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## Federalism as the New Nationalism

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## Federalism as the New Nationalism: An Overview

Federalism has had a resurgence of late, with symposia organized,<sup>1</sup> stories written,<sup>2</sup> and new scholarly paths charted. Now is an appropriate moment to assess where the *new* “new federalism”<sup>3</sup> is heading. This Feature thus brings together five scholars who have made unique contributions to the field in order to offer a snapshot of the current debate.

Taken together, these essays suggest that federalism is the new nationalism. Shorn of the traditional trappings of sovereignty and separate spheres, detached from the notion that state autonomy matters above all else, attentive to the rise of national power and the importance of national politics,

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\* J. Skelly Wright Professor of Law, Yale Law School. I am indebted to Bruce Ackerman as well as to the contributors to this Feature for their helpful comments and the many productive conversations we’ve had since we met last summer. We, in turn, are all deeply indebted to Judith Resnik. She not only took part in our initial conversation, but her work has served as a major source of inspiration for us all. Excellent research assistance for this introduction was provided by Zach Arnold, Emily Barnet, Megan Browder, Micah Fergenson, Ben Moskowitz, Danny Randolph, and Meng Jia Yang. Special thanks go to James Dawson for helping me figure out whether this was a symposium worth holding in the first place.

1. *E.g.*, Symposium, *Federalism All the Way Down*, 85 U. COLO. L. REV. (forthcoming 2014); Symposium, *Progressive Federalism*, 3 HARV. L. & POL’Y REV. 1 (2009); Symposium, *Federalism and Climate Change: The Role of the States in a Future Federal Regime*, 50 ARIZ. L. REV. 673 (2008); Symposium, *The New Federalism: Plural Governance in a Decentered World*, 57 EMORY L.J. 1 (2007); Symposium, *Interactive Federalism: Filling the Gaps?*, 56 EMORY L.J. 1 (2006).
2. Emily Bazelon, *States’ Rights Are for Liberals*, ATLANTIC, June 19, 2013, <http://www.theatlantic.com/magazine/archive/2013/07/states-rights-are-for-liberals/309388>.
3. As opposed to the old “new federalism,” the term used to describe the Rehnquist Court’s efforts to reintroduce limits on national power.

this work offers a descriptive and normative account that is deeply nationalist in character.

Nationalists, of course, have long been skeptical of conventional accounts of federalism. But, as the work here shows, those accounts no longer describe vast swaths of “Our Federalism.” It’s time for the nationalists, who have often rebuked federalism’s proponents for being behind the times, to catch up to today’s realities. That’s especially true now that scholars have developed new justifications for devolution that pivot off of nationalist concerns. While the contributors to this Feature have different views, each believes that a committed nationalist ought to believe in federalism, just as a committed proponent of federalism ought to care about the states’ evolving role in our national system.

The work of the contributors offers a lens for identifying the basic tenets of what I call the “nationalist school of federalism.” In this introduction, I’ve organized my observations around the five features needed for any account of federalism: (1) a tally of the ends served by devolution, (2) an inventory of the governance sites that matter, (3) an account of what gets the system up and running, (4) a description of how the national and local interact, and (5) “rules of engagement”<sup>4</sup> to guide those interactions. In each instance, the nationalist school of federalism departs from state-centered accounts of federalism and pushes toward a nationalist vision of devolution’s virtues. While I focus on the work done by the contributors to this Feature, I also acknowledge the scholars who have inspired or helped develop this new account, even if they may not count themselves as members of the nationalist school.<sup>5</sup>

## I. FEDERALISM’S NATIONALIST ENDS

Any account of federalism must begin with the values it serves. The question at the core of this Feature is whether federalism can serve nationalist ends. Alison LaCroix poses the question most provocatively: If we accept Holmes’s expansive vision of national power, is it nonetheless “possible to conceive of the states as having significance?”<sup>6</sup>

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4. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005).
  5. Ernie Young, for instance, is likely to demand a formal apology for suggesting that he inspired any of this work.
  6. Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2050 (2014). Abbe Gluck offers a different formulation: if we live in the age of federal statutes, what is the

Supporters of conventional federalism have a ready list of reasons why states matter. Federalism promotes choice, fosters competition, facilitates participation, enables experimentation, and wards off a national Leviathan. The conventional account insists that sovereign or at least autonomous states—states with “meaningful things to do,” to use Ernie Young’s pragmatic definition<sup>7</sup>—are necessary to achieve these important goals.

The nationalist school has put a different set of reasons for valuing states on the board. Most take the perspective of the detached social engineer, focusing on the institutional features needed for a vast and diverse nation to thrive. But some take the vantage point of a self-interested national actor. What unites these new accounts of federalism’s ends is that they are also *nationalist* ends.<sup>8</sup>

You might think that a “nationalist school of federalism” is a contradiction in terms. It isn’t. In order to see why, a bit of a definitional work is in order.

Scholars often write as if the key difference between the two camps is that nationalists favor lodging most decisions with the federal government, whereas federalism’s supporters favor devolution to the states. While that simple definition may be descriptively accurate, it elides an important distinction between means and ends. *Both* devolution and centralization are means to an end. They are, in fact, means to the same end: a well-functioning democracy.<sup>9</sup> That’s why most of the arguments conventionally offered in federalism’s favor are ones a nationalist could accept.

For this reason, it can’t be that the federalism/nationalism divide has only to do with our choice of means. There are many sensible justifications for moving decisions up or down the governance hierarchy. If we were just quibbling about means, views on devolution ought to be highly contextual and fall along a broad continuum. These questions could only be worked out on a case-by-case basis, and disagreements would concern matters of degree. What we see instead are clearly defined intellectual camps with firm commitments to a single institutional design strategy across policymaking spheres. Federalism

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continuing relevance of states? Abbe R. Gluck, *Our [National] Federalism*, 123 *YALE L.J.* 1996 (2014).

7. Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 *TEX. L. REV.* 1, 52 (2004) (emphasis omitted).
8. That is true even when they also advance federalism’s traditional aims. Gluck, in particular, has emphasized that these arrangements further ends associated with both nationalism and traditional federalism. Gluck, *supra* note 6.
9. Or, if we look to LaCroix’s historical work, a well-functioning federal republic. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 6 (2010).

types favor state power in most situations;<sup>10</sup> the nationalists' one-way ratchet pivots the other direction.

A cynic might think that camps exist because we've let means bleed into ends. On this view, state autonomy and national power are mistakenly treated as if they were ends, not means.<sup>11</sup> Scholars have so vigorously canvassed the democratic ends served by devolution or centralization that they sometimes confuse those accounts with an exhaustive description of what a vibrant democracy requires.<sup>12</sup>

While it's possible that both camps have allowed means to bleed into ends, a more generous take suggests that what really propels this battle are two different visions of democracy. One emphasizes state power, state politics, and state polities; the other national power, national politics, and a national polity.

If we characterize the two camps in this fashion, it becomes clear that federalism *can* serve the ends that the nationalists have long associated with their vision of American democracy. It is possible to have a "nationalist account of federalism,"<sup>13</sup> an "intrastatutory federalism,"<sup>14</sup> or for "federalism's afterlife [to be] a form of nationalism."<sup>15</sup> It is possible to imagine federalism integrating rather than dividing the national polity.<sup>16</sup> Given the importance of "build[ing] a *union*" to the Founding generation, it is even possible that "federalism . . . has always been the United States' distinctive species of nationalism."<sup>17</sup> The work

10. Cf. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 550 (2011) (suggesting that "most of the existing federalism literature has considered federalism from the perspective of states").
11. For examples of this critique, see Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1332-33 (2004); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 699 (2001); Roderick M. Hills, Jr., *Is the Fostering of Competition the Point of American Constitutional Federalism?*, 48 TULSA L. REV. 339, 353 (2012) (reviewing MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012)).
12. Cf. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997) (analyzing our failure to offer a full account of the reasons for valuing federalism).
13. Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44-72 (2010).
14. Gluck, *supra* note 10.
15. Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014); Gluck, *supra* note 6, 1998.
16. Cristina M. Rodríguez, *Federalism and National Consensus* 4-5 (Oct. 2010) (unpublished manuscript) (on file with author); see also Gerken, *supra* note 13, at 44-72.
17. LaCroix, *supra* note 6, at 2093.

of the scholars contributing to this Feature confirms that federalism can be a tool for improving national politics, strengthening a national polity, bettering national policymaking, entrenching national norms, consolidating national policies, and increasing national power. State power, then, is a means to achieving a well-functioning *national* democracy.

Note what else follows from treating federalism as a means rather than an end. There is little point to valorizing categories like “state” and “national.” For some of us, that position doesn’t just signal skepticism about the stability or coherence of these categories.<sup>18</sup> It also heralds an openness to national involvement in areas of traditional state concern and the use of local sites to build a national polity or forge national policy. Even those who embrace a more state-centered view—Abbe Gluck being the notable example in this collection<sup>19</sup>—have done a great deal of descriptive work on the way that federalism, in fact, serves nationalist ends.

At this point, federalism’s traditional proponents might think it’s time to get off this train. They shouldn’t. A nationalist account of federalism may not resemble the conventional one, with its emphasis on autonomy and independent state policymaking. But this work shows why state power, in *all* of its forms, matters to a thriving national democracy. Too often federalism scholars have treated sovereignty and autonomy as if they were the only forms of state power,<sup>20</sup> as if the states and national government were in a zero-sum policymaking game.<sup>21</sup> They’ve neglected the different but equally important forms of state power that are at the heart of the nationalist school’s work on federalism: The power states enjoy as national government’s agents.<sup>22</sup> The power states exercise in driving national policy and debates.<sup>23</sup> The power states wield in implementing and interpreting federal law.<sup>24</sup> Abbe Gluck even argues

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18. As LaCroix has shown, the history of federalism is a history of contestation over these and other categories, including sovereignty, jurisdiction, and union. LACROIX, *supra* note 9.

19. Gluck, *supra* note 6.

20. See Gerken, *supra* note 13, at 11-18.

21. For critiques, see Bulman-Pozen, *supra* note 15; Gerken, *supra* note 13, at 11-18; Gluck, *supra* note 6; Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014); and Erin Ryan, *Negotiating Federalism Past the Zero-Sum Game*, 38 ADMIN. & REG. L. NEWS 4 (2012). For an elegant account of the history, see LaCroix, *supra* note 6, at 2046-50.

22. Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013).

23. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); Gerken, *supra* note 13, at 33-44; Rodríguez, *supra* note 16.

24. Gluck, *supra* note 6.

that states are exercising their “sovereign powers” in cooperative federal regimes, “albeit in ways different from those contemplated by the traditional account.”<sup>25</sup>

While these forms of state power may not fit the conventional account, they should still matter to those who care about state clout. That’s because these avenues of state influence may be the most important forms of state power going forward.<sup>26</sup> They may even become the only game in town.<sup>27</sup>

So how does federalism ensure our national democracy thrives? What nationalist ends have scholars identified? The scholars contributing to this Feature, standing alone, have written about at least four: improving national politics, knitting together the national polity, improving national policymaking, and entrenching national power and national policies.

#### A. *Improving National Politics: The Discursive Benefits of Structure*

Much of the work of the nationalist school has focused on what one might call the “discursive benefits of structure.” Constitutional theory has divvied up the tasks of American constitutionalism into doctrinal silos.<sup>28</sup> Those interested in governance—allocating power among institutions so that policymaking flourishes and a Leviathan does not emerge—have focused on constitutional structure generally and federalism in particular. Those interested in democratic debate, meanwhile, have focused on the rights side of the Constitution, particularly the First Amendment.

One of the nationalist school’s distinctive contributions is showing how structural arrangements help tee up national debates, accommodate political competition, and work through normative conflict. Rather than foreground the distribution of power, as does most federalism scholarship, this work considers how national debates and national identity are forged against the background of these structural arrangements. Federalism, in Cristina Rodríguez’s words,

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25. *Id.* at 1997.

26. See, e.g., Heather K. Gerken, *The Federalis(m) Society*, 35 HARV. J.L. & PUB. POL’Y 942 (2013); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old Fashioned Federalists’ Gamble*, 81 FORDHAM L. REV. 1749 (2013).

27. Gluck, in her effort to provoke, teeters on the edge of making this claim. Gluck, *supra* note 6. Rodríguez is more skeptical; she emphasizes the ways in which states operate independently of the federal government and thus serve the interests of discrete communities. Rodríguez, *supra* note 21, at 2114-19.

28. Heather K. Gerken, *Abandoning Bad Ideas and Disregarding Good Ones for the Right Reasons: Reflections on a Festschrift*, 48 TULSA L. REV. 535, 536-37 (2013).

“amplifies the polity’s capacity for politics,”<sup>29</sup> and state and local structures can serve as sites of contestation and pluralist competition.<sup>30</sup> The work is more interpretive than normative; it does not insist that these institutional arrangements are ideal in theory. Instead, like much legal scholarship, it sets out to identify the underappreciated normative benefits associated with real-world phenomena so we can correctly assess their worth.

I have argued that structural arrangements serve the same discursive aims as the right to free speech.<sup>31</sup> States and localities facilitate “dissenting by deciding,”<sup>32</sup> giving political outliers an opportunity to force engagement, set the national agenda, dissent from within rather than complain from without, and offer a real-life instantiation of their views. On this view, federalism serves decidedly nationalist ends, providing “the democratic churn necessary for an ossified national system to move forward.”<sup>33</sup>

Rodríguez has similarly examined how the allocation of power shapes debates over core issues of national identity. Beginning with her early work on “immigration federalism”<sup>34</sup> and moving on to federalism’s discursive role writ

29. Rodríguez, *supra* note 16 (manuscript at 4).

30. We write in good company. Judith Resnik, for instance, has done important work on the way that “translocal organizations of governmental actors” pursue international law projects and foreign policy aims, thereby serving “national, not federal” interests. Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 34 (2007); see also Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1581 (2006); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008). For other takes on the discursive benefits of structure, see, for example, Theodore W. Ruger, *Preempting the People: The Judicial Role in Regulatory Concurrence and Its Implications for Popular Lawmaking*, 81 CHI.-KENT L. REV. 1029, 1047-48 (2006); and Emily Zackin, *What’s Happened to American Federalism?*, 43 POLITY 388 (2011). For early accounts, see, for example, DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); and Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

31. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Gerken, *supra* note 22; Gerken, *supra* note 13; Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005); Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958 (2014).

32. Gerken, *Dissenting by Deciding*, *supra* note 31.

33. Gerken, *supra* note 13, at 10.

34. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 568 (2008).

large,<sup>35</sup> she argues that we often *can't* have a “national conversation” on a divisive subject until we've had a variety of local ones.<sup>36</sup> On her view, decentralization doesn't just provide manageable sites for working out conflict, but generates a more variegated set of procedures and policies than would be possible at the national level.<sup>37</sup> Federalism also provides a much-needed outlet for contestation when issues don't lend themselves to national resolution.<sup>38</sup> Note that Rodríguez's account of state variation is less about state laboratories generating different policy “solutions” and more about maintaining varied processes for working out conflict or dealing with an unraveling consensus.

While Rodríguez's and my work centers on political outliers and networked interest groups,<sup>39</sup> Bulman-Pozen's research has called attention to federalism's partisan dimensions. Reorienting the debate over the relationship between the political parties and federalism, which has been dominated by the important work of Larry Kramer,<sup>40</sup> she argues that federalism provides a “durable and robust scaffolding” for partisan competition and shows the ways in which national parties run their fights through state sites.<sup>41</sup> On her view, states serve as a crucial “staging ground” for national debates.<sup>42</sup>

While Gluck and LaCroix haven't endorsed these visions of federalism, one can nonetheless see deep continuities between their work and our interpretive claims. Gluck, for instance, shows how cooperative federalism renders federal entry into new policymaking arenas “more politically palatable.”<sup>43</sup> She also argues that one of federalism's cherished ends—state experimentation—is better served when states act as part of national schemes.<sup>44</sup> LaCroix's rich

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35. Rodríguez, *supra* note 16; Rodríguez, *supra* note 21, at 2100.

36. Rodríguez, *supra* note 16 (manuscript at 5).

37. See Rodríguez, *supra* note 21, at 2127-28; see also Rodríguez, *supra* note 16 (manuscript at 3); Gerken, *Second-Order Diversity*, *supra* note 31, at 1171-79.

38. Rodríguez, *supra* note 16 (manuscript at 46-48).

39. Gerken, *Dissenting by Deciding*, *supra* note 31; Heather K. Gerken & Charles Tyler, *The Myth of the Laboratories of Democracy* (2014) (unpublished manuscript) (on file with author); Rodríguez, *supra* note 16 (manuscript at 20-22). For another take, see Miriam Seifert, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. (forthcoming 2014).

40. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

41. Bulman-Pozen, *supra* note 23, at 1081.

42. Bulman-Pozen, *supra* note 15, at 1922-23, 1946.

43. Gluck, *supra* note 6, at 1997; see also Gluck, *supra* note 10, at 573.

44. Gluck, *supra* note 10.

historical account makes clear that the ill-defined notion of sovereignty itself has provided a site of contestation between proponents of state and federal power.<sup>45</sup>

*B. Knitting Together the National Polity: Structure and the Project of Integration*

The work featured here shows that federalism serves another nationalist aim: it knits together the national polity. Nationalists have long worried that decentralization exercises a centrifugal force on the polity, scattering us into isolated enclaves. But contributors to this Feature have shown that decentralization can serve rather than undermine the project of integration.<sup>46</sup>

Bulman-Pozen's work, for instance, has focused on the partisan dimensions of national identity. She argues that partisanship supplies the much-needed explanation for why people affiliate both with their state and with the federal government.<sup>47</sup> Because states serve as sites for national politicking, they create sources of identification even for those whose preferred party is out of power in Washington.<sup>48</sup> Federalism, then, doesn't just take the sting out of losing, but helps bind winners and losers to national politics. Moreover, the existence of fifty states generates multiple opportunities for state-based affiliation. States, argues Bulman-Pozen, "generate a federalist variant of surrogate representation" by allowing "individuals across the country [to] affiliate with states they do not inhabit" based on their partisan affiliation.<sup>49</sup>

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45. Indeed, her work shows that it even served as a site of contestation between the imperial center and the colonial periphery prior to the Founding. LACROIX, *supra* note 9; see also Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 746 (2011) (describing federalism in the Founding era as a rejection of Blackstone's specter of *imperium in imperio*, or a sovereign within a sovereign); *id.* at 758-59 (describing how the federalism of the Founding era rejected the "theory that sovereignty could be divided along subject-matter lines, lines that would in turn be policed by an institution with a special mandate to monitor these boundaries").

46. Cf. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2220-23 (1998) (arguing that states may be useful because their borders do not coincide with racial or religious divides).

47. Bulman-Pozen, *supra* note 23.

48. *Id.* While conventional federalism has looked for forms of state identification in which each state is exceptional, Bulman-Pozen argues that it is "the unexceptional—the ways in which states and the federal government occupy the same political space—that generates today's state-based identification." *Id.* at 1130.

49. *Id.* at 1078.

Bulman-Pozen's contribution to this Feature makes an even stronger claim. She criticizes process federalism scholars for arguing that federal-state "integration . . . yields separation" — that "state actors use their connections to federal politicians and administrators to safeguard state autonomy and to advance particularistic state interests."<sup>50</sup> Instead, she insists, "integration yields integration," so that with respect to both "governance and interests," states frequently serve as national actors.<sup>51</sup>

My work has emphasized the ways in which decentralization integrates racial minorities and dissenters into the national polity.<sup>52</sup> Structure thus furthers the same aims as the First and Fourteenth Amendments. Because federalism and localism allow national minorities to rule as local majorities, decentralization "turns the tables," allowing the usual losers to win and the usual winners to lose.<sup>53</sup> Decentralization, then, gives democracy's outliers the same opportunities that members of the majority routinely enjoy.<sup>54</sup> It gives dissenters the ability to speak truth *with* power, not just to it.<sup>55</sup> It gives racial minorities the chance to protect themselves from discrimination rather than look to the courts or the federal government for solace.<sup>56</sup> Local power thus exercises a gravitational pull on racial minorities and dissenters, pulling them into the project of governance and giving them a stake in its success.<sup>57</sup>

Rodríguez has argued that accommodation is a necessary part of the project of integration, and here too federalism plays a crucial role. Rodríguez's early work on "immigration federalism" shows the important part states and localities play in integrating immigrants into the polity, thereby putting the lie to abstract claims about federal exclusivity in this domain.<sup>58</sup> These sites not only offer traditional forms of accommodation, but also provide the means for challenging federal enforcement priorities and sparking the debate necessary to consolidate immigrants' status. They are, in short, "mechanisms for shaping national identity."<sup>59</sup> Rodríguez has begun to extend her analysis to other

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50. Bulman-Pozen, *supra* note 15, at 1922.

51. *Id.*

52. Gerken, *The Loyal Opposition*, *supra* note 31; Gerken, *supra* note 13, at 44-71.

53. Gerken, *Second-Order Diversity*, *supra* note 31, at 1142-59.

54. *Id.*

55. Gerken, *Dissenting by Deciding*, *supra* note 31, at 1747.

56. Gerken, *supra* note 13, at 52-58.

57. *Id.* at 44-71.

58. Rodríguez, *supra* note 34.

59. Rodríguez, *supra* note 16 (manuscript at 10).

divisive issues – gay rights, drug legalization, gun regulation – which are being worked out at the state and local level.<sup>60</sup> “Decentralization,” she writes, “can promote national integration and national problem solving in a world of deep demographic and ideological diversity.”<sup>61</sup> Political pluralism, in Rodríguez’s view, is best accommodated through policymaking pluralism,<sup>62</sup> and federalism is a tool for the management of cultural change writ large.<sup>63</sup>

What makes Rodríguez’s work so important is that it is not premised on a conventional accommodationist account, which emphasizes Tiboutian sorting, preference satisfaction, and enclave solutions. For Rodríguez, the key to federalism isn’t just that varied policies accommodate varied preferences. Instead, decentralized policymaking *shapes* our preferences and teaches us the skills required for integration as we continually revisit the problem of accommodation in local and state nodes.<sup>64</sup>

While LaCroix’s work is largely historical, it reveals interesting continuities with the interpretive work done by other members of the nationalist school, particularly Rodríguez’s. LaCroix portrays the lower federal courts as the key actors in creating and enacting federalism during earlier periods in our history.<sup>65</sup> Courts did so not as neutral referees, but as decidedly federal actors using their jurisdiction to promote national integration and connect the periphery to the center.<sup>66</sup>

Gluck examines the question of integration through an institutional and interpretive lens. She argues that state implementation of federal law can make national lawmaking possible because it eases federal entry into traditional state

60. Rodríguez, *supra* note 21, at 2100.

61. *Id.*

62. *See id.* at 2119–21; *see also* Rodríguez, *supra* note 16 (manuscript at 10).

63. Rodríguez, *supra* note 16.

64. For a different but equally distinctive take on the participatory benefits of decentralization, *see* Ruger, *supra* note 30, at 1047–48.

65. Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 206–07, 210, 215 (2012) [hereinafter LaCroix, *Federalists, Federalism, and Federal Jurisdiction*]; *see also* LaCroix, *supra* note 45, at 750 (challenging arguments that popular sovereignty was the sole cause of federalism’s development and noting that “it is . . . difficult to exaggerate the importance of the judiciary for the creation of American federalism”); Alison L. LaCroix, *What if Madison Had Won? Imagining a Constitutional World of Legislative Supremacy*, 45 IND. L. REV. 41 (2011) (considering what would have happened had the Constitutional Convention adopted Madison’s proposal to give Congress the power to negative state law in lieu of judicial review).

66. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, *supra* note 65, at 206–07, 210, 215.

domains while embedding state values in the federal scheme.<sup>67</sup> State policymaking thus takes a national turn, and national policies assume a local guise. So, too, the roles state and federal actors play in construing each other's law knits these institutions together and produces a blended interpretive regime.<sup>68</sup>

Note that when members of the nationalist school write about federalism's role in promoting integration, they do not equate national integration with national uniformity (something nationalists often laud and federalism's proponents often fear). To be sure, several of us have written about political actors using state and local sites to pursue decidedly national agendas. I've written about the ways that dissenters and interest groups use their policymaking power at the state and local level to build a national movement, force issues on the national agenda, and tee up national debates, all with an eye to forging a national norm.<sup>69</sup> Bulman-Pozen's work on partisan federalism similarly focuses on state actors using local sites to pursue national agendas.<sup>70</sup> But we all agree that local variation is perfectly consistent with a nationalist scheme.<sup>71</sup>

Rodríguez and Gluck are the most explicit on this front. Rodríguez acknowledges that federalism can "help produce values or policy consensus" for some issues.<sup>72</sup> But she also questions the utility, the desirability, even the possibility of a national consensus for others.<sup>73</sup> Rodríguez suggests instead that federalism's utility lies in its ability to enable sustained friction over the long run.<sup>74</sup> On this view, "integration can emerge through the achievement of an

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67. Gluck, *supra* note 10.

68. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898 (2011); Gluck, *supra* note 10; Gluck, *supra* note 6.

69. Gerken, *supra* note 13, at 60-71.

70. Bulman-Pozen, *supra* note 23.

71. E.g., Gluck, *supra* note 6, at 2019-21; Rodríguez, *supra* note 21, at 2101-03; see also Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 112 MICH. L. REV. (forthcoming 2014) (manuscript at 39).

72. Rodríguez, *supra* note 16 (manuscript at 5).

73. See Cristina M. Rodríguez, *The Integrated Regime of Immigration Regulation*, in WRITING IMMIGRATION: SCHOLARS AND JOURNALISTS IN DIALOGUE 44, 53 (Marcelo M. Suárez-Orozco et al. eds., 2011) (arguing that "no amount of federal action will flatten out the underlying differences in public opinion" in the immigration context).

74. Rodríguez, *supra* note 16 (manuscript at 33); see also Gerken, *Second-Order Diversity*, *supra* note 31, at 1171-79 (discussing the benefits of cycling).

equilibrium that contains within it the possibility of ongoing debate,”<sup>75</sup> with federalism “keep[ing] open the capacity for change, so that law and policy can reflect and channel the variable rather than linear nature of public opinion.”<sup>76</sup> Similarly, while Gluck recognizes that states can be drivers of legal uniformity,<sup>77</sup> she does not take federalism’s end to be a uniform national solution. Instead, emphasizing the persistence of traditional forms of federalism, she “takes continuing variety and state power as an *end* worth pursuing and aims to persuade states-rights theorists that nationalism is one important means to it.”<sup>78</sup> These observations resonate deeply with LaCroix’s work, which shows that contestation over federalism’s meaning has been a recurring feature of American legal and political thought since before the Founding.<sup>79</sup>

### C. *Improving National Policymaking: Beyond Laboratories of Democracy*

Conventional federalism has long posited a role for the states in improving national policymaking.<sup>80</sup> But the nationalist school has moved well past the anodyne idea that states serve as “laborator[ies]” of democracy.<sup>81</sup> Some of us have challenged the notion itself,<sup>82</sup> some have recharacterized it,<sup>83</sup> and many have offered a more textured and sophisticated account of states’ policymaking roles.

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75. Rodríguez, *supra* note 21, at 2100.

76. Rodríguez, *supra* note 16 (manuscript at 62).

77. Gluck, *supra* note 6, at 2021-22.

78. *Id.* at 2022.

79. LACROIX, *supra* note 9, at 220-21 (suggesting that “the federal ideal” is “an intellectual artifact, not a transcendent or timeless idea that has always hovered around waiting to be applied to a particular political project”); LaCroix, *supra* note 6, at 2045 (suggesting that the only real consensus about federalism is that we disagree about it).

80. For one of the most important and wide-ranging accounts, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

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

82. See, e.g., Gerken & Tyler, *supra* note 39; David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008). For one of the earliest and most important challenges, see Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980).

83. See Bulman-Pozen, *supra* note 23, at 1124-29 (arguing that the states are “laboratories of partisan politics”).

Much of this work has been done by scholars not featured here, many of whom might resist being classified as “nationalists.” Robert Schapiro’s work on “polyphonic federalism” was one of the earliest and most important contributions.<sup>84</sup> But scholars inside and outside of constitutional law have convincingly established the policymaking benefits associated with redundancy, administrative overlap, joint regulation, and mutual dependence.<sup>85</sup> The environmental federalists, in particular, have been key movers on this front, offering a comprehensive account of the ways in which these unconventional forms of federalism improve policy outcomes.<sup>86</sup>

Contributors to this Feature have taken these ideas in a different direction, emphasizing the role that contestation plays in a healthy policymaking

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84. See, e.g., ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 97-98 (2009). For earlier work in this vein, see, for example, Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).
85. See, e.g., Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 U. KAN. L. REV. 1219 (1997); Chemerinsky, *supra* note 11; Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011); Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567 (2011); Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1719-20 (2010); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377 (2006); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001). Rick Hills, as is his wont, has developed his own, distinctively Hillsian account of why “federalism can improve the national legislative process.” Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007); see also Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181 (1998).
86. See, e.g., ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2012); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 1, 1 (1997); William W. Buzbee, *Interaction’s Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 154, 157 (2007); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Daniel C. Esty & Damien Geradin, *Regulatory Co-Opetition*, in REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 30 (Daniel C. Esty & Damien Geradin eds., 2001); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2002); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011).

process.<sup>87</sup> Bulman-Pozen and I have described the “uncooperative” dimensions of cooperative federalism.<sup>88</sup> Decentralization puts skeptics inside the Fourth Branch, reproducing the dynamics long lauded by conventional federalism within the federal administrative state.<sup>89</sup> Because states and localities play a crucial role in administering federal law, federalism turns dissenters into decisionmakers, not just lobbyists or supplicants. They can help set policy rather than merely complain about it.<sup>90</sup> Better yet, dissenters’ arguments will be based on detailed knowledge of on-the-ground facts and will be cast in the vernacular of shared expertise and experience.<sup>91</sup> Administrative law scholars have thought long and hard about how to ensure an adequate level of contestation inside the Fourth Branch.<sup>92</sup> “Uncooperative federalism” isn’t just a theoretical solution to this problem; it’s a solution that’s working in practice. And it’s one that serves the distinctively nationalist end of improving federal policymaking.

Bulman-Pozen has offered a promising new take on these issues. She argues that federalism serves another nationalist goal: safeguarding the separation of powers.<sup>93</sup> On her view, states in cooperative federal regimes help check executive power. In the federal-state tussles that inevitably emerge from joint regulation, states cast themselves as Congress’s “champions”<sup>94</sup> and focus attention on congressional aims. They also enlist the courts as allies against an overweening executive branch.<sup>95</sup> What makes this work especially significant is

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87. For an analysis of these differences, see Gerken, *supra* note 13, at 20 (contrasting accounts of cooperative federalism that resemble conventional arguments about states serving as “laboratories of democracy, sources of innovation, and regulatory rivals” with the Foreword, which “limn[s] the theories that make up the other half of [conventional] federalism – those that emphasize the role that minority rule plays in shaping identity, promoting democracy, and diffusing power” (footnotes omitted)).

88. Bulman-Pozen & Gerken, *supra* note 26.

89. Gerken, *The Loyal Opposition*, *supra* note 31, at 1981.

90. Gerken, *Exit, Voice, and Disloyalty*, *supra* note 26.

91. Bulman-Pozen & Gerken, *supra* note 31.

92. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006). For an excellent survey of this work and an important contribution to it, see Jon D. Michaels, *Dynamic Separation of Powers* (2014) (unpublished manuscript) (on file with author).

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

94. *Id.* at 461.

95. *Id.* at 493-96.

that it doesn't insist, as does so much other work, that success depends on Congress pulling up its socks and enforcing its own prerogatives. Instead, Bulman-Pozen suggests that federalism converts what some see as one of Congress's worst habits—its propensity to delegate broad swaths of authority to other actors—into a constitutional virtue.<sup>96</sup>

Consistent with her expertise in the field of legislation, Gluck views these design choices through the eyes of Congress rather than those of a hypothetical social engineer. Because the states' role in national policymaking is a product of a congressional intent, even “nationally oriented motivations,” like the entrenchment of federal statutes, “have federalism within them.”<sup>97</sup> Cooperative federal regimes do a better job of catalyzing state experimentation than do the exclusively state-based mechanisms contemplated by the conventional laboratories account. So, too, Gluck argues that “administrators are not all equal” and that a nationally oriented member of Congress might sensibly prefer state implementation over federal implementation.<sup>98</sup> Implementing federal law at home lends it a different shape than Washington-based implementation.<sup>99</sup> National actors, in short, have plenty of reasons to prefer the “disuniform implementation of national law.”<sup>100</sup> So, too, Rodríguez argues that decentralized conflict and the percolation of national debates often inure to the federal government's benefit, an insight reflected in statutory delegation as well as federal enforcement schemes.<sup>101</sup>

*D. Entrenching National Power and National Policies: The Role of Self-Interested National Actors*

While much of the work of the nationalist school focuses on improving national politics and national policymaking, not aggrandizing national power, at least some of that work shows how the federal government can increase its power by devolving it. That might seem like a counterintuitive claim.<sup>102</sup> But contributors to this Feature have shown that self-interested national actors

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96. *Id.* at 486-88, 498-500.

97. Gluck, *supra* note 6, at 2019.

98. *Id.*

99. *Id.*

100. *Id.* at 2020.

101. Rodríguez, *supra* note 21, at 2113; Rodríguez, *supra* note 34, at 630-40.

102. At least for those who haven't read their Daryl Levinson. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

have as much of an interest in state power as does the disinterested social engineer.

Gluck has been a leader on this front, showing that federalism can be a “tool of national power.”<sup>103</sup> When Congress uses states to implement federal law, state participation helps “entrench” the statutory regime and invests more political actors in its success.<sup>104</sup> Delegating power to state agencies even allows the federal government to engage in “field claiming.”<sup>105</sup> It eases federal entry “into a field of lawmaking traditionally governed by the states,” thereby further extending the federal government’s reach.<sup>106</sup>

Rodríguez has similarly sought to separate the perspective of self-interested national actors from national interests writ large. Like Gluck, she believes that the federal government has its own institutional interests and needs to be understood as simply “one actor in the system.”<sup>107</sup> Although both scholars focus on the federal government’s long game, Rodríguez has taken that insight in different directions. Rodríguez highlights instances in which self-interested national actors favor devolution even to states pursuing policies that are inconsistent with federal law. The Obama Administration’s grant of waivers, for instance, assures the robustness of federal programs by giving states much-needed opportunities to adapt them.<sup>108</sup> So, too, federal officials have been happy to let states take the lead in promoting marriage equality or de-escalating the war on drugs.<sup>109</sup> “Because of a variety of political and institutional pressures,” she writes, the federal government “cannot be the prime mover” in these processes, but nonetheless has an interest in their going forward.<sup>110</sup>

## II. THE INSTITUTIONS THAT MATTER TO “OUR FEDERALISM”

If the nationalist school has expanded our list of the ends of federalism, it has also identified new institutional means for achieving those ends. For

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103. Gluck, *supra* note 10, at 564.

104. *Id.* at 538, 569, 572-74.

105. *Id.* at 574.

106. *Id.* at 565.

107. Rodríguez, *supra* note 21, at 2100.

108. *Id.* at 2108-09.

109. *Id.* at 2111.

110. *Id.*

conventional accounts, the states and the federal government are the sites that matter, with much of the emphasis placed on the states. The nationalist school has offered a more textured account by (1) disaggregating the states and federal government into their component parts; (2) pushing federalism all the way down, looking not just to state institutions, but substate, local, and sublocal institutions; and (3) paying attention to federalism's horizontal dimensions, not just its vertical ones.

*A. The States and the Federal Government Are "Theys," Not "Its"*

Consistent with the bad habits of constitutional theory generally, conventional federalism often treats the states and federal government as if they were "its" and not "theys."<sup>111</sup> Members of the nationalist school have taken the opposite tack. Some have disaggregated the states themselves, emphasizing differences rather than continuities among them.<sup>112</sup> Others have "dissected" the state and federal government, to use Rick Hill's evocative phrase,<sup>113</sup> and thereby moved beyond stale debates about "the" states and "the" federal government. Indeed, much of the work of the nationalist school begins with this move, breaking state and federal governments into their component parts rather than treating them as unitary, homogenous institutions.

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111. With thanks to Ken Shepsle. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992); see also Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).
112. See, e.g., Gerken & Holtzblatt, *supra* note 71, at 45-46 (arguing that the idea of state equality is belied by facts on the ground); Adelman & Engel, *supra* note 86, at 1822 (arguing that given the wide variability among the states, "the state-federal debate ought to be a sideshow"); Carlson, note 86, at 1099-100, 1107, 1160 (discussing the "superregulator" status of certain states in environmental law). This might be one way to characterize Bulman-Pozen's work on partisan federalism, which focuses on the partisan identity of states rather than states as states. Bulman-Pozen, *supra* note 23. Rodríguez has emphasized the internal diversity of states, which manifests itself not only in state-federal relations but in the differences among state administrators. Rodríguez, *supra* note 34, at 585-90, 636-40.
113. Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999). Like Hills, Judith Resnik has been a leading figure in this debate, as much of her work is devoted to "[m]ulti-faceted federalism," which "presumes that governance cannot accurately be described as residing at a single site." Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 623 (2001). We see this move being made in many areas, from policing, see Richman, *supra* note 85, to environmental law, see sources cited *supra* note 86.

Building on the work of scholars like Rick Hills and Larry Kramer, for example, most of the contributors to this Feature have focused heavily on the *administrative* dimensions of federalism, keying their work to the role states play in implementing and interpreting federal law.<sup>114</sup> Gluck insists that this form of cooperative federalism is where all the action is nowadays,<sup>115</sup> and the nationalist school has certainly heeded that advice. For instance, Bulman-Pozen and I have emphasized the uncooperative dimensions of cooperative federalism and the federalist safeguards of federal administration.<sup>116</sup> I've developed accounts of the "power of the servant" to describe the influence states and localities wield as the center's agents.<sup>117</sup> Bulman-Pozen describes how state actors vindicate congressional interests and challenge the federal executive in cooperative regimes.<sup>118</sup> Gluck has singlehandedly defined the field of "intrastatutory federalism."<sup>119</sup> She has even schematized different variants of cooperative federalism.<sup>120</sup> Indeed, while Rodríguez, Bulman-Pozen, and I focus on blended policymaking and political regimes, Gluck focuses on blended interpretive regimes. As a result, no one has done more work on the interpretive puzzles these regimes raise.<sup>121</sup>

Interestingly, Rodríguez's immigration work and LaCroix's historical work also fit with this administrative turn. Rodríguez argues that local, state, and federal governments constitute an "integrated regulatory structure" in the immigration arena, one that has largely been hidden from view by the field's doctrinal frame.<sup>122</sup> She's also shown how state and federal enforcement and administrative decisions constitute one another. Similarly, LaCroix has unearthed the ways in which the Founders wrestled with the question of

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114. Not to be confused with the work on "administrative federalism," which focuses on the role agencies play in limiting or expanding state power. See *infra* note 133 (collecting sources).

115. In her view, "*federalism now comes from federal statutes . . .* [F]ederalism's primary source is Congress." Gluck, *supra* note 6, at 1998. As such, federalism "comes—and goes—at Congress's pleasure." *Id.*

116. Bulman-Pozen & Gerken, *supra* note 31.

117. Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006); Gerken, *supra* note 13, at 33-43; Gerken, *Exit, Voice, and Disloyalty*, *supra* note 31.

118. Bulman-Pozen, *supra* note 93.

119. Gluck, *supra* note 10.

120. *Id.*

121. See sources cited *supra* note 68.

122. Rodríguez, *supra* note 34, at 571.

“multilayered authority” and “multiplicity’s institutional and practical significance.”<sup>123</sup> That work has shown how contingent today’s conventional wisdoms are. Earlier debates over joint regulation, for instance, rested on the assumption that it was better for Congress to force states to do something than for Congress to do that work itself, a notion that’s in deep tension with conventional federalism’s tropes.<sup>124</sup>

“Dissecting” the state and national government has allowed us to take a different view of the states’ role in “Our Federalism.” Bulman-Pozen and I, for example, have emphasized the nominally bureaucratic role played by decidedly political actors (including state legislators and governors), something that allows them to serve as a source of contestation and dissent within the Fourth Branch.<sup>125</sup> Gluck’s work on the relationship between state and federal courts—which debunks the long-standing assumption that federal courts and agencies implement federal law and state courts and agencies implement state law—has been field-opening.<sup>126</sup> So, too, LaCroix has uncovered the early role that the federal courts played in federalism’s development. The Federalists’ “judiciary-centric federalism,” she writes, viewed the lower federal courts as “the most important symbolic and institutional nodes by which the people of the nation would encounter the authority of the general government.”<sup>127</sup> The expansion of the lower federal courts and federal jurisdiction was central to the early struggles over federalism and helped “cement[.]” a nationalist vision.<sup>128</sup>

Some of this work has been more granular, focusing on the complex interactions that take place within individual policy domains. Rodríguez has written the leading work on immigration federalism.<sup>129</sup> Gluck, along with Ted Ruger and others, writes at the intersection of health law and federalism.<sup>130</sup> But

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123. Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 *LAW & HIST. REV.* 451, 457–58 (2010).

124. Alison L. LaCroix, *The Interbellum Constitution and the Spending Power* 3–4 (Univ. of Chi., Working Paper No. 420, 2013).

125. Bulman-Pozen & Gerken, *supra* note 31; *see also* Hills, *Federalism in Constitutional Context*, *supra* note 85, at 191 (1998).

126. Gluck, *supra* note 68.

127. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, *supra* note 65, at 206–07, 210, 215.

128. *Id.* at 206; *see also* Alison L. LaCroix, *The Constitution of the Second Generation*, 2014 *U. ILL. L. REV.* 1775, 1786 (describing the nineteenth century as “an unparalleled site for exploring the transmission of the Constitution, both written and unwritten”).

129. Rodríguez, *supra* note 34.

130. Gluck, *supra* note 26; Theodore W. Ruger, *Health Care Devolution and the Institutional Hydraulics of the Affordable Care Act*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S*

the vast majority of this work has been done by those whose work is not featured here. For instance, Dan Richman has been an important voice on the federal dimensions of policing.<sup>131</sup> Bill Buzbee, Ann Carlson, Kirstin Engel, and Erin Ryan are a few of the stars of environmental federalism,<sup>132</sup> which has been ground zero for much of the new thinking on federalism.

Bulman-Pozen's burgeoning work is emblematic of how many ideas emerge when one pulls apart institutions once treated as if they were unitary.<sup>133</sup> She shows how partisan alliances between state and national actors crisscross the regulatory terrain in a complex and unexpected fashion.<sup>134</sup> In her essay for this Feature, for instance, she "break[s] open the national side of cooperative federalism" to show that "the diversity and competition generated by state administration of federal law do not follow from state-federal separateness," but that instead "states ally themselves with certain federal actors and interests to oppose others."<sup>135</sup> Rodríguez's work suggests even more variegation within the federal government. She breaks down the constituencies that exist within a single Administration, showing that federal policies are often shaped by these internal divisions.<sup>136</sup>

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DECISION AND ITS IMPLICATIONS 359 (Nathaniel Persily et al. eds., 2013); see also Nicole Huberfeld, *With Liberty and Access for Some: The ACA's Disconnect for Women's Health*, 40 FORDHAM URB. L.J. 1357 (2013).

131. Richman, *supra* note 85.

132. See sources cited *supra* note 86.

133. Another example of efforts to "dissect" the national government is the work done on "administrative federalism," which focuses on the role that federal agencies play in influencing state-federal relations. See Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009).

134. Bulman-Pozen, *supra* note 23.

135. Bulman-Pozen, *supra* note 15, at 1934. Rick Hills is one of the most astute commentators making the reverse move, examining what happens when Congress "dissect[s] the state, unpacking the black box of 'the state' to liberate certain state or local institutions from control of state laws." Hills, *supra* note 113, at 1203; see also Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 877-78 (1998).

136. Rodríguez, *supra* note 21, at 2101, 2103-04, 2110, 2112-13.

### B. *Federalism All the Way Down*

Some members of the nationalist school have disaggregated the states in a different way, arguing that “Our Federalism” extends beyond the states. I have argued that federalism should be pushed “all the way down” and thus understood to encompass not just states, but the substate, local, and sublocal institutions that constitute states: juries, zoning commissions, local school boards, locally elected prosecutor’s offices, state administrative agencies, and the like.<sup>137</sup> Federalism’s values are vindicated by the many sites where national minorities wield power as local majorities.<sup>138</sup>

So, too, a good deal of Rodríguez’s work has focused on cities, public schools, and social-service agencies as sites of contestation and debate.<sup>139</sup> She’s placed special emphasis on what she calls the “discretionary spaces of federalism,” where policy decisions must be made and “actors within the system must [therefore] figure out how to interact with one another.”<sup>140</sup> In her other work, Rodríguez has looked to nongovernmental actors,<sup>141</sup> which she views as falling within the ambit of decentralization, but not federalism, since their decisions are not “instantiated in law.”<sup>142</sup>

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137. Gerken, *supra* note 13, at 21–33.

138. Rick Hills has also grouped subnational institutions within federalism’s ambit. See Hills, *supra* note 113; Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 187–88 (2005). Others have written on the relationship between the local and the national, albeit not in the terms I describe here. See, e.g., David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 487–91 (1999); Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006); Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1313–15 (1994); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 990–1000 (2007); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL’Y REV. 187, 208–09 (1996); Resnik, *supra* note 113, at 621–23; Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2563 (2006); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1811–13 (2004).

139. Rodríguez, *supra* note 34; Rodríguez, *supra* note 21, at 2115 & n.52.

140. Rodríguez, *supra* note 21, at 2097.

141. E.g. Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006).

142. Rodríguez, *supra* note 21, at 2115 & n.52.

### C. Horizontal Federalism

Finally, building on the work of two of my colleagues,<sup>143</sup> several members of the nationalist school have complicated our understanding of “Our Federalism” by attending to relations *among* the states. Ari Holtzblatt and I have recently put forward the first account of the “the political safeguards of horizontal federalism.”<sup>144</sup> I am also co-authoring a paper on the “myth of the laboratories of democracy” that uses cutting-edge research on state-to-state relations to upend some of the basic assumptions undergirding federalism doctrine.<sup>145</sup> So, too, Rodríguez has argued that “[h]orizontal federalism . . . is as central to understanding the utility of our governing structure[] as the vertical dynamics of sub-federal entities’ interaction with the national” are.<sup>146</sup> And Bulman-Pozen’s account of “partisan federalism” views federalism through the lens of networked national parties and thus imagines it as something other than an “exclusively top-down, Washington-centric affair.”<sup>147</sup> Her framework enables us to think more deeply about questions as general as the relationship between citizens and states where they don’t reside<sup>148</sup> and as specific as cross-state campaign donations.<sup>149</sup> Finally, Gluck has argued that statutory federalist regimes don’t just bind state and national officials to one another, but generate networks among state officials as they administer the same program and dicker over its implementation.<sup>150</sup> She also identifies a horizontal federalism of a different sort: state adoption of uniform laws which,

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143. Judith Resnik has written extensively on federalism’s horizontal and even “diagonal” dimensions, *see* sources cited *supra* note 30, and Susan Rose-Ackerman has written a seminal paper on interstate competition, Rose-Ackerman, *supra* note 82. For other work in this area, *see*, for example, Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 966-72 (2001); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 117-126 (2001); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007); Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133 (2010); and Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1105-08 (2010).

144. Gerken & Holtzblatt, *supra* note 71.

145. Gerken & Tyler, *supra* note 39.

146. Rodríguez, *supra* note 16 (manuscript at 25-26).

147. Bulman-Pozen, *supra* note 23, at 1126.

148. *Id.* at 1108-34.

149. *Id.* at 1135-42.

150. Gluck, *supra* note 10, at 570-71.

in her view, pushes toward a nationalist approach even in the absence of congressional action.<sup>151</sup>

### III. WHAT GETS FEDERALISM UP AND RUNNING?

Any account of federalism must identify what gets it up and running. The least reflective vein of conventional federalism has followed the lead of constitutional theory, assuming a simplistic Madisonian account in which “ambition is made to counteract ambition.”<sup>152</sup> On this view, state and federal officials pursue distinct “interests” as they compete for the hearts and minds of citizens. Many have found this account deeply unsatisfying. Much of the pushback against Wechsler’s political safeguards account, for instance, challenged this assumption.<sup>153</sup> There’s even been an intense debate on whether states have distinctive identities in the first place.<sup>154</sup>

Because members of the nationalist school refuse to valorize the states as states, they have new ideas about what fuels federalism’s dynamics. Bulman-Pozen has argued that partisan competition is what brings federalism to life (and, in doing so, has recast the debate on state identity).<sup>155</sup> On her account, “states participate in controversies that are national in scope and do so on behalf of the nation’s people at large.”<sup>156</sup> Although she sees partisanship as the prime mover of contemporary federalism, she also gestures to a broader account of politically charged federalism.<sup>157</sup> Rodríguez and I argue that

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151. Gluck, *supra* note 6, at 2021-22.

152. Cf. Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 72, 82-85 (2012), [http://www.harvardlawreview.org/issues/126/december12/forum\\_985.php](http://www.harvardlawreview.org/issues/126/december12/forum_985.php) (criticizing the Madisonian model in the context of separation of powers).

153. See Gerken, *supra* note 13, at 17-18 (surveying this debate).

154. See Bulman-Pozen, *supra* note 23, at 1108-13 (surveying this debate). Leading the charge has been Ernie Young, on the one hand, and Malcolm Feeley and Ed Rubin on the other. Compare Ernest A. Young, *The Volk of New Jersey? Sovereignty and Political Community in Europe and the United States* 14-15 (Summer 2008) (unpublished manuscript) (on file with author) (arguing that states have distinct identities), with Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (2001) (taking the opposite view), and Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944 (1994) (same).

155. Bulman-Pozen, *supra* note 23, at 1108-21.

156. *Id.* at 1082.

157. *Id.* at 1096 (“While the specifics of the arrangements are mutable, the fact that states exist as separate sites of governance means political conflict will be channeled through them.”).

networked interest groups and political outliers can serve as the wellsprings of federalism, providing the political energy necessary to jumpstart debates, pass new policies, and move an ossified system forward.<sup>158</sup> These interests are more variegated than partisan identities and don't break down neatly along state lines, which may help explain why, as Rodríguez's work suggests, some enclaves are impervious to outside influence while others are quick to take up red or blue policymaking mantles.

#### IV. HOW DO THE CENTER AND PERIPHERY INTERACT?: FEDERALISM(S), NOT FEDERALISM

Conventional federalism has been centered around the case law; that's why the sovereignty/process debate has absolutely dominated the field. Perhaps as a result, conventional federalism often offers a distinct picture of state-federal interactions, one involving one-off battles over regulatory terrain and focusing on whether the judiciary should serve as the referee. Despite the efforts of process scholars like Ernie Young, Larry Kramer, and Rick Hills to complicate this debate, conventional federalism continues to place undue focus on turf wars between autonomous governments.

The work by the nationalist school emphasizes state-federal interactions that bear scant resemblance to this picture. Every contributor to this Feature writes about areas of federal-state regulatory overlap. The federalism we describe, then, is a federalism largely "sheared of sovereignty,"<sup>159</sup> at least as traditionally understood.<sup>160</sup> Bulman-Pozen and I, for instance, have written about the "power of the servant" or "agency as a form of influence" in describing states' relationship to the federal government.<sup>161</sup> Gluck writes about federalism "at Congress's pleasure."<sup>162</sup> Rodríguez has highlighted sources of local and state power where the federal government is thought to be

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158. Along with our colleague, Judith Resnik. See sources cited *supra* note 30.

159. Gerken, *supra* note 13, at 14.

160. Gluck's position on this question is more ambivalent. She agrees that the new federalism "lacks the traditional appearances of federalism's defining feature—sovereignty," but wants federalism scholars to reimagine sovereignty so that they can see, as Gluck does, that "federalism depends on, and strengthens, the state's continuing sovereign status in important ways." Gluck, *supra* note 6, at 1999, 2000.

161. Bulman-Pozen & Gerken, *supra* note 31; Gerken, *supra* note 117; Gerken, *Exit, Voice, and Disloyalty*, *supra* note 31.

162. Gluck, *supra* note 6, at 1998.

preeminent.<sup>163</sup> LaCroix has shown that notions of state and federal power have always been contingent and subject to contestation.<sup>164</sup>

Because the nationalist school focuses on the administrative, discursive, interpretive, and partisan dimensions of federalism, it recognizes that there are many forms of state power. Conventional thinking about federalism has moved beyond sovereignty as the touchstone of power, but it still clings to an autonomy model (which at least one of us believes is proof that federalism remains haunted by sovereignty's ghost).<sup>165</sup> The contributors to this Feature, in contrast, write about the power states enjoy as agents when they implement federal law,<sup>166</sup> the power states enjoy by virtue of the fact that they are embedded in a larger political system,<sup>167</sup> and the sovereign-like role states play in the national policymaking process.<sup>168</sup> We all have a different theory about what forms state power takes, but we're in agreement that there cannot be one theory to rule them all.<sup>169</sup> We use the phrase "Our Federalism," but it would be more accurate to say that we are writing about "Our Federalism(s)."<sup>170</sup>

Finally, because much of the nationalist school's work focuses on areas of administrative overlap and joint regulation, most of us understand state-

163. Rodríguez, *supra* note 34.

164. LaCroix, *supra* note 18. Her work thus challenges much of the doctrine and scholarship that relies on originalist modes of interpretation and portrays federalism as static.

165. Gerken, *supra* note 13, at 11-20.

166. Bulman-Pozen & Gerken, *supra* note 31; Gerken, *Exit, Voice, and Disloyalty*, *supra* note 31; Gerken, *supra* note 117; Gluck, *supra* note 6; Gluck, *supra* note 10; Gluck, *supra* note 26.

167. Bulman-Pozen, *supra* note 15; Bulman-Pozen, *supra* note 23; Gerken, *The Loyal Opposition*, *supra* note 31; Gerken, *supra* note 13; Gerken, *Dissenting by Deciding*, *supra* note 31; Gerken, *Exit, Voice, and Disloyalty*, *supra* note 31; Rodríguez, *supra* note 16; Rodríguez, *supra* note 34; Rodríguez, *supra* note 21.

168. Gluck, *supra* note 6; cf. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550 (2013) (arguing that different forms of state power—sovereignty, autonomy, and agency—complement and reinforce one another).

169. I use this line in Gerken, *supra* note 168, at 1550, where I issue a formal apology to Tolkien. Judith Resnik has long written about "federalism(s)." Her recent *Nomos* piece describes a dizzying array: "administrative federalism, cooperative federalism, competitive federalism, creative federalism, cultural federalism, dialectical federalism, dialogical federalism, dual federalism, fiscal federalism, intrastatutory federalism, noncategorical federalism, polyphonic federalism, territorial federalism, and the like." And she has long been "hesitant to assume that any one of them provides a stable and general account." Judith Resnik, *Federalism(s)'s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in *NOMOS LV: FEDERALISM AND SUBSIDIARITY* (James Fleming ed.) (forthcoming 2014).

170. Gerken, *supra* note 168.

federal interactions to be iterative, dynamic, often informal, and typically blending a mix of conflict and cooperation.<sup>171</sup> In some places, we see “uncooperative federalism.”<sup>172</sup> In others, we see “negotiated federalism.”<sup>173</sup> In still others, we see “polyphonic federalism,”<sup>174</sup> “dynamic federalism,”<sup>175</sup> “iterative federalism,”<sup>176</sup> and the like.

LaCroix suggests that the changing nature of state-federal regulation has even influenced the way these cases are litigated in the courts (the traditional focus of conventional federalism scholarship).<sup>177</sup> The reason the “shadow powers” embedded in the Necessary and Proper Clause and the General Welfare Clause are now front and center in judicial fights, she argues, is that “contemporary legal and political players [have] determine[d] that there is no more room to move the doctrine in the domain of ‘real’ enumerated powers, such as the commerce power.”<sup>178</sup> And she thinks the Justices are construing these “shadow powers” to reflect their own concerns about the turn toward joint regulation and the appropriate relationship between the states and the national government.

## V. RULES OF ENGAGEMENT

Finally, any account of federalism must offer what Robert Schapiro has called “rules of engagement”<sup>179</sup>—an account of how state-federal interactions *ought* to occur. As Gluck points out, recent developments in federalism don’t just raise interesting theoretical questions; they also raise “‘law’ problem[s].”<sup>180</sup> The work on conventional federalism is particularly deep and well theorized along this dimension. Sovereignty federalism, process federalism,

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171. Here again, the environmental federalists are some of the dominant figures in developing these sorts of accounts, *see* sources cited *supra* note 86, although we see similar arguments in other areas as well, *see* sources cited *supra* notes 84–85. Virtually all of Judith Resnik’s work, for example, describes federal-state relations in this fashion.

172. Bulman-Pozen & Gerken, *supra* note 31.

173. Ryan, *supra* note 86.

174. Schapiro, *supra* note 84.

175. Engel, *supra* note 86.

176. Carlson, *supra* note 86.

177. LaCroix, *supra* note 6, at 2049.

178. *Id.* at 2052.

179. Schapiro, *supra* note 4, at 285.

180. Gluck, *supra* note 6, at 1997.

administrative federalism—all represent efforts to identify the rules of engagement.

The nationalist school has done much less work on this front. Indeed, there's a case to be made that identifying "rules of engagement" is the most pronounced weakness of this school of thought—a "sorry state of affairs," to use Gluck's diagnosis.<sup>181</sup> Were it not for scholars like Gluck, Erin Ryan,<sup>182</sup> and a handful of others,<sup>183</sup> we wouldn't have much to say.

One reason for that omission is methodological. A great deal of the work in this area is descriptive; it's designed to connect federalism theory with what's actually taking place on the ground.<sup>184</sup> Even the work that is normatively inflected is mostly interpretive; it tries to construct a normatively attractive account of existing institutional arrangements. Moreover, scholars doing this work typically focus less on how we ultimately balance the costs and benefits of devolution and more on what goes on the scale in the first place (a move I have defended elsewhere).<sup>185</sup>

Moreover, members of the nationalist school set out to complicate the story we tell about federalism. The problem is that we've succeeded. It was hard enough to get traction on federalism's fights when the only actors that mattered were "the" state and "the" federal government, when each camp had a limited list of the values served by devolution or centralization, and when constitutional theory didn't pay enough attention to on-the-ground realities. Complexity makes it even harder to identify the rules of engagement.<sup>186</sup>

Nonetheless, at some point someone has to decide something, and the nationalist school hasn't (yet) said enough about who should decide, let alone how. To be sure, good law professors all, we often give doctrinal examples to

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181. *Id.*

182. RYAN, *supra* note 86; see also Erin Ryan, *Environmental Law After Sebelius: Will the Court's New Spending Power Limits Affect Environmental State-Federal Partnerships?*, AM. CONST. SOC'Y (2013), <http://www.acslaw.org/sites/default/files/Ryan-After-Sebelius.pdf>.

183. See, e.g., Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. (forthcoming 2014); Weiser, *supra* note 183.

184. Bulman-Pozen, *supra* note 15; Gerken, *The Loyal Opposition*, *supra* note 31; Gluck, *supra* note 10, at 538; Rodríguez, *supra* note 34, at 573.

185. See Gerken, *The Loyal Opposition*, *supra* note 31, at 1967; Gerken, *supra* note 28, at 549-50.

186. Cf. Gluck, *supra* note 6, at 2000 (arguing that "[n]on-dualist models of federalism have always suffered from a 'wishy-washiness' problem when it comes to law"); Rodríguez, *supra* note 21, at 2098 (noting that work on the new federalism makes it "difficult to move from describing the functions federalism performs in different domains to an overarching normative structural theory").

show how our ideas would matter. Some of us have even vaguely gestured at what the “rules of engagement” might look like in practice. But developing that sort of model is far easier said than done, which is precisely what makes much of this descriptive and interpretive work frustrating in the first place.

Happily, two of the contributions to this Feature are largely focused on the rules of engagement. Gluck, who has already done yeoman’s work on the interpretive dimensions of federalism,<sup>187</sup> devotes more than half of her essay to identifying concrete doctrinal questions that must be answered in the near term.<sup>188</sup> Her analysis makes clear both the theoretical difficulties involved and the pressing importance of this task.

LaCroix, meanwhile, has analyzed the Court’s efforts to sketch the rules of engagement as it struggles to squeeze changes in state-federal relations into conventional federalism doctrine. That’s why the Necessary and Proper Clause has been transformed “from a regulatory and interpretive device that tend[s] to expand federal power into a tool for checking that same power.”<sup>189</sup> Particularly evocative is her argument that the Court’s most recent federalism doctrine, with its emphasis on the limits of national power, “has cycled back to its 1930s incarnation, rather than continuing in the line laid down by the ‘new federalism’ cases of the 1980s and 1990s.”<sup>190</sup> It is both an elegant end to LaCroix’s piece and a useful warning about the hubris involved in declaring anything to be “new.”

## CONCLUSION

If we can describe recent work on federalism as “new,” then we should also describe it as the “new nationalism” and recognize the emergence of the nationalist school of federalism. The boundaries that once divided the nationalist and federalism camps have dissolved as federalism has evolved. Nationalists often pride themselves on taking a clear-eyed view of on-the-ground realities, rebuking their sparring partners for not coming to grips with the changes in federal power brought on by the New Deal. But the nationalists are now the ones behind the times, as they have not yet absorbed how much *state* power has changed in recent years. States now serve demonstrably national ends and, in doing so, maintain their central place in a modern legal

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187. See sources cited *supra* note 68.

188. Gluck, *supra* note 6, at 2022-43.

189. LaCroix, *supra* note 6, at 2061.

190. *Id.* at 2087.

landscape. Even someone who dismisses notions like sovereignty and separate spheres, someone who is skeptical of state autonomy, someone who glories in the rise of national power and the importance of national politics has reason to believe in federalism. The nationalist school is premised on the idea that we should make the best of federalism's virtues rather than wish away the existence of a system that is here to stay. It's an effort to convince all of us to take ownership of "*Our* Federalism."