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT* (2018).

9. *Public Trust in Government: 1958-2021*, PEW RSCH. CTR. (May 17, 2021), <https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/>.

true organic political communities like those of the eighteenth-century American states assemble. If we are to foster civic faith in governmental legitimacy like the Framers did by crafting a government that was responsive to the relevant socio-political identities of the day, we must think creatively about how to empower homogeneous partisan localities to govern themselves—to allow localities to “live and let live.”

This article outlines one way forward, as it proposes state constitutional reforms that will enable localities to override certain swaths of state law. While the degree of autonomy enjoyed by localities varies from state to state, on the whole “local governments are mere creatures of” their respective states.<sup>10</sup> Thus, actual state constitutional reform—not clever interpretation—is needed to effect the pro-localization measures I propose here. I leverage my home state, the Commonwealth of Pennsylvania, as an example of what such reforms might look like.

As the issues of the “culture wars”—sticky questions over communal morality, individual liberty, historical interpretation, biology, sexual ethics, and the like—drive our partisan divisions more and more, it seems prudent to allow localized differentiation on matters like abortion policy, transgender rights, gun rights, etc. Localized differentiation on these issues would not present “free-rider” problems, as it would not entail the creation of large local bureaucracies or expensive local social programming that relies on state tax dollars. Most crucially, localized differentiation on these issues would serve as a boon to the cause of governmental legitimacy: more people would be empowered to live under legal regimes that accord more with their most fundamental political and moral values. Meanwhile, the human and civil rights of all, including political and racial minorities, would continue to be safeguarded by the constitutional protections afforded by the Federal Bill of Rights and state bills of rights.

## II. THE STRONG STATES AND A WEAK NATION—LATE 18<sup>TH</sup> CENTURY UNITED STATES OF AMERICA

We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies solemnly publish and declare, That these United

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10. Richard Briffault, *The Challenge of the New Preemption*, 70 *Stan. L. Rev.* 1995, 2011–12 (2018).

Colonies are, and of right ought to be, *FREE AND INDEPENDENT STATES* . . . .<sup>11</sup>

A. *The State-Based Political Realities Confronting the Framers*

In 1787, the Framers confronted a political reality that was marked by Americans' strong attachments to their respective states and weak attachments to their shared nation. America's original Constitution, the Articles of Confederation, demonstrated how central the states were to Americans' political identities during the founding era. Gordon S. Wood writes, "[t]he Confederation Congress was certainly not a national government in the usual sense of the term."<sup>12</sup> With the Congress having rejected proposals that would have created a structure akin to an energetic central government more befitting of a nation-state,<sup>13</sup> the Articles ultimately constituted a loose "coming together of thirteen sovereign states in an alliance not altogether different from the present-day European Union."<sup>14</sup>

Indeed, leading Americans at the time routinely likened their attempts at confederation to international settlements between separate sovereigns in the European theater.<sup>15</sup> This tentative, limited unification, or "peace pact,"<sup>16</sup> was certainly not an end in itself; it was a "means of promoting the struggle" against the British.<sup>17</sup> Yet even in the midst of the bloody Revolutionary War, cross-colony unification posed a steep challenge due to the colonists' incredibly weak sense of a shared national identity.<sup>18</sup> The drafters of the Articles themselves lamented "the

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11. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

12. Gordon S. Wood, *July 16, 1787: The Day the Constitution Was Saved*, in DAYS OF DESTINY: CROSSROADS IN AMERICAN HISTORY 68 (James M. McPherson & Alan Brinkley eds., 2001).

13. See RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 40 (1987).

14. Wood, *supra* note 12, at 69; see also BERGER, *supra* note 13, at 28–29.

15. DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 24–29 (2003).

16. *Id.* at x–xi. While Hendrickson's use of "peace pact" applies to the entire project that was the American Founding, the aptness of the phrase does not diminish as we apply it to the Articles of Confederation specifically. *Id.*

17. Jack Rakove, *The Legacy of the Articles of Confederation*, 12 PUBLIUS 45, 48 (1982). For a similar point on how the presence of significant external threats was necessary to create a sense of inter-colonial union, see RAMESH DUTTA DIKSHIT, THE POLITICAL GEOGRAPHY OF FEDERALISM: AN INQUIRY INTO ORIGINS AND STABILITY 60 (1975).

18. See also John M. Murrin, *A Roof without Walls: The Dilemma of American National Identity*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 333, 333–48 (Richard Beeman et al. eds., 1987). For more on Americans' dearth of a shared national identity during the Revolutionary War and the immediate post-Revolutionary period, see Heidi Tarver, *The Creation of American National Identity: 1774–1796*, 37 BERKELEY J. SOCIO. 55, 66–81 (1992).

difficulty of combining in one general system . . . a continent divided into so many sovereign and independent communities.”<sup>19</sup> This difficulty stemmed in large part from the fact that the states constituted organic political communities that commanded genuine and intensely strong loyalties from their respective citizenries.<sup>20</sup> Infringing on these organic, historically-conditioned political loyalties by bringing the newly anointed states under a single general jurisdiction—however limited—was understandably difficult.

Therefore, even as American governance floundered under the Articles,<sup>21</sup> a stronger central government by no means stood out as the unquestioned, predetermined solution to the problem of the Articles’ ineffectiveness. On account of the overwhelming strength of Americans’ state-based political identities, complete dissolution of the Union into thirteen separate sovereign entities seemed like an equally likely alternative. In a letter to James Madison in November of 1786, George Washington fretted over precisely this possibility. While he held out the hope that Americans’ “prejudices, unreasonable jealousies, and local interest [would] yield to reason and liberality” and a collective embrace of an American “[n]ational character,” Washington feared that the experience under the Articles of “[t]hirteen sovereignties pulling against each other, and all tugging at the federal head [would] soon bring ruin on the whole.”<sup>22</sup>

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19. OFFICIAL LETTER ACCOMPANYING ACT OF CONFEDERATION (1777), *reprinted in* 1 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 56, 56–57 (2018) (1830), *quoted in* HENDRICKSON, *supra* note 15, at ix.

20. For more on the early states’ status as organic political communities, see Keith E. Whittington, *Recovering “From the State of Imbecility,”* 84 TEX. L. REV. 1567, 1575–76 (2006).

21. See GEORGE WILLIAM VAN CLEVE, *WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION* (2017).

22. Nat’l Archives, *To James Madison from George Washington, 5 November 1786*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0070> (last visited Aug. 3, 2021). For an earlier example of Washington’s fears of the dissolution of the Union, see Nat’l Archives, *From George Washington to William Gordon, 8 July 1783*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/99-01-02-11573> (last visited Aug. 3, 2021) (alteration in original). As detachment can breed clarity, it is important to note that foreign observers of American politics at the time foresaw a similar outcome. The French royal government predicted in 1787 that the Confederation would soon collapse and that the separate states would “subsist in a perfect independence of each other” thereafter—an outcome that would “not be regretted” on the part of France. Letter from the Cabinet of Versailles to Louis-Guillaume Otto (Aug. 30, 1787), *in* 2 GEORGE BANCROFT, *HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 438 (New York, D. Appleton & Co., 3d ed. 1883), *reprinted in* VAN CLEVE, *supra* note 21, at 1.

As the Articles faltered, the unavoidable differences—political, cultural, and economic—between the former colonies threatened to replace the loose union with the complete absence thereof. The stormy national marriage between the states threatened to end in a thirteen-way divorce. As John Adams reflected in 1818:

The colonies had grown up under constitutions of government so different, there was so great a variety of religions, they were composed of so many different nations, their customs, manners, and habits had so little resemblance, and their intercourse had been so rare, and their knowledge of each other so imperfect, that to unite them in the same principles in theory and the same system of action, was certainly a very difficult enterprise.<sup>23</sup>

The overwhelming challenge of this “very difficult enterprise” was further heightened by the fact that distinct regional identities buttressed Americans’ separate state-based identities. If Washington’s fears of a thirteen-way dissolution were to go unrealized, national cohesion was not the only alternative—many thought that the dismemberment of the Union along regional lines was quite possible. As the distinguished twentieth century legal scholar Charles Warren pointed out in *The Making of the Constitution*, the three years preceding the Constitution’s drafting in 1787 witnessed the proliferation of letters and newspaper articles advocating a division of the Union into three separate confederacies of Southern, Middle, and Eastern states in light of the regions’ excessively divergent “commercial and political interests.”<sup>24</sup>

As a result, the project of American nationalism favored by the likes of George Washington and James Madison faced considerable constraints not only in the form of deep-seated inter-state differences, but also in the inter-regional antagonisms that overlay those differences. As they neared Philadelphia in the summer of 1787, the delegates were confronting “what had become a profound crisis in regional integration” atop interstate tensions, and they understood it as such.<sup>25</sup> Madison

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23. Letter from John Adams to Hezekiah Niles (Feb. 13, 1818), in 10 CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR* 282, 283 (Boston, Little, Brown & Co. 1856), quoted in HENDRICKSON, *supra* note 15, at 27.

24. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 24 (1937). For more on Americans’ distinctive regional identities during the late eighteenth and early nineteenth centuries, see HENDRICKSON, *supra* note 15, at 27.

25. Drew R. McCoy, *James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 226, 244 (Richard Beeman et al. eds., 1987).



himself feared “a partition of the Union into three more practicable and energetic Governments”—a “[great] evil” he desperately hoped to prevent by means of a successful nationalizing Constitutional Convention in Philadelphia.<sup>26</sup>

That the Constitution’s Framers envisaged the end of the Union if their nationalizing efforts in Philadelphia were to fail speaks to Americans’ weak sense of strong, organic, shared nationhood at the time.<sup>27</sup> The Framers could not rely upon Americans’ abstract, organic feelings of shared national identity—of nationalism—to preserve the Union. Such affective nationalism did not exist. It could perhaps arise, or be manufactured by political elites, in the coming years.<sup>28</sup> For the time being, though, a successful constituting effort would have to buy time for true American nationalism to emerge.<sup>29</sup> If not quickly shored up, the worrisomely thin bonds of American nationalism were threatening to snap.

### III. FEDERALISM AT THE CREATION

“State attachments, and State importance have been the bane of this Country.”

Gouverneur Morris (PA), Statement at the Constitutional Convention, July 5, 1787<sup>30</sup>

#### A. *The Constitutional Convention: A Response to State-Based Political Reality*

The 1787 Philadelphia Convention debates make clear that the structures of American federalism—the scheme of representation at the federal level and the division of sovereignty between the federal and state governments—were direct responses to the state-based political reality at the time. Even as leading delegates helped create a Constitution that was “stunningly nationalist,” in the words of Michael Klarman, they had

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26. Nat’l Archives, *From James Madison to Edmund Pendleton, 24 February 1787*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0151> (last visited Aug. 3, 2021), cited in WARREN, *supra* note 24, at 45.

27. For a discussion of the Philadelphia Convention as building a more centralized, veritably national state, see Whittington, *supra* note 20, at 1577–78.

28. See Tarver’s discussion of the concerted efforts on the part of the “nationalist elite” to manufacture an American national identity in the years following the ratification of the Constitution. Tarver, *supra* note 18, at 56, 81–92.

29. Murrin, *supra* note 18, at 346–48.

30. James Madison, Convention Notes on Mr. Govr. Morris (July 5, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 530 (Max Farrand ed., 1911).

to reckon with the fact that citizens were loyal to their states, not the nascent, internally divided nation.<sup>31</sup> In the heated debates over representation, delegates' awareness of citizens' strong attachments to their respective states shaped the contours of compromise. In the end, nationalist-minded delegates had no choice but to reckon with the strength of state-level attachments when penning the new and improved structures of the federal government.

Even when advocating for nationally apportioned representation in the Federal Congress, leading mainstream nationalists like James Wilson and James Madison repeatedly voiced their full-throated support for the sustained sovereignty of the individual states.<sup>32</sup> In doing so, they consistently distanced themselves from more overtly extremist opponents of states' rights, like Delaware's George Read, by stating that the institution of proportional representation in the federal government and the continuance of state sovereignty were not at odds in the slightest.<sup>33</sup> As the University of Virginia historian Peter Onuf writes, "[w]hen negotiating terms of union with each other, the nationalist-minded reformers thus had to acknowledge the practical necessity—and even the desirability—of preserving the states."<sup>34</sup>

However, Madison and Wilson's denunciations of anti-states' rights nationalist extremism were insufficient to assuage the concerns of more jealous guardians of states' powers. On June 9<sup>th</sup>, New Jersey's William Paterson vigorously voiced his opposition to the Virginia Plan, proclaiming: "I will never consent to the present system."<sup>35</sup> Paterson's own notes on that same day reveal his genuine concern that the advocates of the Virginia Plan were giving less than satisfactory weight to citizens' state-based political identities. He wrote: "we must follow the People; the People will not follow us—The Plan must be accommodated to the public Mind—consult the Genius, the Temper, the Habits, the Prejudices of the People."<sup>36</sup> For Paterson, whatever the specifics of the form of federal government produced in Philadelphia, it was essential that the government's structure sufficiently take citizens' state-based

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31. Michael J. Klarman, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 253 (2016).

32. See, for example, Wilson and Madison's remarks. *Id.* at 159, 495, 499–500.

33. *Id.* at 136–37, 151, 159, 179, 495, 499–500. For a sampling of Read's extremist nationalist advocacy, see his Convention remarks on June 6<sup>th</sup>. *Id.* at 136–37.

34. Peter S. Onuf, *State Sovereignty and the Making of the Constitution*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 81 (Terence Ball & J. G. A. Pocock eds., 1988).

35. *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 30, at 183.

36. *Id.* at 186.

political identities into account.<sup>37</sup> Paterson viewed such “prejudices” not as obstacles to be overcome, but as realities with which the new Constitution absolutely would have to reckon. Paterson was not at the convention “to sport Opinions of [his] own,” nor to say what was “the best Govt.” in theory or “what ought to be done” ideally. Rather, he was there to help do what was possible—to do “what can be done.”<sup>38</sup> Thus, in Paterson’s opinion, the Convention had to do “that [which] will meet with the Approbation of the People,” and thus “their Will” had to function as the principal “guide” of the delegates.<sup>39</sup>

Like the Virginia Plan’s supporters, Paterson was determined to frame a government that would avoid the fatal weaknesses of the Articles, but he preferred to do so while maintaining what he deemed the popularly legitimate, equal-state representational structure of the Confederation Congress. Thus, his New Jersey Plan proposal of June 15<sup>th</sup> granted each state an equal—single—vote in a unicameral federal legislature while still granting the federal government the necessary powers to regulate interstate and foreign commerce and to pass taxes.<sup>40</sup> Retaining a state-based representational structure while still warding off the enforcement weaknesses of the Articles was, as John Roche puts it, an act of “political acumen,” not a self-interested, narrow-minded defense of “states’-rights.”<sup>41</sup>

Anti-Virginia Plan delegates like Paterson understood themselves to be representing separate, sovereign political communities, and they viewed the United States as being comprised of such distinct political communities.<sup>42</sup> After all, as Gordon Wood writes, “[w]hatever feelings of American nationalism existed, they paled before people’s loyalties to their separate states.”<sup>43</sup> No matter how much historical precedent or political theory James Madison could leverage against their arguments, “the delegates from the small States were not to be moved by argument.”<sup>44</sup> These men were not really arguing from the basis of

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37. *Id.*

38. *Id.*

39. *Id.*

40. *See id.* at 242–43, 250.

41. John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 805–06 (1961).

42. *Id.* at 805–06. This conception of the American polity ran directly counter to that of James Wilson’s theory of popular sovereignty. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 30, at 141. Moreover, it flies in the face of Samuel H. Beer’s contention that the Framers “worked from the premises of the national theory” of American federalism. Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9, 12 (1978).

43. *See* Wood, *supra* note 12, at 68.

44. WARREN, *supra* note 24, at 249–50.

rational logic, political theory, or knowledge of world history; that is, they were not forming their arguments from the sources which Madison had imbibed at Princeton and Montpelier. Rather, they were primarily arguing from the basis of feeling. They were riffing off of their innate sense of attachment to their respective states and their keen awareness of the state-based political character of their fellow citizens.

On July 16<sup>th</sup>, the Convention adopted a compromise—of a nationally apportioned House and a Senate of equal state representation—by a razor thin margin, finally putting to rest the debacle of representation.<sup>45</sup> In the remaining weeks, the Convention primarily concerned itself with allocating sovereign powers between the federal government and the state governments. The Framers agreed on the substance of the federal government's powers rather easily. As Jack Rakove writes, once the Framers had cleared the trying “hurdle” of the representation issue, “the record of debate indicates that the Convention was not hard-pressed to reach a general consensus about the powers of Congress.”<sup>46</sup>

The paucity of vehement disagreement in the Convention regarding the substantive allocations of power—the lack of which is especially apparent when compared to the heat of the representation debates of June and the first half of July—underscores the fact that the divisions between the delegates ultimately centered on the scheme of representation, not the substance of sovereignty.<sup>47</sup> Even if they harbored “righteous anger” towards what they deemed unjust legislation being passed by state legislatures,<sup>48</sup> leading mainstream nationalists like James Madison arrived in Philadelphia concerned not so much “with redivision of responsibilities between the general government and states,” but rather with correcting “the structural and operational

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45. CT Humanities, *The Connecticut Compromise – Today in History: July 16*, CONNECTICUTHISTORY.ORG, <https://connecticuthistory.org/the-connecticut-compromise/#:~:text=On%20July%2016%2C%201787%2C%20the,by%20a%20one%2Dvote%20margin> (last visited Aug. 3, 2021).

46. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996). Madison himself predicted that once the “great difficulty” of the representation issue had been resolved, the other questions facing the Convention—like the allocation of sovereign powers—would prove “surmountable” soon enough. See Madison's remarks on June 19<sup>th</sup> in the Convention. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 30, at 321.

47. John Roche makes a similar point when he writes: “Basic differences of opinion emerged [in the Convention], of course, but these were not ideological; they were *structural*.” Roche, *supra* note 41, at 803. After all, Paterson's Plan provided the federal government with the necessary powers to regulate interstate and foreign commerce and to pass taxes, for example. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 30, at 242–43.

48. See CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 15–16 (2005).

deficiencies of the existing system.”<sup>49</sup> For the sake of preserving the nascent nation of states, strengthening the existing capabilities of the federal government was the task at hand—not radically expanding the substantive scope thereof.

In sum, the design of American federalism and the political reality of 1787 were inextricably linked. Through its structuring of representation within the bicameral federal legislature and its allocation of sovereign power between the federal government and state governments, American federalism provided the federal government with the requisite capabilities to carry out its “few and defined” sovereign powers while simultaneously giving due recognition to the states’ status as the primary, organic units of American political life.<sup>50</sup> The Convention effectively strengthened the bonds of the Union, but did so within the constraints imposed by the state-centric political reality of 1787.

#### *B. Sociopolitical Reality Today: A Far Cry from 1787*

Contemporary political science literature on American political identity indicates that the state-based political identities around which American federalism was originally wrapped have waned to the point of oblivion. The picture around which the federal frame was first placed has been altered in fundamental ways, leaving the utility of the frame in question.

With regards to the primary object of Americans’ political attachments, the nation has subsumed the states. Meanwhile, such enhanced national political identity has coincided with the diversification of the country along myriad lines of difference—differences that are increasingly gaining a political voice and sorting themselves under two partisan banners. Partisans, meanwhile, are territorially sorting themselves into separate localities, not states.

These shifts constitute immense socio-political changes “on the ground,” so to speak, but the basic structural contours of American federalism “on high” persist. The pages to come indicate that American political reality is no longer state-based; we live under a nationalized, partisan political reality. While states retain immense and wide-ranging

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49. Lance Banning, *The Practicable Sphere of a Republic: James Madison, the Constitutional Convention, and the Emergence of Revolutionary Federalism*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 162, 170 (Richard Beeman et al. eds., 1987).

50. THE FEDERALIST NO. 45 (James Madison).

powers,<sup>51</sup> Americans no longer identify with their respective states nor care much about state politics.<sup>52</sup> Moreover, American federalism does not provide sufficient institutional voice to this political reality like it did in relation to the political reality of the late eighteenth century. State boundaries no longer graph onto Americans' subnational feelings of political attachment and community. Localities do.

Why is this a problem? John Dewey wrote that “[h]umanity cannot be content with a good,” such as government, “which is procured from without, however high and otherwise complete that good.”<sup>53</sup> This is especially true for democratically conditioned people. True satisfaction in the realm of democratic politics does not require every political outcome to go one's way—that is a fanciful political reality in a democratic republican polity, where differing opinions are bound to proliferate.<sup>54</sup> That said, democratic political satisfaction does indeed require some sense on the part of the citizenry of inclusion in and control over the political decisions that are reached and enforced. For a citizenry to accept the legitimacy of government, the ballot by itself is insufficient; it must be cast by individuals who feel themselves to be part of a meaningful group—a polity. Even if democratically elected, the legitimacy of any level of government stands to suffer when the electorate does not constitute a self-conscious political community—one whose members are on the whole quite aware of their belonging together in the community. An anti-democratic government faces steep challenges in terms of fostering a feeling among the citizenry of its legitimacy, but so too does a democratic government whose divisions of authority and jurisdiction insufficiently accord with the extents and limits of its citizens' feelings of socio-political communal belonging.

By adequately respecting the nation's state-based political reality at the time of the Constitution's framing, American federalism accorded

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51. See, e.g., Steven Michael Rogers, *Accountability in a Federal System* 2 (Sept. 2013) (Ph.D. dissertation, Princeton University) (DataSpace) [hereinafter *Accountability in a Federal System*].

52. For data on how Americans no longer politically identify with their respective states, see *infra* Part IV. For evidence of Americans' lack of knowledge about the political workings of their own state governments, see *JHU Survey: Americans Don't Know Much About State Government*, JOHNS HOPKINS UNIV. (Dec. 18, 2018), <https://releases.jhu.edu/2018/12/11/jhu-survey-americans-dont-know-much-about-state-government/>. For evidence of Americans' state-level political decision-making being the result of national political forces and their partisan identities, see Steven Rogers, *National Forces in State Legislative Elections*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 207, 217–20 (2016).

53. JOHN DEWEY, *THE POLITICAL WRITINGS* 61 (Debra Morris & Ian Shapiro eds., 1993).

54. See THE FEDERALIST NO. 10 (James Madison) (“As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed.”).

with such feelings. Due to the withering away of state-based political reality, it no longer does.

#### IV. THE NATIONALIZED REALITY OF AMERICAN POLITICS

“Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States.”

James Madison, *The Federalist No. 46*<sup>55</sup>

The state-based political identities that undergirded the creation of American federalism have faded to a considerable degree. An American’s state of residence is no longer the primary, explicit basis upon which she constructs her sense of her political self—her political identity. Rather, her political identity is chiefly nationalist and partisan. When acting in her political capacities, she does not understand herself to be a Pennsylvanian, for example, so much as she understands herself to be an American and a Republican or a Democrat. The structures of American federalism have been failing to respond to this changing reality of American political identity.

##### A. *The Retreat of State-Based Identity*

In modern-day America, states still have borders, but those borders neither embody nor bound Americans’ senses of organic, political belonging and obligation.<sup>56</sup> Americans’ political attachment to the nation outstrips their political attachments to their states. The 1996, 2004, and 2014 editions of the General Social Survey conducted by the National Opinion Research Center at the University of Chicago, for example, underscore the states’ diminished contribution to Americans’ political identities.<sup>57</sup> In each of these years, between eighty and ninety percent of respondents reported feeling “close” to America, while only sixty and seventy percent did so vis-à-vis their respective states.<sup>58</sup> Writing in *The Federalist*, Alexander Hamilton deemed it “a known fact in human nature, that its affections are commonly weak in proportion to the

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55. THE FEDERALIST NO. 46 (James Madison).

56. See generally CARA J. WONG, BOUNDARIES OF OBLIGATION IN AMERICAN POLITICS: GEOGRAPHIC, NATIONAL, AND RACIAL COMMUNITIES (2010).

57. GSS DATA EXPLORER, *Search GSS Variables: CLSEUSA and CLSESTAT*, <https://gssdataexplorer.norc.org/> (last accessed Aug. 3, 2021).

58. *Id.*; WONG, *supra* note 56, at 77–78.

distance or diffusiveness of the object.”<sup>59</sup> Contrary to such assumptions, in the modern United States, the more removed nation exerts a greater hold on the sentiments of the American people than the more immediate states. As Cara Wong writes, “the size of the circle does not always determine an individual’s sense of belonging within it.”<sup>60</sup>

Daniel Hopkins’ 2018 book, *The Increasingly United States: How and Why American Political Behavior Nationalized*, provides more recent evidence that, with respect to our “imagined” geographic communities, the nation is far more central to the American imagination than the states.<sup>61</sup> Through a variety of studies, Hopkins found that Americans identify far more with America than their respective states.<sup>62</sup> Moreover, while Americans’ state-based identities are far weaker than their national identities, the content of their state identities is also much less politically salient.<sup>63</sup>

Non-quantitative social science bears out Hopkins’ findings regarding the weakening of Americans’ state-based political identities—an aspect of socio-political reality which so clearly served as an original building block for our constitutional order. For example, University of Buffalo Law Professor James A. Gardner’s 1992 *Michigan Law Review* article documenting “the poverty of state constitutional discourse” presents a key example of the loss of—or at least the immense reduction of—the states’ statuses as organic political entities in American political life.<sup>64</sup> As defined by Professor Gardner, constitutional discourse entails “a language and set of conventions that allow a participant in the legal system to make an intelligible claim about the meaning of the constitution.”<sup>65</sup> In providing the tools by which legal participants debate the meaning of their state’s constitution, state constitutional discourse provides opportunities for debating the values and commitments for

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59. THE FEDERALIST NO. 17 (Alexander Hamilton). Madison made a similar point in *Federalist No. 46*, writing that “on the side of [the states] . . . the popular bias may well be expected most strongly to incline.” THE FEDERALIST NO. 46 (James Madison).

60. WONG, *supra* note 56, at 78.

61. DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* 171, 178–84 (2018). My reference to the nation and the states as “imagined” communities stems from Benedict Anderson’s famous definition of the nation as an “imagined . . . community.” BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6 (3d ed. 2006). While Anderson used the phrase to refer to nations specifically, applying it to states is quite acceptable. See e.g., WONG, *supra* note 56, at 4.

62. HOPKINS, *supra* note 61, at 171, 178–84.

63. *Id.* at 192–93.

64. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992).

65. *Id.* at 767 (emphasis omitted).



which the state community stands.<sup>66</sup> Thus, according to Gardner, “constitutional discourse is an integral aspect not only of constitutional law as a body of positive legal authority, but of societal self-identification as well.”<sup>67</sup> Therefore, the fact that state constitutions routinely fail to live up to this very task ought to give us pause. The weakness of state constitutional discourse points to the inability of the states to garner genuine popular political attachment and loyalty. As Gardner writes:

[W]hatever currency the notion of local variations in character and values might once have had, it is a notion that no longer describes in any realistic way the polities of the present day states. Regardless of what they may once have been, Americans are now a people who are so alike from state to state, and whose identity is so much associated with national values and institutions, that the notion of significant local variations in character and identity is just too implausible to take seriously as the basis for a distinct constitutional discourse.<sup>68</sup>

When Americans identify far more with their shared national polity than their respective state polities, it becomes more likely that state-level politics will merely serve as sub-national stages upon which the real, national political drama can play out. Despite states’ retention of considerable sovereign authority over a vast array of consequential political matters,<sup>69</sup> voters increasingly judge their state legislators not based on their performance, but rather based on how these legislators align themselves with national political forces.<sup>70</sup> Thus, rather than “being local affairs, state legislative elections are dominated by national politics.”<sup>71</sup> On a similar note, Hopkins has found that the correlation between voters’ presidential voting decisions and gubernatorial voting decisions has increased substantially in the past two decades.<sup>72</sup>

In sum, voters are approaching state politics not so much as Pennsylvanians or New Jerseyans, but as national Republicans and national Democrats.

It is essential to also note that the substantive content of these partisan political identities—Republican and Democrat—are increasingly homogenizing across state boundaries. Having two distinct

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66. *Id.* at 768–70, 815–16.

67. *Id.* at 770.

68. *Id.* at 818.

69. *See, e.g., Accountability in a Federal System, supra* note 51.

70. *See Rogers, supra* note 52, at 220–22; *see also HOPKINS, supra* note 61, at 19.

71. *Rogers, supra* note 52, at 222.

72. *HOPKINS, supra* note 61, at 48–51.

partisan labels under which the vast majority of Americans politically congregate is nothing new to American politics. In addition, the political science literature has provided a number of arguments regarding the benefits of party labels to induce responsive political systems.<sup>73</sup> However, the extent to which each label entails the same policy positions across state lines is reaching unprecedented levels. In the past, the cross-regional and cross-state variation in policy stances held under the same party label amounted to the implicit assertion of state-based political identity within our political system.<sup>74</sup>

Today, such cross-state intra-party differences are fading: “Like McDonald’s, today’s major parties are thoroughly nationalized brands.”<sup>75</sup> Although 1990–2000s state legislative roll-call data from Boris Shor and Nolan McCarty demonstrate that state politicians are by no means wholly unresponsive to the particularities of their states,<sup>76</sup> voters largely perceive the parties as nationalized, ideologically homogenous blocs—a view that is not wholly unreasonable.<sup>77</sup> State parties are increasingly homogenizing in their policy positions, and voters’ perceptions of the remaining differences between state and national parties are negligible at best.<sup>78</sup> Also, atop state parties’ increased uniformity in intra-party policy stances across the states, state parties increasingly are taking up the same—often culturally-charged—issues.<sup>79</sup> From issues like abortion to gay rights, “the state parties now shift their gaze in unison.”<sup>80</sup>

Such enhanced cross-state homogenization of partisanship in America reflects legal scholar Larry Kramer’s insight that “[t]he natural fault line between state and federal governments [has been] replaced to a considerable degree by fissures based on ideology and party affiliation.”<sup>81</sup> At the time of the framing, the separate states truly did embody separate, organic political communities. Today, as Malcolm Feeley and Edward Rubin write, labeling the separate states as organic political communities would dilute the concept of political community “to the point of insignificance.”<sup>82</sup> Their assertion—that “the United States

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73. See *id.* at 145–46.

74. See JOEL PADDOCK, 9 STATE & NATIONAL PARTIES & AMERICAN DEMOCRACY 48–49 (Steven E. Schier ed., 2005).

75. HOPKINS, *supra* note 61, at 143.

76. Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 543–46 (2011).

77. HOPKINS, *supra* note 61, at 143.

78. *Id.* at 168.

79. *Id.* at 153–59.

80. See *id.* at 159.

81. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1492 (1994).

82. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944 (1994).

has one political community, and that political community is the United States”—seems to be growing more true with time.<sup>83</sup> American federalism increasingly leaves us with subnational stages upon which national-level partisan conflicts can play out rather than subnational forums upon which particularized subnational issues can be worked out. Columbia Law School’s Jessica Bulman-Pozen aptly termed this phenomenon “Partisan Federalism” in a 2014 *Harvard Law Review* article.<sup>84</sup> In light of the fact that “Democratic and Republican, not state and national, are today’s political identities,” says Bulman-Pozen, the key role that American federalism—i.e., the existence of the states—plays today is its provision of “durable and robust scaffolding for partisan conflict.”<sup>85</sup> Bulman-Pozen celebrates the fact that American federalism enables “Americans who feel alienated from the national government [to] turn to the states and know that there are government institutions controlled by their team.”<sup>86</sup> Federalism, in short, holds out the prospect of providing partisan losers temporary consolation prizes.

Such nationalized, partisan federalism—documented by the likes of Hopkins and Rogers and articulated so well by Bulman-Pozen—constitutes a degradation of American federalism. American federalism was a response on the part of the Framers to the state-based political reality—and the state-based political identities that comprised it—that defined the early republic. As the bifurcated state-national political identity upon which the federal polity was premised increasingly gives way to a partisan-national identity, the structures of that polity will fail to mount an adequate response to this changed—and continually changing—socio-political reality of the nation. That is, if “Democrat” and “Republican” are today’s principal political identities, the current state-national structural interplay of American federalism is ill-equipped to constructively channel the energies and demands of these political identities as it did with respect to the state-based political identities at the time of the Constitution’s framing. Indeed, it seems that this troubling failure is already underway.

#### V. THE GROWING FAILURE OF AMERICAN FEDERALISM

“Fit your shoes to your feet . . . The constitutions imagined by philosophers are for Utopia, not for any actual, living, breathing people.

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83. *Id.* at 945.

84. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1078, 1081 (2014).

85. *Id.*

86. *Id.* at 1118.

You must take the state as it is, and develop your governmental constitution from it, and harmonize it with it.”

Orestes Brownson, *The American Republic* (1866)<sup>87</sup>

Today, the relationship between the nationalized, partisan political reality of America and the governance structures of American federalism is akin to that of feet and a pair of old shoes that no longer fit. Our political reality is crying out for a better institutional fit. American federalism does not contain, harness, and mold the energies of these political identities as well as it did with respect to the state-centered political identities of the 1780s over 230 years ago. The inadequacy of American federalism in meeting the task of coping with America’s partisan nationalized political reality grows apparent when we take stock of (1) the growing strength of partisan political identities and (2) the simultaneous partisan incoherence of the states. The “Democrat” and “Republican” political identities are growing increasingly entrenched, but state boundaries are not sufficiently aligned with the trench lines. One could imagine a situation in which individual states are emerging as clear and overwhelming members of the red or blue team. In reality, localities are doing this to a far greater degree than the states are. Thus, if we are to allow these partisan identities to flower, the states do not provide fertile institutional soil. Instead, local jurisdictions like counties seem to hold out the hope for gaining a better institutional grasp on America’s contemporary political reality.

A. *The Growing Strength of Partisan Political Identity and the Case of the Keystone State*

The strengthening of “Republican” and “Democrat” as the defining political identities of contemporary American politics is undergirded by the fact that opposing social groups are increasingly sorting under the two separate party labels. Partisan divides are increasingly overlapping with America’s many deep-seated social divides.<sup>88</sup> Alongside the enhanced social sorting into each of the partisan camps, America’s two partisan political identities seem to have been simultaneously strengthened in the past few decades by the increased political salience of the “culture wars.”<sup>89</sup> As Christopher Ellis and James A. Stimson noted

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87. ORESTES A. BROWNSON, *THE AMERICAN REPUBLIC: ITS CONSTITUTION, TENDENCIES, AND DESTINY* 185–86 (1866).

88. *See generally* MASON, *supra* note 5 (providing background on how political divides are merging with social divides).

89. CHRISTOPHER ELLIS & JAMES A. STIMSON, *IDEOLOGY IN AMERICA* 118, 122 (2012).

in their 2012 work, *Ideology in America*, “cultural preferences were of little relevance to either elite or mass political conflict until at least the mid-1980s.”<sup>90</sup> Indeed, “[c]ultural preferences were unrelated to partisan choice for much of the 20<sup>th</sup> century but have become progressively more relevant since about 1990.”<sup>91</sup> A review of the effects of specific battles of the “culture war” on partisan attachments, as well as data on wider voting trends bear this point out.

A variety of cultural conflicts—over abortion, gun rights, gay rights, criminal justice, religious freedom, etc.<sup>92</sup>—have helped bring about “significant political change by producing slow, steady shifts in the partisan complexion of the electorate” in accordance with Edward G. Carmines and James A. Stimson’s “issue evolution” theory of electoral change.<sup>93</sup> Take the example of abortion. As Democratic elites have progressively grown more pro-choice and Republican elites more pro-life,<sup>94</sup> abortion has morphed into a politically “partisan issue,” with each party firmly planting its flag on opposite sides of the debate.<sup>95</sup> Pro-choice and pro-life voters slowly but surely sorted themselves between the Democratic and Republican camps from the 1970s to 1990s.<sup>96</sup> This distinction has grown so strong that some leading national politicians have framed a voter’s stance on abortion rights as a litmus test for being a member of the party in recent years.<sup>97</sup> On a related yet distinct note, Christopher Achen and Larry Bartels have found that partisans with weak opinions regarding abortion—males in particular—have changed those opinions over time to conform with their party’s increasingly unanimous stance on a particular side of the abortion divide.<sup>98</sup> That is, while strong pro-life Democrats have tended to flee to the Republican fold, more tepid pro-life Democrats have shifted to the pro-choice camp, thereby harmonizing their somewhat weak abortion attitude with their

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90. *Id.*

91. *Id.*

92. For a particularly helpful historical account of the major cleavages of America’s culture wars, see ANDREW HARTMAN, *A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS* (2d ed. 2019). See also KEVIN M. KRUSE & JULIAN E. ZELIZER, *FAULT LINES: A HISTORY OF THE UNITED STATES SINCE 1974* (2019).

93. Edward G. Carmines & James A. Stimson, *Issue Evolution, Population Replacement, and Normal Partisan Change*, 75 AM. POL. SCI. REV. 107, 108 (1981).

94. Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 AM. J. POL. SCI. 718, 723–24 (1997).

95. *Id.* at 724.

96. *Id.* at 732.

97. See David French, *Bernie Sanders’s Abortion Comments and the Unnecessary Intolerance of the Culture War*, DISPATCH (Feb. 11, 2020), <https://frenchpress.thedispatch.com/p/bernie-sanderss-abortion-comments>.

98. CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 260–64 (2017).

stronger partisan identity.<sup>99</sup> Therefore, cultural conflicts increasingly have the power to both shift and shape the policy content baked inside Americans' partisan political identities.

Analyzing the shifts in the partisan makeup of a particular state can help make these somewhat abstract developments more concrete. Changing patterns of partisanship in the Commonwealth of Pennsylvania underscore the fact that “cultural cleavage” has come to play a central role in defining American political conflict and the partisan identities that comprise it.<sup>100</sup> In her 2009 book, *The Realignment of Pennsylvania Politics Since 1960*, Renée Lamis uses county-level voting data in the Keystone State to track the slow, sustained growth of the centrality of cultural conflict in determining Pennsylvanians' electoral behavior.<sup>101</sup> While comprising the most affluent region in the state,<sup>102</sup> the culturally progressive Philadelphia suburbs grew increasingly Democratic throughout the 1980s–2000s. During the same time period, the culturally conservative southwestern Pittsburgh-area counties shifted from the Democratic Party to the Republican Party.<sup>103</sup> These trends continued apace during the 2010s.<sup>104</sup> The disputes of the “culture

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99. *Id.* at 258–64.

100. See generally RUSSELL J. DALTON, POLITICAL REALIGNMENT: ECONOMICS, CULTURE, AND ELECTORAL CHANGE 181–206 (2018); Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POLITICS 1 (2009).

101. See RENÉE M. LAMIS, THE REALIGNMENT OF PENNSYLVANIA POLITICS SINCE 1960: TWO-PARTY COMPETITION IN A BATTLEGROUND STATE 13–16, 75, 175–87 (2009).

102. See Nick Falsone, *Ranking the 35 Most Affluent Pa. Counties Based on Per Capita Personal Income*, LEHIGH VALLEY LIVE, [https://www.lehighvalleylive.com/news/2018/07/ranking\\_the\\_35\\_most\\_affluent\\_p.html](https://www.lehighvalleylive.com/news/2018/07/ranking_the_35_most_affluent_p.html) (last updated May 17, 2019).

103. LAMIS, *supra* note 101, at 75, 175–87.

104. See Jonathan Lai & Jared Whalen, *Pennsylvania, Polarized*, PHILA. INQUIRER (Feb. 7, 2019), <https://www.inquirer.com/politics/inq/pennsylvania-polarization-election-results-democrats-republicans-trends-map-20190207.html>; see also Maddie Hanna & Michaelle Bond, *In Suburbs, a Shift, and a Path to Victory*, PHILA. INQUIRER (Sept. 3, 2016), [https://www.inquirer.com/philly/news/politics/presidential/20160904\\_In\\_suburbs\\_a\\_shift\\_and\\_a\\_path\\_to\\_victory.html](https://www.inquirer.com/philly/news/politics/presidential/20160904_In_suburbs_a_shift_and_a_path_to_victory.html). For more recent data on the growing southwest-southeast divergence (but in terms of party registration rather than presidential voting), see Nick Field, *Voter Registration Update: Pa.'s Blue and Red Divide Deepens as April Primary Approaches*, PA. CAPITAL-STAR (Mar. 11 2020), [https://www.penncapital-star.com/government-politics/voter-registration-update-pa-s-blue-and-red-divide-deepens-as-april-primary-approaches-analysis/?utm\\_source=First+Read+Newsletters&utm\\_campaign=02b575ae2bEMAIL\\_CAMPAIGN\\_2020\\_03\\_11\\_03\\_00&utm\\_medium=email&utm\\_term=0\\_252d27c7d1-02b575ae2b-34774028&mc\\_cid=02b575ae2b&mc\\_eid=2d10bfdeb](https://www.penncapital-star.com/government-politics/voter-registration-update-pa-s-blue-and-red-divide-deepens-as-april-primary-approaches-analysis/?utm_source=First+Read+Newsletters&utm_campaign=02b575ae2bEMAIL_CAMPAIGN_2020_03_11_03_00&utm_medium=email&utm_term=0_252d27c7d1-02b575ae2b-34774028&mc_cid=02b575ae2b&mc_eid=2d10bfdeb). It is worth noting that the growing divergence appears rather steady, although certain candidates like Barack Obama and Donald Trump seem to have tapped into the cultural disagreements that are stretching the gap more so than others, such as Mitt Romney. Perry Bacon Jr., *How the 2016 Election Exposed America's Racial and Cultural Divides*, NBC NEWS (Nov. 11, 2016, 11:16 AM), <https://www.nbcnews.com/politics/white-house/how-2016-election-exposed-america-s-racial-cultural-divides-n682306>. For insights on President

wars” are playing an increasingly large role in drawing our partisan battle lines in Pennsylvania and other states.<sup>105</sup> Partisan conflict can operate along different axes—slavery vs. anti-slavery; pro-government action economic liberals vs. government wary conservatives; cultural liberals or progressives vs. cultural conservatives. In Pennsylvania, as in its fellow states throughout the nation, the economic axis now co-exists with an ever-strengthening cultural axis.

### B. Nonsensical States

Thus, our nationalized, partisan political identities have grown stronger in recent decades amidst (1) greater partisan capture of social divisions and (2) the enhanced political salience of cultural conflict. The structures of American federalism do not provide a healthy institutional framework to cope with this contemporary partisan political reality. As partisan divisions constitute the chief markers of political identity, it would seem that homogenous “red” and “blue” states would be preferable. That is, each state would be more or less dominated by a given partisan team, allowing that team to live in accordance with its partisan policy preferences. Alas, neither state-level absolute partisan homogeneity nor the rate of state-level partisan homogenization comes close to matching the same two measures on more localized levels of government like state legislative districts and counties.

Localities, not states, provide the strongest territorial embodiment of partisan divisions—of today’s political reality. Centering greater sovereign authority in localities would help bring our formal institutions of government into greater alignment with contemporary political reality.

#### 1. Geographic Partisan Sorting: A Local Affair

An analysis of electoral competitiveness measures like Ranney and HVD scores provides a good starting point for a discussion of the strength of localized partisan sorting. In their 2012 *State Politics & Policy Quarterly* journal article, “Two Distinct Concepts: Party Competition in Government and Electoral Competition in the American States,” Gregory

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Trump’s continued acceleration of this growing southwest-southeast PA divide, see Holly Otterbein, *Pennsylvania Suburbs Revolt Against Trump*, POLITICO (Nov. 6, 2019, 9:36 PM), <https://www.politico.com/news/2019/11/06/pennsylvania-suburbs-trump-067078>.

105. For more on this, see Carr et al.’s review of the increasing “culture war” content of state party platforms. Matthew A. Carr et al., *Origins of the Culture Wars: Social Issues in State Party Platforms, 1960-2014* (Sept. 2016) (unpublished working paper) (on file with Columbia University).

Shufeldt and Patrick Flavin point out that Ranney and HVD scores are two very distinct measures of partisan competitiveness in America's state governments.<sup>106</sup> The Ranney index measures "competition between [the two] parties for control of state government"—i.e., state legislatures and governorships.<sup>107</sup> It does so by taking into account the partisan makeup of state legislative branches, the partisan control of the governor's office, and the period of time during which these two distinct measures of control persist.<sup>108</sup> The HVD index, on the other hand, measures competition between the two parties for *individual* state legislative districts, taking into account average margins of victory in individual district races and the prevalence of uncontested seats.<sup>109</sup> Thus, the Ranney index provides a state-level score of partisan competitiveness, while the HVD index provides a state legislative district-level score of partisan competitiveness.<sup>110</sup>

The graph below displays the average HVD scores of all fifty states from 1970–2011.<sup>111</sup> The downward trend in HVD scores provides a clear picture of how the competitiveness of individual state legislative districts is decreasing—i.e., the districts are becoming increasingly homogenous in their partisan makeup.

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106. Gregory Shufeldt & Patrick Flavin, *Two Distinct Concepts: Party Competition in Government and Electoral Competition in the American States*, 12 STATE POL. & POL'Y Q. 330, 331 (2012).

107. *Id.*

108. *Id.*

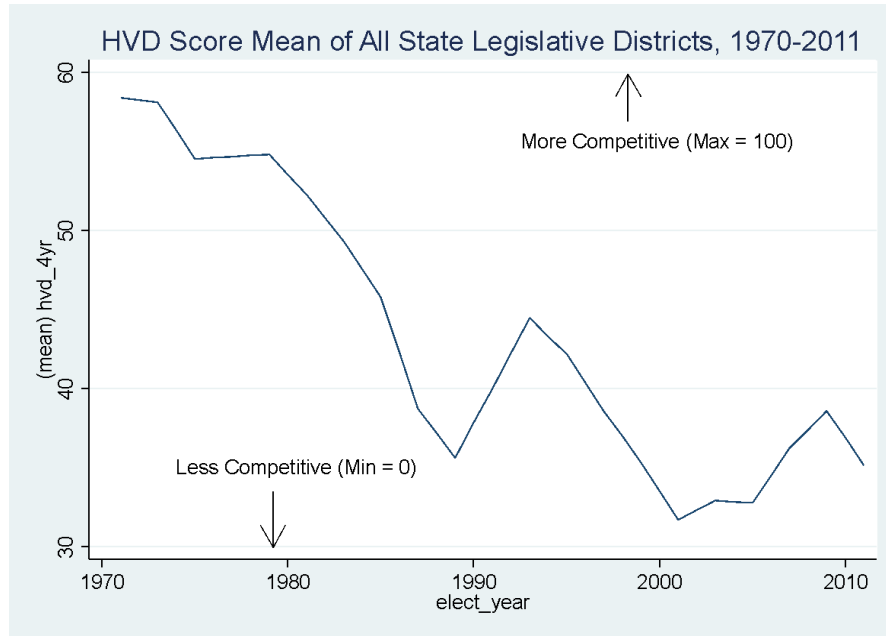
109. *Id.*

110. *See id.*

111. *See id.* at 336. I produced HVD and Ranney score graphs using Carl Klarner's datasets available on *Harvard Dataverse*. *See* Carl Klarner, *Other Scholars' Competitiveness Measures*, HARVARD DATAVERSE (2013), <https://doi.org/10.7910/DVN/QSDYLH>. I produced my graphs with the STATA software available at the Data and Statistical Services ("DSS") Lab at Princeton University's Firestone Library.



## 2. HVD Score Mean of All State Legislative Districts, 1970-2011



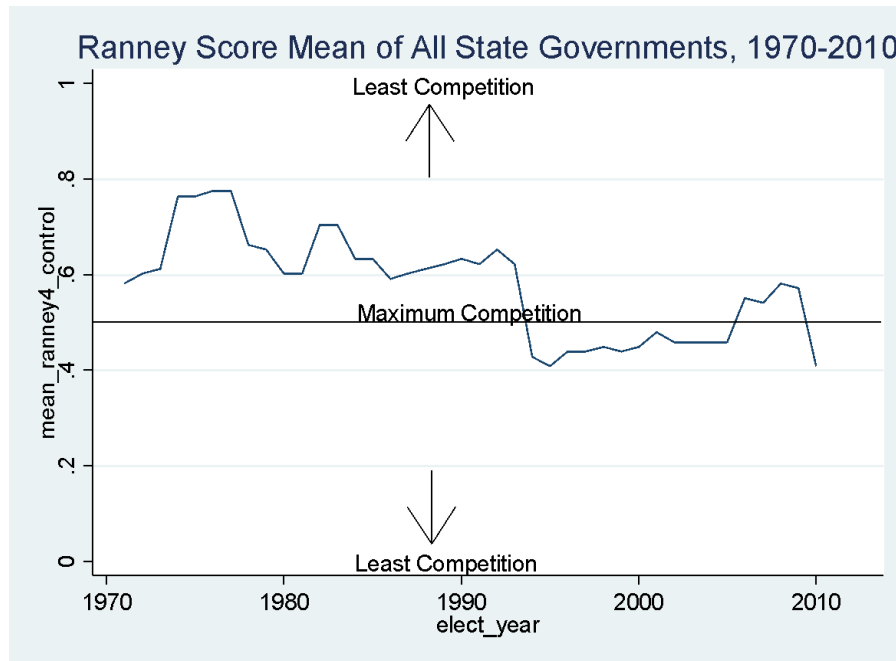
It is important to note that the decline in competitiveness—i.e., the rise in partisan homogeneity—of individual state legislative districts shown above is by no means solely a function of gerrymandering. On the extremely static level of the county, whose borders are not changed every ten years in politically charged ways, researchers have found stronger spatial polarization—i.e., geographic segregation—than on the level of the state.<sup>112</sup> This finding mirrors the downward progression of HVD scores. Localized partisan sorting is substantial and real; it is not solely an artificial consequence of partisan legislators' district-drawing malpractice.

The Ranney scores similarly indicate that trends of geographic partisan sorting are not as strong on the state level as they are on the state legislative district level. The graph below averaging out the fifty states' Ranney scores from 1970–2010 demonstrates that partisan competition has seemingly *increased*, in fits and starts, at the state

112. See Ron Johnston et al., *Spatial Polarization of Presidential Voting in the United States, 1992–2012: The “Big Sort” Revisited*, 106 ANNALS AM. ASS'N GEOGRAPHERS 1047, 1052–53 (2016).

level.<sup>113</sup> That is, the states have grown less homogenous in terms of their partisan makeup.

### 3. Ranney Score Mean of All State Governments, 1970-2010



The states are not capturing partisan sorting nearly as well as state legislative districts are. That is, partisans are territorially sorting more so into localities, not states. As partisan political identities are strengthening, partisan divisions are finding their territorial embodiment more so on the local level than the state level.

#### C. *Where Do We Go from Here?*

The upshot is that if late-18<sup>th</sup> century state-based political identities have faded and the subnational governance structures those identities helped spawn—the states—do not give optimal institutional embodiment

113. It is important to point out here that the competitiveness scores provided by the two indexes run along different continuums. The HVD scores fall along a straightforward 0–100 scale, where 0 is least competitive (a situation of one-party dominance within a district) and 100 is most competitive. See Shufeldt & Flavin, *supra* note 106, at 338. The Ranney scores, meanwhile, span from 1 (Democratic dominance) to .5 (perfect competition) to 0 (Republican dominance). *Id.* at 331.

to the dominant, partisan political identities of today, it seems necessary to ask if a structural change is in order. Are there certain institutional changes within the realm of the possible that could give a better voice to our partisan political identities? The above discussion of localized partisan sorting indicates that providing greater sovereign power to localities could be one such change. In the pages to come, I flesh out the details of this pro-localization proposal, starting with an overview of how our continuing to vest so much subnational power with the states has already begun to chip away at the legitimacy of the American government at both the state and national levels.

#### VI. SIGNS OF STRAIN AND OPENINGS FOR CHANGE

Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the Old World, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New, in another shape that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.

James Madison, *The Federalist No. 45*<sup>114</sup>

There are epochs in human affairs when novelty even is useful. If a general opinion prevails that the old way is bad, whether true or false, and this obstructs or relaxes the operations of the public service, a change is necessary, if it be but for the sake of change. This is exactly the case now. It is a universal sentiment that our present system is a bad one, and that things do not go right on

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114. THE FEDERALIST NO. 45 (James Madison).

this account. The measure of a Convention would revive the hopes of the people and give a new direction to their passions.

Alexander Hamilton, Letter to James Duane, 1780<sup>115</sup>

In this section, I use the example of Pennsylvania once more to highlight the fact that the inability of the states to capture the relevant political identities of today is already beginning to manifest itself in real ways. In the realm of criminal justice, in particular, locally elected “progressive prosecutors” like Philadelphia District Attorney Larry Krasner are effectively negating state laws via non-enforcement. This is a highly consequential development. As Montesquieu wrote in Book Three of *The Spirit of the Laws*, “in a popular government when the laws have ceased to be executed, as this can come only from the corruption of the republic, the state is already lost.”<sup>116</sup> I complement my discussion of the Krasner administration with a review of the growing calls for the abolition of—or subversion of—the Electoral College, an institution whose legitimacy was premised on a state-based political reality that has since faded. Therefore, the states’ loss of political salience in the minds of Americans has already begun to hamper the legitimacy of the American government on both the state and national levels.

Having underscored the fact that legitimate state authority has already begun to break down in its most consequential sovereign realm—criminal justice—and to diminish the legitimacy of the federal government itself—the presidency in particular—I discuss the potential state constitutional changes by which real localized devolution might come to fruition, and I specify some of the added benefits of enabling localities to have greater sovereign authority with regards to “culture war”-type issues discussed above.

A. *American Federalism’s Disconnect with Political Reality: The Case of Philadelphia, Pennsylvania and Criminal Justice*

Tensions stemming from the disconnect between American federalism and the geographically localized concentration of partisan political identities have already begun to organically manifest themselves. In fact, such manifestations are bringing into question

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115. Letter from Alexander Hamilton to James Duane (1780), in KEITH E. WHITTINGTON, *AMERICAN POLITICAL THOUGHT: READINGS AND MATERIALS* 151, 153 (2017).

116. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 22 (Anne M. Cohler et al. eds. & trans., 17th ed. 2013).

states' authority within what has historically been their most powerful realm of sovereignty under our federal system: criminal justice. In *Federalist No. 17*, Alexander Hamilton predicted that the states' power of administering criminal justice would prove to be a principal "source of popular obedience and attachment" of Americans to their respective states.<sup>117</sup> As the states become less meaningful, organic political communities, the legitimacy of the states holding this most awesome power of government—the power to deprive an individual of his liberty—is increasingly under dispute. Such developments cast doubt on the contemporary functionality of American federalism. Developments in Pennsylvania, once again, help illuminate this point.

In November of 2017, civil rights defense attorney Larry Krasner won the race for Philadelphia District Attorney ("DA") by a landslide after he had bested his competition in the Democratic primary in a similarly commanding fashion six months prior.<sup>118</sup> Despite spending his legal career becoming a "completely unelectable" DA candidate as he often joked, the reform-minded Krasner won a compelling democratic mandate from Philadelphians.<sup>119</sup> The reforms that garnered Krasner so much electoral support are telling. Krasner ran on stretching prosecutorial discretion to its absolute limits, even refusing to enforce significant swaths of Pennsylvania state criminal law wholesale.<sup>120</sup>

Granted, Pennsylvania courts have found the scope of prosecutorial discretion to be quite expansive, particularly with respect to the decision of whether or not to bring criminal charges in the first place.<sup>121</sup> That said, prosecutorial discretion cannot be so wide as to strip statutes of their status as good law. As Pennsylvania Supreme Court Justice Nicholas Papadakos pointed out in his 1986 *Parker White Metal Co.* dissent, "the legislature has the exclusive power to pronounce which acts are crimes,

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117. THE FEDERALIST NO. 17 (Alexander Hamilton).

118. See Chris Brennan & Aubrey Whelan, *Larry Krasner Wins Race for Philly DA*, PHILA. INQUIRER (Nov. 7, 2017), <https://www.inquirer.com/philly/news/politics/city/larry-krasner-wins-race-for-philly-da-20171107.html>. For more on Krasner's primary win, see Chris Brennan, *Krasner's Anti-Establishment Push for DA Wins Over Splintered Dems*, PHILA. INQUIRER (May 17, 2017), <https://www.inquirer.com/philly/news/politics/city/Krasners-anti-establishment-push-for-DA-wins-over-splintered-Dems.html>.

119. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 96, 101 (2019).

120. See *Philadelphia DA Larry Krasner's Revolutionary Memo*, INTERCEPT (Mar. 20, 2018, 9:21 AM), <https://theintercept.com/document/2018/03/20/philadelphia-da-larry-krasners-revolutionary-memo/>. I interned part-time at the Philadelphia District Attorney's Office from August 2018 to May 2019.

121. See, e.g., *Commonwealth v. Brown*, 196 A.3d 130, 145–46 (Pa. 2018).

to define crimes, and to fix the punishment for all crimes.”<sup>122</sup> Non-legislators—including executive officers like district attorneys—do not have the power to give blanket pronouncements regarding what constitutes a criminal, chargeable offense. The prosecutor has broad discretion within the confines of individual cases, but he does not have the power to effectively legislate. Krasner, however, ran on a platform premised on blanket non-enforcement of various areas of Pennsylvania state criminal law—a platform perhaps best termed as quasi-legislation via executive negation.<sup>123</sup>

In office, Krasner has instructed his Assistant District Attorneys (“ADAs”) not to charge a variety of offenses enumerated under the Pennsylvania Criminal Code. In a February 2018 memorandum, he instructed prosecutors not to charge prostitution cases provided that the offender had not already committed the offense three times.<sup>124</sup> Depending on whether the offense is a first, second, or third offense, meanwhile, Pennsylvania state law characterizes prostitution as a misdemeanor or felony,<sup>125</sup> recommending a maximum prison sentence of 1–7 years.<sup>126</sup> The same Krasner memorandum instructed prosecutors to charge retail thefts of below \$500 as summary offenses provided that the offender does not exhibit “a very long history of theft and retail theft convictions.”<sup>127</sup> Unless the value of the object stolen falls below \$150, Pennsylvania state criminal law classifies retail thefts falling within the monetary range outlined in Krasner’s memo as either a first-degree misdemeanor or third-degree felony, depending on whether the defendant is a repeat offender.<sup>128</sup> Per Pennsylvania state sentencing guidelines, such offenses recommend a maximum prison sentence of 2–7 years.<sup>129</sup> Lastly, the memo explicitly called on prosecutors to “[m]ake plea offers *below the bottom end* of the mitigated range of the PA Sentencing Guidelines for most crimes.”<sup>130</sup>

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122. Commonwealth v. Parker White Metal Co., 515 A.2d 1358, 1373 (Pa. 1986) (Papadakos, J., dissenting).

123. See *Real Change in the DA’s Office*, LARRY KRASNER FOR DIST. ATT’Y, <https://krasnerforda.com/platform> (last visited Aug. 3, 2021).

124. *Philadelphia DA Larry Krasner’s Revolutionary Memo*, *supra* note 120.

125. 18 PA. STAT. AND CONS. STAT. § 5902 (West 2012).

126. 18 PA. STAT. AND CONS. STAT. § 1104 (West 1973); *id.* § 1103 (West 1973) (amended 1995).

127. *Philadelphia DA Larry Krasner’s Revolutionary Memo*, *supra* note 120.

128. 18 PA. STAT. AND CONS. STAT. § 3929 (West 2014).

129. 18 PA. STAT. AND CONS. STAT. § 1104 (West 1973); *id.* § 1103 (West 1973) (amended 1995).

130. *Philadelphia DA Larry Krasner’s Revolutionary Memo*, *supra* note 120 (emphasis added).

My brief account of the gap between the prosecutorial practices of the Krasner administration and Pennsylvania state criminal law is meant to underscore the fact that Philadelphians elected a man to the city's chief law enforcement role who pledged to insulate them from state laws they deemed harmful, unjust, illegitimate, and the like. When the authority of state law breaks down within its most important area of sovereignty, perhaps then it is time to think more critically about the scope of the sovereignty of that political entity. In other words, my statistically saturated insinuation of the waning coherence of the states in the face of contemporary political realities is not a shot in the theoretical dark; sovereign powers of the states are already coming under fire from disaffected local residents in the real world.

*B. The Electoral College under Fire*

The states' lack of political salience has not only begun to throw the rule of state law into dispute in some locales; it also is increasingly bringing the legitimacy of U.S. presidential elections into question. The source of contention at the presidential level is the Electoral College, which allots each state the same number of presidential electors as it has in its total Congressional delegation.<sup>131</sup> In comparison to a popular presidential election on the national scale, the Electoral College creates a considerable—and growing—bias in favor of less populous states.<sup>132</sup>

The growing legitimacy problem for the Electoral College stems from the fact that the artificial overrepresentation of small states largely results in the artificial overrepresentation of Republican electoral strength—i.e., a seemingly unfair partisan advantage.<sup>133</sup> “Strong Republican” states—per Gallup's criteria<sup>134</sup>—enjoy a significant advantage in the Electoral College over others.<sup>135</sup> According to Sean Darling-Hammond, strong Republican states “have 12 percent more representation than ‘strong Democratic’ states, at least 25 percent more representation than ‘weak Democratic’ or ‘weak Republican’ states, and

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131. *Distribution of Electoral Votes*, NAT'L ARCHIVES (Mar. 6, 2020), <https://www.archives.gov/electoral-college/allocation>.

132. See Sean Darling-Hammond, *The Electoral College Is Even More Biased than You Think. But Democrats Can Beat It.*, NATION (Jan. 19, 2017), <https://www.thenation.com/article/archive/the-electoral-college-is-even-more-biased-than-you-think-heres-how-democrats-can-beat-it/>.

133. *Id.*

134. See Jeffrey M. Jones, *Red States Outnumber Blue for First Time in Gallup Tracking*, GALLUP (Feb. 3, 2016), <https://news.gallup.com/poll/188969/red-states-outnumber-blue-first-time-gallup-tracking.aspx>.

135. See Darling-Hammond, *supra* note 132.

61 percent more representation than ‘competitive’ states.”<sup>136</sup> In our nationalized, partisan political age, one team seems to be playing the presidential election game with a bit of a stacked deck. From the standpoint of governmental legitimacy, that is a problem. Why? First, attachment to one of the two parties has replaced attachment to one’s own state as the dominant subnational political identity in America. Second, Congress has largely prostrated itself at the feet of the Presidency,<sup>137</sup> the power of which has grown exponentially since the days when the Framers were worrying a great deal about *legislative* overreach.<sup>138</sup> Thus, many Democrats perceive a game of very high stakes being played under very unfair rules.<sup>139</sup> And with calls to “abolish” the Electoral College growing increasingly vehement,<sup>140</sup> and with novel ways being proposed to work around it,<sup>141</sup> it seems reasonable to conclude that the institution’s legitimacy will only grow shakier in the years to come.

### C. A Way Forward

If the interplay between the thick states and the thin nation no longer defines Americans’ senses of their political selves, what can be done? What ought aligning the structures of American federalism with the nationalized, partisan political identities of today entail?

Constitutional change should entail evolution rather than revolution. As London School of Economics Public Law Professor Martin Loughlin has written regarding Edmund Burke’s constitutional thought: “Sensitive incremental reform of the constitution is fine: we should get rid of the accretions that no longer deliver good government. But we must

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136. *Id.*

137. See Yuval Levin, *Congress Is Weak Because Its Members Want It to Be Weak*, COMMENT. MAG. (July/Aug. 2018), <https://www.commentarymagazine.com/articles/yuval-levin-2/congress-weak-members-want-weak/>. The problem of Congress shirking its legislative duties is not entirely new. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131–34 (1980).

138. See, e.g., THE FEDERALIST NO. 51 (JAMES MADISON).

139. See Darling-Hammond, *supra* note 132.

140. Of course, calls for the death of the Electoral College are not entirely new. In the late 1960s-1970s, political leaders like President Carter and Senator Birch Bayh as well as organizations like the American Bar Association called for the end of the Electoral College. See MARTIN DIAMOND, *THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY* 1 (1977). That said, such calls seem to be reaching a bit of a fever pitch. See, e.g., Deanna Paul & Michael Brice-Saddler, *Elizabeth Warren Wants to Kill the Electoral College*, WASH. POST (Mar. 19, 2019) <https://www.washingtonpost.com/politics/2019/03/19/elizabeth-warren-wants-kill-electoral-college/>.

141. See *Agreement Among the States to Elect the President by National Popular Vote*, NAT’L POPULAR VOTE (Apr. 27, 2021), <https://www.nationalpopularvote.com/sites/default/files/1-pager-npv-v211-2021-4-27.pdf>.



never lose sight of the fundamentals: we must always work with the grain.”<sup>142</sup> American constitutionalism can work with the grain. It can adapt to changed sociopolitical realities while staying true to its values and much of its past and current practice—in large part because the real shortcoming of modern American constitutionalism is not deep-rooted and philosophical in nature. The problem is a straightforward one that can be corrected without mass constitutional overhaul. The present defect of the American government is that it has divisions of power premised on geographic, subnational, state-based political identities, but Americans’ political identities today are national and partisan. The blessing is that those partisan identities have rather coherent geographic embodiments—localities. When taken together, the defect and the blessing point towards the first step of a solution: shift greater sovereign power—particularly powers regarding the culturally-charged issues that increasingly anchor our partisan identities—to localities, such as counties, cities, and townships.

1. The Devil Is in The Details: The Specifics of Pro-Localization Reform

To delve into the specifics of how to localize power, we must first ask: in what policy areas could local differentiation be useful, just, and plausible? In relation to the requirements of utility, justice, and plausibility, culturally divisive issues present the most apt opportunities for the pro-localization reforms I propose for two reasons. First, as discussed in detail above, “culture war”-type conflicts increasingly define partisan conflict—i.e., the divisions in contemporary sub-national American political identity. Thus, localizing decision-making with regards to these issues would constitute a substantial step in the right direction, better aligning the distribution of sovereign authority with the geographic distribution of subnational, partisan political identity. Second, the very nature of “culture war” political conflict lends itself to localized resolution. Why this is the case is a complex matter, but one that is essential to flesh out.

The issues that define the “culture war” tend to pit liberty rights asserted by individuals against a community’s right to democratically enact its moral code as law—a right historically recognized as being part of states’ police powers to regulate public health, safety, and morals. For example, abortion debates center around the right to privacy and bodily autonomy of individual women versus the communal right to outlaw

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142. Martin Loughlin, *Burke on Law, Revolution and Constitution*, 29 *GIORNALE DI STORIA COSTITUZIONALE* 49, 51–52 (2015).

abortion as unlawful and immoral—as the wrongful taking of the right to life of the unborn child or fetus. Disputes over the legalization of gay marriage pit the individual right to marry whom one loves—including a person of the same sex—against the communal right to bar a practice its members deem unnatural and immoral.

These disputes are about morals, not money. Both on their face and at their very core, such disagreements are not about balancing competing self-interests, but rather coming to terms with harder questions of morality and justice. The voters and politicians staking out positions on these issues largely do not do so as a result of their myopic self-interest; they stake out their positions on the basis of their individual determinations of what is right and what is wrong. The question of tax rates, for example, is bound to arouse the self-interest of just about all Americans to some extent, since the vast majority pay taxes and all reap the benefits of tax-paying by virtue of their living in a well-governed society with public works and utilities financed by tax dollars. Questions like gay marriage, on the other hand, do not come close to implicating self-interest in such a direct fashion. After all, reputable sources like Gallup and researchers at UCLA have estimated in recent years that only 3.5% to 4.5% of the U.S. adult population identifies as gay, lesbian, bisexual, or transgender.<sup>143</sup>

In short, Americans' competing senses of communal justice, not their sense of their own financial health, is placed on the ballot and debated in legislative chambers when issues like abortion come to the fore. Relatedly, and most importantly, these disputes are unique in that they tend to be two-sided, black-and-white, either-or. In other words, the disagreements may run extremely deep—all the way down to competing conceptions of “the good” and differing notions of what constitutes life itself—but they tend not to be multi-faceted. Should abortion be legal or not? Should the death penalty be legal or not? Or put another way: is abortion right or wrong? Is the death penalty right or wrong? Of course, there can be gray areas—think about the “rape and incest” exceptions in the pro-life context—but at bottom, citizens and politicians alike must and do come down on one side or the other to some considerable extent.

This “either-or” aspect truly differentiates the “culture war” from most politics as usual. On the whole, politics is multi-faceted; an abundance of interests converge to take a number of different positions

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143. See Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, WILLIAMS INST., UCLA SCH. OF L. (Apr. 2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>; Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>.

regarding discrete issues. This is the vision of politics James Madison famously put forth in *Federalist No. 10*—and during the Philadelphia Convention on behalf of the Virginia Plan<sup>144</sup>—in defense of the “extended republic.”<sup>145</sup> Extend the territorial sphere of government, said Madison, and a great many more interests—factions—are taken into account in the electoral and policymaking processes, thereby barring any one faction from attaining dominance by itself and trampling smaller factions underfoot.<sup>146</sup> In a small, homogenous polity, the government could fall under the sway of the merchants alone, say, much to the potential detriment of the less numerous farmers, lawyers, and artisans. On the other hand, with the territorial sphere of governance having been extended—i.e., in the context of a *large* republican polity—no single group is big enough to form a majority. The merchants, farmers, artisans, lawyers, and the rest have no choice but to work things out with one another. Each particular faction is effectively disallowed from executing “their plans of oppression” upon the others.<sup>147</sup> Thus, according to Madison, on the national level—unlike the smaller, state-level of governance—the “increased variety” of factions proffers enhanced “security” to the rights of the collective citizenry.<sup>148</sup>

Madison’s above model of politics, however, does not make much sense when it comes to the “culture wars.” Madison posited the extended sphere of republican government as an optimal way to tackle what he deemed “the principal task of modern legislation”: the “regulation of . . . various and interfering interests” like “[a] landed interest, a manufacturing interest, a mercantile interest, a moneyed interest[,]” etc.<sup>149</sup> The extended sphere makes sense for regulating the many sectors and interests that comprise a modern economy; there are enough “factions” dispersed throughout the nation such that no single one can easily constitute a majority and wield governing power to “oppress” the others.<sup>150</sup>

As discussed above, however, the issues of the “culture war” are either-or in nature. These are not issues that give rise to multitudinous factions to which an extended sphere affords optimal regulation. Rather, these are two-sided issues pitting (1) the forces of individual liberty against (2) the forces of community-enforced morality. No matter how far

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144. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 135–36 (Max Farrand ed., 1787).

145. See THE FEDERALIST NO. 10 (James Madison).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

we extend the sphere, with respect to an issue like abortion, for example, we are more or less going to end up with some people being pro-life and some people being pro-choice. When decided on the national level, whoever is in the minority faction with respect to such an issue loses out entirely, with no exit option. No matter which side wins, some form of real or perceived “oppression,” to put it in Madisonian terms, will be maximized; either the individual rights-bearers will be or feel oppressed, or those wanting to uphold the community morality interests in question will.

Allowing these questions to be decided differently by a vast number of small republics—localities—serves the Madisonian end of warding off oppression, albeit via non-Madisonian means. Thanks to partisans’ localized geographic sorting, localizing sovereignty over the “culture wars” will enable many more communities to live under their preferred moral codes. If those codes are perceived as oppressive to any individual rights-bearers—or “topical minorities,” to use the phrasing of Jeremy Waldron<sup>151</sup>—those individuals are quite able under this decentralist scheme to realistically exercise their exit option. That is, they can move to a nearby locale that enforces a moral code that is more to their liking—one that respects the individual liberty interest(s) they assert.

Unfortunately, Supreme Court decisions such as *Obergefell v. Hodges*,<sup>152</sup> *District of Columbia v. Heller*,<sup>153</sup> *McDonald v. City of Chicago*,<sup>154</sup> *Roe v. Wade*,<sup>155</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>156</sup> have precluded meaningful action on many of the substantive, cultural issue-areas that are calling out for locally differentiated policies.<sup>157</sup> Some of these decisions rest on shakier textual foundations (like *Obergefell*, *Roe*, and *Casey*) than others (like *Heller* and *McDonald*). That said, they all restrict meaningful policy differentiation at the state and local levels with regards to fraught “culture war” disputes. These precedents are not set in stone. Moreover, there is clearly still room at the margins for policy innovation within all of these policy spheres, not to mention emergent ones like sanctuary city policies and

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151. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1397 (2006).

152. 576 U.S. 644 (2015).

153. 554 U.S. 570 (2008).

154. 561 U.S. 742 (2010).

155. 410 U.S. 113 (1973).

156. 505 U.S. 833 (1992).

157. This has not precluded localities from attempting to innovate. For a discussion and defense of local (largely urban) gun regulation innovations, see Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 98–103 (2013).

transgender rights, for example. For the time being, what might localization of such emergent issues entail?

First, it would include the end of state legislatures' "preemption" of local policy innovations that are at odds with the objectives of the party in power at the state level. Preemption chokes off localized differentiation and has regrettably been on the rise as of late.<sup>158</sup> In fact, it has grown more extreme. As Richard Briffault has written, many state legislatures have begun to engage in a "new preemption"—one that moves beyond barring localized differentiation on matters like firearms regulations and sanctuary city policies, for example, going so far as to levy criminal and civil penalties on local legislators who pass or enforce measures that conflict with state-level preemption provisions.<sup>159</sup> In addition, some state legislatures—often Republican-controlled legislatures aiming to counteract local innovation by Democratic-controlled, urban locales, but not always—have considered cutting off local regulation and policymaking from whole swaths of law, which would "effectively nuke local power" and pose "an existential threat to local self-government."<sup>160</sup> As of yet, the state constitutional doctrine of home rule has been quite unsuccessful at overturning these new overreaching forms of state preemption.<sup>161</sup> While reinvigorating home rule like Briffault proposes or grounding a robust right to local self-government in state and federal constitutional Assembly Clauses as Nikolas Bowie advocates may constitute paths forward,<sup>162</sup> it seems that popular mobilization and state constitutional reforms hold out stronger hopes for institutionalizing local sovereignty with real teeth.

The main thrust of such state constitutional reforms would be to provide localities with a limited ability to override state legislation.<sup>163</sup> These reforms would empower local county legislative bodies to override specific state legislative statutes by a simple majority vote, provided that they demonstrate that their local innovation would not cost the state additional money. This qualification will require much more fleshing out in future work, but I will state here that its purpose is to keep localized

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158. See generally Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403 (2017).

159. See Briffault, *supra* note 10, at 1995, 1997.

160. *Id.* at 1997–98, 2007.

161. *Id.* at 2011–12.

162. See *id.* at 2017–25; Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1740–45 (2021).

163. The inspiration for my proposal below comes from UCLA Law Professor Stephen Gardbaum's discussion of the "notwithstanding" clause in Section 33 of the *Canadian Charter of Rights and Freedoms*. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 721–22 (2001).

innovation restricted to the non-economic “culture wars” issues discussed above. Such issues not only lend themselves the most to localization,<sup>164</sup> but they also would not unjustly require other counties—i.e., the rest of the state—to pay for some particular county’s costly policy innovation. If Philadelphia wants to stray from state minimum wage policy—including the current preemption of local minimum wages being raised above the state-level minimum wage—by implementing a \$15/hour minimum wage, then the rest of Pennsylvania ought not have to foot any of the bill that may result, such as the enhanced unemployment compensation costs such a measure could induce.

Once a county invokes its veto of a particular piece of state legislation, the state legislature would retain the power to bring the dissenting county into line by overriding it with a supermajority vote—a two-thirds vote in both the state House and state Senate—as well as a gubernatorial signature. If the governor refuses to sign on to the override, the state House and Senate would have to mount a three-quarters vote in each chamber to override the county in question. Of course, counties’ override power would always be subject to the civil and human rights protections afforded by the Federal Bill of Rights and its state constitutional analogs. To guard against a chaotic proliferation of county overrides of state legislation, some limit would be placed on the number of pieces of state legislation each county may override in a single year. Moreover, each override would only be in force for a set time period—say, four years—at the end of which the county would be forced to either use one of its allotted overrides for that year to renew its divergence from state law or to come back into line with the existing state legislation.

## 2. A Localization Hypothetical in Pennsylvania

How might this novel constitutional mechanism play out? Let’s use Pennsylvania as an example once more. One could imagine the state legislature in Harrisburg passing a bill subsequently signed by the governor into law that mandates students in Pennsylvania public schools to use the bathroom that accords with their sex as listed on their birth certificate. The Philadelphia City Council, say, could respond by passing a law that enables students within the Philadelphia School District to use the bathroom that accords with their self-selected gender identity—effectively overriding the state law. Assuming City Council has not yet reached its allotted number of override opportunities that year, the Philadelphia law would be good law within the city so long as both the Pennsylvania House and Senate do not respond by negating the city’s

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164. See THE FEDERALIST NO. 10 (JAMES MADISON); see also *supra* Part V.

legislation via two-thirds supermajorities. Moreover, the governor would have to sign off on the House and Senate's negation of Philadelphia's divergence from state law. If the governor were to veto the House and Senate's two-thirds negation for some reason, both the House and the Senate would have to override the gubernatorial veto via three-fourths supermajorities.

Alternatively, one could imagine the Fayette County Commissioners instituting a 72-hour waiting period for women seeking abortions after they receive state-mandated counseling, thereby exceeding the 24-hour waiting requirement under existing Pennsylvania state law by 48 hours.<sup>165</sup> Provided that Fayette County had not yet reached its override limit that year, its 72-hour waiting period law would remain intact for four years within the county unless the Commissioners repealed it or both the Pennsylvania House and Senate overrode it with the requisite supermajorities and gubernatorial signature.

### 3. An Overlooked Benefit of Localization: Concretizing Politics

An additional benefit of the localization I have sketched out here is that it would help *concretize* American politics. In an age saturated with media and a worryingly vast federal administrative state, it seems that national political debates and divides—and the nationalized state-level political bouts that are mirroring them—are not especially *about* anything.<sup>166</sup>

That is, politics has grown increasingly “symbolic.” As the UCLA social psychologist David O. Sears pointed out in an excellent 1993 piece as part of a volume on *Explorations in Political Psychology*: “Political symbols often evoke and mobilize human emotions.”<sup>167</sup> Pictures, people, word choice,<sup>168</sup> and particular policies can all function as symbols—as markers of a larger world view that trigger “strongly held affective predispositions” among the citizenry.<sup>169</sup> In light of the low levels of political knowledge among the American public<sup>170</sup> and the rise of civic

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165. 18 PA. STAT. AND CONS. STAT. § 3205 (West 1982) (amended 1988).

166. For a similar argument, see Jonathan Rauch, *Rethinking Polarization*, NAT'L AFFS. (Fall 2019), <https://www.nationalaffairs.com/publications/detail/rethinking-polarization>.

167. David O. Sears, *Symbolic Politics: A Socio-Psychological Theory*, in *EXPLORATIONS IN POLITICAL PSYCHOLOGY* 113, 113 (Shanto Iyengar & William J. McGuire eds., 1993).

168. See, e.g., Tim De Chant, *All Politics Is Cultural*, KELLOGG INSIGHT (Nov. 1, 2010), [https://insight.kellogg.northwestern.edu/article/all\\_politics\\_is\\_cultural](https://insight.kellogg.northwestern.edu/article/all_politics_is_cultural) (noting that word choice can function as a symbol).

169. Sears, *supra* note 167, at 142.

170. See generally ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2d ed. 2016).

illiteracy,<sup>171</sup> it makes all the more sense for politicians to craft appeals that tap into voters' symbolic attitudes, predispositions, and world views by framing issues "in terms that can be readily linked to widespread, consensually understood predispositions."<sup>172</sup>

Daniel Hopkins writes that America's nationalized politics increasingly brings such "symbolic" issues to the fore of policy debates at both the national and state levels, thereby "pit[ting] groups against each other based more on their values and identities than on their concrete interests."<sup>173</sup>

Even something as concrete, real, and dangerous as a viral pandemic does not seem to have reattached American political discourse to reality. In the face of the wrenching number of deaths and the debilitating economic downturn wrought by COVID-19 and our policy responses to it, Republicans and Democrats did indeed come together, at least initially, to mete out compromises and pass crisis-induced policies that would help keep the American people afloat.<sup>174</sup> But as the crisis continued with no vaccine in sight in the spring and summer of 2020, soon enough name-calling, bloviating, and pandering had once again become the only common possessions of our two political parties. The COVID-19-related rhetoric of some thought leaders on the political right, in particular, has underscored how detached from reality our national politics has become—even when that reality is one that so clearly demands less posturing and more problem-solving. As the pundit Jonah Goldberg remarked in May 2020 responding to the right's recent blowup against COVID-19-induced mask-wearing: "The culture war has become more important than the issues the culture is supposed to be about . . . some people really just like the culture war while not caring that much about the issues that define it."<sup>175</sup>

When the battle itself becomes the rationale for the battle, perhaps it is time that the soldiers and generals hit the reset button. Our differences are real and deep-seated; there is no denying that. But only when we unnecessarily nationalize them and filter them through the

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171. See Jonathan R. Cole, *Ignorance Does Not Lead to Election Bliss*, ATL. (Nov. 8, 2016), <https://www.theatlantic.com/education/archive/2016/11/ignorance-does-not-lead-to-election-bliss/506894/>.

172. Sears, *supra* note 167, at 144.

173. HOPKINS, *supra* note 61, at 24, 229.

174. See Philip Wallach, *Crisis Government*, NAT'L AFFS. (Summer 2020), <https://www.nationalaffairs.com/publications/detail/crisis-government>.

175. Jonah Goldberg, *Face Masks Are Temporary. The Culture War Is Forever*, DISPATCH (May 13, 2020), <https://gfile.thedispatch.com/p/face-masks-are-temporary-the-culture>.



hate-amplifying vessels of social media and cable news do the disagreements and the invective reach artificially great heights.<sup>176</sup>

As policy debates drip with symbolic posturing and their connections to the particularities of real-life wane, enhanced localization holds out the hope of making politics more about tangible issues—where there may in fact be a greater scope of agreement than previously thought—and less about conflicting, abstract world views. Alexis de Tocqueville articulated this point far better than I nearly 200 years ago in *Democracy in America* when he wrote:

Men who live in democratic countries are very avid for general ideas because they have little leisure and these ideas free them from wasting their time in examining particular cases; that is true, but it must be understood to be so only in matters that are not habitual and necessary objects of their thoughts. Those in commerce will readily seize all the general ideas one presents to them relative to philosophy, politics, the sciences, and the arts without looking at them closely; but they will entertain those that have reference to commerce only after examination and will accept them only with reservation.

The same thing happens to men of state when it is a question of general ideas relative to politics.

Therefore, when there is a subject on which it is particularly dangerous for democratic peoples to indulge in general ideas blindly and beyond measures, the best corrective that one can employ is to have them occupy themselves with it every day in a practical manner; they will then be forced to enter into the details, and the details will make them perceive the weak sides of the theory.

The remedy is often painful, but its effect is sure.<sup>177</sup>

Politics ought to reattach itself to reality. Bringing political debates and decision-making authority back down from the ether of social media, cable news, state capitols, and Washington, D.C. to the minds, mouths,

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176. For a reflection on the potentially concretizing effects of coronavirus on American politics, see Bari Weiss, *The Coronavirus Makes Our Old Culture Wars Seem Quaint*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/opinion/coronavirus-culture-war.html>.

177. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 416 (Harvey C. Mansfield & Delba Winthrop eds. & trans., The Uni. of Chi. Press 2000) (1835).

and lives of real people and real, local communities is the best way of doing precisely that.

#### 4. Addressing Counterarguments

There are many complications and counterarguments to my proposal. For now, in the interest of brevity, I will address what I take to be the strongest argument against the desirability and feasibility of the pro-localization state constitutional reforms I have sketched out here. This argument is best summed up by Grove City College Political Science Professor Matthew Berry's response to proposals that would allow states to have limited nullification power over federal law as laid out in F.H. Buckley's recent book, *American Secession*.<sup>178</sup> Berry writes:

At one point, Buckley asks why a citizen of one state should "care what another state does with same-sex marriage." But people *do* care about what goes on in other states, because many of the issues that divide us are not merely policy preferences, as Buckley at one point calls them, but matters of justice and injustice, right and wrong. And many people agree with Martin Luther King, Jr.'s assertion that "injustice anywhere is a threat to justice everywhere." Many supporters of same-sex marriage consider marriage to be a human right that ought to be recognized everywhere. In much the same way, opponents of abortion believe that abortion is the murder of a human being, and murder, like slavery, is not something that ought to be left up to the states.<sup>179</sup>

Berry's critique of interstate differentiation on these fundamental issues of rightness and wrongness holds with equal force in relation to the inter-county differentiation I proposed above.<sup>180</sup> After all, the rights individuals assert are held to be universal truths, not privileges of positive law to be respected or not depending on whether one lives in Montgomery County, Pennsylvania or Bucks County, Pennsylvania.

However, the very logic of constitutional democracy runs against the notion that people will never be satisfied with the government unless their entire worldview is enacted into law. Democracy requires some acceptance of issues having to "live to see another day"—some

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178. See F.H. BUCKLEY, *AMERICAN SECESSION: THE LOOMING THREAT OF A NATIONAL BREAKUP* ch.10 (2020).

179. Matthew Berry, *The Divided States of America?*, L. & LIBR. (Mar. 3, 2020), <https://lawliberty.org/the-divided-states-of-america/>.

180. See *supra* Part VI, sec. C.

acknowledgment that today's losing issue can be tomorrow's winner. That said, certain issues, like slavery, can engender such deep-seated disagreements over what is right and what is wrong that they threaten the sustained existence of the polity itself, thereby necessitating some sort of settlement one way or another to prevent dissolution. This, of course, is what Abraham Lincoln meant in his June 1858 "House Divided" speech when he stated:

In *my* opinion, [agitation over slavery] *will* not cease, until a *crisis* shall have been reached, and passed.

"A house divided against itself cannot stand."

I believe this government cannot endure, permanently half *slave* and half *free*.

I do not expect the Union to be *dissolved*—I do not expect the house to *fall*—but I *do* expect it will cease to be divided.

It will become *all* one thing, or *all* the other.<sup>181</sup>

Lincoln did not mean that the nation must have uniform agreement on all issues. Rather, he meant that a country so deeply divided on a single issue of maximum consequence—slavery—could not persist for long. Uniformity throughout the nation on all issues of moral weight was never necessary, desirable, nor plausible in Lincoln's mind.<sup>182</sup> The issue of slavery was unique, in that it had aligned American political conflict along a single—sectional—axis,<sup>183</sup> both ends of which progressively viewed one another as threats to the nation's core principles or their own group's time-honored way of life. The issues for which I advocate localization—i.e., non-uniformity—are entirely different from the slavery dynamic in at least two key respects.

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181. Abraham Lincoln, "House Divided" Speech at Springfield, Illinois (June 16, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858 426, 426 (Don Edward Fehrenbacher ed., 1989).

182. See generally Michael Les Benedict, *Abraham Lincoln and Federalism*, J. ABRAHAM LINCOLN ASS'N, 1988–89, at 1.

183. For a theoretical exposition of the idea of political conflict being structured along different axes at different times, see SCHATTSCHEIDER, *supra* note 5, at 62–77. For a striking antebellum prediction of the sectional alignment that was to precipitate the Civil War, see *Martin Van Buren Proposes a New Opposition Party, 1827*, in MAJOR PROBLEMS IN THE EARLY REPUBLIC, 1787–1848, at 289–91 (Sean Wilentz & Jonathan H. Earle eds., 2d ed. 2008).

First, as a matter of practical morality, I think the most honest reckonings with the many fraught questions associated with these issues, such as abortion,<sup>184</sup> for example, will leave both sides more unsure in the rectitude of their position than before. Concretizing these debates via localization will enable such reckonings, as they force more real people to have real discussions with one another, in the flesh, regarding the merits of both sides of each issue. The more northerners had to directly confront slavery in the antebellum era, on the other hand, the greater the proliferation of anti-slavery agitation became. The fundamental wrongness of the institution only grew more apparent. I do not think that is the case with the twenty-first century moral disputes under review here. George Will has written that “[a] democratic society presupposes only minimal consensus as to the common good; but it presupposes consensus nonetheless.”<sup>185</sup> The patently evil practice of chattel slavery threatened that consensus. I am less than convinced that the battles of today’s culture war do so as well.

Second, we must not forget the importance of the enhanced ease of exercising exit options under the localization scheme I have set forth. Slavery was a deep moral wrong that enflamed the hearts and minds of abolitionists in the North, in large part because this evil institution was, by its very nature and with the help of federal fugitive slave provisions, a largely inescapable state of being for those affected. The moral disagreements of today are altogether different on this front. If women seeking abortions had to travel to the next county over to get an abortion, their right to an abortion would not be snuffed out in nearly the same way as the right to liberty of antebellum southern slaves was obliterated; a burden would be placed upon the woman’s right, but by no means would that burden be an insurmountable one. And if we think that the ease of such an exit option will not be accepted by those on the pro-life side, for example, then we are overlooking the current reality of pro-life Americans working to codify their pro-life views in their own local communities via “sanctuary cit[ies] for the unborn” local ordinances.<sup>186</sup>

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184. See, e.g., Caitlin Flanagan, *The Dishonesty of the Abortion Debate*, ATL. (Dec. 2019), [https://www.theatlantic.com/magazine/archive/2019/12/the-things-we-cant-face/600769/?te=1&nl=david-leonhardt&emc=edit\\_ty\\_20191113?campaign\\_id=39&instance\\_id=13819&segment\\_id=18745&user\\_id=357343c6d189bb4096b0f46b4cf898ea&regi\\_id=7654905120191113](https://www.theatlantic.com/magazine/archive/2019/12/the-things-we-cant-face/600769/?te=1&nl=david-leonhardt&emc=edit_ty_20191113?campaign_id=39&instance_id=13819&segment_id=18745&user_id=357343c6d189bb4096b0f46b4cf898ea&regi_id=7654905120191113); see also Naomi Wolf, *Our Bodies, Our Souls*, NEW REPUBLIC, Oct. 16, 1995, at 26.

185. GEORGE F. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES 142 (1983).

186. See Dionne Searcey, *The Wall Some Texans Want to Build Against Abortion*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/us/politics/texas-abortion-sanctuary-cities.html>.

Moreover, even if those women living within an anti-abortion county were to mobilize or litigate in order to expand what E. E. Schattschneider termed the “scope of conflict”<sup>187</sup>—i.e., to bypass the hostile political environment of their own county in favor of more friendly state or federal authorities that may invalidate the county’s innovation on statutory or constitutional grounds—it does not seem clear that the women would get mass support even from those who wholeheartedly agree with them on the specific substance of the abortion question. The rest of the citizenry—or “the audience,” to use Schattschneider’s phrasing<sup>188</sup>—very well may realize that cutting off “bad” localization in one policy area may bar “good” localization in another. The American people will either right themselves with the reality of this tradeoff, or they will not. My prediction is that they can, should, and will.

##### 5. Localization Better Serving Modern-Day Federalism Rationales

Shifting sovereignty to locales would not only constitute a first step towards bringing our structures of government into better alignment with the political identities that ought to undergird them; it would also enhance the functions of American federalism that judges, constitutional theorists, politicians, law professors, and others have articulated on federalism’s behalf in the modern era. I outline three such rationales for federalism—what I take to be today’s most popular and powerful reasons for keeping robust powers in the hands of the sovereign states—here: (1) federalism as a solution to the problem of intractable political disagreement, (2) federalism as providing subnational labs for public policy experimentation, and (3) federalism as enhancing democratic civic virtue.<sup>189</sup>

The first rationale is federalism as a means to cope with political diversity. Perhaps most memorably summed up by Justice Holmes in his dissent in the infamous 1905 case of *Lochner v. New York*, the existence of independent, powerful sub-national states acknowledges the fact that the Constitution was created for people of “fundamentally differing views.”<sup>190</sup> That is, federalism allows Americans to cope with their political diversity. Constitutional scholars such as Ilya Somin remind us that federalism presents a means by which each side of the Red-Blue

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187. See SCHATTSCHNEIDER, *supra* note 5, at 7.

188. *Id.* at 2.

189. It is important to note that Justice Sandra Day O’Connor’s Opinion of the Court in the 1991 case of *Gregory v. Ashcroft* includes these three justifications of federalism. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

190. *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

divide “can get their own way.”<sup>191</sup> Louis Capozzi agrees, writing that “the people of different states have different political preferences, and federalism allows elected officials in state and local governments to tailor policies to those preferences more easily than the federal government.”<sup>192</sup> Similarly, public intellectuals like Kevin Williamson exhort readers to “[t]ry [f]ederalism” in order to avert the unhappy situation whereby Americans of very different political persuasions and worldviews are “forced to live the same way in many regards, meaning that one mode of life must prevail and that the other must be subordinated.”<sup>193</sup>

The second modern-day rationale for American federalism can also be summarized by the pithy phrasing of the Supreme Court. In the 1932 case of *New State Ice Co. v. Liebmann*, Justice Louis Brandeis famously wrote the following in dissent:

Denial of [states'] right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>194</sup>

As Alan Tarr has argued, Justice Brandeis' famous “laboratories of democracy” rationale for upholding wide-ranging state policy-making authorities is “implicitly at odds with federal diversity.”<sup>195</sup> Informed by his pragmatist approach to politics and policymaking,<sup>196</sup> the assumption undergirding Justice Brandeis' metaphor was that successful policies

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191. Ilya Somin, *How Federalism Can Help Save the Failing “Marriage” Between the Red and Blue States*, WASH. POST (Jan. 3, 2017, 10:40 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/03/how-federalism-can-help-save-the-failing-marriage-between-the-red-and-blue-states/>; see also Bulman-Pozen, *supra* note 84, at 1123–24.

192. Louis Capozzi III, *Sixth Amendment Federalism*, 43 HARV. J.L. & PUB. POL'Y 645, 696 (2020).

193. Kevin D. Williamson, *Down and Out? Try Federalism*, NAT'L REV. (May 7, 2019, 6:30 AM), <https://www.nationalreview.com/2019/05/federalism-limits-authoritarian-politics-washington/>.

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

195. G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 PUBLIS: J. FEDERALISM 37, 39 (2001).

196. The experimentalist ethos infused the thought of American pragmatists like John Dewey, for example, who envisioned a philosophy that “will think of time not as that part of reality which for some strange reason has not yet been traversed, but as a genuine field of novelty, of real and unpredictable increments to existence, a field for experimentation and invention.” See JOHN DEWEY, *THE POLITICAL WRITINGS* 44, 171–72 (Debra Morris & Ian Shapiro eds., 1993).

would ultimately be reproduced throughout the rest of the nation. Understood as such, Justice Brandeis' defense of state-level policy innovation—and thus autonomy—was principally a means for inducing needed policy experiments that might not otherwise be undertaken under a centralized system. In the short-term, policy diversity may reign in differing state labs, but over time, “the tendency would be toward policy uniformity, as states emulated the successful policies of sister states.”<sup>197</sup>

The fact that the experimentation rationale put forth by Justice Brandeis and the aforementioned diversity rationale work somewhat at cross purposes is not of great interest to us here. What counts is whether the “laboratories of democracy” argument is a relevant contemporary justification of federalism, and indeed it is. As James Gardner's research has demonstrated, the “laboratories of democracy” metaphor has been frequently invoked to both describe and justify state sovereignty by state and federal judges alike.<sup>198</sup> Since Gardner's work was published in 1996, the U.S. Supreme Court, for example, has continued to invoke the “laboratories of democracy” phrasing, particularly in cases regarding the boundaries between state and federal power.<sup>199</sup> Nor is the metaphor's invocation a misguided one; states have indeed proven themselves to be policy innovators throughout American history.<sup>200</sup>

Third and finally, American federalism has been justified on the grounds that it fosters civic virtue. While “Washington” is felt to be a faraway “other,” so the argument goes, the American people can better hone their democratic muscles on the state level. This line of argumentation traces its roots to the early American Republic when according to Stanford Law Professor Michael W. McConnell, leading thinkers framed public spiritedness as “a product of participation in deliberation over the public good.”<sup>201</sup> Clearly, citizens could more readily engage in such deliberation at less centralized levels of government like the states.<sup>202</sup>

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197. See Tarr, *supra* note 195, at 42.

198. See James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 482–91 (1996).

199. See *Evenwel v. Abbott*, 577 U.S. 937, 1141 (2016) (Thomas, J., concurring); *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015).

200. See DAVID BRIAN ROBERTSON, *FEDERALISM AND THE MAKING OF AMERICA* 8 (2012). Scholars have found some states to be more “innovative” than others. See generally Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969).

201. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1510 (1987).

202. *Id.*

In addition to fulfilling the principal task of better aligning the distribution of sovereign power with Americans' relevant political identities, devolving power to localities would better serve all three of these modern-day rationales for enhancing states' sovereign powers. First, due to the localized character of partisans' geographic sorting, enhancing local autonomy would enable the American government to better cope with political diversity—that is, it would produce more preferable policy outcomes for more people—than simply lodging as much sub-national power as possible with the states. Second, on account of counties' smaller size and greater absolute numbers, enhanced localization would increase the number of “laboratories” available for policy innovation. Lastly, by bringing power “closer to home” in a literal sense, pro-localization reforms would make consequential involvement in the policymaking process—and the honing of democratic muscle—far easier for ordinary citizens.

VII. CONCLUSION: ALLOWING THE PAST TO INFORM, NOT CONTROL,  
THE PRESENT

“Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?”

James Madison, *Federalist No. 14*<sup>203</sup>

To instruct democracy, if possible to reanimate its beliefs, to purify its mores, to regulate its movements, to substitute little by little the science of affairs for its inexperience, and knowledge of its true interests for its blind instincts; to adapt its government to time and place; to modify it according to circumstances and men: such is the first duty imposed on those who direct society in our day.

Alexis de Tocqueville, *Democracy in America* (1835)<sup>204</sup>

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203. THE FEDERALIST NO. 14 (James Madison).

204. DE TOCQUEVILLE, *supra* note 177, at 7.



The disparate strands of this article have been held together by a simple proposition: that along with instituting democratic—majoritarian—electoral schema, government must accord with people’s senses of their political selves—their political identities and group attachments—if it is to maintain legitimacy. I have argued that American federalism, as originally designed, did precisely this. Today, it does not.

Diversity has always been and will increasingly be a fact of American political life, so it stands to reason that some form of decentralized sovereignty will always be necessary to institutionally cope with that diversity. In light of the state-based political identities of eighteenth-century America, it made great sense that such decentralization would hinge on the division between the nation and the states. There is already a sense today that this interplay of nation and states no longer defines the American political character, as the states do not cohere with the nationalized, partisan political identities of today. This recognition is what motivates rebukes of the Electoral College, for example, as well as the real resistance to state authority from the locally elected leadership of the Philadelphia District Attorney’s Office. Both developments speak to the fact that the states simply do not garner the same sort of political allegiance they once enjoyed.

The question is whether America’s initial responses to this political reality will adhere to a top-down or bottom-up approach. Rather than immediately resorting to *top-down* reform approaches like the immediate abolition of the Electoral College, Americans could instead begin the necessary process of reform and adaptation by adopting a *bottom-up* approach like the one I have outlined here. Localities increasingly provide the most coherent territorial embodiment of the partisan political identities that lay at the heart of the American political character today. Americans should empower localities—subject to the limits that stem from Bill of Rights protections, individual rights protections enshrined in state constitutions, and state legislative supermajority overrides—to have a greater say in the debates that reside at the heart of contemporary American politics.

Such pro-local innovation would provide sounder institutional embodiment to the partisan divides that define contemporary American political identity, thereby following in the footsteps of the Framers. If we localize more political power, more Americans would have more say in the passage of policies with which they agree—a significant boon to legitimacy and faith in government. Perhaps the successful localization of more policy decisions would even induce the federal government to devolve more sovereign power—particularly over divisive cultural issues—back to local communities. Far-off future possibilities need not

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detain us here, however. The task at hand is to follow the example of the Framers by not letting the past hold us back from coping with the political reality of the present. It is high time that we begin to deal with our present challenges in earnest, and state constitutional reform may provide a welcome means to start.