

2015

The Rites of Dissent: Notes on Nationalist Federalism

Jessica Bulman-Pozen
Columbia Law School, jbulma@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#)

Recommended Citation

Jessica Bulman-Pozen, *The Rites of Dissent: Notes on Nationalist Federalism*, 59 ST. LOUIS U. L. J. 1133 (2015).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1939

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu, rwitt@law.columbia.edu.

THE RITES OF DISSENT: NOTES ON NATIONALIST FEDERALISM

Responding to Heather K. Gerken's Childress Lecture, *Federalism and Nationalism: Time for a Détente?*

JESSICA BULMAN-POZEN*

It is at least superficially paradoxical that a lecture celebrating dissent, resistance, and contestation is framed as a plea for rapprochement, mutual conciliation, and compromise. Is Heather Gerken engaged in peacemaking between “opposing camps”?¹ Or is she flamethrowing? And if it's both, if she's trying to negotiate a truce by provoking both sides, is she antagonizing everyone or only the federalists? Do she and other proponents of nationalist federalism—and I should note at the outset that I include myself in this group—challenge precepts of the nationalists at all?

As Gerken recognizes, nationalist federalism seems, at least at first blush, to demand greater concessions from members of what she terms the federalist “camp.”² It upends their very definition of federalism. While they understand federalism in terms of a sphere of sovereign, or at least autonomous, state authority and disparage arrangements that don't give states the final word as mere decentralization,³ Gerken insists that states can fare just fine without sovereignty or autonomy. She is not shy about what she's asking the federalist

* Associate Professor, Columbia Law School. Thanks to my fellow symposium participants, Joel Goldstein, David Pozen, and the editors of the *Saint Louis University Law Journal*.

1. Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 997 (2015).

2. *Id.* at 1010.

3. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 928 (1997) (“It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”); JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* 18–19 (2009) (defining federalism to require the constitutionally declared sovereignty of both state and federal governments); WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 11 (1964) (defining federalism to require the autonomy of both state and federal governments in their own spheres); 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, 816 (1998) (arguing that federalism requires state autonomy, rather than sovereignty); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 4 (2004) (proposing “strong autonomy” as the linchpin of federalism).

camp to give up. Even her labels seem designed to rankle. Calling states “servants”⁴ is hardly the way to win federalist hearts and minds.

So how does she propose to sell the federalists on her *détente*? By showing that there is no real alternative. First, she tells us, the federalists have already lost the doctrinal war; if Washington seeks to regulate in an area, it may do so.⁵ And, by and large, it has. So there’s not much left for federalists who cling to state sovereignty or even autonomy. If they are not willing to recognize a new form of federalism, they will be left without any federalism at all. Then comes some reassurance: there is still state power to be had without an independent sphere of action. As a practical matter, states retain substantial authority to govern even when they occupy the same regulatory space as the federal government—even when they are the federal government’s servants.⁶ So understood, contemporary nationalism accommodates a substantial degree of state power.

If Gerken approaches the federalists with a clear-eyed description of the contemporary landscape, she frames her appeal to the “nationalist camp”⁷ in more normative terms. Yes, Washington may regulate with a free hand as a legal matter, she says, but there is good reason for even a committed nationalist to value state power.⁸ Devolving authority to the states can “improv[e] national politics, strengthen[] a national polity, better[] national policymaking, entrench[] national norms, consolidat[e] national policies, and increas[e] national power.”⁹ Nationalists should think twice, Gerken urges, before assuming that centralization best furthers their vision.

What is Gerken really asking of the nationalist camp? And what, for that matter, is “nationalism” in this project? If she would replace federalists’ very definition of federalism, she seems to seek a more modest concession from those who have traditionally sided with Washington: accepting that devolution—to non-sovereign, non-autonomous states, no less—may sometimes further the ends of a national government or, more generously, a national polity. Does “[u]nderstanding federalism as the new nationalism” actually “complicate[] both the federalism and the nationalism sides of the equation,” as I have elsewhere argued,¹⁰ or just generate an equivalence by redefining federalism?

4. Gerken, *supra* note 1, at 1010.

5. *Id.* at 1009.

6. *Id.* at 1010–11.

7. *Id.* at 1001.

8. *E.g., id.* at 999–1001.

9. Gerken, *supra* note 1, at 1002 (quoting Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1893 (2014)).

10. Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014) (internal quotation marks omitted).

In this response, I consider how the nationalist school of federalism reconceptualizes nationalism, and not only federalism. Taking as my starting point Gerken's claim that federalism can be good for nationalism, that nationalists should "believe in giving power to the states,"¹¹ I first outline two possible understandings of nationalism suggested by this claim—that "national" refers to the federal government, and that "national" refers to a unified American polity—and explain what it would mean for federalism to serve nationalism so understood. After rejecting both accounts, I sketch the view of nationalism I propose we continue to develop. It is a nationalism that is ineluctably pluralist, one that recognizes multiple and competing national interests, institutions, and constituencies. In brief, then, this response proposes that we do for nationalism what scholars—Gerken foremost among them¹²—have recently been doing for federalism. If important pieces have examined the multiple ways in which states exercise power without separate spheres of action, more work needs to study the effects of state-federal integration on our nationalism. We must grapple with the diversity of the national and examine, in particular, how this diversity is itself generated and instantiated by the states.

I.

Try talking about federalism, and you quickly find yourself tripping over the vocabulary: Does federalism refer to the empowerment of the states or the consolidation of power in a central government?¹³ With anti-federalism long purged from our vocabulary, one response has been to align "federal" with the states and "national" with the federal, er, national government. This has hardly

11. Gerken, *supra* note 1, at 999.

12. See, e.g., Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012); Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) [hereinafter Gerken, *Federalism All the Way Down*]; see also, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011).

13. See, e.g., Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 499–500 (2008) (noting that "federalism is a euphemism for at least four partially incompatible preferences," including the diffusion of authority to states and the centralization of authority in the federal government); see also Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19, 19 (1982) ("In meeting to discuss federalism, we have to bear in mind that it is a form of government midway between two extremes. At one extreme, the autonomy, the disunity, the conflict of independent states; at the other, the uniformity, the inflexibility, the monotony of one centralized government. Federalism is meant to be a compromise between the two. As such, it is a stick that can be used to beat either dog. When Alexander Hamilton exalted its virtues, he meant it as a criticism of colonial disunity; we mean it today—in this [Federalist Society] group, at least—as a criticism of central control.").

been a universally embraced move, but at least it held out some hope of semantic precision. When juxtaposed with “national,” we knew what “federal” meant.

And then along comes the nationalist school of federalism and complicates references to nationalism, too. The term now might encompass devolution as well as centralization, power to the states as well as power to Washington, a fractious polity’s disagreements as well as a final negotiated accord.¹⁴ What’s a student of federalism to do? Or, to put it more constructively, what does the nationalist school take nationalism to be? Here, I want to briefly sketch—but ultimately reject—two answers that might be offered: first, that “national” is indeed a stand-in for the federal government, and second, that “national” evokes not Washington, but rather a unified American community.

Of course, nationalism might refer to other things as well. Perhaps ironically, for instance, one thing the nationalist school of federalism clearly does not mean is the sort of provincialism or patriotism vis-à-vis other nations that the dictionary might suggest. Because nationalism is juxtaposed in this work with federalism, instead of with internationalism, transnationalism, or cosmopolitanism, it does not refer to a doctrine that American culture or interests are superior to those of other nations, a belief that the U.S. should go it alone, or any sort of aspiration of a people for independence. While in our interdependent world, the transnational dimensions of our federalism merit attention as well,¹⁵ for purposes of this brief response, matters are complicated enough with a focus on the domestic.

So, first, maybe the nationalist school of federalism intends each term to have its conventional meaning: federalism as state power and nationalism as federal government power. This seems a fair reading of what Gerken’s “nationalist camp” must believe. To the extent there is a “camp” opposed to those who champion state sovereignty and autonomy, it must comprise those who favor centralization in Washington.¹⁶

One might think, then, that the nationalist school of federalism reconciles federalism and nationalism by arguing that *federalism enhances the power of the federal government itself*, that devolution ultimately, if paradoxically, yields centralization. There are indeed some arguments to this effect in the

14. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014).

15. See, e.g., 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); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

16. See Gerken, *supra* note 1, at 1001.

burgeoning nationalist federalism literature¹⁷ and, I hasten to add, some ways in which federal government actors may benefit from granting authority to the states. Edward Rubin and Malcolm Feeley have long argued that federalism without state sovereignty is in fact decentralization, which might readily be embraced by Washington as a policy matter.¹⁸ Abbe Gluck makes the argument without jettisoning state sovereignty, describing how devolving the administration of federal statutory schemes to states may allow Congress to enter areas previously occupied exclusively by the states and to entrench federal law.¹⁹ On her account, conferring implementation authority on the states is often “a specific strategy used by the federal government to strengthen its new federal laws and the federal norms they introduce.”²⁰

In a more theoretical vein, Richard Ford contends that the “production of local difference can be an effective strategy for consolidating and maintaining centralized power.”²¹ In the United States, the common narrative describes “progressive centralization of power at the expense of locally distinctive political communities such as the states and local governments.”²² But, he tells us, while centralization has indeed occurred, so too has local difference been “produced and enshrined, not only as an act of resistance to centralized power, but also as a mechanism of the centralization of power.”²³ Ford’s story is largely about congressional districts and local governments,²⁴ but the nationalist view of federalism makes states more similar to these non-sovereign units. Once federalism does not mean the states rule their own fiefdoms separate and apart from the federal government, they start to look more like local governments—a view Gerken in particular has embraced.²⁵ Perhaps, then, the creation or reinforcement of difference through devolution to states ultimately enhances the federal government’s power?

17. Certain critics of nationalist federalism have also reduced the argument to this point. See, e.g., Richard A. Epstein & Mario Loyola, *Saving Federalism*, 20 NAT’L AFFAIRS 3, 15 (2014), available at <http://www.nationalaffairs.com/publications/detail/saving-federalism>.

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

19. Gluck, *supra* note 12, at 568–74.

20. *Id.* at 565.

21. Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 845 (1999); see, e.g., *id.* at 864 (“[W]e might imagine that the discursive strategy by which a central government would secure its integrity would be to insist on the synthetic nature of its component parts But an equally effective centralization tactic might be to assert the distinctiveness and uniqueness of its subparts, but only in order to subsume them under a greater whole”).

22. *Id.* at 888–89.

23. *Id.* at 889.

24. *But see id.* at 890 (noting that the states are sometimes “understood as synthetic territories”—i.e., non-organic jurisdictions created by another entity to serve its purposes).

25. See Gerken, *Federalism All the Way Down*, *supra* note 12, at 21–33 (arguing that the study of federalism should include local governments and special purpose institutions).

If federalism is good for Washington, the answer to the question Gerken poses near the outset of her lecture is straightforward. “How . . . can a *nationalist* believe in giving power to the states?”²⁶ Easy: because giving power to the states is a means of securing the power of the federal government.

But that’s not the answer the nationalist school of federalism has offered.²⁷ Nor, in my view, is it the answer the nationalist school should offer. While some acts of devolution increase the power of the federal government, others decidedly do not. And this is true even when the states are agents, or servants, of the federal government. When states act uncooperatively, they may undermine cooperative federalism programs, using the very power conferred on them by Washington to push back against federal policy choices.²⁸ Even apparently cooperative forms of state action may pose challenges to federal authority. When states engage in what David Pozen and I call “uncivil obedience,” they disrupt federal regimes through literalistic, hyperbolic, or otherwise unanticipated adherence to federal law or policy.²⁹

One cannot reasonably understand all such state resistance to federal programs as ultimately serving the federal government. Moreover, doing so would undermine a key contribution of the nationalist school. The project Gerken has set out in calling attention to the “power of the servant”³⁰ is to show how even small spaces of discretion, even power that is not autonomous but rather conferred and subject to revocation, can yield genuine resistance. To argue that this form of state dissent necessarily serves the federal government would suggest there is no real power of the servant after all.

If nationalist federalism does not equate the national with Washington and cast decentralization as necessarily centralizing, how else might it reconcile federalism and nationalism? A second possibility is that *federalism domesticates conflict so as to unify a national polity*. Call it consensus

26. Gerken, *supra* note 1, at 999.

27. See, e.g., Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2100 (2014) (arguing that we must “de-center[] the national from the federal”); Bulman-Pozen, *supra* note 10, at 1923 (arguing that “the state and federal governments” are “interdependent sites of national governance”); Gerken, *supra* note 1, at 1005 (mentioning devolution’s ability to entrench federal power as only one possibility, and also discussing “national interests writ large”).

28. See Bulman-Pozen & Gerken, *supra* note 12.

29. See Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 833–36 (2015). For instance, states have challenged federal immigration policy by incorporating certain federal statutory terms into state law and requiring strict enforcement as a matter of state law. They have also enacted laws requiring that medication-induced abortions adhere precisely to a protocol specified by the federal Food and Drug Administration more than a decade ago and not generally followed by doctors. In both cases, states have taken “a federal policy that leaves ample space for discretion . . . and challenged that policy by demanding strict adherence to it a matter of state law.” *Id.* (manuscript at 26).

30. Gerken, *supra* note 1, at 1010.

federalism.³¹ Here, the “national” would not be Washington, but rather the American people, and instead of decentralization’s serving the federal government as such, the argument would be that decentralization engenders greater public cohesion: an arrangement that licenses dissent so that it is always already blessed as a structural matter may render disagreements manageable and underwrite ultimate accord.

This sort of account would lend nationalist federalism some distinguished traveling companions. We might, for instance, locate a version of the argument in Sacvan Bercovitch’s study of American ideology. In his sweeping exploration of American literature, *The Rites of Assent*, Bercovitch argues that Americans have always privileged dissent in a manner that places it in the service of national harmony.³² Various radical reformist movements since the country’s founding have, in his view, conformed to a “ritual of consensus” that focuses on the meaning of America and thus “enlist[s] radicalism itself in the cause of institutional stability.”³³ Far from imagining fundamental alternatives, dissenters have reinforced cultural norms. With a little tweaking, we might similarly argue that the United States’ federal structure draws out state-based protest so as to be able to absorb and contain it. Like parents celebrating any act of rebellion by their child as revealing the independent spirit they have cultivated, nationalists might reimagine any act of state difference or even outright dissent as shoring up national consensus.

While the ultimate claim of consensus federalism would differ from accounts offered by the federalist camp, it might also draw on defenses of state sovereignty sounding in diversity, experimentation, and contestation.³⁴ State

31. Cf. RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT*, at xxix–xxxii (1948) (arguing that historical research had focused excessively on conflict in American society and should focus instead on commonalities). Cf. PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 332–521 (1988) (exploring the debate over consensus history and resulting historiographical approaches); Justin Driver, *The Consensus Constitution*, 89 *TEX. L. REV.* 755 (2011) (critically examining “consensus constitutionalism,” the popular notion that the Supreme Court generally interprets the Constitution in a way that reflects the consensus beliefs of Americans).

32. See SACVAN BERCOVITCH, *THE RITES OF ASSENT: TRANSFORMATIONS IN THE SYMBOLIC CONSTRUCTION OF AMERICA* (1993).

33. *Id.* at 49–50; see also *id.* at 368 (describing American literature as “the aesthetic flowering of an ideology adopted from the start precisely for its ability to transmute radicalism of all kinds, from religious protest to revolutionary war, into varieties of ideological consensus”).

34. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”); cf. Ilya Somin, *The New Liberal*

difference and dissent would not be ends worth preserving in themselves, but they would nonetheless be valuable insofar as they contributed to a broader project of national unity. In contrast to the national-as-Washington perspective's traditional nationalist bent, the consensus-federalism perspective might therefore align itself more closely with traditional federalist arguments.

If federalism unifies the nation, it stands to reason that a nationalist focused on the cohesion of the American polity (rather than the power of the federal government as such) could believe in giving power to the states.³⁵ As with the nationalism-as-Washington view, however, consensus federalism also falls short. There are, to be sure, certain aspects of the argument that resonate with recent scholarship. Alison LaCroix, for instance, has written about the Founders' project of building a "union," with federalism serving as a tool rather than an end in itself.³⁶ And Cristina Rodríguez has explored how a federal structure can, at least sometimes, transform dissent into consensus, broadly understood.³⁷

But none of the nationalist federalism scholarship argues that federalism reliably unifies the nation. In the United States, state-centered conflict has always abounded. Today, even secession- and nullification-talk are having a renaissance.³⁸ Such conflict is not merely a prelude to consensus, not merely dissent elicited in order to be defused. While American federalism offers a framework for accommodating and resolving some disagreements, it tees up and amplifies others. For the nationalist school of federalism to insist otherwise would be to refute the possibility of real contestation rather than embrace it, as it purports to do.³⁹ Just as decentralization does not reliably yield

"*Nationalist*" Case for Federalism, WASH. POST (Apr. 16, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/16/the-new-liberal-nationalist-case-for-federalism/> (noting that traditional defenses of federalism also insist "that allowing greater autonomy for state and local governments often serves important national objectives, such as increasing our ability to accommodate the needs of a diverse population, and promoting policy experimentation").

35. See Gerken, *supra* note 1, at 999 ("How . . . can a *nationalist* believe in giving power to the states?").

36. Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2089–93 (2014).

37. Cristina M. Rodríguez, Federalism and National Consensus (unpublished manuscript) (on file with author). Importantly, Rodríguez understands "national consensus" to often consist of contradictions and agreements to disagree. Her consensus is thus quite different from that of consensus history referenced above. See *supra* note 31 and accompanying text.

38. See Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to Be Wrestled With?*, 67 ARK. L. REV. 17 (2014); James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, 1 AM. POL. THOUGHT 263 (2012); see also *infra* notes 50–53 and accompanying text (discussing recent nullification and secession proposals).

39. See, e.g., *supra* note 30 and accompanying text.

centralization, state-located dissent does not reliably enhance nationwide accord.

II.

If the nationalist school of federalism is not offering an account of how state power serves the federal government or unifies the American polity, what account of “the national” does it, or should it, provide? Most basically, I submit, it defines national in a thin—and therefore capacious—way to include interests, institutions, and constituencies that cut across state lines.⁴⁰ Yet while its understanding of what counts as national is generous, nationalist federalism calls attention to difference and disagreement *within* the category of the national. Nationalist federalism takes from classic accounts of federalism an insistence on irrepressible diversity and dissent, but instead of mapping contestation onto state-federal relations as such, it regards diversity and dissent as national phenomena involving various state and federal actors in shifting configurations.

There are, it follows, two principal ways nationalist federalism complicates our understanding of nationalism (and not only of federalism). First, it breaks open the category of the national, destabilizing traditional views of unitary federal power and singular national interests.⁴¹ Even as the two accounts sketched above—taking national to refer to the federal government or to a unified American community—depart from common assumptions about the relationship between federalism and nationalism, they presuppose that there is something, *one thing*, that can confidently be identified as the national. Nationalist federalism challenges this supposition. It casts national institutions, interests, and constituencies as necessarily multifarious.

The federal government, for instance, must be broken into its component parts. Reckoning with this requires more than just the usual caveat footnote stating and then brushing past the idea that the federal government, or any particular branch, is a “they, not an it.”⁴² When discussing federal law or policy, we must attend to how Congress and the executive may advance separate, even conflicting, agendas. We must consider how different actors within these branches may seek different ends. While we can properly

40. *E.g.*, Rodríguez, *supra* note 27, at 2100 (defining “national” issues as “those whose salience cuts across state lines and constituencies”).

41. *See* Bulman-Pozen, *supra* note 10, at 1934–35; *see also* Abbe R. Gluck, *Our [National] Federalism*, 123 *YALE L.J.* 1996, 1999 (2014) (arguing that national federalism “is a nationalism that often lacks nationalism’s defining theoretical feature—uniformity”).

42. For excavations of certain institutions’ plural characters and the consequences for theory, *see*, for example, Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 *INT’L REV. L. & ECON.* 239 (1992); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 *J. CONTEMP. LEGAL ISSUES* 549 (2005).

understand these many actors as national actors advancing national interests, we also need to recognize the multiplicity of the national. There are always a variety of national actors, advancing different, and perhaps contradictory, national interests.

If an argument that federalism serves nationalism-as-Washington falls short in part because not all exercises of state authority serve the federal government,⁴³ then, it also falls short because it conceptualizes the federal government as unitary. While certain state actions augment or challenge the power of the federal government conceived as a single entity, many state actions have a more ambivalent relationship to the federal government. Some state acts enhance congressional power at the expense of executive power. When a federal law confers implementation authority on both the states and the federal executive branch, for instance, this partial devolution to the states will tend to shore up congressional authority but to constrain federal executive discretion.⁴⁴ Other state acts empower the executive branch over Congress or empower one part of the bureaucracy over another.⁴⁵ To fully appreciate the relationship between states and the federal government, we therefore need to disaggregate the latter and not only the former. A nationalist perspective on federalism calls for a richer integration of federalism doctrine and theory with the doctrine and theory of separation of powers and administrative law.⁴⁶

That states affect the distribution of power within the federal government leads to a second observation about how nationalist federalism reorients our understanding of nationalism. Rather than take “the national” to be something that exists separate and apart from the states, nationalist federalism understands the ineluctable diversity of national interests, institutions, and constituencies to itself be generated and instantiated in part by the states. The thoroughgoing integration of state and federal governance has implications for nationalism as well as federalism. States continue to be relevant actors without a robust separate sphere of action precisely because they help define national interests and act on behalf of national constituencies.

One upshot of this integration is that it is not partisans of states versus the federal government as such who are waging the battles that matter. It is, instead, partisans of various interests who wage their national battles through

43. See *supra* notes 27–30 and accompanying text.

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

45. See Rodríguez, *supra* note 27, at 2110 (noting disagreements about immigration policy and drug policy within the executive branch that may be exacerbated by state actions).

46. For work integrating federalism with the separation of powers and administrative law from a more traditional federalism perspective, see, for example, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1325 (2001); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); and Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014).

state and federal sites. Perhaps most important are partisans in the colloquial sense: the United States' federal structure furnishes the terrain on which the Democratic and Republican parties fight.⁴⁷ Although the text of these fights often reads as federalism—the states challenging Washington's overreach in the Patient Protection and Affordable Care Act, for example, or the states challenging Washington's inaction with respect to greenhouse gas emissions—the not-so-subtle subtext is partisan politics.⁴⁸ States controlled by Republicans challenge a Democratic federal administration; then states controlled by Democrats challenge a Republican federal administration. And these state actors are supported, not opposed, by federal politicians who share their party affiliation.⁴⁹ There is still conflict aplenty, but it is best understood as national versus national, with the states helping to formulate and concretize a variety of national interests.

Even the most extreme state-centric tools of federalism, secession and nullification, have been repurposed as tools of national partisan struggle in recent years. Cries for states to secede from the union or to nullify federal law do not reflect the separation of state and national, but rather their deep integration. When residents of Texas, Tennessee, and other states petitioned the White House to withdraw from the United States in 2012,⁵⁰ for example,

47. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

48. See, e.g., Robert N. Weiner, *Much Ado: The Potential Impact of the Supreme Court Decision Upholding the Affordable Care Act*, in THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 69, 69–72 (Nathaniel Persily et al. eds., 2013) (describing how Republican officials representing twenty-seven states argued that the Patient Protection and Affordable Care Act violated state sovereignty, while Democratic officials representing thirteen states defended the exercise of federal power); JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., RL33812, CLIMATE CHANGE: ACTION BY STATES TO ADDRESS GREENHOUSE GAS EMISSIONS (2008) (describing how Democratic legislators in California, Hawaii, and New Jersey passed laws to reduce greenhouse gas emissions when the George W. Bush administration took no action on climate change).

49. Sometimes these state actors are even prodded to resist federal law by federal politicians in the first instance. Witness, for instance, Senate Majority Leader Mitch McConnell's attempt to undermine federal Environmental Protection Agency regulations about coal-fired power plant emissions by asking the states not to comply with the regulations. Senator Mitch McConnell, Letter to the Nation's Governors (Mar. 19, 2015), available at http://www.mcconnell.senate.gov/public/index.cfm?p=newsletters&ContentRecord_id=d57eba06-0718-4a22-8f59-1e610793a2a3&ContentType_id=9b9b3f28-5479-468a-a86b-10c747f4ead7&Group_id=2085dee5-c311-4812-8bea-2dad42782cd4; see also Coral Davenport, *McConnell Urges States to Help Thwart Obama's 'War on Coal'*, N.Y. TIMES (Mar. 19, 2015), <http://www.nytimes.com/2015/03/20/us/politics/mitch-mcconnell-urges-states-to-help-thwart-obamas-war-on-coal.html> (“Since Mr. McConnell is limited in how he can use his role in the Senate to block regulations, he has taken the unusual step of reaching out to governors with a legal blueprint for them to follow to stop the rules in their states.”).

50. E.g., *Peacefully Grant the State of Texas to Withdraw from the United States of America and Create Its Own NEW Government*, WE THE PEOPLE (Nov. 9, 2012),

they were participating in, not forsaking, national political struggle. Secession talk wasn't about vindicating distinctive state cultures. It was about the alienation of Republicans upon the reelection of a Democratic president.⁵¹ So too, the recent embrace of nullification by some state legislatures can best be understood in terms of national partisan contest, not state exceptionalism. Focused largely on healthcare and gun control,⁵² state nullification legislation reflects and advances a national Republican position about a Democratic federal administration's policies. That's why we find federal politicians supporting, even goading, state efforts to nullify federal law.⁵³

This is not, then, a sanguine story of consensus federalism. The ways in which states articulate and amplify national conflict are front and center. But precisely insofar as states articulate and amplify *national* conflict, this account understands federalism to exert centripetal force.⁵⁴ States don't function as enclaves, facilitating Americans' ability to opt out of national ideological struggles. Instead, they provide many points of entry into fractious national debates.

* * *

The nationalist school of federalism has responded to federalist concerns about waning state power by describing how states continue to exercise

<https://petitions.whitehouse.gov/petition/peacefully-grant-state-texas-withdraw-united-states-america-and-create-its-own-new-government/BmdWCP8B>.

51. See Bulman-Pozen, *supra* note 47, at 1114–15; see also Jim Gaines, *One in Four Americans Want Their State to Secede from the U.S., but Why?*, REUTERS (Sept. 19, 2014), <http://blogs.reuters.com/jamesrgaines/2014/09/19/one-in-four-americans-want-their-state-to-secede-from-the-u-s-but-why/> (“Secession got more support from Republicans than Democrats, more from right- than left-leaning independents And of the people who said they identified with the Tea Party, supporters of secession were actually in the majority, with 53 percent.”); Eric Kleefeld, *Poll: Texas Republicans Approve of Rick Perry’s Secession Remarks*, TALKING POINTS MEMO (Apr. 23, 2009, 6:54 PM), <http://talkingpointsmemo.com/dc/poll-texas-republicans-approve-of-rick-perry-s-secession-remarks> (finding that 48% of Republican survey participants thought Texas would be better off as an independent nation, and that 51% of Republican survey participants approved of Governor Rick Perry’s suggestion that Texas might need to leave the United States).

52. See Read & Allen, *supra* note 38, at 263–67 (cataloging examples).

53. See, e.g., Igor Bobic, *Joni Ernst Has a History of Advocating Nullification of Federal Laws*, HUFFINGTON POST (July 29, 2014, 4:16 PM), http://www.huffingtonpost.com/2014/07/29/joni-ernst-nullification_n_5631097.html (discussing then-Senate candidate Joni Ernst’s support for nullification); James Hohmann, *Touting Ken Cuccinelli, Ron Paul Urges ‘Nullification,’* POLITICO (Nov. 4, 2013, 11:27 PM), <http://www.politico.com/story/2013/11/ken-cuccinelli-ron-aul-urges-nullification-virginia-governor-2013-election-99358.html> (describing a speech in which Ron Paul argued for the nullification of the Patient Protection and Affordable Care Act).

54. See Gerken, *supra* note 14, at 1897 (arguing that nationalists “have long worried that decentralization exercises a centrifugal force on the polity,” but that it can have an integrative force).

meaningful authority without separate, sovereign spheres of action. A set of normative questions has, as Gerken argues, been met in part with empirical answers.⁵⁵ But understandings of nationalism do not emerge from this study unscathed. If state power today inheres in its integration with federal power, so too federal power today inheres in its integration with state power. State and federal actors alike use both state and federal governments to advance national agendas. They work together to articulate and further particular national interests, and, in so doing, oppose other combinations of state and federal actors who are championing distinct national interests. Nationalism is not something that exists apart from, let alone in distinction to, federalism. Instead, states play a constitutive role in our national rites of dissent.

55. See Gerken, *supra* note 1, at 1008 (“[F]ederalism has always been a field . . . in which you can answer a normative question with an empirical answer.”).

