

Federalism and National Consensus

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Abstract

True to the American constitutional tradition, the practices and institutions of federalism define and structure many of today's important public policy debates. These debates, in turn, highlight how the various levels of government must engage in ongoing negotiation, which requires them to conceptualize their power in relation to one another. In many of these settings, which I term the discretionary spaces of federalism, assertions of state and local power may seem to challenge or undermine federal power. But these assertions, I argue, are not necessarily counter to the national interest. Instead, many of the challenges and complements to federal power I explore have been (or have the potential to be) productive of national consensus. Importantly, however, I define consensus not as national uniformity, but as integration of a demographically and ideologically diverse nation. This conception of the relationship between federalism and national consensus takes off from work I have done on immigration federalism and highlights how conflict can be a necessary and productive part of forming a coherent polity. In developing my conclusions, I revisit the immigration domain in light of the political and legal developments of the last five years, but I also explore the federalism dynamics I describe with respect to the struggle for marriage equality and the development of marijuana policy. I explore how state and local activity not only helps set the federal government's enforcement agenda, but also how the subsequent and iterative negotiation of federal and local power constitutes our national debate over important public policy issues. Though I highlight the work of political actors, particularly enforcement bureaucracies and administrative actors, courts play an important role in the account, too, but as participants in the debates rather than as final arbiters. I envision this paper as in the same tradition as my immigration federalism work, which explores the value and function of federalism in a discursive vein and without a preoccupation with sovereignty. But its conclusions will have implications for debates concerning the scope of state and federal power, and an important part of the negotiated federalism I describe will be the strategic reliance on sovereignty arguments to advance policy agendas over which consensus may still be developing.

Federalism may be the most turned-over subject in constitutional theory, but for good reason. Our federal structure constantly generates opportunities for new and even innovative approaches to governance, and it produces regular legal and political conflict. Theories of federalism typically address one dynamic or the other—they explore or critique how the levels of government work together, or they attempt to devise constitutional rules for resolving conflicts among them. In this paper, I reframe this divide as a choice that faces actors within the system on an ongoing basis—actors who must regularly conceptualize their power in relation to one another and decide

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whether to strike a cooperative or a competitive pose. A quick glance at today’s salient public policy debates underscores that the federal system requires governments to regularly negotiate the terms of their relationship. From the Obama administration’s decisions concerning how to respond to Arizona’s immigration law and Colorado and Washington’s marijuana legalization referenda, to its consideration of whether to defend the Defense of Marriage Act and challenge the states’ own definitions of marriage, the federal government repeatedly has been confronted in recent years with the question of how to wield federal power in light of the assertion of state power. From the sub-federal point of view, officials face decisions, such as whether to accept the funds to expand Medicaid or set up health care exchanges under the Affordable Care Act, or whether to join the federal government in immigration law enforcement efforts or otherwise diverge in law enforcement strategies on matters as diverse as drugs and financial crimes. Though federal choices can set the parameters for state policy, sub-federal decisions also often set the agenda for the federal government.

This paper is of a piece with an important turn federalism scholarship has taken in recent years, away from a focus on sovereignty (which remains important) and toward a more discursive approach that emphasizes the value and functions of federalism as a set of ongoing relationships and a system of governance. As scholars increasingly have come to appreciate and study in recent years, federalism is neither a zero-sum game between the federal government and the sub-national, nor a concept that describes a fixed set of relationships among institutions. The nature of the federal structure and the contours of decentralized decision-making are constantly under negotiation.² As

² For example, in his analysis of the Supreme Court’s decision in *Arizona v. United States*, Peter Spiro describes its constitutional aftermath as being one of “negotiated federalism”—a description I believe characterizes the federal-state relationship across domains. Peter J. Spiro, *Immigration Preemption After United States v. Arizona: Rebuttal*, U. Penn. L. Rev. Online 100, 106 (2012). See also Rick Hills, Erin Ryan, and Judith Resnik.

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Heather Gerken has argued, there is no single federalism,³ but rather many federalisms, whose value will depend in large part on context.⁴ The challenges of negotiation thus demand a theory (or theories) of federalism that acknowledges the background rules and legal and rhetorical tools that come from sovereignty-based accounts, but that also pays close attention to the range of institutional options for defining the relationship within those bounds.

In this paper, I evaluate these processes of negotiation in several publicly salient policy domains and argue that one of the primary functions such negotiation performs is to enable the expression and resolution of conflict while providing a framework for national integration when resolution proves ephemeral. I explore this process of negotiation in what I call the “discretionary spaces” of federalism, or the sites of overlapping interests and concurrent jurisdictions where each actor in the system must choose how to interact with the other and may have available a range of hard and soft options for shaping that interaction. These are not the only domains of federalism, but they are the sites for much of the system’s day-to-day work of negotiation. In attempting to illuminate the contours of federal-state negotiation, I highlight two of its features. First, much of it happens in the realm of enforcement and administration, and I therefore highlight some enforcement contretemps that shape the federal-state relationship and define the parameters of policymaking for each level of government⁵—a federalism dynamic I believe is underexplored but central to federalism as negotiation. The examples I explore show how sub-federal decision-making

³ Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Induce the Legislative Process*, 82 N.Y.U. L. Rev. 1, 4 (2007) (“deep disagreement is disagreement between factions of interests about their fundamental rights, with the assertion of one side’s fundamental rights in the denial of the other side’s conception of a fundamental right”).

⁴ Heather Gerken, *Our Federalism(s)*, 53 William & Mary L. Rev. 1550 (2012).

⁵ This focus on enforcement is most “opposite” to the standard preemption inquiry focused on whether a state law conflicts with a federal law or regulation. To be sure, as this paper’s discussion of the Supreme Court’s recent decision in *Arizona v. United States* will show, the federal government has sought in certain realms to turn its enforcement interests into a source of preemption. But my primary concern will be with circumstances in which the federal government must decide whether and how to assert its own power in light of sub-federal decisions that have been taken.

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can tee-up a policy and enforcement agenda⁶ for the federal government, even as federal enforcement power might threaten to undermine state power. Though federal decision-making often helps constitute the sphere for local activity, decisions by sub-federal actors also frequently set the agenda for the federal government, demanding that it articulate a conception of its power. Second, and often in tandem with the enforcement dynamic, negotiation in the discretionary spaces amplifies the polity's capacity for politics. I explore not only how national politics can take shape through sub-federal politics and decision-making,⁷ but also how the dynamics can run in the opposite direction, with local politics constituting the national debate, including through the development of enforcement policies.⁸

In exploring how the national and local interact, sometimes at cross-purposes, but sometimes in service of one another, I conclude that the public debates generated by the need for negotiation in the discretionary spaces ultimately highlight how decentralized decision-making can help maintain an integrated polity by facilitating the development of consensus. But by consensus I

⁶ I use the term “enforcement” broadly to refer not only to law enforcement and prosecution, but also to the implementation of government programs. The point is to capture how the demands of governance, as opposed to the realm of lawmaking, play out within the federal system. A growing literature exists with respect to administration, see the work of Catherine Sharkey, Gillian Metzger, Abbe Gluck, and Erin Ryan; while much of this work focuses on judicial resolutions of conflict, some of it highlights the processes I describe here—the processes of negotiation, or the activity outside the courtroom where government actors define their sphere of action.

⁷ For a recent argument that the federal structure provides a scaffolding for national politics mediated through political parties, see Jessica Bulman-Pozen, *Partisan Federalism*, Harv. L. Rev. (forthcoming 2014).

⁸ In some instances, the imperatives of enforcement might trump the desire for widespread politics, and the perpetuation of political debates can undermine effective governance. With respect to enforcement capacity, the dynamic does not always flow in the direction of expansion, at least not for the federal government, because sub-federal agents may have different ideas concerning implementation methods and enforcement priorities. What is more, for both the federal and the sub-federal, efforts to cooperate to expand capacity may result in irresolvable conflict or constraints on one or the other's policy preferences. With respect to the capacity for politics, decentralization can produce heightened deliberation and debate that, contrary to nationalist assumptions is often not balkanizing but rather productive and integrative—all the more so if we assume the existence of a diverse or polarized polity and accept that certain issues may be best resolved through competing experiments in governance. Of course, in a world of expanded politics, voices that might otherwise be dominant will become muted or constrained—a particular dilemma for the federal government or for groups that seek the entrenchment of a national norm. But negotiating these tensions is precisely what is at stake in the negotiation of the federal-state dynamic.

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do not mean uniformity of views, or even necessarily the consolidation of norms. It has been a theme of my work generally to argue that the “consensus” our federal system produces can consist of contradictions—of the acceptance of disagreement as a feature rather than a bug of the system. National identity often takes shape through a decentralized array of interactions among public actors and private citizens and not through a single, national conversation, or through exclusively national institutions directed from the center.⁹ Indeed, a goal of my work has been to de-center the concept of the “national” from the “federal” and to explore when and how the federal government serves as just one (albeit very important) actor in pursuit of the national interest.¹⁰

In some cases, federalism will help maintain equilibrium amidst perpetual disagreement,¹¹ and in others it will help produce values or policy consensus by facilitating incremental change, either slowly over time, or rapidly in response to quick changes in public opinion. In some debates, the national government will play a robust role without dictating outcome,¹² and in other cases true national norms eventually will emerge as the result of what has happened within and among states and localities, supplemented by the assertion of federal power. Decentralized governance thus facilitates national debates, but it does so by providing an institutional framework for mediating social conflict and making stable and productive the diversity of views that inevitably characterizes a

⁹ See, e.g., *Language and Participation*, 94 Cal. L. Rev. 687 (2006) (discussing mid-level social institutions, such as workplaces, public schools, and social service agencies, as the sites of identity formation, specifically with respect to linguistic integration).

¹⁰ For an extended discussion of this idea, see Cristina Rodriguez, *Perspectives on Federalism*, 124 Yale L.J. (forthcoming 2014).

¹¹ In this sense, federalism performs the function Heather Gerken has described for it, of allowing dissenters within the system to govern. See Heather K. Gerken, *Dissenting by Deciding*. At the same time, this dimension of federalism not only provides outlets for minority voices, but also facilitates a multiplicity of voices, when no true majority exists.

¹² This conclusion reflects an important observation of Rick Hills’: “[T]heories of preemption need to accept the truisms that the federal and state governments have largely overlapping jurisdictions, that each level of government is acutely aware of what the other is doing, and that each level regulates with an eye to how such regulation will affect the other.” Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Induce the Legislative Process*, 82 N.Y.U. L. Rev. 1, 4 (2007).

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polity as heterogeneous as the American one.¹³ Approaching a wide range of public policy problems through a decentralized lens can make complex issues tractable. The importance of this function is particularly salient in the face of what Rick Hills has called “deep disagreement,”¹⁴ or what I would characterize as high levels of uncertainty about values and how to generate “good” policy outcomes.

This conception of consensus, and any theory of federalism built up around it, will give rise to the question whether moments arrive when diversity in values or policies should no longer be tolerated, such that a federal institution should intervene to impose a national norm. When does the time come for the national government to bring dissenting voices or institutions into line? When should a national norm enforced from the center replace decentralized debate? I accept that this imperative may exist—constitutional history is full of these moments on a grand scale (see, for example, the Fourteenth Amendment and the civil rights movement). Indeed, in each of the domains I describe, the pressure for national “solutions” has been articulated, with varying degrees of intensity. In exploring this question, it will be important to be attentive to the significance of the particular institution imposing or consolidating a norm; in other words, whether the judiciary, the executive branch, or the legislature does the work may help determine its legitimacy, wisdom, and success. But more to the point, the implication of my descriptive account is that this normative question of when outliers ought to be brought into line, or when uniformity should actively be pursued, cannot be answered in a general sense, but rather depends on the history and politics of particular debates. What is more, as I explore below, the substance of a national consensus can be hard to define, and sometimes a principle accepted nationwide amounts to a highly generalized idea subject to contestation about its meaning and application—a fair description of the national consensus regarding principles of non-discrimination and equality that emerged out of the civil

¹³ Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Induce the Legislative Process*, 82 N.Y.U. L. Rev. 1, 4 (2007) (emphasizing that federalism today is more about how the national and state governments work together than how to demarcate the spheres of each one).

¹⁴ See Roderick M. Hills, *Federalism and the Culture Wars*, 31 Ok. City L. Rev. 507 (2006).

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rights movement, for example. Importantly, even when consensus does take shape, either across institutions or within public opinion, the capacity for change through decentralized decision-making will often remain desirable in order to manage the follow-on effects of that consensus, especially as it frays. At the very least, then, the dynamics of decentralized decision-making I seek to illuminate here, when transformed into a normative theory, will demand acceptance of disagreement and a skepticism of centralized enforcement, or at least suspension of the view that moral progress and national integration necessarily require strong centralized governance or leadership.

In what follows, I explore these dynamics as they have characterized debates surrounding three major social policy issues¹⁵ that have generated considerable cross-state diversity and public

¹⁵ In thinking about the value of decentralization to producing an integrated polity, it might be helpful to distinguish not only among particular policy domains but also among types of policy issues, because it will be difficult to gain traction on a single account of decentralization's value abstracted from context. The dichotomy I articulate above between implementation capacity and capacity for politics maps onto a distinction commonly drawn in political science literature between social welfare policy and morality policy—a distinction drawn to often for the purposes of illuminating how federalism functions differently in each setting. For a representative example, see Christopher Z. Mooney & Mei-Hsien Lee, *The Influence of Values on Consensus and Contentious Morality Policy: U.S. Death Penalty Reform, 1956-82*, *J. of Pol.* 62 (1) (2000) (evaluating whether morality policy diffuses according to different dynamics than social welfare policy); *see also* Michael Greve (criticizing cooperative federalism but arguing that many of the virtues claimed for it actually apply better to morals debates). Whereas implementation and enforcement raise complex technocratic questions, the existence of multiple forums for debate is considered useful primarily to enable diverse resolutions of hard moral questions. And as the political science literature demonstrates, the central debates in morality policy are far more accessible to the public and therefore the subject of broader contestation and politicking than the technocratic details of welfare policy. And thus, the upshot of this dichotomy could easily be that the values I claim for decentralization fit much more comfortably in the morals domain than the social policy one.

But as I hope this paper will show, while this separation has some intuitive appeal as a way of categorizing and simplifying debates over the values of federalism, the distinction between social welfare and morality policies is not stable. At first glance, the debates on which I have chosen to focus each revolves around a moral question—should gays be treated equally, or can institutions with a moral valence such as marriage be closed to them; when and should how drug consumption be permitted; should unauthorized immigrants be treated as outlaws, or as entitled to respect as members of a community—rather than questions involving the mechanics of federal-state dynamics in the pursuit of social welfare policy. But of course, each of the moral questions articulated, when transformed into a form of regulation, raises enforcement and technocratic concerns, particularly in the contexts of immigration and drug policy. And the classic social welfare domains characterized by federalism—take for example health care and environmental regulation—also implicate moral disputes that could become salient to the general public as well. And thus, in each setting both the capacity for enforcement and the capacity for politics must be considered in tandem. Sometimes the latter will stymie the former, or the former may be used to flatten out the latter. But both dynamics must be negotiated.

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policy headaches for the federal government: the gay marriage debate; state and local efforts to regulate immigration, especially after the Supreme Court’s decidedly pro-federal decision in *Arizona v. United States*; and the growing challenge presented by state marijuana legalization laws to the drug policy status quo. I first explore how negotiation has unfolded in each policy domain by considering the federal interest in asserting power versus refraining from action, to locate the federal government in the debate and identify its policy and political interests. I then consider the national interest in having a de-centralized debate over the issue, or the way that decentralized debate effectively has been an alternative to (though not necessarily a substitute) for the supposed national conversation needed—an inquiry that can incorporate the interests of sub-federal units as governing units but that focuses more on the mechanisms through which deep disagreements have been negotiated and pockets of consensus have been produced. Third, I consider in each context what the value of discord might be—a process that requires overcoming fears of externalities¹⁶ in order to develop some federalism practices that permit as much disagreement to be expressed, including through lawmaking, as possible. In conclusion, I consider what some of the normative consequences of this conception of federalism and decentralization might be.

One final note: as should be apparent by this point, I invoke both federalism and decentralization, but I do not mean them to be synonymous. On the one hand, I take a cue from Heather Gerken, who speaks in terms of “federalism all the way down,”¹⁷ or a conception of federalism that focuses not just on sovereign actors, but also on institutions embedded in social life. Gerken’s favorite example is the jury, and mine are the public schools. What is more, in the process of offering a more sociological and less inter-governmental account of federalism, I take a cue from Judith Resnik and notice national actors that are neither agents of the federal government nor

¹⁶ For a compelling affirmative account of the value of externalities from which I will draw throughout this paper, see Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism* (unpublished manuscript 2013).

¹⁷ See Heather K. Gerken, *Federalism all the Way Down*, 2010—Forward, Harv. L. Rev. (2010).

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focused on a national agenda, per se, as opposed to a substantive agenda. These actors in the federalism dynamic include trans-local associations that unite diffuse constituencies with similar interests, moneyed interest groups with particular political agendas, and individual and group-based norm entrepreneurs.¹⁸ I consider how these actors help shape national norms and the extent to which they inform national debates, often by using state and local institutions to advance their ends. Perhaps more important, I pay special attention to the horizontal dimension of federalism, taking off from the norm diffusion literature in political science, as well as a growing legal literature that considers the doctrines that police states' imposition of externalities on one another.¹⁹ But despite this move to step outside of purely inter-governmental dynamics, the distinctiveness of a federal system versus a decentralized regime is the many sites of power that the former creates, the exercise of which can both complicate and enrich the policy-making process, including by making disagreement more meaningful and even dangerous. I therefore emphasize throughout the value of having governments as participants in the debates I describe.

I. IMMIGRATION FEDERALISM AND THE NECESSITY OF CONFLICT

The approach to understanding the value and function of federalism I defend in this paper has its roots in my previous work on immigration federalism, in which I have described the federal structure as performing a debating and sorting function vital to the management of demographic

¹⁸ For a recent account in the legal literature of the role these forces play in developing and transmitting norms, see Judith Resnik, *NOMOS*.

¹⁹ See, e.g., Allan Erbsen, *Horizontal Federalism*, 93 *Minn. L. Rev.* 493 (2008) (mapping the various constitutional doctrines that structure state-to-state relations); Gillian Metzger, *Congress, Article IV, and Interstate Relations*, 120 *Harv. L. Rev.* 1468, 1474, 1479 (2007) (calling attention to the fact that the Court has scarcely addressed Congress's power to regulate inter-state relations through Article IV and arguing that such inquiry is vital, because "some national umpire is needed to ensure union"); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 *U. Pa. P. Rev.* 855 (2002); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine, (II) Extraterritorial State Legislation*, 85 *Mich. L. Rev.* 1865 (1987) (arguing that the extraterritoriality principle that attempts to regulate states' extraterritorial behavior operates across many bodies of case law but is ill defined and inadequately justified).

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change. Of course, if Supreme Court dicta were to be taken at face value, the concept of immigration federalism would be an oxymoron. The Court intones repeatedly that, on matters related to immigration, “the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union.”²⁰ But the fact that the Court calls for “one voice” in immigration does not make it so. The “one voice” nationalism that pervades the immigration cases, along with the Court’s foreign affairs jurisprudence, remains aspirational. Even when the courts enforce it through robust preemption doctrine, the idea achieves mixed results at a policy level, not to mention at the level of public opinion. The American people never have spoken with a single voice on the subject of immigration. Indeed, it is far from clear what it would mean for that to be the case outside the context of diplomatic engagements managed at very high levels of government. Americans always have held deeply mixed views about whether immigrants should be considered equal to citizens, how great a benefit as opposed to a cost comes from enforcing prohibitions on entry, and what justice demands in a context where law enforcement cannot be perfect and therefore gives rise to an unauthorized population.

In reality, state and local responses to immigration are manifestations of how international integration penetrates deep into the nation state, and state and local regulations can serve as mechanisms for shaping national identity in response to those pressures as much as federal regulation.²¹ I have sought to explain how sub-national entities counter-intuitively perform indispensable work in managing immigration, a phenomenon typically associated in jurisprudence and politics with “one voice” nationalism,²² and highlighted how immigration federalism constitutes

²⁰ *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); *see also Galvan v. Press*, 347 U.S. 522 (1954) (exclusive federal control over immigration is “about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government”).

²¹ *See Cristina M. Rodriguez, The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567, 573 (2008).

²² *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (holding that Massachusetts state law sanctioning corporations that did business with human-rights violator Burma was preempted by

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an important elements of our national conversation over immigration, through varied and contradictory forms of lawmaking and political posturing that may sometimes determine the federal agenda and constrain federal policymakers. In general, I reject the outmoded version of federalism that seeks to sort different issues into their proper national and sub-national spheres in a context (immigration and foreign affairs) where that concept still defines the field. In so doing, I have sought to de-center the concept of the “national” from the “federal”; to explore when and why the federal government might not always stand in for the national interest; and to argue that strong assertions of federal power vis-à-vis the states should not be assumed to be in the national interest.

Our decentralized political structure has been useful in the immigration context, because the question underlying state and local immigration laws—how best (or whether) to incorporate immigrants—requires debate anew each generation.²³ Importantly, federalism has played a crucial role in this process by helping to mediate, or at least highlight, disagreements about the *pace* of change and who can legitimately be deemed incorporated. I have argued that state and local behavior reflects politically motivated efforts to exercise generally legitimate police powers and free association rights, whether the form of the regulation is a law sanctioning employers for hiring unauthorized workers or adopting a sanctuary ordinance that protects unauthorized immigrant from police questioning. And the efforts have been diverse; a central feature of immigration federalism is that some local policies are designed to abate immigration and force immigrants out, and others accept immigrants’ presence and even value and work toward their incorporation. Decentralized governance, in this way, actually contributes to the integrity of the nation state, by enabling the polity to make inroads in managing difficult moral questions that may not be susceptible to definitive answers.

federal sanctions scheme, in part on the ground that the state law undermined the one voice with which the nation should be speaking on foreign policy matters).

²³ Of course, certain national default rules such as birthright citizenship clearly frame that debate.

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But since I last engaged this subject, the lay of the land has changed considerably, in large part because the federal government itself has loudly asserted its interest in the field by filing preemption lawsuits across the country against state laws designed to crack down on illegal immigration. This aggressive move by the government not only underscores its relative power in national political debates, but also highlights the possibility that the federal government often has its own particular point of view as to what constitutes the national interest. In 2012, these litigation efforts resulted in a resounding victory for the federal government, when the Supreme Court decided *Arizona v. United States* and struck down most of Arizona’s notorious SB1070, which created a number of immigration-related state crimes and authorized law enforcement to make warrantless arrests of persons they had reason to believe had committed a removable offense. In so doing, the Court defended the power of the federal government to determine whether and how to enforce the immigration laws and displaced even those state efforts that merely adopted federal law as written as the states' own project. The “system” of immigration federalism thus has changed, both in terms of how the actors in the system interact with one another, and as the result of new legal lines drawn by courts. And so understanding what it means to have an integrated regime of regulation and a national debate through decentralized means demands a fresh consideration, both of the federal interest and of how the sub-federal is now positioned in relation to the center to shape national debates.

1. *The re-assertion of the federal interest.*

The need for federal leadership in immigration, and even exclusivity in certain circumstances, has been clear at least since the nineteenth century. The value of uniformity is clearest with respect to the setting of formal standards for admission and removal, not only in the interest of creating an orderly regime of entry and exit, but also in establishing clear standards for determining who has a right to be in the country and on what grounds a person can be removed, for the sake of all parties

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invested in the presence of non-citizens in the U.S. But enforcement has raised different imperatives, in large part because Congress has delegated considerable enforcement authority to sub-federal actors, and because, as a matter of practice, the federal government depends on the law enforcement capacities of states and localities, not only to gather information in immigration policing, but to establish the criminal law predicates for removal.²⁴ The INA contains a complicated balance of delegation to and constraint on state authority and is full of varied inter-governmental relationships.²⁵ Indeed, one of the challenges in articulating the federal government’s position in *Arizona* was how to account for and not undermine the fact that state and local police have been partners of the federal government for a long time. The institutional corollary of one voice-ism—that the federal government retains unified control over immigration law and enforcement—is in tension with contemporary institutional practice, including practice initiated and valued by the federal government, not only in the immigration field but with respect to law enforcement generally.

Despite this integrated relationship, the federal government took the unprecedented step in 2010 of filing a preemption lawsuit against the state of Arizona. Just as Arizona’s SB1070 could be described as a partisan political move,²⁶ the Obama administration’s response could be characterized as a political statement about the proper scope of immigration enforcement and the federal government’s power to adjust enforcement policy according to its own priorities. Many state officials have defended their immigration enforcement enactments as taking responsibility where the federal government has abdicated control, suggesting a federal enforcement vacuum. But whether

²⁴ For recent literature documenting how criminal law enforcement choices made by state and local actors affect the federal agenda by determining who is eligible for removal, in ways that reflect local preferences and values, see, for example, Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. Rev. 1819 (2011), and Ingrid Eagley, NYU Law Rev. (2013).

²⁵ For a discussion of a similar dynamic in the health care context and the elaboration of a cooperative federalism taxonomy, see Abbe R. Gluck, Yale L.J. (2010).

²⁶ For an empirical study establishing that immigration crack-down measures correlated with the political parties in power in a given jurisdiction rather than other factors, see Pratheepan Gulasekaram & Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. Rev. (forthcoming 2013).

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this critique is valid depends entirely on the framing of the problem. To be sure, an argument could be made that, in jurisdictions such as Arizona, federal enforcement policies have had a disparate impact. But these federal policies are not enforcement failures, *per se*, but rather the product of trade-offs made by the federal government, between goals such removing security threats, reducing the incentive for illegal immigration, advancing humanitarian objectives, allowing businesses to operate without excessive surveillance, preventing racial profiling, and choosing to devote resources elsewhere. Laws such as SB1070 amount to rejections of such balancing acts and are thus grounded in political or normative worldviews that diverge from those of the current and likely past federal administrations.

This combination of direct challenge to the priorities and constraints embodied in the federal enforcement scheme and the articulation of an immigration politics at odds with its own seems like a more plausible explanation for the federal government's filing of suit, as opposed to a belief in federal exclusivity or rejection of state and local involvement in policing. Nor does it seem likely that the federal suit was intended to police the externalities Arizona might have been imposing on its neighbors (as I have written elsewhere, conceptualizing people as negative externalities, particularly when their presence in a given state is by happenstance and may in fact be tolerated or approved by the federal government, is awkward at best). Instead, Arizona's challenge to the federal agenda had become publicly salient and serious enough that the federal government felt compelled to reassert its control and reclaim the politics of immigration, perhaps even reclaiming the authority to set the agenda for subsequent immigration reform. The Arizona legislature and governor enacted SB1070 in a particularly oppositional way, and the media attention drawn to the law made state involvement in immigration regulation too apparent, especially for important constituencies within the President's political coalition. Even though formal and informal practices very similar to the core of the bill's policing provisions occurred on a regular basis across the country, and even though several of the

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prohibitions enacted by Arizona mirrored federal provisions, the scope and the posture of the Arizona law made it impossible for the federal government to not reassert its interest in (if not the actual fact of) uniformity. The lawsuit represented an effort to reign in states whose laws reflected different political conclusions about the meaning of unauthorized immigration and, in the federal government's telling, threatened to interfere with its ability to enforce federal law without disrupting communities it ostensibly sought to protect through the balancing of interests in its enforcement policy.²⁷

At the doctrinal level, the result of the federal government's intervention—the Supreme Court's decision in *Arizona v. United States*²⁸ —begins with the court's rejection of the idea that state laws that merely re-enforce or mirror federal laws present no conflict with federal law. In reasoning its way to this conclusion, the Court articulated a seemingly novel conception of preemption; it is not enough for states to mimic or act consistently with federal law, because federal law consists not only of the laws passed by Congress, but also of the enforcement decisions made by the federal government. In responding to Arizona's argument that its alien registration scheme simply adopted substantive federal standards, the Court wrote:

Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted. Were section 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.²⁹

²⁷ Arizona was not the only state to have asserted its inherent authority to enforce immigration law. Colorado, Oklahoma, Georgia, and New Jersey each have their own version of a statute that directs police to inquire into immigration status, irrespective of federal authorization. Arizona's Senate Bill 1070 sweeps far more broadly than these other provisions by directing questioning in relation to any encounter and not just an arrest, but SB1070 reflects a law-and-order impulse that is also behind other state enactments and common to the large swaths of the general American public that support the Arizona law. *See* Pew Hispanic Center Poll (2010), available at <http://www.pewhispanic.org>.

²⁸ 567 U.S. ___, 132 S.Ct. 2492 (2012).

²⁹ The Court also emphasizes the different and harsher penalty scheme adopted by the state, suggesting that Congress's setting of penalties reflects a preemptive determination of how seriously to judge the prohibited conduct at issue. In striking down the provision of SB1070 that would have made it a state misdemeanor for an unauthorized alien to solicit work, the Court took this form of field preemption even further. Congress's failure to enact a similar provision reflected a conscious decision not to take such a step in deterring the

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The Court’s analysis assumes that, when enacting the immigration laws, Congress understood that the executive would enforce them and thereby articulate federal priorities, and that it is the federal scheme as a whole to which states must conform. Some commentators have characterized Arizona’s law as standing in for Congress’s interest, as a check against executive divergence from the law as Congress wrote it, and the Court’s decision as siding with the Executive.³⁰ But it would be more precise to say that the Court based its preemption theory on the view that the meaning of the statute as Congress enacted it encompassed the federal government’s authority to enforce it.

This approach to preemption considerably expands the executive’s power vis-à-vis the states by rendering enforcement policy decisions relevant to the evaluation of conflict between state and federal law. The Court’s invalidation of the state provision authorizing police officers to conduct warrantless arrests of persons they have probable cause to believe committed offenses that would trigger removal highlights this implication of the opinion. The Court emphasized that the provision gave state and local officials power to make arrests even where federal officials would have exercised their discretion not to, and that a coherent conception of federal-state cooperation could not include “the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal government.”

To the extent the Court’s opinion targets enforcement redundancy, though, it is at odds with the structure of our federalist system. As commentators have pointed out, if the Court were to extend its analysis to federal enforcement efforts generally, a great deal of state regulation would be

hiring of unauthorized workers, thus precluding states from “interfering with the careful balance struck by Congress with respect to the employment of unauthorized aliens.” In his dissent, Justice Alito replies quite sensibly that Congress’s decision not to impose penalties on unauthorized workers does not necessarily mean it intended to preempt state laws that do the same, underscoring that the Court’s preemption analysis is informed by the tradition of federal exclusivity and the treatment of Congress’s enactments in this domain as having sweeping effects.

³⁰ See Eric Posner, *The Imperial President of Arizona*, Slate (June 26, 2012), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency.html.

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displaced,³¹ including enforcement on which the federal government often depends because of its inability to reach all activity that amounts to violations of federal law—the drug context being the most salient example of this dependency. In his dissent, Justice Alito dramatized the implications of the Court’s analysis for the federal-state balance, emphasizing how reliance on federal enforcement priorities as a basis for preemption constitutes a moving goal post against which state and local actors will be helpless to conform their actions. The radical implications of this approach to preemption perhaps suggest that the rhetorical tradition of federal dominance in the immigration field drove the decision and would keep it cabined largely to its setting.

From a political point of view, the implications of *Arizona v. United States* have yet to crystallize. The decision highlights the power the federal government to re-set an agenda when politics demands it. It is therefore difficult in retrospect to question the decision to bring the lawsuit, even though it sits uneasily with the federal government’s dependence on states to help enforce its laws, given the strong re-enforcement by the Court not only of federal primacy but also of federal enforcement *discretion*. The assertion of the federal interest in this case could even have been in the national interest.³² By charting the path toward the invalidation of numerous similar ordinances and laws across the country, the lawsuit certainly serves the interests of unauthorized immigrants and the larger communities in which they are embedded, as well as business and commercial interests that prefer as little regulatory friction as possible.

³¹ Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 32 Sup. Ct. Rev. 31, 32-33 (2013).

³² Cf. Legomsky & Rodriguez, *Immigration and Refugee Law and Policy: 2013 Supplement*, at 116 (“A May 2010 survey conducted by the Pew Hispanic Center revealed that 59% of respondents supported S.B.1070 as a whole, after being informed of the law’s provisions. Seventy-three percent approved of requiring people to produce documents verifying their legal status when asked by police, 67% approved of allowing police to detain persons unable to verify their status, and 62% approved of police inquiring into the status of persons believed to be in the country without authorization. See *Public Supports Arizona Immigration Law*, Pew Research Center Publications, May 12, 2010, <http://pewresearch.org/pubs/1591/public-support-arizona-immigration-law-poll>. Whereas Republicans overwhelmingly approved of the law, only 45% of Democrats approved of the law as a whole, though majorities of Democrats approved of the provisions that permit police to verify status and detain those unable to prove legal status.)

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But the decision should not be mistaken for the achievement of “one voice” as a matter of substance rather than form. It may be that the Supreme Court’s decision will help shape opinion on the matter and thus quiet state and local-level agitation. But the fundamental disagreement about the costs and morality of illegal immigration reflected in the lawsuit more likely will take on different shape, such that the decentralized ferment will continue. In order to see why, we must understand what is left of the domain of immigration federalism after *Arizona v. United States*.

2. The value of decentralized debate.

In the aftermath of *Arizona v. United States*, commentators began in earnest either to declare an end to immigration federalism or to celebrate the fact that the Court refused to facially invalidate the centerpiece of the law—its section 2(B), which requires police to make reasonable attempt to determine the immigration status of persons otherwise lawfully stopped, detained, or arrested if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” Who “won” the case may be a matter of framing, but even under a robust reading favorable to the federal government, quite a lot could still remain of immigration federalism, for many of the reasons that decentralization remains vital as a means of mediating social conflict. One voice-ism will continue to be elusive, even in the context of enforcement where the Supreme Court assertively re-enforced federal control.

Most immediately, the lower courts will continue to develop the picture as they consider the constitutionality of state laws not addressed in *Arizona*. Already a fascinating circuit split has emerged. The Third and Fifth Circuits have found local ordinances that seek to prevent landlords from renting to unauthorized immigrants preempted, reasoning that they are the functional equivalents of removal laws. But the Tenth Circuit has dismissed this de facto equivalence and rejected the notion that it should prevent Nebraska from imposing externalities on its neighbors by

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forcing unauthorized immigrants out of their jurisdiction. The court rejects as fanciful the idea that this measure threatens the federal government’s capacity to enforce, because there is no foundation to the claim that allowing a Nebraska town to regulate in this way will open up a race to the bottom.³³

With respect to law enforcement itself, again, the so-called “show me your papers” provision that received the most media attention and opprobrium required Arizona police to make a reasonable attempt to determine the immigration status of persons otherwise lawfully stopped, detained, or arrests if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” Because the provision had yet to go into effect, and because it contained important caveats, such as the use of the word “reasonable” to cabin police discretion and a prohibition on racial profiling, the Court declined to find the measure preempted on its face, emphasizing that Congress had in fact invited information-sharing among law enforcement officials. Some observers have concluded that the Court’s willingness to entertain post-enforcement and as-applied challenges, coupled with its conception of federal enforcement primacy, likely means that section 2B will have little effect in practice.³⁴ And it may be that Arizona will abandon the effort now that much of the political wind has been taken out of its sails. But it remains too early to tell whether and how state and local police will exercise the section 2B authority, and whether it can be done without giving rise to as-applied constitutional concerns and interfering with federal operations.

³³ As I have argued elsewhere, the different valuation of illegal immigration made by differently situated polities all but guarantees that federalism will prevent the parade of horrors from arising.

³⁴ Peter Spiro, for example, argues that “the requirement is meaningless on the ground. . . . [T]he Court was careful to interpret the ‘papers please’ provision such that it did not supply a basis for detention by state authorities, and it left the door open to subsequent as-applied challenges.” See Peter Spiro, *Immigration Preemption After United States v. Arizona: Rebuttal*, U. Penn. L. Rev. Online 100, 105 (2012). David Martin notes that, even though the Court sustained the so-called “show your papers” provision, or section 2(B) of the statute, it cautioned that the state could run afoul of the law in enforcing the provision and predicted future litigation challenging its implementation. David A. Martin, *Reading Arizona*, 98 Va. L. Rev. in Brief 41, 41 (2012) (“It’s the federal side . . . that has the better claim to success.”).

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But the more important dynamic to watch will be how the integrated regime of immigration regulation evolves—how the interaction of federal and local law enforcement embedded in the system develops in a post-*Arizona* climate. After all, the federal government never rejected its general invitation of state and local cooperation, and to the extent that the term cooperation is now in the hands of the federal government to define, the extent of it could be significant. As Peter Spiro has pointed out, the federal government retains the authority to approve state and local action within existing parameters of the INA and related statutes,³⁵ and just as Congress enlisted states and localities in various ways in 1996 amendments to the INA and related laws, Congress further institutionalize state involvement in enforcement policy.³⁶ The Secure Communities program that enables the sharing of arrest data sent by local police to the FBI with immigration officials also reinforces the conclusion that the regime remains an integrated one, as does the persistence of state and local agenda setting through the criminal law enforcement that drives the removal system. What is more, the Court in *Chamber of Commerce v. Whiting*, a straightforward statutory interpretation case decided in 2010, concluded that the savings clause of an express preemption provision reflected the federal government’s intent to enlist states in the enforcement of the federal employer sanctions through the discrete means of licensing laws. The domain that this sort of federally supported regulation might occupy could be significant. Finally, the picture is complicated by the fact that the federal government also faces a challenge from the anti-enforcement direction, by the movement among some localities to refuse to acknowledge federal requests for immigration detainees on potentially removable aliens in state and local custody.³⁷ Whether DHS or even Congress can require

³⁵ See Spiro, *Immigration Preemption After United States v. Arizona*, *supra*, at 105.

³⁶ One example in the bill currently pending before the Senate would create a commission of border state governors that would help determine if enforcement triggers have been met to permit elements of a legalization program to move forward.

³⁷ Chicago’s “Welcoming City Ordinance” prohibits city agencies from detaining persons for immigration violations, subject to a few exceptions for convicted felons and admitted gang members. A similar impulse was reflected in state and local efforts to opt out of federal enforcement collaborations. See *Counties in East and*

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respect for detainer requests raises potential commandeering concerns. But the more important point to see is that federal control over enforcement hardly remains seamless.

As with any delegation scheme, this variation highlights the classic concern of administration that agents will not follow the priorities of the principle—perhaps a particularly acute concern when the agent is a distinct government rather than an arm of the federal government subject to direct supervision and may therefore not be fairly characterized as an agent at all (see the anti-detainer ordinances). The ways in which delegation programs authorized by the INA have played out demonstrate that this risk is real. Under the auspices of the enforcement program (known as 287(g)), for example, some jurisdictions use their authority to identify and arrest only persons who have committed serious crimes, which dovetails with the federal government’s purported priorities.³⁸ But other jurisdictions have used their authority to identify and then process numerous unauthorized immigrants who have done nothing more than commit a traffic violation. Similarly, a few states have used their benefits authority to deny access to certain classes of non-citizens, whereas others have maintained the status quo pre-1996. In the public benefits context, courts actually have themselves diverged over whether it is permissible for Congress to authorize this sort of variation, in a context in which the Supreme Court has repeated the uniformity mantra with frequency.³⁹

West Coast Opt out of Secure Communities, Deportation Nation, Sept. 28, 2010, available at <http://www.deportationnation.org/2010/09/counties-on-west-east-coast-vote-to-opt-out-of-secure-communities/>. ICE officials speaking anonymously have said that localities may not opt out. To avoid having arrest data sent to DHS, it appears that state and local law enforcement would have to refuse to send their data to the FBI, which they do as a matter of course and pursuant to spending clause incentives. Though these particular opt out efforts have been ineffectual, the important point for my purposes is that the attempts to opt-out reflect how local priorities in relation to immigration are necessarily distinct from the federal.

³⁸ See Randy Capps, Marc Rosenblum, Cristina Rodriguez, & Muzaffar Chishti, *A Field Study in Seven Sites of 287(g)* (forthcoming 2010).

³⁹ Compare *Aliessa v. Novello* (NY Court of Appeals 2002) (holding New York’s decision to deny aliens Medicaid benefits as a violation of the Equal Protection Clause, even though the decision was authorized by federal statute, and thus essentially declaring a federal law unconstitutional) with *Soskin v. Reinertson* (10th Cir. 2004) (holding that benefits decisions permissible, because federal government can decide that it seeks variation in the system).

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The criticism that variation in and of itself undermines the uniformity of immigration policy is ultimately misplaced, however, because it is ultimately at odds with the mechanics of delegation, not to mention the structures of law enforcement. The federal government's decision to delegate represents some tolerance for variation, and it seems perfectly plausible that Congress seeks and depends on variation to manage immigration enforcement effectively. The federal system itself is deeply diverse; local federal agents often hold different priorities from agency heads and officials in Washington. Across the border region, each sector has devised its own combination of enforcement programs to address localized pressures, which include not just the nature of immigration in that sector, but also the pressure exerted by state and local officials, who see enforcement differently depending on whether they are from California, Arizona, or Texas. It is not ultimately clear that this variation is a problem that needs to be solved, as opposed to a consequence of our governing structure and the ideologically diverse demography it organizes. In fact, delegation strategies can simultaneously take advantage of local or institutional expertise, shift the political costs of difficult decision-making, and promote more efficient policy by expanding capacity. With respect to enforcement in particular, local officials will be closer to the communities in which the enforcement will occur and therefore may have a better sense of how to balance enforcement and crime control goals, and better access to information. The law also enables local actors enthusiastic about immigration enforcement to bear some of the political cost of either overly robust enforcement or failure to enforce to the satisfaction of the community. Similar claims can be made of the public benefits provision. The question of course remains how much variation is tolerable, even where it might not be optimal. The answer will likely depend on context; I doubt a legal rule could be devised to yield the appropriate results. The important point to understand post-*Arizona* is that even in contexts where uniformity is thought to be a defining feature of the system, the federalist logic runs deep.

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And outside of the context of enforcement, the local churning also continues. The terrain of the public debate between federal and local interests has simply shifted post-*Arizona*. In Arizona itself, for example, the state has done what it can to disrupt the federal government’s latest highest profile (non)-enforcement policy of Deferred Action for Childhood Arrivals,⁴⁰ refusing to permit recipients of this form of relief from removal to apply for drivers’ licenses. In fact, after being rebuffed by a district court for denying DACA recipients licenses, while granting them to recipients of garden-variety deferred action,⁴¹ the state opted to level its policy down and deny the benefit to all aliens with the deferred action designation.⁴² But crucially, as I emphasize in my earlier work on immigration federalism, this dynamic will not be all, or even primarily, aimed at constraining the scope of action for unauthorized immigrants. Governor Jerry Brown of California has recently

⁴⁰ In June 2012, DHS Secretary Janet Napolitano announced the agency’s plans to rely on deferred action—a form of prosecutorial discretion traditionally used in discrete cases to defer removal action—to address the plight of unauthorized immigrants brought to the United States as children. She issued a memorandum to the heads of ICE, CBP, and USCIS “setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security . . . should enforce the Nation’s immigration laws against certain young people who were brought to this country as children and know only this country as home.” See Memorandum from Janet Napolitano, Sec’y of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://search.dhs.gov/search?query=Exercising+Prosecutorial+Discretion+with+Respect+to+Individuals&op=Search&affiliate=dhs>.

⁴¹ *Arizona Dream Act Coalition v. Brewer*, ___F.Supp.2d ___, 2013 WL 2128315, *25 (D. Ariz. May 16, 2013). Unable to conclude that heightened review applied to the class of unauthorized aliens eligible for DACA, the court applied rational basis review to the state law and found it wanting because it arbitrarily distinguished among similarly situated groups—recipients of deferred action in the ordinary course and DACA recipients. The court emphasized that it was “not saying that the Constitution requires the State of Arizona to grant driver’s licenses to all noncitizens or to all individuals on deferred action status. But if the State chooses to confer licenses to some individuals with deferred action status, it may not deny it to others without a rational basis for the distinction.” *Id.* at *20.

⁴² Some commentators have argued that the administration pursued this course in response to state and local crackdown efforts, based on its desire to provide a form of protection against state action, presumably by preventing local police from forcing this sympathetic class of people into the removal system. See, e.g., Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W.Va. L. Rev. (forthcoming 2013) (arguing that the administration adopted DACA in response to repeated failures to enact the DREAM Act and to shield a particular class of unauthorized immigrants from the vagaries of state and local immigration enforcement measures); Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers* (unpublished manuscript 2013), available at <http://ssrn.com/abstract=2215255> (arguing that a theory of prosecutorial discretion does not support the “blanket relief” DACA affords but that the President does have a provisional stewardship power to protect “intending Americans” from restrictive immigration legislation enacted by the states).

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highlighted our local variation by signing into law several bills that make life easier for certain unauthorized immigrants, including by making college tuition more accessible and permitting unauthorized immigrants to join the state bar. I will not repeat here the substance of my previous work—all of the ways in which action grounded at the state and local level actually constitutes our national immigration policy outside of the parameters set by preemption doctrine. But this phenomenon beautifully highlights the ability of a federal system to channel contradictions.

3. The channels of debate

Among the important features of immigration federalism has been the rapid-fire adoption of nearly identical state and local ordinances in jurisdictions around the country. It is by now well known that particular individuals and groups have been responsible for presenting templates for immigration crack-down measures to interested legislators, leading to convergence across certain jurisdictions predisposed to the policies reflected in those model ordinances.⁴³ This phenomenon may well be behind the slippery slope assumptions made by courts conducting preemption inquiries, that is that laws whose effects may be minimal on their own, when coupled with other like laws, might in fact constitute a de facto national policy inconsistent with federal objectives. But other trans-local associations have helped shape the debate as well, though with less obvious tangible effects. Associations of police chiefs have been crucial in introducing into the debate the potential risks of immigration policing by ordinary law enforcement officials. And familiar interest groups, such as the Chamber of Commerce, have highlighted the economic costs of employment-related ordinances.

That trans-local interests might be shaping immigration local policy is hardly unique to the immigration context, and it certainly seems of a piece with the interest group politics that

⁴³ For a thick description of this phenomenon, see Pratheepan Gulasekaram & Karthick Ramakrishnan, *The Importance of the Political in Immigration Federalism*, 44 *Ariz. St. L. J.* 1431 (2012).

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characterizes lawmaking more generally. But the fact that immigration ordinances in particular have spread through these networks does underscore that, to understand how the structures of federalism have been central to the promotion of a national debate, we must peer into the sites where the debate has occurred. Theories of federalism that extol the value of decentralization, either for promoting deliberation or for producing practical examples of how dissenting views might work when implemented in practice, become all the more powerful if we can discern if, when, and how novel sub-federal programs and ideas transfer across state lines. The diffusion of norms and policies through formal and informal channels constitutes a crucial functional feature of federalism, even though such diffusion does not require a federal system to occur.

And yet, inter-state influences as a constructive phenomenon are surprisingly under-explored in legal scholarship on federalism. Legal scholars overwhelmingly tend to approach federalism as a set of vertical relationships between states and the institutions of the federal government. An important body of literature exploring the horizontal dimensions of federalism does, of course, exist, but it focuses largely on the mechanisms for mediating conflict among states, deciding choice-of-law issues, or preventing states from interfering with federal powers.⁴⁴ As Heather Gerken and Ari Holtzblatt highlight in their work calling for an affirmative account of the value of inter-state spillovers, the preoccupation among constitutional scholars for policing spillovers has reduced discussions of horizontal federalism to ones of line-drawing and policing, obscuring the ways in which horizontal relationships can help advance national debates through conflict that has value. Horizontal federalism understood as an inquiry into how states work together or influence the

⁴⁴ A related and significant literature on the Dormant Commerce Clauses exists. I have not yet mined that work for the purposes of this paper, in large part because it does not address the mechanisms of diffusion or how consensus travels across state lines, but rather contends with efforts by the Supreme Court to prevent states from imposing externalities on its neighbors through discriminatory or protectionist trade policies. As a result, the literature still has a fairly vertical focus, though of course the legal constraints on state-level policy innovation embodied in doctrines such as the Dormant Commerce Clause are relevant to describing how states interact with one another and therefore how ideas and policies spread among them.

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policymaking processes of one another is as central to understanding the utility of our governing structure, as the vertical dynamics of sub-federal entities' interaction with the national.

In the political science literature, a robust and largely empirical debate has been underway for several decades about how norms diffuse horizontally within the U.S. federal regime.⁴⁵ The field emerged in the 1970s,⁴⁶ as part of an effort to test the claim that states operate as laboratories of democracy. The studies in the field seek to determine under what conditions lawmakers adopt particular policy ideas from other states, and whether factors such as success of the program under study, geographic proximity or affinity, and partisan dynamics shape policy diffusion. An important dimension of this work focuses on how responsive state governments are to public opinion—a factor with enormous implications for normative claims regarding the desirability of decentralization.⁴⁷ More recently, the literature has drawn a distinction between morality policy and what we might call technocratic policy and has found that the two types of lawmaking translate from one context to the next in different ways, in large part because morality policy is far more salient and

⁴⁵ See Posner & Sunstein, *Stan. L. Rev.* (on common law borrowing). A robust literature exists with respect to the sociology of norm diffusion across nation states, as well. In this draft, I do not directly engage that literature, because the relative homogeneity of the states of the U.S. in relation to one another, and the integrated governing structures and presence within a single, national government, present differences in context that make me wary of reliance on the international norm diffusion literature, which focuses primarily on how human rights norms come to be adopted across national settings. For a comprehensive survey of this literature and an argument that processes of acculturation (as opposed persuasion and coercion) are central to norm diffusion, see Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (2010); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *Duke L.J.* 621, 647-48 (2004). Katerina Linos' work might also have some purchase in this context. She demonstrates that, contrary to much conventional wisdom, it is not networks of elites transmitting their ideas to the political process that results in diffusion of policy ideas, but rather that diffusion occurs through democratic processes—through politicians' appeals to voters based on reference to successful and therefore credible experiments in other states. That these appeals would be influential within the United States seems even more intuitive.

⁴⁶ For three classic articles in the area, see Jack Walker, *The Diffusion of Innovation Among the American States*, *Am. Pol. Sci. Rev.* 63(3) (1969); Virginia Gray, *Innovation in the States: A Diffusion Story*, *Am. Pol. Sci. Rev.* 67(4) (1973); Francis Stoke Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, *Am. Pol. Sci. Rev.* 84(2) (1990).

⁴⁷ See, e.g., Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, *Am. Pol. Sci. Rev.* 103 (3) (2009).

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accessible to the general public.⁴⁸ In addition, some studies show that the impact of public opinion on policymaking increases as the salience of the issue increases,⁴⁹ a dynamic that could be explained by lawmakers' tendency to track public sentiment only when it runs deep, as well as a rational trade-off. Mirroring public opinion on salient issues might free up time and resources to pursue personal policy objectives or interest group preferences in other contexts.⁵⁰

The fact that salience contributes to the spread of ideas ultimately dovetails nicely with the more normative work of legal scholars,⁵¹ who emphasize the value of local jurisdictions putting into practice dissenting ideas, or policies that disagreement at the national level might preclude from coming into existence.⁵² This fact also has strategic value by highlighting when norm entrepreneurs and national networks organized around particular issues can have a major impact on policy development. Though these networks tend to be non-governmental, or involve associations of

⁴⁸ See, e.g., Christopher Z. Mooney & Mei-Hsien Lee, *The Influence of Values on Consensus and Contentious Morality Policy: U.S. Death Penalty Reform, 1956-82*, J. of Pol. 62 (1) (2000) (studying death penalty policy changes after *Furman v. Georgia* and concluding that “state to state variation on contentious morality policy is driven by specific mass public opinion, while consensus morality policy variation is influenced almost exclusively by the general ideology of political elites”); Lax & Phillips, *supra* note 47 (arguing that the impact of public opinion on policymaking increases as the salience of the policy issue increases and that when policymakers depart from public opinion in the gay rights context, the departure tends to be away from gay rights).

⁴⁹ See Lax & Phillips, *supra* note 47, at 377 (measuring salience by appearances of issue in *The New York Times*). Lax & Phillips seek to place their results in the context of debates over the desirability of federalism and argue that, though state policies do not mirror public opinion, state control results in majority-supported policies more often than national control. *Id.* at 382. At the same time, their research lends support to the Madisonian vision in Federalist 10 by demonstrating that minorities are often better protected at the national level; in the case of pro-gay rights positions, for example, they find that passage requires more than 50% of public opinion, sometimes substantially more. *Id.* at 382.

⁵⁰ Lax & Phillips, *supra* note 47, at 382.

⁵¹ Political science scholars have acknowledged, their field has not paid sufficient attention to identifying the mechanisms that promote diffusion, perhaps because the goals of the work do not include devising normative positions on how to promote diffusion—a goal likely of more interest to normatively oriented legal scholars. Whereas the political science literature makes empirical determinations of whether and under what conditions norms diffuse, the legal focuses on the actual mechanisms, if not of diffusion, at least of inter-state relations. Though the scope of the latter ultimately is narrower than what would be required to truly understand the conduits through which states influence one another, it brings to light the fact that the constitutional regime contains numerous mechanisms for mediating state-to-state relations.

⁵² See, e.g., Gerken, *Dissenting by Deciding*, *supra* note and Barron, *supra* note 75.

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government actors acting outside their sovereign capacities,⁵³ they matter significantly to how policy decisions get made.

Again, trans-local networks of politically motivated private actors have been crucial to the spread of Arizona-style immigration ordinances. Though immigration policy can hardly be reduced to a question of morality, strong moral intuitions underpin most people’s evaluation of how unauthorized immigrants ought to be treated. Among the implications of the “national” phenomenon of “local” immigration regulation is that it further destabilizes the assumption still underpinning some federalism jurisprudence that policy areas can or ought to be neatly divided into spheres,⁵⁴ or the assumption that the federal-state-local dynamic is either zero-sum⁵⁵ or necessarily one of conflict. In other words, the policies emerging from states and localities reflect part of a national agenda, albeit one that may be at odds with the interests of the current national government and that has not been consolidated in the form of national legislation.

The role of these networks in the spread of immigration ordinances also gives rise to important normative questions at the heart of our account of democracy and for the time being beyond the

⁵³ For a reach and detailed account of the numerous types of associations of this kind that incorporate governmental actors, see Judith Resnik, Joshua Civin, & Joseph Frueh, *Ratifying KYOTO and the Local Level: Sovereignty, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 Ariz. L. Rev. 709, 733 (2008). The associations that fit this category include the National Governors Association, The National Association of Counties, The National League of Cities, The United States Conference of Mayors, the Council of State Governments, and various similar associations organized around party affiliation, regional affiliation, or racial and ethnic identity groups.

⁵⁴ In truth this assumption has become less important in the Supreme Court’s federalism jurisprudence, though it dominates the discourse on immigration law—a tendency I sought to challenge in *The Significance of the Local in Immigration Regulation*.

⁵⁵ Theda Skocpol has taken on this zero-sum way of thinking in empirical fashion, arguing that the tendency in political science and public political discourse alike to pose the state as in opposition to society, or the national state in opposition to local volunteerism “cannot make sense of American civic engagement.” Theda Skocpol, *The Tocqueville Problem, Civic Engagement in American Democracy* 467 (1997). She charts how Americans have been working together through trans-local associations through U.S. history, *id.* at 467, and that those networks have not just “bubbled up” from the grassroots, but that they have also “stimulated a lot of local activities.” *Id.* at 472. She argues, however, that recent upsurges in associational activity in the U.S. are not correlated with the emergence of new federations of citizens, but rather of “narrowly focused advocacy groups . . . headquartered in D.C. or New York City, with professional staffs.” *Id.* at 475. See also Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (2005) (tracing the rise and decline of civic participation through associations in U.S. history).

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scope of this paper. Does their agitation and influence, especially when bankrolled by a small handful of wealthy advocates, undermine the democratic character of state and local legislation, or cast doubt on the democratic legitimacy of measures adopted by state and local governments at their behest?⁵⁶ Does the fact that these networks have been much more robust on the restrictionist side matter to how we understand their role? The answer to these questions might depend on the nature of the networks in question—whether they amount to little more than moneyed interests or whether they constitute associations of public officials or political campaigns animated by an issue salient to the public.

But as important as these networks have been to the evolution of the debate on illegal immigration in particular, it is important not to lose sight of the role of the inter-governmental dynamic in shaping the particular features and emphases of the debate. The dynamic operates in two directions. General evidence exists, for example, that the national government can influence state and local policymaking not just through its exercise of the spending power, but also by sending “strong, clear signals to states” concerning preference and potential for future action.⁵⁷ The government’s position in *Arizona* may be one such signal, but so were the cooperative federalism elements added to the INA in 1996, which together highlight the federal government’s position that the federal-local dynamic is not zero-sum. It seems likely, too, that the signals move in the opposite direction. Where networks have been able to forge alliances with state and local officials to advance a policy agenda, the former have succeeded in turning their visions into law, with state and local officials become advocates for their agendas,⁵⁸ such that officials might themselves spark trans-local

⁵⁶ Think here of the influence of the Koch brothers and the role of the ALEC organization in promoting state-level gun rights legislation, among other policy agendas.

⁵⁷ Allen, Pettus, Haider-Markel, *Making the National Local: Specifying Conditions for National Government Influence on State Policymaking* 319-20 (noting that mandates can come from Congress, the Supreme Court, the Executive Branch, direct orders, regulations, and partial preemption).

⁵⁸ For example, the move by a state governor to stop executions in his state pending a review of the capital punishment regime creates opportunities for trans-local discussions of the motivations for such a policy.

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debate or find a sympathetic ear in Congress. Ultimately, the politics that yielded the Arizona ordinance will have its points of entry at the federal level, too, though determining policy outcomes will much more challenging at that level. Finally, through the actual commingling of enforcement and other activities, actors from the different governments are likely to inform one another's priorities and determine the scope of one another's actions, in the manner described in the previous section.

II. SAME-SEX MARRIAGE AND THE EVOLUTION OF EQUALITY

It is by now commonplace to note that norms in favor of marriage equality have evolved in decentralized fashion, through a variety of state and local legislative, administrative, and judicial decisions to establish (and preclude) same-sex marriage. In particular, numerous progressive voices who might otherwise have been expected to extol the value of a nationally-enforced standard of equality have written stirring defenses of the role of federalism in the development of the norm and the danger of taking the issue prematurely to the U.S. Supreme Court, for fear of political backlash that might thwart the otherwise gradual (and in reality quite quick) development of the norm through decentralized political debate. In this part of the paper, I highlight three important dynamics that connect the gay marriage debate to the other domains I explore and that reflect on the value of federalism to the process of consensus formation more generally. First, the trajectory of the same-sex marriage debate reflects how sub-federal action can set a federal agenda and enable federal policy

Indeed, policymakers responsible for recent shifts in death penalty policy demonstrate awareness and draw justification from actions by other states. *See, e.g.*, New Jersey Death Penalty Study, Commission Report 29-40 (2007), available at http://www.njleg.state.nj.us/committees/njdeath_penalty.asp (referencing practices of other states in making recommendation). Similarly, the moratorium in Illinois appears to have influenced the decision of Governor Glendening in Maryland to do the same. The indictment of Governor Ryan on bribery and racketeering charges, however, undermined his credibility as a reformed, and the moratorium was cited as one of the explanations for the electoral defeat of Lieutenant Governor Townsend in her race for governor. When he came into office, Governor Ehrlich, a Republican, rescinded the moratorium. For discussion of other states' consideration of a moratorium in light of the Illinois experience, see John Nagy, Illinois Moratorium Puts Fresh Focus on Death Penalty, Stateline.org, Mar. 24, 2000, available at <http://www.stateline.org/love/printable/story?contentId=13969>.

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shifts, underscoring that national change sometimes demands decentralized decision-making, not only to manage deep disagreement, but also to create political space for federal action. Second, the evolution of the matter highlights courts as savvy actors within a larger political debate, as opposed to institutions to be feared for the potential havoc they might cause in their attempts to superintend the debate. And finally, precisely because norms in favor of same-sex marriage have been developed in large part through state-court litigation, the events of the last two decades provide a set of texts through which to explore how sub-federal actors influence one another. This mechanism of norm diffusion adds to the picture of trans-local networks of activists drawn in the immigration context. Though the mechanics of horizontal norm diffusion are complex and can be difficult to pinpoint, they are clearly at work in each of the domains I explore, and so a full account of the value of federalism demands attention to them.

1. *The federal interest*

To begin the discussion of gay marriage⁵⁹ by focusing on the federal interest in its resolution is to enter the story from the middle. Though a larger civil rights movement by and for the LGBT community long predates the marriage question, the latter became a subject of national attention in the mid-1990s with Supreme Court of Hawaii's judgment in *Baer v. Lewin*—a shot across the bow that eventually precipitated the enactment of Defense of Marriage Act (DOMA), the statute whose passage and eventual rejection bookend the account of the federal role in the debate. If we take DOMA's rise and fall as the lens through which to view the federal government's interest in the marriage equality question, its role comes into focus as highly political and ideological, but also

⁵⁹ I focus on the movement for marriage equality for simplicity's sake, but the definition of the social movement at issue could be broadened to include the litigation and political activity surrounding the evolution from *Bowers* to *Lawrence*, the move to repeal the Don't Ask, Don't Tell policy, efforts to include sexual orientation in antidiscrimination statutes, and efforts to secure equal civil rights in specific contexts, such as with respect to partner benefits or adoption rights. My goal in this Paper is not, however, to write a social movement history but to illuminate a particular dynamic of federalism as it relates to the development of morality policy.

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largely reacted and ultimately related to the government’s own conception of how to administer its affairs and allocate the benefits under its control, in response to changes in at the state and local level.

DOMA began both as a statement of the federal government’s view on the meaning of marriage for its own purposes and as a mechanism for policing inter-state externalities by giving federal cover to states unwilling or unable to recognize the same-sex marriage performed in sister jurisdictions. In both senses, the federal government has been a single, albeit important, actor in the debate—a voice with an influential opinion and some administrative tools with which to help shape events. In the years between the statute’s passage in 1996 and the Obama administration, the federal government remained largely passive. That the end of this passivity coincided with the advent of a Democratic president is hardly surprising. Recall that the President began his tenure still publicly opposed to same-sex marriage. It therefore seems at least plausible that space was created for the Obama administration to take a more active posture on marriage equality and same-sex partner benefits under federal law as the result of the developments in San Francisco, Massachusetts, and the numerous other jurisdictions that had begun to reflect the dramatic shifts in public opinion on the gay marriage question, especially after the 2004 and 2006 elections, when numerous state electorates adopted constitutional amendments to prohibit same-sex marriage, arguably to forestall the legal pressure that some thought would mount in the aftermath of *Lawrence v. Texas* in 2003.

Importantly for this story, the administration has stayed largely within its domain in its contributions (at least until it filed its amicus brief in *Hollingsworth v. Perry*), seeking to align federal law with federal interests in the question. But in so doing, the federal government has put its considerable weight behind a particular constitutional and normative vision in two primary ways. First, in June 2010, the White House began a concerted effort to require the bureaucracy to do what it could with administrative tools as long as DOMA was on the books to extend benefits of many

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different kinds to same-sex partners, priming the bureaucracy for a significant policy shift in line with developments across the country. Taking a highly textualist approach and treating DOMA as a purely definitional statute despite the extensive legislative history later used in DOMA litigation to highlight legislators' broad animus, the President ordered the heads of executive departments and agencies to extend certain federal benefits to same-sex partners and their children. The presidential memorandum emphasized that "systemic inequality [in the provision of benefits] undermines the health, well-being, and security not just of our Federal workforce, but also of their families and communities," and emphasized that administrative action should be taken even though legislative action would be required to achieve full equality, "to the extent permitted by law," *i.e.* consistent with DOMA.⁶⁰ And then agency by agency, benefits as defined by law or regulation that did not depend on a being in a "marriage" or constituting a "spouse," were extended to same-sex couples, including numerous health and welfare benefits, as well as other benefits designed to honor the partners of federal employees, such the right to be buried in military cemeteries, and to facilitate unions, such as the right to be placed by the Peace Corps in the same location as one's partner.⁶¹

Second, and more boldly, in February of 2011 the administration made the decision to cease defending DOMA in litigation,⁶² while continuing to enforce the statute, ostensibly to permit judicial

⁶⁰ Presidential Memorandum, *Extension of Benefits to Same-Sex Domestic Partners of Federal Employees* (June 2, 2010). Perhaps unwittingly, in taking this approach, the administration arguably introduced a new though perhaps less troubling inequality in the provision of federal benefits—a distinction between unmarried heterosexual and homosexual partners, the former of which have no entitlement to federal benefits. Perhaps this distinction was justified as long as DOMA remained valid on the ground that same-sex spouses were still denied eligibility for benefits, not to mention the fact that regardless of DOMA's validity, same-sex partners in most states are simply not eligible at all for the marriage benefit that would qualify their heterosexual peers for federal benefits,

⁶¹ After DOMA's invalidation, developments in the states present a new challenge to the federal government—determining under what circumstances the federal government can recognize a state-based same-sex marriage for its own purposes.

⁶² In the Attorney General's letter to Congress announcing the shift in policy, he explained that in previous lawsuits the Department had been able to defend the statute as satisfying rational basis review, because the litigation arose in circuits in which precedent made rational basis the binding standard of review. But the filing of two new lawsuits in circuits with no precedent on the matter would require the government to take an affirmative position on the level of scrutiny required, thus precipitating the government's conclusion that

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resolution of the issue and give respect to the Congress that enacted DOMA, effectively passing responsibility to defend and act of Congress to Congress itself. The choice to stop defending while continuing to enforce may also have reflected a kind of split the difference approach whose logic reflected a form of incrementalism informed by a strong sense of institutional obligation mixed with political maneuvering, or even potential disagreement from within the administration about how to respond to what appeared to be a rapidly growing shift in public opinion, and perhaps even a change of heart among the political leadership, including the President himself. But whatever the cause of the shift in institutional position—and it seems likely that the evolution of the debate nationally and through the states played a role in the timing and substance of the decision—the formal letter from the Attorney General to Speaker John Boehner staked out a clear constitutional position, despite existing doctrinal uncertainty. In laying out why DOMA ought to be subject to heightened scrutiny and why it could not meet it, the Attorney General cited many of the same reasons given by courts when deciding to overturn precedent, including the erosion of the justification for discrimination based on sexual orientation by cases such as *Lawrence v. Texas* and *Romer v. Evans*; developments in social science establishing that sexual orientation is immutable; changes in federal law, such as the repeal of Don't Ask, Don't Tell that highlight the unfairness of requiring gay men and women to hide their orientation; and evolution in “community practices and attitudes.” In perhaps its most aggressive move vis-à-vis the states, the administration advanced this vision in an amicus brief to the Supreme Court in *Hollingsworth v. Perry*, arguing that California's Proposition 8 prohibiting same-sex marriage was unconstitutional. But the federal resolution of that question was left in the Supreme Court's hands.

The Supreme Court's decision in *United States v. Windsor* striking down DOMA contains some significant federalism trappings. Justice Kennedy's narrative lays out the evolution of public opinion

the statute could not survive the heightened scrutiny to which it believed it should be subjected. Letter from Attorney General Eric Holder to The Honorable John A. Boehner, *Defense of Marriage Act* (February 23, 2011).

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as accompanied by legal transformation in the states, which began in some instances, as in New York, as recognition of marriages performed in other states, and became recognition of the right under state law to marry. The Court writes:

[t]he responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people. DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.⁶³

But Justice Kennedy stops short of adopting the most aggressive federalism posture advanced in the case—that federal law must define its terms according to state law in those domains that states historically regulate.⁶⁴ Though he does not say so explicitly, to have done so would have been an assault on federal power by depriving the government of the ability to set the parameters for its own affairs. Indeed, the Court acknowledged the federal government’s authority to define marriage for its own purposes, such as in its immigration provisions denying recognition to marriages entered into for the purposes of procuring immigration benefits, even when those marriages were valid under state law.

In its federalism account, the Court pivots to the “dignity” conferred by state law on same-sex partners through the extension of the fundamental benefit of marriage and thus fuses the state interest with a larger narrative of dignity and equality. For the Court, Congress’s rejection of the states’ decision to confer same-sex marriage represents evidence that suspicion of Congress’s motives might be justified. But it is the evidence that Congress in fact intended to interfere with the equal dignity of same-sex marriages that doomed the statute. Kennedy concludes that DOMA’s creation of two tiers of marriage for the same couple “demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationships the State has sought to dignify. And it

⁶³ *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013).

⁶⁴ The Court writes: “Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”

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humiliates tens of thousands of children now being raised by same-sex couples. . . . By its great reach, DOMA touches many aspects of married and family life.”

Perhaps Justice Kennedy is suggesting that DOMA presents a problem only because it seeks to take away something that the states have conferred. But without the multi-front assault on dignity that DOMA represents, which arises from its effects on federal law and the message federal law subsequently sends to individuals, it seems unlikely Kennedy would have held it invalid,⁶⁵ though Kennedy’s opinion does not go through the motions a straight-up equal protection or due process invalidation would have. The importance of the federalism dynamic implicated by DOMA would have been easier to pinpoint had the Court decided *Perry v. Hollingsworth* on the merits. In other words, a decision upholding Proposition 8 on the merits might have suggested that respect for state choices animated its invalidation of the federal statute, because its talk of equality and dignitary harms in *Windsor* otherwise should have translated to *Perry*, the differences in context notwithstanding. This sort of outcome would have made clear that the federalism narrative the Court told in *Windsor* was analytical rather than just descriptive and atmospheric.⁶⁶ And perhaps the Court’s decision to resolve *Perry* on standing grounds reflects some institutional and federal modesty, and a desire to let the substantive question of the propriety of same-sex marriage percolate through the states.

But whether the federal structure drove the Court’s decisions, perhaps the most important federalism lesson to take from these cases is that federal law and policy can function in a context of

⁶⁵ As Justice Alito describes it in his dissent, “[r]ather than fully embracing the arguments made by *Windsor* and the United States, the Court strikes down section 3 of DOMA as a classification not properly supported by its objectives. The Court reaches this conclusion in part because it believes that section 3 encroaches upon the States’ sovereign prerogative to define marriage.” *United States v. Windsor*, 570 U.S. ____ (slip op. at 16) (Alito, J., dissenting).

⁶⁶ As Justice Alito put it in his dissent: “I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in today’s opinion of the Court will soon be scattered to the wind.” *United States v. Windsor*, 570 U.S. ____ (slip op. at 19) (Alito, J., dissenting).

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uncertainty and non-uniformity. As among the states, the lack of uniformity on the marriage equality question might matter to those who seek national consolidation of the norm in favor of marriage equality, but the norm in favor of percolation that has become pervasive in activist and progressive circles, in part in response to doubt about the Court’s actual substantive intentions, means that a return to the political process and state-by-state litigation will likely be welcome. At the same time, *Windsor* puts a significant thumb on the scale for other courts to follow in favor of the constitutional defense of same-sex marriage.⁶⁷ Perhaps *Windsor* will come to stand for the Supreme Court’s capacity to advance national debates without resolving them by changing the terms of the debate that continues to be conducted from within the context of state institutions.⁶⁸

The first state court decision to address the marriage equality question has in fact resulted in a change in position, not because of the substance of the U.S. Supreme Court’s federalism-inflected equal protection reasoning, but because of the consequence of its holding. In *Garden State Equality v. Dow*, a superior court in New Jersey held that the state’s civil union scheme violated the equal protection provision of the state constitution because, post-*Windsor*, it would result in the denial of numerous federal benefits to partners in same-sex civil unions that would now be available to married

⁶⁷ For another example of the Court playing this role, we might look to its decision in *Furman v. Georgia* invalidating state capital punishment statutes, which forced states to reconsider the penalty and redraft its parameters. We might characterize *Furman* as the Court identifying a moral problem but then enlisting the states in its ultimate resolution. See John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 Ariz. L. Rev. 143, 198 (1986) (noting that debate focused primarily on restoration of capital punishment and which option to adopt, as opposed to morality of the punishment). As one legal scholar has framed it, *Furman* pointed to a system in which “federal courts and local democratic actors would share constitutional responsibilities.” James Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 Colum. L. Rev. 1 (2007) (arguing that *Furman* was an experiment that “provoked useful feedback from state legislatures” and that it triggered a “national referendum” on whether to reinstate the death penalty).

⁶⁸ Evidence also exists that the national government can influence local policymaking not just through the spending power, but also by sending “strong, clear signals to states” concerning preference and potential for future action.” Allen, Pettus, Haider-Markel, *Making the National Local: Specifying Conditions for National Government Influence on State Policymaking* 319-20 (noting that mandates can come from Congress, the Supreme Court, the Executive Branch, direct orders, regulations, and partial preemption). The different means by which the national government exerts influence on the states short of preemption is well worth exploring further. It may also be worthwhile to tease out the differences between the influence and power of trans-local networks and the national sovereign.

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same-sex partners. Because many agencies of the federal government have declared their intention to extend federal marriage-based benefits to couples married under state law but not in civil unions under state law, “the parallel legal structures created by the New Jersey Legislature therefore no longer provide same-sex couples.” In *Lewis v. Harris*,⁶⁹ the Supreme Court of New Jersey had held that the New Jersey constitution requires that same-sex partners be granted the same benefits and privileges as heterosexual married couples, but that the status of “marriage” need not be conferred. In light of *Windsor* and the federal government’s subsequent interpretation of its meaning, the state court reasoned, “marriage” and “spouse” were no longer mere words; those words now had material consequence. The federal move thus changed the factual predicates of the state court’s prior holding, resulting in once constitutional provisions violating the New Jersey constitution.

For the federal government, as Justice Scalia pointed out in his dissent, the Court’s ruling does create uncertainty, because DOMA helped the federal government avoid choice of law issues in a climate of state diversity by creating a uniform federal definition of marriage.⁷⁰ But not only did the federal government embrace this eventuality in its decision not to defend the statute, but little if any evidence exists that Congress sought uniformity for uniformity’s sake when it enacted DOMA. In other words, the federal government has accepted the consequences of non-uniformity, banking both on its ability to work out the details through its administration,⁷¹ and opting to support a

⁶⁹ 188 N.J. 415 (2006).

⁷⁰ *United States v. Windsor*, 570 U.S. ___ (slip op. at 19) (Scalia, J., dissenting). See also Will Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stan. L. Rev. 1371 (2012).

⁷¹ The immigration laws present a helpful example of the questions raised by *Windsor*, as well as of the capacity of the government to resolve those questions through ordinary administrative processes. In light of DOMA’s invalidation, the government was freed to extend marriage-based immigration benefits to same-sex spouses. But to do so, it would have to determine whether a couple married in one state could claim immigration benefits if residing in another state in which same-sex marriage was not permitted. Secretary Napolitano early on indicated the Department’s intent to recognize benefits on the basis of where the marriage had been celebrated, rather than the state of residence, and the Bureau of Immigration Appeals subsequently has followed suit. *Matter of Aeleniak*, 26 I&N Dec. 158 (BIA 2013) (“The issue of the validity of a marriage under State law is generally governed by the law of the place of celebration of the marriage.”). In other contexts in which the place of celebration does not constitute a long-standing default rule, these questions may be more difficult to resolve.

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constitutional norm over an administrative convenience. And in fact, many federal agencies appear to have quickly developed a stable position in at least one sense, establishing that marriage-based federal benefits are to be extended only to same-sex couples formally married under state law and not to couples in parallel civil unions.⁷² From one point of view, this move by the federal government imposes unequal conditions on residents of a state previously considered to be equal in all material respects. The state of New Jersey took this position in *Garden State Equality*, arguing that the federal government and not the state government bore responsibility for creating unequal conditions by refusing to recognize the materially identical same-sex civil union as a basis for extending federal marriage benefits. But from the federal government's point of view, this move simply takes its cue from the formalities of state law and withholds judgment on the question of whether civil unions can be de facto equivalent to marriage. New Jersey's position in the state litigation certainly raises an interesting question—whether it is the states that treat same-sex civil unions in the same way as marriages regardless of title is really the actor giving rise to the unequal treatment. But it would also be unorthodox and potentially more intrusive into state prerogatives for the federal government to judge the import of particular state statuses not called marriage.

2. *The national interest in decentralized debate and the policing of externalities*

The benefits of decentralized decision-making in this setting are obvious—at the time of DOMA's passage, for example, the deep disagreement that existed on the question was actually more like asymmetry, with few if any mainstream politicians willing to promote same-sex marriage, and a public opinion either hostile to or agnostic about it. Indeed, when DOMA emerged from Congress, it was arguably itself a mechanism for preventing outlying states from forcing the issue

⁷² See, e.g., Federal Employee Health Benefit Program Carrier Letter No. 2013-20, from John O'Brien, Director of Healthcare and Insurance, OPM to All Carriers (July 3, 2013), <http://www.op.gov/healthcare-insurance/healthcare/carriers/2013/2013-20.pdf>.

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onto a national agenda; its section 3 created a default rule that protected non-consenting states. And thus, one way to understand the law, other than as an election-year triangulation by Bill Clinton, was as a means of mediating potential state conflict, as some scholars have framed it.⁷³ The law substantially reduced the stakes of a court decision recognizing same-sex marriage by not requiring other states to recognize that marriage, thus eliminating the major externality produced by this particular federalist episode. At the risk of putting too positive a spin on the statute, this characterization of DOMA highlights a crucial role the federal government can play in a debate happening for the most part outside of the federal umbrella. By asserting its superiority, the federal government counter-intuitively enables an issue to simmer and disagreement to persist. This sort of federal move operates a bit like delegation, giving states and localities the ambit to redefine long-standing traditions through regulatory reform without the intensity of cross-border conflict that often accompany such challenges to the status quo. In retrospect, we could characterize the law as providing a framework for change, or a context in which to debate gay marriage without the specter of either a national rule or the undue influence of a sister state skewing the politics of the issue. Of course, the legislative history of DOMA highlighted in *Windsor* paints a very different picture of Congress's intent, which may have been to influence state policy on the matter without taking the unorthodox and possibly unconstitutional step of defining marriage at the state level.

⁷³ See Metzger, *supra* note, at 1533 (observing that DOMA “contributes to state unity given the extent of national debate and contention over same-sex marriage and the fact that forty states recently have added statutory or constitutional prohibitions against recognizing such marriages”); Dale Carpenter argues, in some tension with this claim, that DOMA is redundant, implying that states do not need the federal government’s imprimatur for refusing to recognize same-sex marriage from other states. Carpenter, *supra* note 77, at 86 If, in fact, DOMA is redundant, then the statute could be said to represent Congress’s own value judgment of the same-sex marriage issue (indeed, DOMA also defines marriage for federal purposes as between a man and a woman) and thus as a means not just of mediating state conflict, but also of influencing state behavior. Indeed, in his opinion in *Windsor*, Justice Kennedy notes the argument put forward by BLAG that, “[a]s the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom of choice of couples married under those laws if they are enacted. The congressional goal was ‘to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws.’” *United States v. Windsor*, 570 U.S. ___ (slip op. at 22).

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As more and more states and localities permitted same-sex partners to marry, the federalism story changed, and a progressive case for federalism began to emerge in activist and policy circles. Given the handiwork of the Supreme Judicial Court of Massachusetts and the other state courts that have found marriage equality constitutionally required⁷⁴— as well as drives by the likes of former San Francisco mayor Gavin Newsome to make gay marriage possible at the local level, commentators have employed gay rights as an example of how decentralization, lo and behold, might actually serve liberal ends. Scholars wary of premature federal intervention in the issue cited the value of state-based experimentation with different means for implementing gay marriage or devising a rough proxy, as well the value of having states and localities grapple with the issue through myriad but simultaneous local debates.⁷⁵ This concern split the activity community, too,

⁷⁴ See, e.g., *In re Marriage Cases*, 43 Cal. 4th 757, 758 (2008) (holding that domestic partnerships offer inadequate remedy for equality violation resulting from denial of access to marriage for same-sex couples); *Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 220 (N.J. 2006) (citing Brandeis' theory of laboratories of democracy but leaving fashioning of remedy to the legislature); *Kerrigan v. Comm'r Pub. Health*, 947 A.2d 407, 477 (Conn. 2008) (noting that “uniformity and consistency with other state and federal laws may be rationally related to the stat’s interest in limiting marriage to opposite sex couples, but it cannot withstand heightened scrutiny”); *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999) (arguing that individual states may provide *more* protections than the Fourteenth Amendment but allowing the legislature to shape the remedy for equality violation, writing “When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation (citing Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 101 (1996)).

⁷⁵ See, e.g., Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & Pub. Pol’y 147, 162 (2006) (arguing that local regulation (as opposed to state or national regulation) of marriage eligibility is consistent with competitive models of local government regulation and that “there is no reason to believe that majority preferences cannot easily be expressed bottom-up through convergent local rules than top-down through one national rule. A benefit of local rules is that ‘experimental’ practices in minority jurisdictions can influence actions taken in other jurisdictions.”); Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 17451754 (2005) (arguing that localities, acting through their governing powers, can turn abstract points of view into concrete practices, which in turn advances the debate, and noting that “[d]uring the period that San Francisco married gays and lesbians, newspapers across the country carried stories about the marriages of elderly lesbian couples or gay lovers who had raised children together . . . and as the New York Times explained, ‘The television images from San Francisco brought gay marriage into America’s living rooms in a way no court decision could.’”); David Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 Yale L.J. 2218, 2249 (2006) (using San Francisco’s challenge to California’s marriage laws as a lens through which to consider localist interpretations of the Constitution that seek to “afford cities the space to make their own choices through the practice of local politics”); Dale Carpenter, *Four Arguments Against a Marriage Amendment that Even an Opponent of Gay Marriage Should Accept*, 2 U. St. Thomas L.J. 71, 86 (2004)

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when David Bois and Ted Olson first initiated their lawsuit against California’s Proposition 8. Both doubt about whether the Supreme Court ultimately would impose a national marriage equality norm in the face of persistent disagreement among states and fear of the political consequences of judicial intervention re-enforced the inclination toward a federalism strategy in certain progressive circles.

This alignment of progressive interests with the structural advantages of federalism helpfully destabilized the conventional narrative that dramatizes states and federalism-wielding courts as agents of resistance to civil rights change and consolidation, thus forcing some recalibration of the nationalist paradigm of civil rights. Of course, historically, the tension between the protection of federalism and civil rights agendas has been stark. From the South’s defense of localized custom as a form of resistance to federal uniformity in the antebellum and Jim Crow eras, to the same region’s sometimes violent and generally oppositional reaction to the Supreme Court’s decision in *Brown v. Board of Education*, to President Nixon’s anti-bussing Southern strategy, federalism has operated as a drag on the advancement of racial equality.⁷⁶ Most recently, in the 1980s and 90s, decentralization and the rhetoric of states’ rights accompanied what progressives would call a civil rights retrenchment, both through the overt states’-rights political rhetoric of the Reagan era, and in the

(arguing against a federal marriage amendment and discussing experimentation occurring in states and localities, which “test whether encouraging stable same-sex unions through some formal legal recognition and support is, on balance, a good or bad thing”); Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 Alb. L. Rev. 719. 741-42 (2003) (“the question of whether the fear of counter-progressive impositions by the federal government is sufficient to justify a progressive embrace of federalism depends to some extent on one’s degree of risk aversion [T]he more cautious progressive, or the progressive that is more suspicious of meta-narratives, may in good faith conclude that the risk of strong national power wielded by conservative activists in Congress, the Executive Branch, or the Judiciary is too great a threat to progress nationwide to justify further concentration of power in those institutions, particularly at the expense of state or local actors);⁷⁶ Indeed, it is not surprising that Justice Brandeis’ “laboratories of democracy” have been rebranded in some quarters as “laboratories of bigotry.” See also Jon Stewart, *The Daily Show*, April 27, 2010 (referring to Arizona as the “meth lab of democracy,” in relation to the state’s now-famous immigration law, Senate Bill 1070 that would require police to inquire into the immigration status of persons during a lawful stop or arrest).

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hands of the Rehnquist Court, which steadily cut back on civil rights remedies through its sovereign immunity⁷⁷ and commerce clause⁷⁸ jurisprudence.

This tension between old and new civil rights narratives complicates any effort to provide an account of a systemic interest in decentralized decision-making. Precisely because gay marriage embodies what we might call a core civil rights concern⁷⁹—an imperative whose supporters believe it ought to be the law of the land rather than a patchwork—the acceptance of decentralized decision-making on the subject has a temporary feel to it and, again, has divided advocates in particular over whether to test anti-gay-marriage initiatives in the courts. The use of the civil rights narrative to bolster the case for new and challenging rights claims reflects the centrality of the civil rights narrative to our national sense of progress and justice, as well as the belief that the core values of the civil rights paradigm ought to be realized universally. In other words, the argument for federal forbearance in the interest of permitting state and local experimentation does not sit well with the end game of the civil rights movement, whose symbols include powerful articulations of national uniformity in *Brown* itself and federal coordination in the form of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

But in thinking through the role of decentralization in the gay marriage debate, it can be helpful to recall that pursuit of a national equality norm is not and has not historically been mutually exclusive with decentralized debate and decision-making, for two reasons. First, decentralized debate can help give shape to a national norm—the process that appears to be playing itself out on the gay marriage front, as discussed above. The profound changes in public opinion that accompanied the

⁷⁷ See, e.g., *Kimmel v. Florida Board of Regents* 528 U.S. 62 (2000) (striking down remedial provisions of Age Discrimination in Employment Act that authorized lawsuits versus state governments); *Boerne v. Flores*, 521 U.S. 507 (1997) (striking down part of Religious Freedom Restoration Act that would have made strict scrutiny the test for the evaluation of “neutral” state laws that burden the free exercise of religion).

⁷⁸ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000).

⁷⁹ Commentators have characterized the movement for gay rights generally and marriage equality in particular as either the latest instantiation of the civil rights movement, or as the consolidation of the civil rights paradigm.

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civil rights movement and have complemented the movement for marriage equality can only occur in a decentralized and variegated fashion, mediated by the very institutions (including state and local governments) that structure decision-making in the United States. Michael Klarman has shown, for example, that forces of moderation that controlled southern politics before *Brown* was decided set into motion forces that would produce indigenous racial change.⁸⁰ What is more, even once initial compliance with *Brown* gave way to vehement opposition, the federalism dynamic still fueled the civil rights movement by catalyzing horror outside the South in the face of the violence that accompanied eventual southern resistance.

Perhaps more important, whether we characterize federalism as an obstacle or a contributing factor to social change depends on the baseline in view; if we consider the status quo or baseline to be segregation (or slavery for that matter), then abolitionist efforts by non-Southern states enable us to recast federalism as a framework that promotes progressivism.⁸¹ This perspective similarly applies to how we might judge moral progress with respect to the death penalty, assuming that abolition represents the moral policy. The achievement of a uniform national policy in this domain has been elusive at best, and for the most part anathema, largely because of the state's traditional role in

⁸⁰ See, e.g., Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 385-86 (2004) (describing how southern politicians in the years before *Brown* were “economically populist, and, although segregationist, they downplayed race while accommodating gradual racial reform”); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 63-65 (1994) (noting how southern blacks were able to use “the ballot to extract local government concessions”, such as the hiring by urban police forces of black officers and the peaceful desegregation of graduate and professional schools.”); *id.* at 51-52 (noting that potent forces, such as southern industrialization, rising education levels, demographic change, and pressures from the business community made racial change essentially inevitable in the South).

⁸¹ See, e.g., Klarman, *From Jim Crow to Civil Rights*, *supra* note, at 344-46 (noting that New Jersey passed a constitutional amendment in 1947 prohibiting segregation and that Illinois, Indiana, Arizona, New Mexico, Kansas, Wisconsin, and Wyoming also began eradicating segregation before *Brown*, as well as the fact that many inter-district institutions in states in the decades before *Brown* were interracial); cf. David Brion Davis, *Slavery and Human Progress* 259 (1984) (describing effects of American Revolution on abolitionist cause and antebellum abolition of slavery by northern states).

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criminal justice matters.⁸² And thus, federalism might be seen as an impediment to consolidation of a national norm. And yet, the variability enabled by the federal system may well be what has allowed the abolitionist movement to make inroads, both historically⁸³ and today, not by challenging the death penalty exclusively through constitutional litigation at the national level, but through state-based reform efforts.⁸⁴

In a more technocratic vein, by the time Congress passed the Civil Rights Act of 1964, over half of the states and numerous localities had adopted civil rights legislation securing equal access to public accommodations, many of them in the nineteenth century.⁸⁵ Perhaps even more significant, numerous states in the decade before the Civil Rights Act adopted civil rights codes in employment that in some cases created governmental commissions to adjudicate claims and investigate violations, though none of these laws predated President Roosevelt's 1941 Fair Employment Practices Committee—a fact that arguably demonstrates the dynamic relationship between center and

⁸² In addition, this persistent diversity likely has resulted from the instability of the social movements associated with the death penalty. The abolitionists of the 1960s and 1970s who focused on the racially disparate application of the penalty have given way to death penalty opponents focused on preventing the execution of the innocent—an emphasis that has led to the reconsideration of the punishment in some states but that has not produced a national-level abolitionist movement. More important, substantial counter-movements have historically offset abolitionism. The reemergence of the death penalty after the Supreme Court's decision in *Furman v. Georgia*, for example, interacted with a broad, national, anti-crime movement in the 1970s and 80s to strengthen moral and practical preferences in many states for the death penalty.

⁸³ See Garland, *supra* note (documenting the evolution of capital punishment by highlighting state-level innovations that have made the punishment more humane and ended the practice, in many cases long before other democratic states did the same).

⁸⁴ As the political science literature demonstrates, whereas abolition has been imposed by national legislatures reflecting elite opinion in other contexts, the public in the U.S. has had far more control over the trajectory of the policy, because of the existence of comparatively weak parties and the federal system. These factors provide support for the argument that federalism can be democracy enhancing. See, e.g., Eric Neumayer, *Death Penalty: The Political Foundations of the Global Trend Towards Abolition* (2007) (noting that in Europe, the death penalty has been abolished in some contexts where the majority of the population supports the practice, reflecting the influence of elites).

⁸⁵ See Milton R. Konvitz & Theodore Leskes, *A Century of Civil Rights 155-56* (1961) (noting that Massachusetts adopted the first state civil rights law in 1865, followed by 21 northern, eastern, and western states, including New York and Kansas, by 1900, and by still another generation of public accommodations laws in states such as Oregon, Montana, New Mexico, Vermont, and Maine in the 1950s and that local public accommodations laws were adopted in Baltimore, El Paso, Louisville, and Washington, D.C.).

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periphery in the development of civil rights.⁸⁶ Not surprisingly, a literature emerged in the 1960s, in the law reviews and elsewhere, assessing the value and limitations of the state civil rights commissions, calling for better use of administrative process to advance the civil rights objective, and drawing reformist attention to many of the commissions' lack of enforcement authority.⁸⁷ The federal Civil Rights Act was partially a response to the weak authority possessed by the non-centralized and diverse patchwork of state civil rights commissions and therefore a solution to the coordination problems created by a federalist approach to civil rights enforcement. But these sub-federal practices helped not only to build support for an anti-discrimination norm that proved central to the Civil Rights Act's passage, but also to developing the institutional capacity for enforcement. In fact, the Civil Rights Act channeled discrimination complaints to state authorities where state remedies were available, and one contemporary commentator argued that this feature reflected legislators' belief that "the primary role in the solution of the civil rights paradigm should and could be expected to be performed by local and state governments."⁸⁸

These various developments underscore that the existence of sub-federal governing structures has been crucial to moral progress—a claim echoed in today's scholarly appreciation of the staging

⁸⁶ See *id.* at 199 (discussing the Commission).

⁸⁷ See, e.g., Duane Lockard, *Toward Equal Opportunity: A Study of State and Local Antidiscrimination Laws* 141-47(1968) (arguing that the antidiscrimination principle itself was anemic but that administrative reforms could transform state and local commissions into more effective regulatory actors, in part by giving state and local officials greater investigatory and conciliatory powers); Joseph P. Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better use of Administrative Process*, 74 *Yale L.J.* 1171, 1189 (noting that 27 states lacked commissions with enforcement authority); see also Herbert Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 *Buffalo L. Rev.* 22 (1965) (concluding that the experiment with state employment commissions had failed, because during a time of relative prosperity, "Negro workers experienced the equivalent of a general economic depression," and noting that the impacts of automation and the "intransigence of employers and labor unions was not anticipated"); Louis H. Pollak, *Comment*, 14 *Buffalo L. Rev.* 70, 71 (1965) (defending the "paramountcy [sic] of the federal interest in the whole question of racial discrimination," but arguing that "in stressing the importance of federal regulation, whether through the President's executive power unaided by legislation or through the whole elaborate programmatic regulation that a federal fair employment practices law would give us, I would urge that we not forget . . . the segments of the employment picture which are beyond federal control").

⁸⁸ See Witherspoon, *supra* note, at 1172.

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function that decentralization has played in the gay marriage debate.⁸⁹ What is more, as our post-civil rights history underscores, it can be difficult even after nationalizing moments to entrench a clear national norm, because such norms are elusive, or even ephemeral, and a commitment that at one point might have been a matter of consensus often gives way to disagreement about its meaning, as public opinion evolves and political fortunes changes. In the classic civil rights context, the elusiveness of consensus is clear: debates over disparate impact versus intentional discrimination, the relationship between equality norms and freedom of association, and the permissible scope of remedies for discrimination, such as affirmative action and diversity-based hiring practices, not only persist, but also take different shape from one generation to the next. At its core, the civil rights paradigm may embody a strong anti-discrimination principle based on the belief that race is irrelevant to merit or status, and that opportunities and access to public goods and accommodations should be equal without regard to race.

But that entrenchment of those norms only began the conversation about how to realize the goals in practice. The nationalization of the anti-segregation and anti-discrimination principles through legislation (the Civil Rights Act) and Supreme Court opinions (*Brown* and *Loving*, among others) gave rise to a second-generation set of interpretive concerns, including how to determine what remedies for discrimination are appropriate and define when actionable discrimination has occurred at all.⁹⁰ In important ways, federalism has been crucial to working out the legacy of civil rights. For example, in the absence of a federal prohibition on affirmative action, states and localities have tested, reformulated, and in some cases rejected affirmative action at the state, local, and

⁸⁹ In contrast to the considerable scholarship documenting the states' positions on school desegregation both before and after *Brown*, the federalist dimension of the debate over equal access in public accommodations and employment remains under-explored, perhaps precisely because of the overwhelming national response that addressed the deficiencies of the decentralized model in achieving the goals of civil rights reformers and eventually ended the diversity. But the dynamic is an important one, if only because it demonstrates how varied and diffuse the mechanisms of social change can be.

⁹⁰ In fact, the battle for gay rights is itself arguably an example of the latter—a sign that complete national consensus on the subject of civil rights remains contested and elusive.

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university levels. Indeed, one of the underappreciated virtues of the Supreme Court’s affirmative action jurisprudence is that it has left the contentious question open to be debated at lower levels of government. And voters in states such as California and Michigan have adopted ballot initiatives that not only decide the question at the local level by prohibiting the use of race-based preferences in admissions, but also as a result pushed the state bureaucracy to devise means of achieving diversity or racial equality that better conform to deep intuitions about fairness. Of course, the Supreme Court’s enabling role only goes so far; one of the clearly appreciated vices of its decision in *Parents Involved v. Seattle Public Schools* was its hobbling of the local political processes that had devised a workable solution to the problems of racial isolation in separation in primary and secondary schools.

I ultimately do not offer these observations as an argument for decentralization in perpetuity; both national consolidation of norms and federal enforcement power are often necessary to advance integrative objectives (and not just in the civil rights context). Instead, these brief reflections on the civil rights movement add historical depth to the account of how the federal system can play a central role in the realization of national moral gains across time, and provide an indication that the national or the federal should not be axiomatically equated with progress. With respect to marriage itself, it may be that uniformity or universality represents an achievable goal that can be consolidated without backsliding. But as with equality concerns generally, the debates over what constitutes actionable discrimination on the basis of sexual orientation and whether freedom of association places limits on the anti-discrimination norm likely will persist, and at least in one case—the scope of transgender rights—innovation again is beginning in decentralized fashion.⁹¹ If civil rights history offers a reliable guide, resistance to homogenization stemming from the historically visible, reticulated structure of decision-making seems probable.

3. *The channels of debate*

⁹¹ See recent California decision to permit transgender public school kids to elect which bathroom to use.

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The insights of the political science literature discussed in the previous section likely have important bearing on understanding the development of the norm in favor of marriage equality. Studies of gay rights, in particular, reveal that national networks' successes can depend on the nature of the networks themselves. For example, nationally organized advocacy coalitions played a larger role in the spread of same-sex marriage *bans* in the 1990s than communications networks among policy elites, for example,⁹² perhaps because elite networks were less likely to organize around the gay rights issue, or because elite networks were less likely to impress decision-makers because of their remove from public opinion. And yet, in the last five years, one of the distinctive features of the debate over same-sex marriage has been the remarkable speed with which public opinion has shifted in favor of the norm. Such shifts are likely attributable to a range of factors, though the “normalization” of same-sex marriage as the result of its adoption in certain jurisdictions seems likely to be one of those reasons. Because one of the key mechanisms adopted by campaigners to advance their objectives has been litigation, in this setting we have the opportunity to see how state institutions might themselves influence one another. I therefore focus here on the judicial decisions that have been crucial sites of the marriage equality debate. Indeed, that much of the inter-state development of the marriage equality norm has occurred through litigation makes this case an easier one to study than most, because courts provide reasons for their judgments, and the practices of judicial decision-making include drawing from precedent in other jurisdictions. Of course, the contexts in which the courts make their judgments also matter, and the extent to which public opinion in a given jurisdiction has shifted, as the result of trans-local politics or other factors, likely informs not only a given court's decision in favor of marriage equality, but also whether developments in other courts actually carry weight in its judgment.

⁹² Donald P. Haider-Markel, *Policy Diffusion as a Geographic Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s*, *State Politics & Policy Quarterly* 1 (2001).

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A central institutional dynamic in the marriage equality debate has involved the competition for territory between legislatures and courts. The question of how consensus takes shape necessarily intersects debates about when courts should act to invalidate public enactments, or to spur on a social agenda that has not grown to fruition in the political process. In looking at the evolution of the norm through the courts, my purpose is not, however, to advance the democracy and judicial review debate about when it is appropriate for courts to act, or to weigh in on whether court involvement promotes backlash, along the lines that Michael Klarman has described in his work. Instead, I consider the role that the Supreme Court plays in asserting the interests of the center, and the role that the federal and state courts play, when social movements drag them into the thicket through the filing of lawsuits, in giving content to norms that have trans-local, if not national, weight. And I emphasize that these judicial decisions have been *one* site of the debate—the courts have been participants as much as myriad other actors—an account that should change our conceptions of court involvement in contentious moral disputes.

Fortunately for the legal scholar and audience, litigation represents one of most visible, if not effective, techniques employed by so-called norm entrepreneurs and trans-local associations to advance their objectives. Even when litigation results in setbacks to a movement, the act of bringing a lawsuit itself constitutes a political move and arguably, in the long-run, contributes to the advancement of the goals of the movement by raising the salience of the issue and thus the likelihood of policy responsiveness,⁹³ as per the dynamics suggested above. In other words, litigation in discrete areas can help promote responsiveness from institutional actors other than courts through the channel of public opinion.

Litigation has played a particularly important role in the evolution of the same-sex marriage issue, much as it did during the civil rights movement. The place of litigation in setting the agenda,

⁹³ See Lax & Phillips, *supra* note 47, at 382.

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or in shaping as opposed to reflecting public opinion, likely differs in important ways in each context,⁹⁴ but much as the national-local dynamic is neither always in conflict, or even at cross purposes when in conflict, the apparent battle between courts and popular enactments in contexts such as the civil rights movement and the gay marriage debate should be seen as parts of a dynamic political process, not a zero-sum battle. Since 1993, when the Supreme Court of Hawaii decided *Baehr v. Lewin*⁹⁵ and declared that the state’s law defining marriage as between a man and a woman constituted gender discrimination, a back-and-forth has been unfolding among courts, voters acting through referenda to constitutionally ban same-sex marriage, national networks mobilized on both sides of the issue, and opportunistic politicians, each of which has played an important role in highlighting the contours of the issue.

This litigation provides a helpful lens for the discussion of the evolution of the mechanisms of national consensus in two ways. First, until Ted Olsen and David Boise joined forces to challenge California’s Proposition 8 in federal court, this diffuse yet “national” conversation was occurring outside the federal system and in the state courts.⁹⁶ The work of the courts themselves demonstrates how norms can be debated and spread across jurisdictional lines, particularly when certain core systemic values (commitments to equality and comity, for example) are present. Second, the litigation has performed the function described for it above, provoking simultaneous public “backlash,” and backlash to the backlash, thus contributing to the national churning on the issue.

At the level of interpretation, the courts that have broached the subject of whether state laws limiting marriage to a male-female couple violate state constitutional liberty or equality provisions

⁹⁴ Cf. Jane Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. Cal. L. Rev. 1153 (2009) (contrasting “unremarkable” public and political response to first state court decision striking down statutory ban on interracial marriage and “widespread political backlash” to court decisions finding same-sex marriage constitutionally required).

⁹⁵ *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993).

⁹⁶ Though the Supreme Court’s decision in *Lawrence v. Texas* striking down sodomy laws as violations of a fundamental liberty likely had a causal role to play in the anti-gay marriage state constitutional referenda that emerged during the 2004 election cycle.

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have used one of two methodologies. The court either incorporates the views of sister courts, using other decisions on the subject as a kind of cover and thus creating a kind of common law of gay marriage, or the court declares an outer limit on comity, to justify its divergence from other states. In a sense, every opinion on the subject makes both of these moves at once, since the states are divided on the issue. But the acute awareness of developments outside each individual state, particularly as time goes on and more opinions accumulate, suggests that sub-federal units can participate in a trans-boundary conversation that need not involve national institutions but that most certainly will influence the formation of a national consensus.⁹⁷ As Helen Hershkoff has suggested in her analysis of state justiciability doctrine, state courts can act as “agenda setters” and promote democratic discourse, sometimes in a way that federal court decision-making does not, because of the finality of the latter.⁹⁸

The latter strategy was apparent in the reasoning of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*, as a response to the state government’s claim that expanding civil marriage in Massachusetts to include same-sex couples would lead to inter-state conflict. The government’s position thus sought to restrain development of a same-sex marriage norm, though it is not altogether clear if the move toward same-sex marriage would ever be possible on this theory, unless the federal government were to impose it uniformly. Even if the government’s claim were based on assumptions about the propriety of judicially driven change, a legislatively enacted same-sex marriage law would presumably produce the same conflict, since the existence of

⁹⁷ For literature discussing the role that state courts can and do play in the development of national constitutional norms, sometimes resisting the national government, see James Gardner, *State Constitutional Rights as Resistance to National Power*, 91 Geo. L. J. 1003 (2002) (arguing that state court interpretations of state individual rights protections constrain national power, including by resisting abuses of national power by the federal government); *cf.*

⁹⁸ Helen Hershkoff, *State Courts and the ‘Passive Virtues’: Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1901 (2003) (arguing that state constitutional interpretation can open up debate in a way that federal court interpretation does not, because of the “finality of federal constitutional adjudication may effectively cut off further democratic debate,” and emphasizing as well that state court judges are often perceived to be part of the political process).

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the law itself would serve as the provocation. Regardless, the Massachusetts court declares its autonomy:

We would not presume to dictate how another State should respond to today’s decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our federal system is that each State’s Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.⁹⁹

Though this position could be, by definition, a function of the fact that *Goodridge* was one of the first state court decisions to declare a state marriage law unconstitutional, subsequent state courts have taken a similar position. The Supreme Court of Connecticut, for example, rejected the claim that uniformity and consistency with other jurisdictions, including federal law, represents an important government interest, particularly for a state.¹⁰⁰ These courts, ultimately, have taken a self-conscious stand as national outliers.

At the same time, even some of these courts, and certainly later courts that have addressed the issue, have been engaged in a kind of horizontal reasoning. The Supreme Court of California, for example, despite declaring itself and its constitution exceptional and invoking sister state precedent explicitly to justify departing from it, mirrored some of the arguments made by its predecessors in the recognition of gay marriage in its decision that ultimately prompted Proposition

8.¹⁰¹ The court clearly echoed the arguments made by the Supreme Judicial Court of Massachusetts

⁹⁹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003).

¹⁰⁰ *Kerrigan v. Comm’r Pub. Health*, 957 A.2d 407, 477 (Conn. 2008). The Supreme Court of New Jersey similarly stakes out its own territory in *Lewis v. Harris*, 908 A.2d 196, 220 (N.J. 2006) (citing Brandeis’ laboratories of democracy defense of federalism and observing that “[i]n protecting the rights of citizens of this State, we have never slavishly followed the popular trends in other jurisdictions, particularly when the majority approach is incompatible with the unique interests, values, customs, and concerns of our people. . . . The New Jersey Constitution not only stands apart from other state constitutions, but also may be a source of individual liberties more expansive than those conferred by the Federal Constitution.”).

¹⁰¹ The Supreme Court claimed California exceptionalism, for two reasons: the state had a comprehensive domestic partnership scheme, which helped undermine the state’s justification for maintaining a heterosexual

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rejecting each of the state interests proffered for denying same-sex couples the right to marry.¹⁰²

Even though the Supreme Court of Connecticut recognizes that the Massachusetts court had inaugurated a redefinition of longstanding custom, it also emphasizes that it is not alone in its decision, citing the Supreme Courts of California, Massachusetts, Vermont, and New Jersey, perhaps as a way of demonstrating a trend away from the former consensus position that might grow of its own momentum.¹⁰³ The Supreme Court of Iowa proceeded similarly, noting on the one hand that only two states permitted same-sex marriage, but emphasizing on the other the fact that states were engaged in a “strong national dialogue centered on a fundamental, deep-seated, traditional institution,”¹⁰⁴ and that courts increasingly have recognized that the gay marriage issue falls within the parameters laid out for the assessment of equal protection claims more generally, thus linking state precedents and creating a feedback loop between state and federal jurisprudence.¹⁰⁵

Given that the state courts to have recognized same-sex marriage remain in the distinct minority nationally, reliance on other jurisdictions’ work can come across as opportunistic, at least to the extent that other courts’ opinions are used as justification, as opposed to as illustration. But given that various theories to support the constitutional requirement of marriage equality exist, this horizontal borrowing offers a mechanism for refining the case for gay marriage and advancing particular frameworks through which to understand the issue. The divergence among states is still far more notable than the convergence, but the reasoning employed by courts recognizing marriage

definition of gay marriage, and the California constitution contains a privacy right, unlike other state constitutions. *In re Marriage Cases*, 183 P.3d 384, 397-399 (Cal. 2008).

¹⁰² *In re Marriage Cases*, 183 P.3d at 401-02; *cf. id.* at 457-58 (dissenting opinion) (citing numerous state courts that have found no constitutional right to gay marriage and rejecting *Goodridge* as “controversial”).

¹⁰³ *See Kerrigan*, 957 A.2d at 416-19.

¹⁰⁴ *Varnum v. Brien*, 763 N.W.2d 862878 (Iowa 2009).

¹⁰⁵ *See Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009) (invoking several sister state precedents to support the conclusion that petitioners were similarly situated to heterosexual persons); *id.* at 888, 890 (relying on federal precedent and *Kerrigan* and *In re marriage cases* to show that sexual orientation falls within suspect class framework, noting that “none of the same-sex marriage decisions from other state courts around the nation have found a person’s sexual orientation to be indicative of the person’s general ability to contribute to society” and that sexual orientation meets the mutability criterion).

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equality increasingly has a mechanical feel to it, which suggests a jurisprudential template is developing.

Of course, even within the states where courts take a stand as “dissenters,” or even claim the mantle of their sister courts, the issue remains far from settled. Proposition 8, which has now been struck down by a federal district court, represents a classic example of so-called popular “backlash” to a judicial opinion that exceeds what public opinion will tolerate.¹⁰⁶ Backlash theories are much in vogue in both popular and scholarly warnings of the dangers of courts pressing past the edges of their institutional boundaries.¹⁰⁷ The backlash concept sometimes carries the assumption that court involvement can be counter-productive to progressive politics, with the unintended effects of *Roe v. Wade* as the best example of a court decision galvanizing a movement that might not have existed had the state legislatures been left to sort out the problem.¹⁰⁸

We might also call these developments politics and simply take a descriptive approach to the popular reaction to court opinions. That description might regard court action and popular reaction as parts of a dynamic conversation. In the case of gay marriage, the dialogue has been far from linear; after *Baehr v. Lewin*, the voters of Hawaii amended their constitution, much as California voters reacted to the state Supreme Court’s decision with Proposition 8, and as advocates in Iowa sought the removal of the Justices who declared marriage equality constitutionally required in that state. But the dialogue nonetheless has been moving incrementally toward greater acceptance of

¹⁰⁶ Recall the observation above from the social science literature that, for a gay-rights friendly position to pass a legislature, more than a majority of the public must support it.

¹⁰⁷ For a comparison of the pronounced backlash to gay marriage court decisions to the muted response to the California Court’s decision striking down bans on inter-racial marriage in 1948—the first decision of its kind—see Schacter, *supra* note 94, at 1153.

¹⁰⁸ As discussed in Part II, the Supreme Court’s decision in *Furman v. Georgia* had a similar consequence, providing states with the opportunity, and perhaps the incentive, to reconsider the death penalty. For the argument that the backlash concept should be broken down into policy counter-measures and public opinion responses, see Schacter, *supra* note 94, at 1219, 1223.

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marriage equality.¹⁰⁹ Even if national consensus either never emerges or takes longer to develop because of the back-and-forth provoked by the courts, the process might arguably be superior to one in which courts retreat and therefore fail to provide a framing of the issue that traffics primarily in constitutional and legal terms.¹¹⁰

The possibility of inter-state conflict inherent in each of the above formulations of the development of the marriage equality norm ultimately raises the question I highlighted in the previous section of when and whether a national umpire might be needed to put the conflict to rest. But as the discussion of the New Jersey court's decision post-*Windsor* suggests, federal institutions need not play the role of umpire to encourage the consolidation of a national norm. Instead, sub-federal institutions can help play that function as they define their authority and responsibility in relation to the work of other institutions similarly situated.

* * *

What does the case of the movements for and against gay marriage tell us about the relationship between federalism and national consensus? In brief, even if we think of the movement as a progressive one for universal justice, gradualism through federalism has characterized its course, much as was the case with the civil rights movement (particularly if we begin the civil rights clock

¹⁰⁹ Cf. Schacter, *supra* note 94, at 1221 (“The overall state of the same-sex marriage movement looked very different in 2008 than it did one year later. With 2009 came the unanimous decision in Iowa, the legislative enactment of marriage in three states, and the rising levels of support in some opinion polls. These developments at least raise the possibility that momentum has shifted on the issue in some significant respect and that the backlash may be running out of steam.”).

¹¹⁰ Here Mike Klarman's account of backlash, according to which the southern states' stark reaction to school desegregation led non-southern states to recoil and thus more vigorously support civil rights, could be instructive. The gay marriage debate is occurring in a much less heated register than the civil rights movement, and violence of the sort that occurred in the South has not been a part of the backlash. Sincere religious faith, even if it does give rise to prejudice, appears to be a driving force. And so the possibility that opposition to gay marriage will crystallized pro-marriage equality support as a form of backlash-to-backlash seems somewhat remote. Instead, the rapidly changing social mores I invoked at the outset of this paper seem more likely to cause the backlash to peter out into a rearguard action and then finally into a non-threatening fringe movement.

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with the Truman administration). Gradualism has its virtues, both because constituencies that oppose the norm will react to its diffusion through resistance, but also because those norm entrepreneurs who begin as dissenters will be more likely to find a foothold for their causes in discrete jurisdictions. Both the costs of organizing, and the fact that diversity of opinion on morality policy makes consensus elusive, contribute to this dynamic. Second, norm entrepreneurs and trans-local networks, are key mechanisms of the sort of dynamic federalism I seek to describe. They often operate outside the legal context, and to understand what binds a federal system and how splintered decision-making power actually functions as a dynamic system, these groups' influence must be taken into account. But as important as these non-legal actors working in parallel to government actors likely have been, what distinguishes the value of *federalism* from the value of mere decentralized debate is the numerous examples of institutional power that have made the gay marriage norm law.¹¹¹ Indeed, litigation represents one high-impact mechanism of social change, and court involvement in the evolution of the debate has produced relatively rigorous *written* arguments for gay marriage.¹¹² Seen from this systemic point of view, judicial interference in political disputes is misplaced; court involvement has been part of the evolutionary process.¹¹³ When it comes to contentious morality policy, or novel efforts that disrupt a prior consensus, courts draw cover from one another, but in so doing contribute to the development of the norm in question by providing frames for debate.

¹¹¹ See *Dissenting by Deciding*.

¹¹² Cf. Justice Breyer.

¹¹³ This conception of judicial review reflects a kind of commonwealth model spirit, according to which courts participate in a dialogue with the political branches. This sort of dialogue is far more likely to occur when the actors are state courts, however, for the reasons Helen Hershkoff describes—state court decisions may be final within one system, but they merely begin the debate rather than end the debate nationally, as federal courts purport to do. The commonwealth model of dialogue of course has institutional mechanisms built into it that enable popular majorities to respond to court decisions through legislatures—a feature missing from the U.S. system of judicial review. But, again, the state court system is structurally well positioned to follow the dialogic dynamic.

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III. DRUG POLICY AND THE VALUE OF FEDERAL ENFORCEMENT RESTRAINT

The national “War on Drugs,” executed by the federal and state governments together and in parallel since the 1970’s, increasingly faces a strong and bracing critique from voices across the political spectrum. In the policy and academic worlds alike, critics have cited its role in perpetuating structural racial inequalities and mass incarceration, particularly of minority men;¹¹⁴ its apparent contribution to staggering violence in Mexico;¹¹⁵ and perhaps above all its futility, or at least its failure of simple cost-benefit analysis. From a pure policy point of view, one low-hanging fruit to address these failures may be to de-criminalize marijuana possession, use, and distribution. Until very recently, the laws at the state and federal level have been impervious to reform, even as numerous states since the late 1990’s have made exceptions to their drug laws for medicinal use of marijuana, and the federal government has adjusted its enforcement policies under the federal Controlled Substances Act accordingly.¹¹⁶ But when Colorado and Washington voters in 2012 approved initiatives repealing the state bans on recreational marijuana use and initiating regulatory schemes to govern distribution and use of marijuana, they may have opened a door to a broader debate about the morality and utility of marijuana prohibitions. Coupled with calls by the leader of Canada’s Liberal Party for legalization (and his admission of smoking marijuana while a sitting MP) and Ecuador’s decision to end the prohibition on marijuana,¹¹⁷ developments in these states seem to reflect the beginnings of a convergence between public opinion long open to these sorts of measures with high-level lawmaking and actual political activity. We are thus at a stage when state-level agenda setting of a national conversation is highly visible. In addition, this activity has forced the federal government to rethink its enforcement policies—an inclination likely abetted by the fact

¹¹⁴ See Michelle Alexander, *The New Jim Crow*.

¹¹⁵ See Statement by Secretary of State Hillary Clinton, acknowledging U.S. complicity in drug-related violence in Mexico.

¹¹⁶ For a discussion of the Ogden memo and the political limits and legal manipulations of so-called prosecutorial discretion memos, see *infra* notes []-[].

¹¹⁷ Though I focus on the federalism dynamic as it unfolds within the

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that a Democrat is in the White House. And do the evolution of marijuana policy offers another vital example through which to examine the relationship between de-centralized lawmaking and the formation of national consensus.

NB: This part of the paper remains to be written. But the ideas I intend to explore will be along the following lines:

1. *The Federal Interest.*

One version of the federal interest in this domain might be in the robust enforcement of its laws and the federal prohibition on use, sale, and manufacture of marijuana pursuant to the Controlled Substances Act. The law enforcement bureaucracy will be inclined to see it this way, especially among non-political appointees. The state referenda, especially the Washington and Colorado ones, but even more so the new initiatives that appear to be in the works spurred in part by the success in Colorado and Washington, might interfere with the federal government's ability to enforce in a number of ways: by seeming to sanction marijuana use, creating a broader market that more people will participate in because it has the imprimatur of the state, and by depriving the federal government of the enforcement capacity represented by state deterrents and prosecutions.

We might also characterize the federal interest as being to protect states neighboring Colorado and Washington from the spillover effects of the referenda. But whether a federal umpire is necessary in this case presents an empirical question difficult to answer, because it depends on the extent to which the new laws increase drug flow into states that haven't approved medical or general use of marijuana or (less compellingly) give residents of one state the incentive to cross the border to make use of marijuana. But a consideration of externalities in this setting should ultimately reveal the concern as hollow, or as inextricable from the federal government's own policy preferences. Because federal intervention on one side (say in favor of Montana) will likely constrain the sovereign choices of another state (Colorado), the relevant question for federal intervention becomes whether a true federal or national interest in policing externalities exists.

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As of right now, the federal government has chosen not to intervene to preempt these laws, though it would not be difficult to construct an argument following the federal government’s articulation of enforcement-based preemption in *Arizona v. United States*, at least against those state laws that create regulatory schemes that authorize the manufacture, use, and sale of marijuana (as opposed to those that simply withdraw the criminal prohibition). Whether it would succeed might turn on how important the tradition of federal exclusivity in immigration was to the Court’s ultimate holding, and whether the federal government would have an incentive to take such an aggressive position might depend on the extent to which the state laws truly undermine its enforcement or political priorities—empirical factors not yet established. But the current federal posture makes such intervention seem unlikely in any case. The enforcement memoranda released by two different Deputy Attorneys General of this administration emphasize that the Department of Justice will target its federal enforcement according to its own priorities, which include diversion of marijuana to states where it is illegal, and the prevention of marijuana activity from being used “as a cover or pretext for the trafficking of other illegal drugs or illegal activity.”¹¹⁸

2. *The national interest in decentralized debate.*

If the federal interest is in continued enforcement of the drug laws, the national interest is ultimately in experimental efforts to back away from them. A policy as totalizing as the drug war can probably only be dismantled or even re-evaluated piecemeal. Much less is at stake for states in the legalization debate than for the federal government, and so a targeted and decentralized campaign

¹¹⁸ Memorandum from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013). The memo strikes a kind of collaborative posture with states such as Colorado and Washington: “In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten [] federal priorities. . . . In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state laws by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.”

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may be precisely the way to go. In fact, another version of the *federal* interest could be in having state electorates and governments manage and advance the debate over marijuana legalization. The administration itself may not yet be prepared to bear the political costs of marijuana legalization. The national political process might make this goal all but unachievable in the foreseeable future. But to the extent that the administration might like to see states move in the direction of legalization, whether as a matter of criminal justice reform, racial justice, or the desire to more productively allocate federal enforcement resources in the long-term, decentralized ferment is likely to be productive. If the federal government, or political actors within it, seeks to de-escalate the drug war, tolerating decentralized decision-making will be the best way to proceed.

3. *The mechanisms of debate*

The mechanisms of debate and decentralization in this setting thus far have involved mostly populist referenda, which may show deeper concern than the state immigration laws passed through legislatures, but are probably also connected to networks of policy entrepreneurs taking advantage of partisan climates favorable to their goals to set the national agenda. Here an analogy can be drawn to the death penalty and the diversity of regulation in that arena. Abolition is a morally elusive goal. There are strong entrenched interests against it and strong moral intuitions about its propriety, but the federal system has made it possible for those intuitions to be expressed through law and to coexist in regimes that sit alongside each other, creating moral incoherence at a national level but stable integration nonetheless.

IV. IMPLICATIONS AND CONCLUSIONS

Our federal structure ultimately supports numerous kinds of vertical relationships between the center and the local, and it facilitates a range of horizontal connections across states and localities

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that sometimes operate independently of the federal center but also influence the decision-making of that center. Among the functions of this variety is that it enables slow and stable evolution of opinion and policy concerning difficult cultural and moral questions and ensures that local and trans-local inputs meaningfully shape that evolution. The structure also allows diverse elements to actually govern within the system. But perhaps the federal system's most important function is that it keeps open the capacity for change, so that law and policy can reflect and channel the variable rather than linear nature of public morality on most questions.

This account of federalism's function challenges the preference for federally driven efforts to achieve national consensus and destabilizes rights-oriented and progressive skepticism of decentralized and delegated strategies of governance. But the question remains what the normative or even doctrinal implications of this account might be. Is it possible to move from an account of federalism's many functions to a coherent normative theory of federalism, particularly given the kaleidoscope of interests and arrangements the discussion above and recent work in federalism highlight? The virtues of accounts of federalism based on either a strong version of federal supremacy or a firm commitment to divided government include the ability to articulate clear presumptions to guide policy-making and legal interpretation. But an account of the value of federalism that describes it as a set of varied, changing, and mutually constitutive relationships among the levels of government and the different political communities behind those governments turns out to be more difficult to translate into a set of normative prescriptions.

We can at least begin with an overarching goal: to facilitate cultural change through frameworks for governance that either help produce broad consensus while leaving open channels for evolution or sustain a national equilibrium in the face of persistent disagreement. I have argued in the immigration context for an anti-preemption norm at the federal legislative level (acknowledging the deeply entrenched tendency toward preemption in judicial doctrine) and suggested that restraint by

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actors at the federal level in the face of inter-state diversity on policy questions with strong moral underpinnings may be more conducive to producing consensus than premature or robust efforts to articulate nationalist positions. But I hope the discussion in this paper underscores that the possibility of restraint will be more meaningful, and the demand for it will arise more frequently, at the level of administration and enforcement. As the examples explored in this paper highlight, enforcement bureaucracies of various sorts will often be the first to confront challenges from the local level. Moreover, the development and implementation of executive policy is more ongoing and constitutive of the day-to-day business of government than judicial action, which begins as reactive, and preemptive legislative action, which will be rare given the comparative difficulties of legislation versus administration. It will thus be important for the executive branch to develop what we might call a culture of “responsive restraint,” to capture the ongoing and iterative nature of the decision-making that occurs in the discretionary spaces of federalism.

As I have argued in the immigration context, this form of restraint involves taking account of when the federal interest in asserting power might be outweighed by national interests in percolation—a presumption as applicable to Congress as to the Executive Branch. This demand, in particular, will mean overcoming the fear of externalities as a general matter and identifying with some precision those externalities that ought to be policed as opposed to those that ought to be tolerated because of the long-term interest in understanding how the parts of the federal system might actually adjust productively to such “shifting” of costs. Indeed, I have argued that traditional conceptions of federal policing of externalities makes little sense in the immigration setting, where one locality or state decision to “force” immigrants out of their jurisdiction is neither obviously good nor bad for surrounding states, nor fair or unfair to surrounding states.

Relatedly, in many situations, the important role to be played by the federal government will be to create trans-local mechanisms for conflict mediation, among states, and even within states, where

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some of the most contentious conflicts over morality policy occur. Such efforts could include greater federal aid to states affected by illegal immigration, or greater law enforcement support for states that might be affected by an enhanced marijuana market, or even the creation of governors' or other state-driven task forces to address localized problems—a model that appears in the omnibus Senate bill pending in Congress to reform the immigration system, which would create a task force of border-state governors to evaluate the state of border enforcement to inform federal policy-making on the subject. Such frameworks should be designed to help states and localities negotiate with each other, as well as the federal government, over regulatory responsibilities. In these settings, state and local entities and even their potential federal partners might consider the potential dangers of being “co-opted” into federal schemes,¹¹⁹ but in domains where comprehensive federal regulation dominates the field, such as immigration, it will be valuable for state and local actors to identify their particular regulatory interests and then use to their advantage the power delegated to them by the federal system.¹²⁰ Indeed, the design of that delegation may be as much to capture diversity of interests in order to achieve “buy-in” as it is to take advantage of the regulatory apparatuses of states and localities in order to advance federal ends.

A concept of responsive restraint might also be appropriate in judicial decision-making. Indeed, one account of *Windsor* and *Perry* reflects precisely this style. But the notion that a Court will hold fire in order to permit norms to develop—a practice I ultimately would defend—nonetheless presents a greater challenge to traditional and powerful conceptions of the judicial role in political disputes. At the same time, vigorous involvement by state courts in morality debates, and trans-local efforts to litigate to provoke responsiveness by lawmakers, or to build consensus around policy

¹¹⁹ For an argument that cooperative federalism arrangements upend the proper federal-state balance by undermining its key feature of promoting regulatory competition in order to ensure limited government, see MICHAEL GREVE, *THE UPSIDE DOWN CONSTITUTION* (2012).

¹²⁰ Abbe Gluck makes this argument persuasively in relation to the provisions of the Affordable Care Act that invite states to set-up insurance exchanges, among other features of the federal regulatory scheme. *See* Abbe R. Gluck, *FORDHAM L. REV.* (2012).

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reforms related to deeply held moral questions, will usually be productive without circumventing trans-local debates, even as state court interpretation might shape subsequent state action. At the very least, this account of federalism should lead to a more sophisticated and political conception of the courts' role in mediating conflict among states that focuses less on the doctrine required by the Supremacy Clause and more on courts as institutional actors with the unique capacity to highlight *reasons* for particular positions.

Though the practical implications of the view of federalism's value as I articulate it in this paper will thus depend on the particular features of the federalism dynamic at issue—on the content of the discretionary space we are in—they should be developed with the understanding that national consensus, much less *uniform* national consensus, is more often than not elusive. The translation of persistent disagreement into an idea of regulatory pluralism might be anathema to the federal government in some settings—clearly Arizona's SB 1070 was a bridge too far for the Obama administration. But even the federal government often invites diversity in the statutory schemes it creates and in managing the enormous regulatory burdens it faces—a reflection of the possibility that much of federal action occurs amidst deep disagreement about ultimate objectives. In the end, consensus and uniformity are often not necessary—or in my view even desirable—for a large and diverse nation to function as an integrated polity.