

# FEDERALISM AND THE LIMITS OF SUBNATIONAL POLITICAL HETEROGENEITY

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With an epidemic of democratic backsliding now afflicting many of the world's democracies, including the United States, some scholars have suggested that federalism might serve as a useful defense for liberal democracy by impeding the ability of an authoritarian central government to stamp it out at the subnational level. In this Essay, I dispute that contention. An examination of both federal theory on one hand and the behavior and tactics of central control employed by ancient and early modern empires on the other leads to the conclusion that the protective value of federalism against the effects of national authoritarianism is indeterminate and depends upon a host of contingencies. These include the particular structure of the federal state in question; the specific pathways of influence available to subnational units to protect their autonomy in any given federal structure; and the goals, motivations, and determination of governments and populations at both levels.

However, a few considerations suggest that the outcome in any particular case, though contingent on many details, might nonetheless be subject to certain general tendencies, and these tendencies by and large favor an eventual strangling of subnational liberal democracy. First, autocratic tolerance for the exercise of subnational autonomy generally extends only to matters of indifference to the central state, and in today's world there may well be few matters as to which an authoritarian central government is truly indifferent. Second, the tendency in all autocracies, as they become better established, has been continually to tighten social and political controls, making successful opposition to the regime increasingly unlikely as time passes. Third, the tactics of subnational influence and self-defense that are most likely to be successful in a centrally authoritarian federation tend to be self-defeating because they require behavior that is largely incompatible with the very liberal democracy it would aim to preserve. Thus, the survival of subnational liberal democracy in a centrally authoritarian federation, although not theoretically impossible, would require an extremely fortunate confluence of highly favorable and unlikely contingencies.

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## INTRODUCTION

Around the globe, liberal democracy is in retreat. Last year “marked the fifteenth consecutive year of decline in global freedom,” according to Freedom House.<sup>1</sup> Autocratization has now “turn[ed] viral,” according to the V-Dem Institute: one-third of the world’s population now lives in nations backsliding from liberal democracy toward autocracy.<sup>2</sup> India, formerly the world’s largest democracy, has now been reclassified as “an electoral autocracy”<sup>3</sup>—a regime that maintains a facade of democratic elections but does not permit meaningful democratic challenge to the incumbent government.<sup>4</sup> In 2016, *The Economist’s* Democracy Index downgraded the United States to a “flawed democracy”<sup>5</sup>; the V-Dem Institute places it today among a small number of countries that have “declined substantially” in metrics of meaningful democracy.<sup>6</sup>

In these circumstances, a number of comparative constitutional scholars have suggested, with varying degrees of hopefulness, that the prospects for long-term survival of liberal democracy, in the United States and elsewhere, may be enhanced by a federal structure. András Jakab, for

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1. FREEDOM HOUSE, FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE 1 (2021), [https://freedomhouse.org/sites/default/files/2021-02/FIW2021\\_World\\_02252021\\_FINAL-web-upload.pdf](https://freedomhouse.org/sites/default/files/2021-02/FIW2021_World_02252021_FINAL-web-upload.pdf) [https://perma.cc/4KW4-R6BC].

2. V-DEM INST., AUTOCRATIZATION TURNS VIRAL: DEMOCRACY REPORT 2021, at 9, 13 (2021), <https://www.v-dem.net/files/25/DR%202021.pdf> [https://perma.cc/ZHM4-SC72].

3. *Id.* at 9.

4. See Rachid Temclani, *Electoral Authoritarianism*, CARNEGIE ENDOWMENT FOR INT’L PEACE (May 27, 2007), <https://carnegieendowment.org/2007/05/29/electoral-authoritarianism-pub-19176> [https://perma.cc/G9TN-MKM3].

5. THE ECONOMIST INTEL. UNIT, DEMOCRACY INDEX 2016, at 3 (2017), [https://www.eiu.com/public/topical\\_report.aspx?campaignid=DemocracyIndex2016](https://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2016) [https://perma.cc/689Q-E5A6].

6. V-DEM INST., *supra* note 2, at 18.

example, argues that federalism “seems to operate as a guarantee against autocratic tendencies.”<sup>7</sup> David Landau, Hannah Wiseman, and Samuel Wiseman contend that “U.S. federalism substantially curbs the power of a potentially autocratic [national] executive.”<sup>8</sup> Sujit Choudhry points out hopefully that federalism “makes the centralization of executive [power] much more difficult than it would be in a unitary state” and that it “enhance[s] political competition.”<sup>9</sup> Stephen Gardbaum similarly views federalism’s dispersion of power as reducing the risk of tyranny compared to a unitary structure.<sup>10</sup> Among scholars to address the subject, only Tom Ginsburg, Aziz Huq, and Mila Versteeg seem to regard federalism as of indeterminate value in resisting the spread of authoritarianism.<sup>11</sup>

I argue in this Essay that Ginsburg, Huq, and Versteeg are correct: the influence of federalism is highly contingent and contextual and thus difficult to predict. However, if it is necessary to hazard a guess, it seems to me that the most likely outcome of a determined, entrenched, authoritarian central government in the United States would be an eventual strangling of subnational liberal democracy in the United States. First, autocratic tolerance for the exercise of subnational autonomy generally has extended only to matters of indifference to the central state, and in today’s world there may well be few matters as to which an authoritarian central government is truly indifferent. Second, centrally authoritarian governments tend to tighten their control over time, which would place intense pressure on subnational liberal democracy. Third, the tactics to which American states would have to resort to defend subnational liberal democracy from central autocracy would likely be so deforming to the character of a democratic state that I doubt the habits of liberal citizenship could long survive the attempt.

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7. András Jakab, *What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law*, 6 CONST. STUD. 5, 19 (2020).

8. David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism, Democracy, and the 2020 Election*, 99 TEX. L. REV. ONLINE 96, 99 (2021), [https://texaslawreview.org/wp-content/uploads/2021/02/Landau.TLRO\\_V99.FINAL\\_.pdf](https://texaslawreview.org/wp-content/uploads/2021/02/Landau.TLRO_V99.FINAL_.pdf) [https://perma.cc/UFY3-SDU2]. This language, however, may overstate somewhat their own position; in an earlier article, they take a less emphatic stance, arguing that federalism can slow, though not necessarily thwart, the spread of central autocracy. David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1190–91 (2020).

9. Sujit Choudhry, *How to Save a Constitutional Democracy: A Comment*, VERFASSUNGSBLOG (Mar. 10, 2019), <https://verfassungsblog.de/how-to-save-a-constitutional-democracy-a-comment-by-sujit-choudhry/> [https://perma.cc/FA5L-99S4].

10. Stephen Gardbaum, *The Counter-Playbook: Resisting the Populist Assault on Separation of Powers*, 59 COLUM. J. TRANSNAT’L L. 1, 29 (2020).

11. See TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 148–50 (2018); see also Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U. CHI. L. REV. 239, 250 (2018).

The Essay proceeds as follows. Part I provides a quick overview of the relation between autocracy and federalism, arguing that readily available evidence suggests that the capacity of federalism to defend against autocracy is equivocal and thus likely contingent on other factors. Part II looks to federal theory to help elucidate the kinds of contingencies that are relevant to the protective capacity of federalism, finding most pertinent the specific—and highly contingent—pathways of influence in fact provided by any particular federal state’s structure, as well as the goals and motivations of actors at each level of government. Part III makes a first pass at answering the question of what happens to subnational influence in a multilevel state when the center is authoritarian and the subunits are heterogenous in political organization. It does so by examining the practices and tactics of central control in ancient and early modern empires, which provide the closest analogy to a contemporary authoritarian takeover of the U.S. central government. Part IV applies these insights directly to the conditions of the present-day United States, concluding that liberal democracy in the U.S. at the subnational level would not long survive such a development.

#### I. POLITICAL HETEROGENEITY IN COMPOUND REGIMES

I begin with a very quick review of some things we already know about political heterogeneity in non-unitary regimes.

First, we know that *authoritarian* enclaves occasionally persist in modern federal states transitioning from authoritarianism to democracy.<sup>12</sup> In these cases, authoritarian rulers of subnational units in a democratizing federal state exploit the institutional boundaries created by the federal structure to seal off local institutions from national forces of democratization.<sup>13</sup> Thus, for example, in the Argentine province of Santiago del Estero, a long-serving governor and his wife enjoyed a “cult of personality” and ruled for decades through personally directed violence until the central state could no longer tolerate the persistence and magnitude of subnational human rights violations.<sup>14</sup> Sometimes these authoritarian enclaves can endure for considerable periods; in the United States, the Jim Crow South—“best understood as eleven enclaves of authoritarian rule”<sup>15</sup>—lasted for nearly a century before yielding finally to

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12. See EDWARD L. GIBSON, BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES 2–5 (2012).

13. See *id.* at 6, 14.

14. See *id.* at 96–109. For other examples drawn from Argentina, Mexico, Brazil, and Russia, see generally ILLIBERAL PRACTICES: TERRITORIAL VARIANCE WITHIN LARGE FEDERAL DEMOCRACIES (Jacqueline Behrend & Laurence Whitehead eds., 2016).

15. ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA’S DEEP SOUTH, 1944–1972, at 33 (2015).

intense national pressure to democratize.<sup>16</sup> If subnational authoritarian enclaves can exist in a federal state committed at the national level to liberal democracy, perhaps the reverse is possible, and subnational liberal democracies can survive when a federal government turns authoritarian.

Second, we know that in fact democratic institutions sometimes can survive a transition to autocracy in both federal and unitary states. Mexico's Federal Electoral Commission, for example, created in 1946, managed to oversee electoral processes in a democratic manner even during extended periods of authoritarian rule by the Institutional Revolutionary Party, and Peru's ombudsman office managed against the odds to conduct itself democratically during the authoritarian Fujimori regime.<sup>17</sup> Even in Russia, the institution of directly elected mayors survived here and there in the face of a central push to assert greater control over local governments nationwide by imposing a more pliable council-manager model.<sup>18</sup> Indeed, democratic institutions have from time to time appeared in autocratic states even where they did not previously exist, as, for example, with the appearance of democratically organized, self-governing clubs and local parents' groups in rural Spain during the Franco era.<sup>19</sup> However, for the most part these institutions have not been territorial or, if territorial, have been small and scattered and thus may not be perceived by a central autocracy as posing the same kind of threat as a democratically organized institution on the scale of a province or region.<sup>20</sup>

Third, we know that many autocracies throughout history have allowed territorial subunits considerable autonomy. In some ancient empires, such as the Persian and Ottoman Empires, imperial governments generally cared little how constituent units governed themselves so long

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16. According to Mickey, the "death blows" to authoritarian "enclave rule" in the American South were delivered by the Civil Rights Act of 1964 and the Voting Rights Act of 1965. *Id.* at 260. However, these same states today seem once again to be mounting resistance to national forces of democratization. See *Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021> [<https://perma.cc/9KEP-KAUU>].

17. Bruce Gilley, *Democratic Enclaves in Authoritarian Regimes*, 17 *DEMOCRATIZATION* 389, 394–95 (2010).

18. Grigorii V. Golosov, Kristina Gushchina & Pavel Kononenko, *Russia's Local Government in the Process of Authoritarian Regime Transformation: Incentives for the Survival of Local Democracy*, 42 *LOCAL GOV'T STUD.* 507, 509 (2016).

19. Óscar Martín García & Damián González Madrid, *Movimientos católicos, ciudadanía y construcción de enclaves democráticos en la provincia de Albacete durante el franquismo final*, 91 *AYER* 195, 198–99 (2013) (Spain).

20. See *id.* at 197–98; see also Golosov, Gushchina & Kononenko, *supra* note 18, at 508 (describing how the Russian federal government implemented reforms that allowed local government units some level of autonomy from the authoritarian regime); Gilley, *supra* note 17, at 394–95 (describing how Mexico's Federal Election Commission was formed and granted freedoms from the national authoritarian regime and how Peru's ombudsman office operated under Fujimori's authorization).

as they paid their tribute, provided personnel for military service, and obeyed central directives.<sup>21</sup> Under the Ottoman *millet* system—perhaps the most fully developed formal system of subnational autonomy in any ancient or early modern empire<sup>22</sup>—non-Muslim religious and ethnic groups within the empire governed themselves largely according to their own laws and customs.<sup>23</sup> Although the Orthodox Christian, Jewish, and Armenian *millets* were non-territorial,<sup>24</sup> the terms of the Kurdish *millet* included territorial self-governance in the form of “semi-independent principalities.”<sup>25</sup>

In other autocratic regimes, imperial subunits have sometimes been able to retain, secure, or appropriate some degree of local autonomy even against the wishes of a central government aspiring to tighter control. Within the Spanish empire, for example, “the traditional phrase by which officials and subjects could choose ‘to obey but not comply with’ (*se obedece, pero no se cumple*) royal orders was not an empty formula.”<sup>26</sup> Imperial subunits used “legal challenges, negotiation, pleading, or outright refusal of royal demands”<sup>27</sup>—what the sociologist James Scott has called “weapons of the weak”<sup>28</sup>—to extract a measure of autonomy from a grudging metropole.<sup>29</sup> It thus appears that, in actual practice, central autocracy need not be incompatible with some degree of subnational autonomy, though autonomy is by no means the same thing as democracy, much less liberal democracy.

Fourth, we know that there is not, and never has been, any such thing as true autocracy in the sense of complete and absolute rule by a monarch or central government.<sup>30</sup> One reason is that actually existing autocratic regimes are never formed from nothing; historically, the great majority, if not indeed all of them, have evolved from, or been formed by cobbling together, existing states with distinct laws, customs, and forms of

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21. 1 S.E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES* 297–98 (1997).

22. *See* 3 *id.* at 1169–70.

23. *Id.* at 1170–71, 1190–91; Latif Tas, *The Myth of the Ottoman Millet System: Its Treatment of Kurds and a Discussion of Territorial and Non-Territorial Autonomy*, 21 INT’L J. ON MINORITY & GRP. RTS. 497, 499 (2014).

24. *See* FINER, *supra* note 21, at 1170.

25. Tas, *supra* note 23, at 509.

26. Alejandra Irigoin & Regina Grafe, *Bargaining for Absolutism: A Spanish Path to Nation-State and Empire Building*, 88 HISP. AM. HIST. REV. 173, 179 (2008).

27. *Id.*

28. JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* 29 (1985).

29. Irigoin & Grafe, *supra* note 26, at 179.

30. *See* DAVID STASAVAGE, *THE DECLINE AND RISE OF DEMOCRACY: A GLOBAL HISTORY FROM ANTIQUITY TO TODAY* 44 (2020) (“[N]o leader truly rules on his or her own.”).

governance.<sup>31</sup> These earlier regimes—and their understandably aggrieved and resentful followers—could not simply be disregarded; instead, they furnished an unwanted inheritance requiring some degree of practical accommodation.<sup>32</sup> As a result, the most common form of autocracy throughout human history has been one in which “those who ruled needed to obtain consent for their decisions from a council or assembly”<sup>33</sup>—frequently a significant constraint, as the aspiring British absolutists Charles I and James II, for example, learned to their misfortune.<sup>34</sup> Attempts by new regimes to wipe away historical inheritance by fiat have generally been failures, sometimes catastrophically so, either immediately, as in the case of the French Revolution, or over a longer term, as with the Soviet Union.<sup>35</sup>

A second reason why autocracy is never truly absolute is that the practical limits of authority mean that there is always some play in the joints of even the most centralized system of governance. Subunits holding administratively delegated powers in a centralized state necessarily have some discretion in how to exercise those powers just in proportion to the degree of central oversight, which, without exception, is necessarily limited by time, resources, motivation, and stamina.<sup>36</sup> Even in China, long considered the paradigm of the unitary, one-party, autocratic state,<sup>37</sup> things are not necessarily as they seem. The ruling party, it turns out, contains factions, and these factions vie for dominance nationally by, among other things, competing at the provincial level to generate experimental policies that “will lead to better governance in their own jurisdictions and national adoption of the innovations, both of which would enhance the responsible faction’s national political outlook.”<sup>38</sup> Both kinds of limitations on central autocratic power—inherited and practical—might conceivably create openings for subnational autonomy in a centrally autocratic federal state.

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31. See J. H. Elliott, *A Europe of Composite Monarchies*, 137 PAST & PRESENT 48, 48–49 (1992); H.G. Koenigsberger, *Composite States, Representative Institutions and the American Revolution*, 62 HIST. RSCH. 135 (1989).

32. Jacob T. Levy, *Not So Novus an Ordo: Constitutions Without Social Contracts*, 37 POL. THEORY 191, 192 (2009). As Levy observes, “[c]onstitutions are enacted in ongoing societies . . . [and] the practice of constitutionalism is usually . . . a practice of *reconciling* those legacies to a new political order.” *Id.* at 192.

33. STASAVAGE, *supra* note 30, at 29.

34. Charles I was executed and James II dethroned and exiled. SHARI BERMAN, DEMOCRACY AND DICTATORSHIP IN EUROPE 38, 43 (2019).

35. See *id.* at 49–50, 363, 372.

36. See, e.g., Yueduan Wang, Laboratories of Authoritarianism 1 (Jan. 6, 2021) (unpublished manuscript) (on file with the Stanford Journal of International Law).

37. See *id.* at 8.

38. *Id.* at 6.

Fifth, if we look to the actual course of events in the United States during the recent period of national authoritarianism (2017–20),<sup>39</sup> it is clear that American states were capable of mounting resistance to national policies to which they objected, sometimes successfully. State attorneys general, for example, brought successful lawsuits challenging Trump administration efforts to gut longstanding environmental regulations and succeeded in blocking initiatives such as an early version of President Trump’s ban on travel to the United States from a list of Muslim countries.<sup>40</sup> Other lawsuits blocked the administration’s unilateral attempt to end the DACA immigration program initiated under President Obama and the administration’s clumsy and overtly partisan attempt to include a citizenship question on the 2020 census.<sup>41</sup> States also used their discretion to decline to cooperate with federal enforcement of criminal restrictions on marijuana use<sup>42</sup> and in some cases adopted “sanctuary” policies in direct defiance of President Trump’s immigration policies.<sup>43</sup>

At the same time, however, numerous states jumped off the cliff toward authoritarianism hand-in-hand with the president, pursuing policies out of the same authoritarian playbook as the federal executive and the Republican-controlled Senate.<sup>44</sup> Federalism thus does not *prevent* democratic backsliding at the subnational level among the willing and may even facilitate it, especially when the central government is itself authoritarian. Clearly, much depends upon the precise distribution of authoritarian political sentiment—and authoritarian-leaning political parties<sup>45</sup>—across the nation.

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39. See Robert C. Lieberman, Suzanne Mettler, Thomas B. Pepinsky, Kenneth M. Roberts & Richard Valelly, *The Trump Presidency and American Democracy: A Historical and Comparative Analysis*, 17 PERSPS. ON POLS. 470, 471 (2019).

40. John Dinan, *The Institutionalization of State Resistance to Federal Directives in the 21st Century*, 18 FORUM 3, 7, 10 (2020).

41. *Id.* at 10–11.

42. *Id.* at 13.

43. For example, in 2019, Washington enacted legislation making it a sanctuary state. See *Sanctuary Jurisdiction Policies by State*, BALLOTPEDIA, [https://ballotpedia.org/Sanctuary\\_jurisdiction\\_policies\\_by\\_state](https://ballotpedia.org/Sanctuary_jurisdiction_policies_by_state) [<https://perma.cc/98DT-M4Y3>] (last visited Sept. 27, 2021). For an overview of state and local policies, see Jessica M. Vaughan & Bryan Griffith, *Map: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUD. (Mar. 22, 2021), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> [<https://perma.cc/X3EF-KU2A>].

44. James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829 (2021).

45. The political science literature is in general agreement that the U.S. Republican Party has drifted dramatically away from liberalism and toward populist authoritarianism. See, e.g., Lieberman, Mettler, Pepinsky, Roberts & Valelly, *supra* note 39, at 471, 473; PIPPA NORRIS & RONALD INGLEHART, *CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM* 245–46 (2019); Paul Pierson & Eric Schickler, *Madison’s Constitution Under Stress: A Developmental Analysis of Political Polarization*, 23 ANN. REV. POL. SCI. 37, 53 (2020); cf. Karyn Amira, Lauren Johnson, Deon McCray &

Finally, we can observe what has happened in other contemporary authoritarian states when they sense a persistent commitment to liberal democracy in subnational institutions. At this moment, China is quickly and brutally extinguishing a long tradition of subnational liberal democracy in Hong Kong.<sup>46</sup> Following the Fidesz takeover in Hungary, central authorities moved quickly to subdue liberal institutions like the Central European University and an independent press.<sup>47</sup> Authoritarians around the world have attacked and undermined the independence of the judiciary, a quintessentially liberal institution.<sup>48</sup> All of this suggests a low degree of tolerance for the persistence of liberal democracy following a national move toward authoritarianism. A recent report by the V-Dem Institute examining nearly one hundred episodes since 1900 in which democracies regressed into authoritarianism concluded, “once a democracy enters an autocratization episode, democratic resilience becomes unlikely.”<sup>49</sup> In only about twenty percent of such episodes was a complete collapse into authoritarianism averted.<sup>50</sup>

Taken together, these various indicators point simultaneously in several different directions, some supporting the hopeful possibility that federalism insulates subnational units from central autocracy, others undermining it. That, however, is precisely the point: whether subnational liberal democracy can survive an encounter with national-level authoritarianism in a federal state depends on a host of highly contingent variables. In the next Section, I review some aspects of federal theory to get a better purchase on what those contingencies might be.

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Jordan Ragusa, *Adversaries or Allies? Donald Trump’s Republican Support in Congress*, 17 PERSPS. ON POLS. 756, 767 (2019) (explaining that data is limited but supports a conclusion that “the GOP is in the midst of realignment away from its conservative roots”); Jacob S. Hacker & Paul Pierson, *Restoring Healthy Party Competition*, in DEMOCRACY UNCHAINED: HOW TO REBUILD GOVERNMENT FOR THE PEOPLE 40, 43 (David W. Orr, Andrew Gumbel, Bakari Kitwana & William S. Becker eds., 2020).

46. See, e.g., Yi-Zheng Lian, Opinion, *Why Is China Still Going After Hong Kong So Hard?*, N.Y. TIMES (Mar. 1, 2021), <https://www.nytimes.com/2021/03/01/opinion/hong-kong-security-law.html> [<https://perma.cc/N5PT-QACD>].

47. LARRY DIAMOND, ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY 61 (2019).

48. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 78–79 (2018); Tom Ginsburg, *International Courts and Democratic Backsliding*, 37 BERKELEY J. INT’L L. 265, 279–83 (2019); Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union*, 51 COMMUNIST & POST-COMMUNIST STUD. 189, 191–92, 197–98 (2018).

49. Vanessa A. Boese, Amanda B. Edgell, Sebastian Hellmeier, Seraphine F. Maerz & Staffan I. Lindberg, *Deterring Dictatorship: Explaining Democratic Resilience Since 1900*, at 3 (V-DEM INST., Working Paper No. 101, 2020), [https://www.v-dem.net/media/filer\\_public/7d/8a/7d8acbb5-806a-4ba9-b68c-238bcc352eb9/wp\\_101\\_final.pdf](https://www.v-dem.net/media/filer_public/7d/8a/7d8acbb5-806a-4ba9-b68c-238bcc352eb9/wp_101_final.pdf) [<https://perma.cc/MR96-JDN7>].

50. *Id.*

## II. THEORETICAL FRAMEWORKS

*A. Classical Federal Theory*

Montesquieu, one of the foundational thinkers of modern federalism, advocated federalism on the ground that it blended all the “internal happiness” of “petty republics” with all the external advantages of strength and self-defense available to “large monarchies.”<sup>51</sup> He went on to argue, however, that the benefits of federalism<sup>52</sup> were available only to “states of the same nature,” by which he meant the constituent subunits.<sup>53</sup> More specifically, Montesquieu thought the benefits of federalism available only when the subunits of a federal state were not merely uniform in structure, but more particularly republican—mainly, it seems, because “[t]he spirit of monarchy is war and enlargement of dominion: peace and moderation are the spirit of a republic.”<sup>54</sup> Subnational autocracies, he thus seemed to think, will be inclined to resolve disputes by violence, introducing instability into a federation, whereas subnational republics will resolve their disagreements peacefully and democratically, meaning that a mix of authoritarian and republican subunits poses a grave danger of instability in a federal state.

Although Montesquieu’s point is generally taken to be a theoretical one, it clearly rests on assumptions that are primarily empirical and pragmatic. Those assumptions have, for the most part, been validated by experience. Many federations, to be sure, contain considerable internal variation among their subnational units. Provincial variations in religion, ethnicity, and even language are not uncommon and, while sometimes stressful to national unity, seem reasonably well-tolerated in many federal states.<sup>55</sup> Similarly, some federations contain significant internal asymmetry in the distribution of powers among subnational units and thus in their capacity for autonomous self-governance, another aspect of

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51. BARON DE MONTESQUIEU, *Book IX: Of Laws in the Relation They Bear to a Defensive Force*, in 1 THE SPIRIT OF THE LAWS 127 (Thomas Nugent trans., Hafner Publ’g Co. 1949) (1748). Rousseau later made a similar argument in favor of federalism. Jean-Jacques Rousseau, *A Lasting Peace Through the Federation of Europe: Exposition and Critique of St. Pierre’s Project*, in THEORIES OF FEDERALISM: A READER 59, 60 (Dimitrios Karmis & Wayne Norman eds., 2005).

52. Montesquieu used the term “confederation,” MONTESQUIEU, *supra* note 51, at 126, but, as Karmis and Norman point out, eighteenth-century authors tended to use the terms “confederation” and “federation” interchangeably. Dimitrios Karmis & Wayne Norman, *The Revival of Federalism in Normative Political Theory*, in THEORIES OF FEDERALISM: A READER, *supra* note 51, at 3, 5.

53. MONTESQUIEU, *supra* note 51, at 127–28.

54. *Id.*

55. FRANCESCO PALERMO & KARL KÖSSLER, *COMPARATIVE FEDERALISM: CONSTITUTIONAL ARRANGEMENTS AND CASE LAW* 97–104 (2017).

internal heterogeneity that can stress the stability of the larger system.<sup>56</sup> Nevertheless, as an empirical matter, the scope of variation in modern federations does not seem to extend to basic forms of political organization—most federations are liberal democracies all the way down.<sup>57</sup> Leagues and other loose alliances of states have sometimes contained members whose basic forms of government differed considerably,<sup>58</sup> but that kind of diversity seems rare in any collection of states that purports to be a single polity at the national level,<sup>59</sup> suggesting there may be something to Montesquieu’s generalization.

In what may be the only work to engage Montesquieu’s contention directly, political theorist Jacob Levy similarly argues that “bounded variation” among sub-federal units is normatively preferable to wider or unlimited variation because it is “the right way to attain the benefits of a federal system.”<sup>60</sup> Levy’s reasons, however, are distinctly pragmatic. If one of the principal justifications for federalism is the enhanced citizen satisfaction associated with being able to choose among distinctive packages of subnational policies, Levy argues, those in a position to choose are best served when the available choices are differentiated and as numerous as possible, but not fundamentally incompatible.<sup>61</sup> Likewise, “radical divergence in fundamental political values” among subnational units in a federation “can be destabilizing, leading to a profound alienation between some states and the rest of the country.”<sup>62</sup> Not only could this have the destabilizing consequence of leading some parts of the population to view other parts as “foreign,” but it could also undermine the beneficial capacity of federalism to encourage and facilitate healthy partisan competition at the national level. As Levy explains, “[t]he opposition party holding power in an outlier state that is hostile to and viewed hostilely by

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56. MAJA SAHADŽIĆ, *ASYMMETRY, MULTINATIONALISM AND CONSTITUTIONAL LAW: MANAGING LEGITIMACY AND STABILITY IN FEDERALIST STATES* 12–13 (2021).

57. I exclude here federations that are federal primarily on paper—those that, like Russia, Venezuela, and Nigeria, have a federal constitution but are in fact centralized autocracies. See discussion *infra* note 95.

58. For example, German leagues of the twelfth through fourteenth centuries, such as the Hanseatic and the Rhenish, comprised a mix of cities, towns, ecclesiastical jurisdictions, and principalities. PETER H. WILSON, *THE HOLY ROMAN EMPIRE: A THOUSAND YEARS OF EUROPE’S HISTORY 570–74* (2016). Ancient Greek leagues, such as the Corinthian League, included a mix of oligarchies and democracies. A.B. Bosworth, *Alexander the Great Part 2: Greece and the Conquered Territories*, in 6 *THE CAMBRIDGE ANCIENT HISTORY* 846–47 (2d ed. 1994).

59. Jacob T. Levy, “States of the Same Nature”: *Bounded Variation in Subfederal Constitutionalism*, in *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS* 27 (James A. Gardner & Jim Rossi eds., 2011).

60. *Id.*

61. *Id.* at 31.

62. *Id.* at 32.

the rest of the system is unlikely thereby to gain any plausibility as a governing party in the center.”<sup>63</sup>

In cases where the basic forms of government differ fundamentally at the national and subnational levels—where one level is autocratic and the other committed to liberal democracy, or where some subnational units are autocratic and others liberal and democratic—we might add to this list some pragmatic complications arising from the form of dual citizenship institutionalized in federations.<sup>64</sup> If the central government is liberal but some subnational units are authoritarian, what happens to *national* citizen equality when some citizens are free nationally and sub-nationally and others enjoy freedom nationally but not from their subnational governments? For such a system to be stable, the federal government would have to feel no obligation whatsoever to protect the rights of its own citizens against subnational oppression—as was indeed the case in the United States until 1868 *de jure* and for another eighty years *de facto*.<sup>65</sup> In the reverse case, where the national government is autocratic, citizens of subnational liberal democracies would ostensibly enjoy human rights and self-rule sub-nationally but not nationally, while citizens of autocratic subnational units would not enjoy human rights or self-rule at either level. The first arrangement seems hardly tolerable to citizens accustomed sub-nationally to the benefits of liberal democracy,<sup>66</sup> and neither arrangement seems particularly stable. As Linz and Stepan argue, a democratic subunit in an autocratic state “would provide for the citizens of the larger unit [an example of] one region enjoying freedoms to which they would not have access,” thereby “generat[ing] a persistent temptation for the sovereign state to subvert those democratic institutions.”<sup>67</sup>

These considerations point, without a doubt, to severe pragmatic difficulties facing the survival of subnational liberal democracy in the face of a national authoritarian takeover in a federal state, though they do not,

63. *Id.* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1124 (2014) (laying out a conception of federalism in which its principal virtue is providing temporary landing pads at the subnational level for parties out of power nationally).

64. *See, e.g.*, James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1257 (2005) (discussing the consequences of dual national and state citizenship for collective and individual political identity).

65. *See* MICKEY, *supra* notes 15–16 and accompanying text. In fact, according to Gibson, it is precisely subnational human rights violations that eventually become intolerable to a liberal democratic national government, prompting it to intervene to secure nationally guaranteed rights. GIBSON, *supra* note 12, at 105–09.

66. *See* NICCOLÒ MACHIAVELLI, *THE PRINCE* 39 (Mark Musa ed. & trans., 1964) (1532) (stating that “in the case of republics . . . the memory of their ancient liberty will not and cannot allow them to rest”).

67. JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* 19 (1996).

I think, demonstrate some deep, intrinsic incompatibility at a theoretical level. Pragmatic obstacles, after all, are just that—pragmatic—and might perhaps be overcome in the right circumstances. As we have already seen, occasional counterexamples can be found: authoritarian enclaves may persist in democratizing federations and democratic institutions in autocratizing ones. All this suggests that the effects on subnational liberal democracy of a complete authoritarian takeover of the U.S. federal government are highly contingent and difficult to predict, and here the utility of more classical forms of federal theory tends to run out. I therefore turn to a more contemporary approach to federalism that makes a place explicitly for this kind of contingency.

### *B. Dynamic Theories of Federalism*

Many contemporary accounts of federalism focus less on the formal arrangements of constitutional structure and its consequences than on the ways in which constitutional actors actually practice federalism on the ground.<sup>68</sup> A useful starting point is Madison's conception of separated powers, according to which the division of power produces a sort of perpetual contest for ascendancy among the various power centers—a competition reliably and sustainably fueled by harnessing human nature to constitutional structure such that “[a]mbition . . . counteract[s] ambition.”<sup>69</sup> The main problem posed by this kind of “contestatory” federalism, in which actors are constantly, or at least frequently, jockeying for better position, is one of maintaining the system at some kind of equilibrium to avoid either fragmentation into the component parts or a collapse into unitarism.<sup>70</sup> The Madisonian conception, then, is of a constitutional system of divided powers that maintains itself at its own design specifications through the construction of a dynamic equilibrium—an equilibrium maintained by a perpetual contest for power among multiple power centers, none of which is able fully or permanently to subdue the others.<sup>71</sup>

Approaching the problem from this angle is illuminating, for it explains a great deal of observed behavior in modern federations. With notable consistency, scholars of federalism tend to describe federal systems as in a state of almost constant motion: such systems are said to

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68. I follow here my account in James A. Gardner, *The Theory and Practice of Contestatory Federalism*, 60 WM. & MARY L. REV. 507 (2018).

69. THE FEDERALIST NO. 51 (James Madison).

70. Gardner, *supra* note 68, at 507.

71. Thomas Schwartz, *Publius and Public Choice*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 35 (Bernard Grofman & Donald Wittman eds., 1989); Peter C. Ordeshook, *Some Rules of Constitutional Design*, in LIBERALISM AND THE ECONOMIC ORDER 204–05 (Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul eds., 1993).

be “highly dynamic,”<sup>72</sup> with “the various parts of the system . . . in continuous interaction.”<sup>73</sup> As a result, “[f]ederal relations are fluctuating relations in the very nature of things.”<sup>74</sup> “[F]ederal systems,” in other words, “are permanently in motion,”<sup>75</sup> “undergoing a perpetual process of evolution and adaptation.”<sup>76</sup>

Observers who take this view typically trace the dynamism and instability of the federal allocation of power to its contestatory design features. Intergovernmental contestation places great pressure on the stability of federal regimes<sup>77</sup>: “The incentive to deviate from the division of authority,” argues Jenna Bednar, “is inescapably built in to the federal structure.”<sup>78</sup> Because the system contemplates that national and subnational actors will compete against each other, “[t]he constitutional allocation of competences . . . is particularly prone to entrepreneurial redefinition.”<sup>79</sup> Constitutional actors, in other words, have an incentive to “try to shift the balance [of constitutional authority] incrementally in a direction favourable to them,” thereby inducing a form of “authority migration.”<sup>80</sup> When government officials become adept players of this

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72. Arthur Benz, *German Dogmatism and Canadian Pragmatism? Stability and Constitutional Change in Federal Systems 1* (2008) (unpublished manuscript) (on file with Institut für Politikwissenschaft, FernUniversität in Hagen), [https://www.fernuni-hagen.de/polis/docs/polis\\_nr\\_65-2008\\_benz.pdf](https://www.fernuni-hagen.de/polis/docs/polis_nr_65-2008_benz.pdf). See also Arthur Benz & César Colino, *Constitutional Change in Federations—A Framework for Analysis*, 21 REG’L & FED. STUD. 381, 381 (2011), for a discussion of federal systems’ dynamic character and instability.

73. M.J.C. VILE, *THE STRUCTURE OF AMERICAN FEDERALISM* 3 (1961).

74. CARL J. FRIEDRICH, *TRENDS OF FEDERALISM IN THEORY AND PRACTICE* 7 (1968).

75. Arthur Benz & Jörg Broschek, *Introduction to FEDERAL DYNAMICS: CONTINUITY, CHANGE, AND THE VARIETIES OF FEDERALISM* 2, 7 (Arthur Benz & Jörg Broschek eds., 2013).

76. Eugénie Brouillet, *Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora’s Box?*, 54 SUP. CT. L. REV. 601, 606 (2011).

77. Nathalie Behnke & Arthur Benz, *The Politics of Constitutional Change Between Reform and Evolution*, 39 PUBLIUS 213, 213 (2009).

78. JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* 63 (2009).

79. Jörg Broschek, *Conceptualizing and Theorizing Constitutional Change in Federal Systems: Insights from Historical Institutionalism*, 21 REG’L. & FED. STUD. 539, 548 (2011).

80. Benz & Colino, *supra* note 72, at 381. See also WILLIAM S. LIVINGSTON, *FEDERALISM AND CONSTITUTIONAL CHANGE* 11–12 (1956) (“[I]n a federal government the problem is even more acute because the distribution of powers between states and nation . . . gives rise to demands for shifts in the allocation of functions from one government to the other.”); Ralph J.K. Chapman, *Structure, Process and the Federal Factor: Complexity and Entanglement in Federations*, in *COMPARATIVE FEDERALISM AND FEDERATION: COMPETING TRADITIONS AND FUTURE DIRECTIONS* 69, 71 (Michael Burgess & Alain-G. Gagnon eds., 1993) (“The actors are continuously involved in mutual transfers creating thereby an additional set of structures and processes, extra-constitutional and, in many cases, extra-parliamentary.”).

game, “assignments of powers and competences have to be continuously renegotiated.”<sup>81</sup>

On this view, the critical variable shaping the dynamics of intergovernmental contestation in a federal system—and exerting a potentially significant influence on the outcomes of such contests—is likely to be the particular pathways made available by the system to actors at one level wishing to exert influence on decision-making at the other level. For example, a subnational unit in a federal state might be able to influence the course of national decision-making through formal pathways baked into the constitutional structure, such as direct representation in a second chamber, like the German *Bundesrat*.<sup>82</sup> Or it might exert influence at the national level through powerful extraconstitutional institutions established by agreement, such as the Canadian First Ministers’ Conference.<sup>83</sup> If the opportunity is presented, it might be able to influence federal decision-making through informal contacts among bureaucrats at the ministerial or sub-ministerial levels or through formal or informal lobbying of federal legislators.<sup>84</sup> Subnational leaders might also be able to intervene in national decision-making processes by exploiting boundary-breaching back channels furnished by political parties.<sup>85</sup>

Sometimes the details of a particular federal system offer subnational units opportunities to secure their own goals by acting independently of the national government. Thus, to the extent that a federal arrangement gives a subnational unit a great deal of autonomy, it might secure its own preferences in some policy domain merely by exercising that autonomy to adopt its own policies independently of policies adopted at the national level.<sup>86</sup> Federal structures also typically offer a menu of uncooperative or even defiant options to subnational units seeking to influence national policy. For example, a state or province might simply refuse to cooperate with the national government when cooperation is necessary for successful implementation of national policies, or it might openly defy legitimate exercises of federal authority and take the risk of a coercive response.<sup>87</sup>

All of this, however, is highly contingent on the particularities of any given federal system and on the context in which intergovernmental conflict arises. The outcomes of intergovernmental contestation, that is to

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81. Benz, *supra* note 72, at 1.

82. Gardner, *supra* note 68, at 553–54, 557–59.

83. Martin Papillon & Richard Simeon, *The Weakest Link? First Ministers’ Conferences in Canadian Intergovernmental Relations*, in CANADA: THE STATE OF THE FEDERATION, 2002: RECONSIDERING THE INSTITUTIONS OF CANADIAN FEDERALISM 113, 113–14 (Peter Meekison, Hamish Telford & Harvey Lazar eds., 2004).

84. Gardner, *supra* note 68, at 563–65.

85. Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000).

86. Gardner, *supra* note 68, at 541–42.

87. *Id.* at 531–38.

say, will depend upon contingent details of constitutional structure, on the willingness of actors to innovate and push the limits of constitutional boundaries, on the tolerance of the system for extraconstitutional innovations, and on a whole range of factors relating to subnational satisfaction with national rule, motivation to resist it when it is unsatisfactory, and the population's stomach for initiating—and stamina for enduring—intergovernmental conflict.

Interestingly, this pattern of contestation-driven dynamism is not unique to federal forms of governance; a very similar dynamic has been observed even in autocracies. Recent historical work on early modern empires has largely exploded the conventional picture of overwhelming central imperial power imposed freely and without meaningful constraint in favor of a conception of the internal structure of empires as to a great extent “negotiated.”<sup>88</sup> Writing of the Portuguese empire in the sixteenth through eighteenth centuries, for example, A.J.R. Russell-Wood argues,

The notion of a centralized metropolitan government, of the formulation of policies impervious to colonial input and implemented to the letter by Crown agents, of an unresponsive Crown, and of rigid metropolitan attitudes toward Brazil demands revision. Whereas the structure of government was highly centralized in the metropolis . . . this was paralleled by decentralization . . . . Unstated, ill-defined, or blurred areas of jurisdiction led to diffusion of authority, and rivalries and tensions between individuals and between branches of government. Centrifugal forces attributable to multiple points of decision making and lack of coordination . . . undermined the effectiveness of [central] government. This opened the door for colonials to participate in government and contribute to the formulation and implementation of Crown policies.<sup>89</sup>

Similarly, writing of Spain's Latin American empire, Amy Turner Bushnell argues that, on the frontier, “the paradigm of power” should be replaced with a paradigm of “negotiation.”<sup>90</sup> Doing so allows us to see “two societies surviving side by side, not because the one is economically stagnant, spiritually irresolute, and unable to conclude a conquest and the other is irretrievably ruined and wronged, but because together they have achieved that wonder of human accomplishments, a delicate, constantly

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88. See generally NEGOTIATED EMPIRES: CENTERS AND PERIPHERIES IN THE AMERICAS, 1500–1820 (Christine Daniels & Michael V. Kennedy eds., 2002) [hereinafter NEGOTIATED EMPIRES]; Irigoien & Grafe, *supra* note 26.

89. A.J.R. Russell-Wood, *Centers and Peripheries in the Luso-Brazilian World, 1500-1808*, in NEGOTIATED EMPIRES, *supra* note 88, at 105, 113–14.

90. Amy Turner Bushnell, *Gates, Patterns, and Peripheries: The Field of Frontier Latin America*, in NEGOTIATED EMPIRES, *supra* note 88, at 15, 22.

negotiated balance.”<sup>91</sup> As we shall see, a similar pattern is detectable in ancient empires as well.<sup>92</sup>

However, while the overall dynamics of internal contestation may be similar in federations and empires, it is quite clear that the specific pathways of influence available to national and subnational actors will differ substantially in the two kinds of regimes. Indeed, one of the functions of liberalism is to take off the table many avenues by which monarchs formerly exercised power and to replace them with others thought less violent, more benign, and more democratically legitimate—that is, in a way, liberalism’s main point. For present purposes, then, the principal challenge is to anticipate what pathways of subnational influence and power might be available in a modern federal state that is authoritarian at the center but whose subnational units are arrayed along a spectrum from populist authoritarianism to liberal democracy. And this analysis, in turn, will depend on the specific structures of governance that would be created by a full-blown authoritarian takeover of the national institutions of a particular federal state and, most specifically, of the United States.

### C. Case Selection

In speculating on this question, there are surprisingly few sources of really useful guidance to which we might recur. Unfortunately, few contemporary examples suggest themselves. Most modern authoritarian states, including the great majority now undergoing democratic backsliding, are unitary in organization,<sup>93</sup> and most authoritarian chief executives thus face a somewhat different set of challenges in centralizing authority and domesticating competing power centers than would be the case in a state organized federally.<sup>94</sup> A few modern federations are clearly authoritarian at the national level—Russia, Nigeria, and Venezuela come to mind—but they, too, may not furnish much guidance for thinking about the United States.<sup>95</sup> Such federations are federal on paper only, and any

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91. *Id.*

92. *See infra* Section III.A.

93. *See, e.g.*, Pedro Paulo Weizenmann, “*Tropical Trump*”? *Bolsonaro’s Threat to Brazilian Democracy*, 2019 HARV. INT’L REV. 12, 12, 14.

94. This is not to say that an authoritarian leader in a federal state would not also face these challenges: such a leader would need to consolidate power just as much as a contemporary leader of a democratically backsliding unitary state, like Hungary, Poland, or Turkey. These challenges include undermining the independence of the judiciary, taming an independent press, achieving control over the civil service, rigging electoral rules, and so forth. DIAMOND, *supra* note 47, at 63–66. Unlike those leaders, however, an authoritarian leader of a federal state would also have to subdue subnational centers of independent power.

95. *See, e.g.*, Allan R. Brewer-Carías, *Centralized Federalism in Venezuela*, 43 DUQ. L. REV. 629, 633 (2005) (The Chávez regime “crushed . . . the autonomy of the States of the Federation.”); Ivan Leksin & Viacheslav Seliverstov, *Concurrency of Powers in the*

periods in which they actually functioned as working federal states were so brief as to suggest both that federalism never really took root and that it collapsed precipitously as soon as central authoritarians applied pressure.<sup>96</sup> In the United States, by contrast, principles of federalism are well-developed, longstanding, and deeply entrenched, and they carry a long history of functional utility and service in the sense that federalism has often been successfully invoked to shield aspects of subnational autonomy from national intrusion.<sup>97</sup>

Other contemporary examples of democratic backsliding in federal states are probably also of dubious utility as guides to what might happen in the United States. Brazil, for example, is clearly engaged in rapid democratic backsliding under the authoritarian Bolsonaro regime,<sup>98</sup> but Brazil only recently (1985) emerged from a military dictatorship that lasted a generation—and that was not its only period of authoritarian rule in the twentieth century.<sup>99</sup> Considering that one of the leading predictors of present populist authoritarian rule is a prior period of populist authoritarian rule,<sup>100</sup> democratically backsliding federal states with a recent history of oscillation between liberal democracy and authoritarianism, and thus a commitment to federalism that is recent and shallowly rooted, may not provide much help in predicting how central authoritarianism in the United States might be likely to develop.

On the other hand, it seems to me that much useful information can be gleaned from considerably older examples. In many ways the

*Russian Federation*, in CONCURRENT POWERS IN FEDERAL SYSTEMS 164, 165 (Nico Steytler ed., 2017) (describing how the conflict between the Soviet national and subnational governments over their respective authority “ended with de facto recentralisation”); Nsaki Wodu, *Nigeria’s Unitary Federalism*, COUNCIL OF FOREIGN RELS. (Dec. 16, 2020, 10:05 AM), <https://www.cfr.org/blog/nigerias-unitary-federalism> [<https://perma.cc/2PF2-JQ2B>] (describing how “[s]uccessive federal governments have maintained the stranglehold on power”).

96. See, e.g., Brewer-Carías, *supra* note 95, at 631–32 (describing the weak Venezuelan Federalist system that never took hold); see also Leksin & Seliverstov, *supra* note 95, at 169, 188 (showing how Russia has never truly been a federation because of the regional autonomy).

97. It has been long understood that American support for federalism has historically been opportunistic and instrumental, depending upon the level of government at which one’s plans can best be implemented. See FORREST McDONALD, STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876, at 28–30 (2000); Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 134–35 (2004). But although fondness for subnational power may be shifting and opportunistic, invocation of the principle can have very real effects.

98. Weizenmann, *supra* note 93, at 12.

99. Brazil was ruled by military dictatorships from 1930 to 1946 and again from 1964 to 1985. Diego Nunes & Luigi Lacchè, *Constitutional Experiences in the Brazilian Legal History*, 40 GIORNALE DI STORIA COSTITUZIONALE 5, 7 (2020).

100. Manuel Funke, Mortiz Schularick & Christoph Tresbech, *The Cost of Populism: Evidence from History*, VOXEU (Feb. 16, 2021), <https://voxeu.org/article/cost-populism-evidence-history> [<https://perma.cc/9XSN-4ZGT>].

hypothetical situation under consideration—a complete authoritarian takeover of the institutions of the United States national government—is analogous to something that has happened many times throughout human history: the acquisition by an authoritarian regime—an empire—of a new set of possessions, in this case the fifty American states. These new possessions are of different sizes, populations, strategic locations, and economic resources. They enjoy a long tradition of freedom, autonomy, and self-rule. At the time of acquisition, some, but not all, are strongly committed to retaining the forms of self-governance to which they have long been accustomed, while others align themselves with the central government and support it enthusiastically. That possibility focuses attention on several main questions. How would such a central regime subdue and control its new acquisitions? To what degree would the new possessions resist the imposition of central power, and in what domains? What pathways of influence would be available to actors at each level, with what degree of efficacy? And of course also relevant would be the main goals of an authoritarian central government, the intensity of commitments at both levels, the relevant time frame, and a host of other, largely imponderable considerations.

To make some headway in thinking through these issues, the next Part takes a brief historical tour of ancient and early modern empires, focusing on the tools and tactics of central control and the pathways and tactics of sub-imperial influence and resistance available in imperial states.

### III. TACTICS OF CONTROL AND RESISTANCE IN ANCIENT AND EARLY MODERN EMPIRES

With these considerations in mind, the inquiry that follows focuses on three main questions: (1) whether centrally autocratic states have ever tolerated significant political heterogeneity among their subunits; (2) if so, whether that political heterogeneity was broad enough to include subunit democracy; and, if so, (3) whether democratically self-governing imperial subunits were able to maintain that status for any length of time.

There are, to be sure, many reasons to be cautious about analogizing from the ancient and early modern worlds to the present. Any pre-modern state larger than a city was typically a “composite” state that had been cobbled together—through acquisition, conquest, alliance, or marriage—from other states, each with its own “laws, rights, privileges and traditions.”<sup>101</sup> As a result,

[a] prince could add province after province, kingdom after kingdom to his realm and rule each as its own prince under different laws and with varying powers. Prerogatives which he

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101. Koenigsberger, *supra* note 31, at 135.

had in one dominion he did not necessarily have in another and the same was true of his subjects' rights.<sup>102</sup>

These kinds of asymmetries, routine in pre-modern times,<sup>103</sup> are likely to be considered scarcely tolerable in contemporary states, inconsistent as they are with modern conceptions, likely dating to Bodin, of the state as the holder of supreme and plenary authority,<sup>104</sup> as well as the Romantic, nineteenth-century conception of a unified *staatsvolk* with a single identity and collective historical destiny and its associated conceptions of nationalism, ethnic or otherwise.<sup>105</sup> More broadly, as Jean Dunbabin has observed, “[i]n the full sense of the word, it is arguable that nobody was governed before the later nineteenth century,”<sup>106</sup> and it is therefore important to avoid overstating the degree of decentralization of early empires simply because all public life in pre-modern times was decentralized by modern standards.<sup>107</sup>

Still, keeping these cautions in mind, I think the best answer to the questions posed above is simply that central imperial tolerance for subunit autonomy of any kind, including democratic varieties, was highly contingent upon the circumstances: empires practiced such toleration when doing so happened to serve central interests and refused to tolerate it in other circumstances. As a rule, however, autonomous self-rule was tolerated only on matters of central indifference. In addition, central control tended to tighten considerably as time passed.

Section A provides an overview of the methods and tactics of imperial control and sub-imperial resistance in ancient empires, and Section B provides a similar analysis in the context of early modern empires. Section C goes into greater depth by examining in detail a particular center-periphery dispute: the rising and ultimately explosive contention between Catalonia and imperial Spain in the first half of the seventeenth century. Over the course of a half century of conflict, Catalans managed to invoke virtually every conceivable pathway of sub-imperial influence, providing a handy catalog of the tactics available to subunits of a centrally autocratic state.

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102. *Id.* at 136.

103. *Id.* at 135–36.

104. JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 25 (M. J. Tooley ed. & trans., Barnes & Noble 1967) (1576); Koenigsberger, *supra* note 31, at 149–50.

105. *See* GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* 38–39 (J. Sibree trans., Dover Publ'ns, Inc. 1956) (1837).

106. JEAN DUNBABIN, *FRANCE IN THE MAKING* 843–1180, at 277 (1985).

107. *Id.*

*A. The Ancient World*

As Walter Scheidel has observed, “all pre-nation states in history that were bigger than city-states”—and thus by definition all empires—“tended to be heterogeneous in terms of language, religion and other cultural characteristics.”<sup>108</sup> The Persian Empire, for example, was, according to Finer, “the most heterogeneous collection of peoples that had ever been brought together in a single unit.”<sup>109</sup> Ancient empires also tended to be highly decentralized by modern standards, not only for the pragmatic reasons already mentioned—amplified of course by the rudimentary condition of technologies of surveillance and oversight—but also because their goals tended to be limited: “tribute and obedience.”<sup>110</sup> In the case of Rome, for example, “[s]o long as sufficient money came into Rome for disbursement to the army and for maintenance of an imperial life-style, nothing else much mattered.”<sup>111</sup> Similarly, the central Ottoman state “was conspicuously shallow in its penetration of everyday life . . . Its role was to make war, acquire plunder, slaves, and revenues, raise taxes, and keep order.”<sup>112</sup>

As a result, ancient empires tended to be—indeed, had to be—tolerant of many kinds of subunit diversity. Thus, for example, “the Persian Empire . . . did not care at all who or how its subject peoples worshiped.”<sup>113</sup> Roman authorities “did not care what language [subject peoples] spoke, what opinions they expressed (other than seditious ones)[,] . . . were blind to the colour of their skins and the *ethnos* or race they came from[, and] did not impose any religious dogma.”<sup>114</sup>

Moreover, because of the way empires grew—by acquisition of previously independent, self-governing communities—they tended also to be heterogeneous in political organization below the imperial level. Annexation of new territory, especially when accomplished without significant resistance, did not generally require deposing the local monarch, who could more easily be converted into a “client-king” of the imperial regime<sup>115</sup> and whose office then became “part of provincial

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108. Walter Scheidel, *Republics Between Hegemony and Empire: How Ancient City States Built Empires and the USA Doesn't (Anymore)* 3 (Princeton/Stanford Working Papers in Classics, Working Paper No. 020601, 1981), <http://www.princeton.edu/~pswpc/pdfs/scheidel/020601.pdf> [<https://perma.cc/D6RP-8P9L>].

109. FINER, *supra* note 21, at 297.

110. *Id.* at 297–98.

111. MARTIN GOODMAN, *THE ROMAN WORLD 44 BC–AD 180*, at 100 (1997).

112. 3 FINER, *supra* note 21, at 1170.

113. 1 *id.* at 89.

114. *Id.* at 562.

115. See H.H. SCULLARD, *FROM THE GRACCHI TO NERO: A HISTORY OF ROME FROM 133 B.C. TO A.D. 68*, at 255, 287 (1959).

administration.”<sup>116</sup> Acquisition of new subject states in this manner generally meant preserving and, if it functioned adequately, simply ruling through the existing apparatus of local governance. For the most part, governments in the ancient world were central and monarchical<sup>117</sup> and thus rested on principles compatible with hierarchical rule from an imperial center, but local variations in government structure, such as a representative council (as in Peloponnesian and Ionian Greek cities), a religious tribunal (as in Judea), or a well-organized central bureaucracy (as in Egypt) might from time to time form part of an inherited provincial apparatus of governance.<sup>118</sup> Most importantly, perhaps, imperial acquisition on this model often meant retention of local laws and customs and thus a continuation in many respects of the kind of subunit governance to which the local population had long been accustomed.<sup>119</sup>

These kinds of arrangements clearly produced some degree of subunit *autonomy*, but it is less clear how much and in what domains. It is unfortunately difficult to answer this question with much accuracy—historical records are scarce and sketchy;<sup>120</sup> contemporary histories were written mainly by imperials rather than subject populations;<sup>121</sup> and modern historians tend to focus more on categories such as religious or cultural autonomy than on the structural question of the allocation of policy authority among levels of government. Subject to that caution, it nevertheless seems to me that the degree of local autonomy of a meaningful sort was generally less than the basic arrangements might in principle have allowed.

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116. GOODMAN, *supra* note 111, at 110.

117. Scheidel, *supra* note 108, at 5.

118. FINER, *supra* note 21, at 308 (independence of Ionian Greek cities); Alan K. Bowman, *Provincial Administration and Taxation*, in 10 THE CAMBRIDGE ANCIENT HISTORY, *supra* note 58, at 344, 360 (retention of democratic citizen assemblies in the Greek East); FINER, *supra* note 21, at 309 (Jewish “Men of the Great Assembly”); STASAVAGE, *supra* note 30, at 175 (retention of Egyptian bureaucracy); GOODMAN, *supra* note 111, at 266 (same).

119. FINER, *supra* note 21, at 541–42. Units of the Roman empire, for example, sometimes exercised self-rule over an impressive range of activities:

The regulation and organization of the councils and magistrates and other communal institutions . . . ; performance of public services . . . ; regulation of food supply and market facilities; general control of communal finances, including the exploitation of particular resources, management of property owned by the community, imposition of some tolls or local taxes; management of temples and cults . . . with attendant festivals and games; exercise of such specific legal powers as were permitted to individual institutions or officials . . . ; the maintenance of public order and the supervision of prisons; sometimes rights to local coinage; [and] organization of building projects in the town . . .

Bowman, *supra* note 118, at 360.

120. FINER, *supra* note 21, at 286; GOODMAN, *supra* note 111, at 4–8.

121. GOODMAN, *supra* note 111, at 4–5.

The key here concerns the tactics of central control—tactics that have scarcely changed in the intervening millennia.<sup>122</sup> Where imperial acquisition was effectuated militarily by the functional destruction of an existing regime, imperial governance was often accomplished by the imposition of a provincial government staffed by imperial officials who reported directly to the metropolitan center.<sup>123</sup> Where, however, a new province joined the empire more or less peacefully, acquisition and control were accomplished mainly by piggybacking the institutions of imperial governance on existing local institutions and by the establishment of a clientelistic relationship with local rulers.<sup>124</sup>

Often, however, the real, or at least the backstop, power in such a province was a centrally appointed procurator or satrap who answered directly to the imperial center and either commanded a military garrison stationed in the locality or could readily summon one from nearby.<sup>125</sup> Thus, even in imperial subunits permitted to engage in some kind of self-governance under traditional local laws and customs, the actual form of rule consisted essentially of parallel governments side by side, with the imperial one always ready to intervene, backed by the threat of force—a circumstance in which “the civic magnates could easily be made to see that the ‘independence’ of the community was at the disposal of the ruling power.”<sup>126</sup> Although some unruliness might be tolerated in provinces that did not contribute much revenue, disobedience in rich, productive possessions could be “ruthlessly suppressed.”<sup>127</sup>

Intervention of this kind was inconvenient,<sup>128</sup> however, and imperial officials greatly reduced the need for it through the seemingly universal tactic of co-opting local elites with privileges and patronage. Rome, for example, especially during the early phases of its imperial growth, frequently secured local cooperation by granting the privileges of Roman citizenship to well-placed provincial oligarchs.<sup>129</sup> More significantly, in exchange for cooperation and compliance, local notables were granted authority to rule, either as a straightforward continuation of the pre-

122. See discussion *infra* Section III.B.

123. This was, for example, the principal tactic of the Ch'in Empire during the third century, FINER, *supra* note 21, at 472, but was also used when deemed necessary by Rome, *id.* at 541, such as when Dacia, after having offered resistance in AD 85–86, was militarily crushed and placed under “direct Roman rule.” GOODMAN, *supra* note 111, at 228.

124. GOODMAN, *supra* note 111, at 208.

125. See, e.g., Bowman, *supra* note 118, at 351–54, 358 (Roman empire); FINER, *supra* note 21, at 301–04 (Persia); *id.* at 540–41 (Roman principate); 2 *id.* at 675, 682–83 (Caliphate).

126. Bowman, *supra* note 118, at 349.

127. GOODMAN, *supra* note 111, at 100.

128. See *id.* at 110–12.

129. FINER, *supra* note 21, at 538; SCULLARD, *supra* note 115, at 272; Bowman, *supra* note 118, at 361.

acquisition regime or sometimes by elevating one competing local faction over another.<sup>130</sup> However accomplished, the deal was one that inevitably found takers because it involved “the certainty of state support for their privileged status so long as they did not complain when [imperial] governors chose arbitrarily to interfere.”<sup>131</sup>

Control of this type required somewhat different tactics when the inherited governance structures of a new acquisition included some kind of democratically representative institution such as a council or assembly.<sup>132</sup> A conqueror might, of course, simply “extinguish” democratic institutions by force and replace them with oligarchic ones, as the Macedonians did in Greece following an Athens-led revolt in 322 BCE.<sup>133</sup> On the other hand, an imperial metropole unwilling to expend the resources necessary to wipe away longstanding institutions to which locals were deeply attached might instead deform them to suit its interests. Since democratic Greek city-states often contained a faction that resented democracy and wished to establish oligarchic rule, a comparatively weak imperial center could opportunistically support the democratic or oligarchic faction to suit its short-term goals.<sup>134</sup> This allowed a continuation of democratic practices, but only so long as their outcomes proved congenial to the metropolitan center.<sup>135</sup> Where the imperium was capable of directing greater power into a democratically self-governed possession, it could domesticate local assemblies by imposing new, restrictive property qualifications to ensure that they were populated by compliant allies among the rich.<sup>136</sup> Assemblies, too, could be gradually stripped of meaningful power, retaining their form and allowing “lip-service [to] be paid to democratic voting procedures,”<sup>137</sup> but without risking the consequences associated with a functioning democracy—a leading tactic, incidentally, among contemporary authoritarian regimes.<sup>138</sup>

Moreover, the degree of central control exercised over imperial subunits had a tendency to increase over time. The appearance of overt dissent could of course trigger brutal repression and the imposition of

130. GOODMAN, *supra* note 111, at 110–11.

131. *Id.* at 103.

132. Of course, the term “democratic” would have meant something much less in the pre-modern world than it means now; such councils represented a much narrower slice of the populace than any modern democratic institution. STASAVAGE, *supra* note 30, at 4; Steven Muhlberger & Phil Paine, *Democracy’s Place in World History*, 4 J. WORLD HIST. 23, 27 (1993).

133. FINER, *supra* note 21, at 367, 382; Édouard Will, *The Succession to Alexander*, in 7 THE CAMBRIDGE ANCIENT HISTORY, *supra* note 58, at 23, 30–31.

134. FINER, *supra* note 21, at 382–83.

135. *Id.* at 382–84.

136. *Id.* at 383.

137. GOODMAN, *supra* note 111, at 101.

138. See STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 7–8 (2010).

direct central rule.<sup>139</sup> Some emperors simply distrusted home-grown leaders and as a matter of policy preferred to impose central rule directly through imperial agents.<sup>140</sup> But another common pattern was a consequence of factional infighting among the elite classes in imperial possessions: “[W]hen the community itself did not have the means or the power to resolve internal difficulties . . . , it would be likely to resort to an appeal to the central authority.”<sup>141</sup> Such an “invitation to intervene was bound to weaken the confidence of the [imperial] government in the ability of the communities to govern themselves peacefully and efficiently, and ultimately lead to the erosion of independence.”<sup>142</sup> Fifteen centuries later, Machiavelli took note of this dynamic as offering opportunities for a prince to expand his state: “[O]ne always finds some unhappy people as well as those who desire a change,” and those are the ones who “can open the way to that state and make the victory easy for you.”<sup>143</sup> And, of course, a gradual tightening of central control may simply be a consequence of the *telos* of empire, which is ultimately to extract wealth for the benefit of the imperial center.<sup>144</sup>

The bottom line seems to be that subunit autonomy in ancient empires was largely the product of a variety of contingent factors. An imperial subunit was more likely to enjoy some measure of autonomy if it joined the empire peacefully, less so if it resisted.<sup>145</sup> It was more likely to enjoy autonomy if it negotiated good terms upon accession,<sup>146</sup> which might in turn depend upon its strategic importance or its wealth, as well as the strength of the empire at that particular moment and its ability successfully to project its power—itsself a function of many factors, including distance, the scope and urgency of other imperial obligations, and the transient compliance of other imperial subunits. A subunit was less likely to enjoy autonomy if it was riven by internal factionalism or made demands on the center and more likely to enjoy autonomy if it maintained internal unity and remained compliant.<sup>147</sup> It was more likely to enjoy autonomy concerning issues thought locally to be of great importance if those same issues happened coincidentally to be matters of indifference to the imperial

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139. See, e.g., FINER, *supra* note 21, at 498–99.

140. This was, for example, the policy preference of the Roman emperor Claudius. SCULLARD, *supra* note 115, at 306; GOODMAN, *supra* note 111, at 112.

141. Bowman, *supra* note 118, at 361.

142. *Id.*

143. MACHIAVELLI, *supra* note 66, at 31.

144. Scheidel, *supra* note 108, at 2–4.

145. GOODMAN, *supra* note 111, at 137–38.

146. *Id.*

147. GOODMAN, *supra* note 111, at 103; FINER, *supra* note 21, at 382–84, 498–99.

center.<sup>148</sup> Local autonomy was correspondingly less likely as to those things in which the center took any significant or continuing interest.<sup>149</sup>

In general, imperial centers treated subunit autonomy instrumentally, as a negotiable token; such policies certainly had little to do with subjective feelings of imperial solidarity. The Romans, for example, highly admired Greek civilization yet first manipulated and, when it suited them, unsentimentally extinguished one of Greece's great and signature achievements—its democracy.<sup>150</sup> At the same time, the Romans loathed the Jews yet granted them significant privileges of self-rule because of Judea's strategic importance.<sup>151</sup>

Another significant contingency concerned the specific goals of the imperial center. The Caliphate, for example, was not Persia; it did not seek merely to extract wealth to support an opulent imperium but to Islamicize conquered populations and to spread the corresponding sacred law and language of *sharia* and Arabic, respectively.<sup>152</sup> The ambition of this imperial goal required much tighter initial control of subject populations than was the case in merely extractive empires.<sup>153</sup> On the other side of the ledger lay the highly variable factor of the perceived importance of autonomy to subject populations. Some peoples, such as the Ubii, a Germanic tribe, considered admission into the Roman empire a kind of distinct privilege and readily accepted integration into the empire.<sup>154</sup> The Greeks initially welcomed the Romans as liberators from Macedonian rule, though they later found Roman rule to be even less congenial.<sup>155</sup> Other peoples, such as the early Britons and the Jews, fought bitterly and consistently against subordination.<sup>156</sup>

### *B. Early Modern Empires*

If we turn our attention to early modern empires—those of Spain, Portugal, Britain, and France, both within Europe and across the Atlantic—the story is much the same: imperial states utilized similar methods of acquisition and control, creating similar kinds of opportunities for provincial autonomy under circumstances of similar contingency.

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148. Scheidel, *supra* note 108, at 10.

149. *See id.*

150. SCULLARD, *supra* note 115, at 194–96; GOODMAN, *supra* note 111, at 155–56, 229.

151. FINER, *supra* note 21, at 562; SCULLARD, *supra* note 115, at 258.

152. 2 FINER, *supra* note 21, at 671–72, 725.

153. 1 *id.* at 73.

154. GOODMAN, *supra* note 111, at 220–21.

155. *Id.* at 229.

156. GOODMAN, *supra* note 111, at 137, 208–12, 255–56; FINER, *supra* note 21, at 562.

First and foremost, the methods by which a European empire might be assembled during, say, the fifteenth through seventeenth centuries did not differ substantially from the methods available in ancient times and, if anything, had by then become more formalized. According to Elliott, there were during this period two widely recognized ways in which “newly acquired territory might be united to a king’s other dominions.”<sup>157</sup> Under the method of “‘accessory’ union, . . . a kingdom or province . . . was regarded juridically as part and parcel” of the monarch’s existing dominions, “with its inhabitants possessing the same rights and subject to the same laws.”<sup>158</sup> Under the other, known as *aeque principaliter*, “the constituent kingdoms continued after their union to be treated as distinct entities, preserving their own laws, *fueros* [constitutions or corporate charters] and privileges.”<sup>159</sup> In this second, and generally more common, type of acquisition, “the king was expected, and indeed obliged, to maintain [the acquired community’s] distinctive identity and status.”<sup>160</sup> Often, the acquiring monarch was required to swear an oath to uphold the laws and customs of the newly acquired community, and many monarchs, if not all, took those oaths quite seriously.<sup>161</sup> Thus, subunits of a geographically compact, European imperium might, even in early modern times, operate under laws and customs different from those of other subunits or the imperial metropole and thus enjoy some degree of autonomy and freedom—although again, it must be kept in mind that “freedom” in this sense most often meant the right to be ruled by a resident, native monarch rather than a distant, nonresidential one.<sup>162</sup> However, as we shall soon see,<sup>163</sup> the native monarch might sometimes be subject to local customary or even constitutional constraints that would then in principle bind the imperial prince who either stepped directly into the shoes of the traditional ruler or governed through him subject to his own pre-existing constraints.

In the case of overseas holdings, the sheer fact of distance, and the limitations it imposed on oversight, communication, and the projection of power, sometimes left imperial centers with little choice but to tolerate some degree of local self-rule under locally developed customs and practices. Indeed, the more “external” or “nonstrategic” peripheries of overseas empires might from time to time find themselves “virtually

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157. Elliott, *supra* note 31, at 52.

158. *Id.*

159. *Id.* at 52–53.

160. *Id.* at 53. Koenigsberger gives a similar account employing somewhat different terminology. Koenigsberger, *supra* note 31, at 135–36.

161. For example, newly crowned Spanish kings, who after 1479 assumed simultaneously the Crown of Aragon, were required to travel to Aragon and swear an oath “to uphold all its constitutions.” J. H. ELLIOTT, *REVOLT OF THE CATALANS* 2, 149 (1963).

162. Koenigsberger, *supra* note 31, at 135–36.

163. *See infra* Section III.C.

independent, the European presence being maintained by persons who owed little to king or kingdom.”<sup>164</sup>

Numerous factors contributed to the autonomy of imperial subunits in these extended early modern empires. Life was different on the frontier, and legal regimes imported wholesale from the very different European context sometimes proved poorly suited for the new circumstances, necessitating local improvisation.<sup>165</sup> Colonial officials often had to react to local events quickly and on their own authority since distance made prior consultation impossible.<sup>166</sup> These reactions over time did not always dependably and dutifully reflect the kinds of decisions that might have been made at the metropolitan center, since “the central value system invariably became attenuated in the outlying reaches.”<sup>167</sup> Even outright disobedience might go essentially unpunished; in the French Caribbean, for example, “[a]ll evidence suggests that mandates from Paris that contradicted island customs and beliefs were not well enforced, or at all.”<sup>168</sup> In these conditions, it cannot be surprising in the least if provincial communities began to develop bodies of local law and custom that reflected local priorities and that as a result may have operated in some tension with policies and imperatives established at the imperial center.

There is, moreover, considerable evidence that provincial deviations sometimes extended beyond the specifics of this or that policy to basic structures and practices of local governance. Where indigenous populations considered by the empire to be subject to its authority nevertheless retained some degree of functional autonomy, this was of course a given,<sup>169</sup> and North American indigenous forms of government were sometimes considerably more inclusive and consensual than those imported by Europeans.<sup>170</sup> Even settler populations, however, sometimes adopted forms of political self-organization that conflicted with imperial policies favoring straightforwardly hierarchical administration. In British North America, for example, “[t]he absence of close control by the British crown in the early stages of colonization left considerable latitude for the

164. Bushnell, *supra* note 90, at 20.

165. J. H. ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA, 1492–1830*, at 127 (2006).

166. Leslie Choquette, *Center and Periphery in French North America*, in *NEGOTIATED EMPIRES*, *supra* note 88, at 193, 194.

167. Amy Turner Bushnell & Jack P. Greene, *Peripheries, Centers, and the Construction of Early Modern American Empires*, in *NEGOTIATED EMPIRES*, *supra* note 88, at 1, 4 (quoting Edward Shils, *Centre and Periphery*, in *THE LOGIC OF PERSONAL KNOWLEDGE: ESSAYS IN HONOUR OF MICHAEL POLANYI* 117, 124 (Polanyi Festschrift Comm. ed., 1961)).

168. Philip P. Boucher, *The “Frontier Era” of the French Caribbean, 1620s–1690s*, in *NEGOTIATED EMPIRES*, *supra* note 88, at 207, 210.

169. See, e.g., Choquette, *supra* note 166, at 200 (describing such autonomy in French Canada).

170. STASAVAGE, *supra* note 30, at 39–41.

evolution of those forms of government that seemed most appropriate to the people actively involved in the process of overseas enterprise and settlement.”<sup>171</sup> For the most part, this involved the establishment of institutions of provincial self-government in the form of representative assemblies, as well as distribution of the franchise on a considerably wider basis than would have been permissible in the home country.<sup>172</sup> Rumors that the Plymouth Colony had established some kind of “democracy,” for example, reached London as early as 1623, requiring quick contradiction by colonial authorities.<sup>173</sup>

Interestingly, just as colonial isolation could lead to the development of non-conforming innovations in local self-governance, so, too, could connection. When the British monarch Charles I tilted toward royal absolutism by refusing to convene Parliament for more than a decade beginning in 1629, British North American colonists responded by asserting all the more emphatically what they viewed as their historic rights as Englishmen by insisting on regular convocation of colonial representative bodies.<sup>174</sup> Adoption of local forms of quasi-democratic self-governance thus served as a form of direct defiance of autocratic drift at the imperial center.<sup>175</sup>

As with ancient empires, the degree of autonomy and self-rule enjoyed by subject populations during the early modern period was thus contingent on numerous variables: the manner by which an imperial subunit was acquired; the specific terms of the acquisition; the seriousness with which the imperial center took its obligations to rule acquired possessions according to their own laws and customs; the degree to which exigencies of war and the need for revenue made demands on the center, requiring it in turn to make demands on subunits for participation and funds; distance from the metropolitan core; the capacity of the center to undertake surveillance and its stomach for enforcing its own rules in remote corners of sprawling empires; the political views of settler populations concerning indigenous populations or the metropolitan center; and many other factors.

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171. ELLIOTT, *supra* note 165, at 134. Elliott observes that this discretion was subject in principle to limitations contained in the relevant royal charters. *Id.*

172. *Id.* at 134–35.

173. *Id.* at 134.

174. *Id.* at 135.

175. In a sense, the main problem facing distant imperial centers was not so much the political heterogeneity of their overseas subunits and the internal chafing associated with provincial obstreperousness or even occasional rebellion, but what can probably be more accurately described as the risk of secession from the empire by a rootstock of the mother country. This seems in fact like a fair description of the American “revolution.”

*C. A Case Study: Catalonia in the Seventeenth-Century Spanish Empire*

The discussion so far has been somewhat abstract and synthetic, and it may therefore be useful at this point to examine a concrete example of center-periphery conflict in an actual imperial setting. The long and increasingly bitter conflict between Catalonia and the Spanish monarchy during the first half of the seventeenth century provides an example that may be as pertinent as any to the kind of struggle that might conceivably develop in the United States. That conflict pitted a rich, populous province with a long history of considerable autonomy, a well-developed tradition of constitutional constraint on the scope of royal authority, and a strong local attachment to inherited freedoms on the one hand against, on the other, an imperial government that commanded considerable resources and fierce loyalty from many quarters of the empire but was overextended by multiple commitments and sought urgently to marshal all its subunits to assist in the achievement of objectives deeply important to the crown, but as to which Catalans were largely indifferent.

The Principality of Catalonia had since the twelfth century comprised a part of the Crown of Aragon, a jurisdiction that also included the kingdom of Valencia.<sup>176</sup> The form of union, not atypical for its time, was dynastic, meaning that each component of the kingdom retained its own traditional institutions and forms of government, sharing only a ruling dynasty.<sup>177</sup> When Ferdinand assumed the throne of Aragon in 1479, he rejected opportunities to centralize power and instead “took pains to resurrect and reinvigorate the old contractual State, and those of its institutions which protected the subject against the abuse of royal power.”<sup>178</sup> This put the Crown of Aragon in quite a different position from that of Castile, in which “the foundations of absolute royal power” were quickly being laid.<sup>179</sup>

The Crown of Aragon was subsequently united with that of Castile by the marriage of Ferdinand and Isabella, and this union followed the same pattern as the dynastic union of Aragon: each unit “retained unaltered its own laws and institutions.”<sup>180</sup> Indeed, because this was the manner by which Spain acquired the majority of its European possessions, a Spanish king occupied a potentially awkward position: “Almost an absolute monarch in Castile, he was a ruler with very limited powers in [his other

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176. TEOFILO F. RUIZ, *SPAIN’S CENTURIES OF CRISIS 1300–1474*, at 3–4, 63–66 (2007).

177. ELLIOTT, *supra* note 161, at 3. I follow Elliott’s magnificent and gripping account of the conflict in this section.

178. *Id.* at 5.

179. *Id.*

180. *Id.* at 2, 7.

possessions].”<sup>181</sup> Despite the potential disadvantages of this arrangement for the consolidation and projection of imperial power, Spanish monarchs generally took seriously their obligations to rule acquired provinces according to local laws and customs.<sup>182</sup>

Among Spanish possessions, Catalonia stood out for the extensive set of constraints its laws, customs, and even written constitutions placed on the authority of its prince, an office after 1479 held by the king of Spain. Its constitutions, for example, limited the size of any royal administrative apparatus based within the province; prohibited the creation of new offices without the consent of the Catalan legislature, the Corts; and required all royal offices below the viceroyalty itself to be held by native Catalans.<sup>183</sup> The constitutions required decrees issued by the king’s representative, the viceroy, to comport in all respects with Catalan constitutions.<sup>184</sup> Tax revenues could be raised locally by action of the Diputació,<sup>185</sup> a Catalan body “whose main purpose was to protect the Principality’s ancient laws from any infringement by royal officials.”<sup>186</sup> The constitutions limited the Catalan obligation to provide troops to service solely within the physical territory of the province.<sup>187</sup> The obligation of a Catalan householder to provide support for royal troops billeted in Catalan territory was limited to providing a soldier “a bed, a table, a light, and service,” along with “salt, water and vinegar. Nothing else could be demanded of him.”<sup>188</sup> Voluntary contributions to the royal fisc, made at the request of the central government, could be granted only by unanimous vote of the Corts.<sup>189</sup> Moreover, the Catalan constitutions provided that no decree issued by Catalonia’s ruler was valid unless and until the sovereign had physically come to Catalonia and there swore an oath “to uphold all its constitutions.”<sup>190</sup> To top things off, Catalonia was amply stocked with lawyers well-versed in minute examination of its constitutions for the purpose of evaluating the validity of requests emanating from Madrid,<sup>191</sup> a bar guided by the generally prevailing Catalan view that “[t]he king had sworn to observe all their laws, and the arbitrary revocation of even one of them implied the breaking of the sacrosanct contract on which their existence as a nation was founded.”<sup>192</sup>

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181. *Id.* at 8.  
182. *Cf. id.* at 15, 158.  
183. *Id.* at 78–79.  
184. *Id.* at 81.  
185. *See id.* at 134–35.  
186. *Id.* at 130.  
187. *See id.* at 185.  
188. *Id.* at 390.  
189. *Id.* at 219.  
190. *Id.* at 149.  
191. *Id.* at 147, 219.  
192. *Id.* at 375.

In addition to the issue of local laws and privileges was the question of money. Although possession of an empire could enrich a metropole, thereby enhancing its power,<sup>193</sup> expanding, maintaining, and defending an empire could be costly.<sup>194</sup> Imperial centers generally had two sources of revenue: revenue generated by lands and other resources owned directly by the crown and revenue raised through various kinds of taxes imposed on imperial subunits.<sup>195</sup> While collecting revenue from local sources upon a royal request was well understood to be a basic obligation of vassals and other imperial clients, the issuance of such a request immediately altered the usual bargaining positions of the parties, offering imperial subunits the opportunity to negotiate and, in so doing, to extract concessions from the center.<sup>196</sup> Where a monarch ruled a province under an obligation to observe its laws and customs, a layer of traditional local restrictions on taxation might also apply.<sup>197</sup>

Over time, variations arising from these traditional restraints, combined with one-off concessions made or privileges granted by monarchs in negotiating a series of revenue requests, could result in substantial asymmetries among the revenue-supplying obligations of different imperial subunits. Catalonia was the beneficiary of such a succession of events: by the early seventeenth century, it paid a considerably smaller portion of its wealth into the royal treasury than many other possessions of the crown, and far less than Castile itself, upon which the crown relied much more heavily for revenue and military service.<sup>198</sup>

This arrangement had fostered simmering mutual suspicion for some time—on the Castilian side from the belief that wealthy Catalonia was not paying its way in the empire, and on the Catalan side from the suspicion that the crown was always looking for ways to undermine its traditional laws and privileges and its consequent autonomy.<sup>199</sup> Beginning in about 1612, reasonably tolerable relations between Barcelona and Madrid began to sour.<sup>200</sup> A wave of banditry, apparently supported to some extent by a faction of the Catalan nobility, swept the province, and Catalans complained that the crown was not discharging its obligation to maintain imperial order.<sup>201</sup> A royal military force was dispatched to Catalonia to restore order and did so quickly and effectively, but the force made use of tactics forbidden by the Catalan constitutions, causing some degree of

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193. Elliott, *supra* note 31, at 59–60.

194. *Id.* at 55, 63, 65.

195. ELLIOTT, *supra* note 161, at 94–96, 143–44.

196. *Id.* at 185–90, 192.

197. *Id.* at 144.

198. *Id.* at 184–85.

199. Fear that the central authorities would attempt to “castilianize” Spanish possessions was not unique to Catalans. *Id.* at 14–20, 185.

200. *Id.* at 110–11, 114.

201. *Id.* at 110–11, 122.

consternation.<sup>202</sup> In 1621, another conflict arose when Philip IV, upon his accession to the Spanish throne, reappointed the existing viceroy, whom the Catalans disliked intensely.<sup>203</sup> The Diputació found the appointment to violate the Catalan constitutions and took the position that the appointment was invalid because the new king had not yet personally come to Catalonia and sworn his oath.<sup>204</sup>

Tensions truly came to a head a few years later, when a combination of exigencies—a plague and drought in Castile, a decline in the flow of American silver, and unrest in other Spanish possessions—caused simultaneously an increase in demands on the royal fisc and a decline in its ability to meet that demand from its usual sources of revenue.<sup>205</sup> This led Spanish officials to look for possible revenue from provinces they considered to be financially underperforming, above all Catalonia.<sup>206</sup> The situation was rendered even more urgent in 1635 by the outbreak of war with France, which shared a border with Catalonia, necessitating immediate measures to raise troops and revenue in Catalonia sufficient for its defense.<sup>207</sup> The increasingly financially strapped crown billeted existing Spanish regiments in Catalonia, demanding that they be supported by the local population.<sup>208</sup> The troops behaved badly, and Catalans claimed the protection of their constitutions, which expressly limited the province's obligation to provide support to royal soldiers.<sup>209</sup> The desperation of the crown to defend itself and the increasing reluctance of the Catalans to participate in that effort eventually led to a Catalan popular revolt in 1640 that Spanish forces, even though resident, were powerless to put down, fully engaged as they were against the French.<sup>210</sup> Eventually, Catalonia seceded from Spain, formed an alliance with France, soured on that relationship, and soon rejoined the Spanish empire, but on more favorable terms.<sup>211</sup>

Throughout these conflicts, what concrete tactics of influence were employed by each side? The royal government made extensive use of its own parallel structure of governance, exercised through the viceregal administrative apparatus, and while it mainly tried to show appropriate respect for traditional local laws and privileges, it did not in every case manage to do so.<sup>212</sup> When time permitted more deliberate tactics, the

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202. *Id.* at 122.

203. *Id.* at 148–49.

204. *Id.*

205. *Id.* at 185–90, 192.

206. *See id.* at 192–93, 199.

207. *Id.* at 306–08.

208. *Id.* at 390–91.

209. *See id.*

210. *Id.* at 418–21.

211. *Id.* at 504, 535, 540–41.

212. *Id.* at 193, 390.

crown often sought to achieve its objectives by attempting to “break the alliance of city [Barcelona] and Diputació, win over by bribery, promises or threats as many influential members of the city oligarchy as possible, and either isolate or suborn the ringleaders of the opposition.”<sup>213</sup> Furthermore, “[b]y a judicious use of patronage, it could convert enemies into friends, and turn the most bitter opponents of the regime into willing partisans.”<sup>214</sup> Indeed, it seems likely that the consistent failure of the crown over many decades to distribute patronage with sufficient generosity among the Catalan elite “help[s] to explain the weakness of the ties that bound the Catalan governing class to the Court, and the consequent refusal of that class to fight for the preservation of the Castilian connection when the revolution occurred.”<sup>215</sup>

Finally, the threat of Spanish force was a constant, and its efficient deployment on Catalan territory in 1616 to suppress banditry<sup>216</sup> demonstrated vividly how force might later be used against Catalan interests rather than in pursuit of them. Yet as a series of contingent events weakened the crown, requiring deployment of all its military forces against foreign enemies, the threat of central deployment of force against Catalonia receded, encouraging Catalan resistance and then intransigence.<sup>217</sup>

On the Catalan side, several pathways of influence stand out. First, Catalans had ready access to local royal officials.<sup>218</sup> Since all local officials working for the crown below the viceroy himself were by law native Catalans, provincial elites would have enjoyed ample back-channel routes to the official apparatus through social and political connections.<sup>219</sup> And of course provincial officials of sufficient stature were able to appeal directly to the viceroy when necessary.<sup>220</sup>

Second, when appeals to the viceroy were unavailing or were deemed a likely waste of time, Catalan officials frequently bypassed the viceregal apparatus entirely and resorted to direct supplication of the king.<sup>221</sup> Numerous Catalan missions made their way to court for a wide variety of reasons. Sometimes missions were dispatched to complain to the king or his ministers about the behavior of the viceroy;<sup>222</sup> sometimes they addressed the substance of royal policy;<sup>223</sup> and occasionally the province

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213. *Id.* at 167.

214. *Id.*

215. *Id.* at 475–76.

216. *See id.* at 121–22.

217. *Id.* at 183, 185, 188–89, 306, 308, 310–12, 317, 319.

218. *Id.* at 78–79, 81.

219. *Id.* at 78–79.

220. *See id.* at 137–38, 340–41.

221. *See, e.g., id.* at 123, 151.

222. *Id.* at 108, 123, 317.

223. *See id.* at 114, 146.

felt the need to send “a special ambassador to Madrid to prostrate himself at His Majesty’s feet”<sup>224</sup>—that is, to beg outright for favorable treatment. Although supplication is in many ways a one-way street, that does not preclude its success as a tactic of influence; for example, a delegation dispatched to Madrid by the Diputació in 1618 to complain about illegal actions of the viceroy resulted in a royal reprimand and a direct instruction to the viceroy to “take care to see that the constitutions are observed.”<sup>225</sup>

A third tactic of influence on which the Catalans sometimes relied was negotiation. Of course, the possibility of truly meaningful negotiation depends greatly on often unpredictable contingencies affecting the relative bargaining strength of the parties. Nevertheless, in some domains, especially in the matter of royal finances, negotiation was routine because, outside its American possessions, the crown had little capacity to raise money directly; instead, it had since medieval times relied mainly on the discharge by vassal princes and states of their obligation to provide revenue upon request.<sup>226</sup> Thus, Catalan officials negotiated with the royal court over sums to be paid into the royal treasury, as well as sums to be loaned to the king to pay for royal visits to the province.<sup>227</sup> In the course of these negotiations, provincial officials sometimes enjoyed a sufficiently strong bargaining position to impose conditions, including security for loans,<sup>228</sup> reductions in amounts deemed owing, and even outright waiver of delinquent obligations.<sup>229</sup> The province was also able to negotiate over contributions of troops to royal military forces, a negotiation the terms of which often included financial compensation from the crown to offset provincial expenses.<sup>230</sup>

These largely cooperative forms of influence were supplemented by an elaborate menu of uncooperative tactics. At various times during this period, as we have seen, the province refused requests to supply funds and troops.<sup>231</sup> It dismissed pleas for military assistance in the form of provision of material support to royal regiments engaged actively in defending against a foreign invasion.<sup>232</sup> It invoked its traditional laws as a basis for refusing to cooperate with or to resist royal initiatives.<sup>233</sup> Ultimately, once central power weakened sufficiently to undermine the credibility of the use of force by the imperial center, Catalans resisted royal authority much

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224. *Id.* at 405.

225. *Id.* at 123–124 (quoting Letter from The King to Alburquerque (Mar. 10, 1618)).

226. *Id.* at 185–90, 192.

227. *Id.* at 243.

228. *Id.* at 267–68.

229. *Id.* at 267–68, 440.

230. *See id.* at 325, 334.

231. *Id.*

232. *Id.* at 334.

233. *Id.* at 390.

more decisively through a destructive popular rebellion, first by threatening to seek, and then actually seeking, assistance in resisting central authority from a foreign enemy of Spain, and finally by deploying what amounts to the nuclear bomb of subnational tactics: seceding altogether from the empire.<sup>234</sup>

In sum, the availability of all these tactics, cooperative and uncooperative alike, and the opportunities they offered for successful defense of Catalan autonomy and self-governance were highly contingent on the needs and relative bargaining strength of the parties; subjective feelings of loyalty and betrayal; the extent to which officials at both levels felt obliged to fulfill promises of recent or ancient vintage; calculations of short- and long-term costs and benefits; and a host of other factors.

#### IV. SUBNATIONAL AUTONOMY IN A CENTRALLY AUTHORITARIAN UNITED STATES

In light of the historical record reviewed above, let us return now to the question of the possible impact on subnational liberal democracy of an autocratic takeover of the U.S. national government. I have argued to this point that the autonomy of subnational units, in both federations and empires, is to a great degree contingent and that a significant contingency concerns the specific pathways of influence made available to each level by the particular architecture of governance that happens to prevail in that state.<sup>235</sup> If I am correct that an authoritarian takeover of the U.S. national government is not unlike the acquisition by an autocratic empire of new subunits,<sup>236</sup> then the initial question in the case of the United States concerns the ways in which substituting autocracy for liberal democracy at the national level within the existing federal structure would alter the pathways of influence now available to American states to assert and defend their autonomy.

For purposes of this thought experiment, let us make the following assumptions. In 2024, Republicans retake Congress and the presidency. Donald Trump might well be the winning presidential candidate, but let us suppose instead that the winner is a Trump acolyte who is smarter, less

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234. *Id.* at 503–12.

235. *See supra* Part III; *see also* Gardner, *supra* note 68, at 541–42.

236. I do not mean to imply, in the analysis that follows, that Donald Trump's accession to the presidency was entirely exogenous to the American political system, as though a foreign army suddenly appeared on the border. Clearly, Trump's win was attributable to events endogenous to the U.S. political system. But that endogeneity does not make the imperial analogy inapt: as we have seen, independent polities often joined expanding empires for a variety of endogenous reasons, including invitation by dissident insiders who wish to subvert the existing regime. *See* Ash Bâli & Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U. CHI. L. REV. 257, 258 n.1, 262–64 (2018).

self-involved, more determined, and has a longer attention span—a truly dangerous populist authoritarian. Assume further that once Republicans assume power, the party displays much the same kind of internal discipline as did Senate Republicans under Mitch McConnell’s leadership between 2017 and 2021. And let us assume as well that the party continues its current populist stance of rejecting out of hand the legitimacy of the exercise of power by Democrats except in the most trivial of circumstances.<sup>237</sup>

Meanwhile, at the state level, with Republican trifectas in twenty-three states compared to fifteen for Democrats,<sup>238</sup> assume that Republicans continue in this redistricting cycle the policy of aggressive partisan gerrymandering they successfully pursued following the 2010 census<sup>239</sup>—but this time, following the Supreme Court’s decision in *Rucho v. Common Cause*,<sup>240</sup> in the knowledge that there is no possibility of federal judicial intervention.<sup>241</sup> And assume an equally aggressive Republican commitment to continue enacting measures at the state level to suppress voting by Democrats.<sup>242</sup> Suppose the result is a Republican lock on both chambers of Congress and the presidency for the remainder of the decade, along with, by mid-decade, secure and undivided control of more than half the states. Finally, let us assume further, and I think plausibly, that at least some substantial number of Republicans in liberal democratic states will function much like an oligarchic faction in an ancient Greek city-state: they wish to hold power locally and to receive the favor and blessings of the central authorities and thus are willing to work actively in concert with central government officials to undermine the existing state regime and transfer power to themselves.<sup>243</sup>

How might American states committed to liberal democracy fare under these circumstances? It seems certain that two consequences would follow. First, American states would find some pathways by which they

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237. *E.g.*, Gardner, *supra* note 44, at 882–84.

238. *State Government Trifectas*, BALLOTPEdia, [https://ballotpedia.org/State\\_government\\_trifectas](https://ballotpedia.org/State_government_trifectas) [<https://perma.cc/S538-SHV3>] (last visited Sept. 27, 2021).

239. *See* Gardner, *supra* note 44, at 904–08.

240. 139 S. Ct. 2484 (2019).

241. *Id.* at 2508.

242. For an overview of tactics before 2018, see CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 22–43 (2018). For more recent examples, see *Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUST., *supra* note 16.

243. To give just one example, Republicans in Arizona conducted a baseless ballot “audit” for the sole purpose of discrediting the outcome of the 2020 election. Sam Levine, *Arizona Republicans to Begin Auditing 2020 Ballots in Effort to Undermine Election Results*, GUARDIAN (Apr. 22, 2021), <https://www.theguardian.com/us-news/2021/apr/22/arizona-republicans-begin-audit-2020-election-ballots> [<https://perma.cc/G97L-252F>].

had previously achieved some influence on national policy making to be simply closed off and no longer available. Second, the autocratic dispositions of the central government, and the tactics that it would likely employ to exercise control over subnational units, would open up new pathways of influence of the kind we have encountered in our exploration of the tactics of subunit control employed by empires.

*A. Pathways of Influence Lost*

To begin, it seems highly likely that some of the pathways of influence by which American states now routinely exert influence on national decision-making would simply be closed off to subnational liberal democracies. For example, subnational units in federal states frequently rely on their representatives in the federal legislature, particularly in a second chamber, to defend their interests in the halls of national policy making.<sup>244</sup> But if, by hypothesis, both chambers of Congress are controlled by a well-disciplined authoritarian party, that avenue of subnational influence is very likely blocked, and all the more so when the state in question is a dissident liberal democracy that elects members of a minority liberal party to represent it in Congress—assuming, of course, that election-rigging measures have not advanced to the point where members of an opposition liberal party cannot reliably get elected to national office in anything other than token numbers.<sup>245</sup>

Similarly, American states often exercise informal influence at the national level through back-channel exploitation of their connections within national political parties.<sup>246</sup> However, on the assumptions I have made about tight and disciplined control of Congress by a committed authoritarian party, subnational influence within a national opposition party is highly unlikely to translate into influence on national policy.

Another route by which American states have long exerted at least some influence over the content of national policy is through litigation in the federal court system.<sup>247</sup> Given that one of the first priorities of an authoritarian administration consistently has been to undermine the independence of the judiciary<sup>248</sup> and that the Republican Party has already made considerable headway in longstanding efforts to capture the federal

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244. Gardner, *supra* note 68, at 557–60.

245. One of the most immediate and urgent tactics of authoritarian regimes is to rig elections. DIAMOND, *supra* note 47, at 64–65.

246. Gardner, *supra* note 68, at 560–62; *see also* Kramer, *supra* note 85, at 219.

247. Gardner, *supra* note 68, at 538–39.

248. Gardner, *supra* note 44, at 874 (quoting DIAMOND, *supra* note 47, at 64–65).

judiciary,<sup>249</sup> that avenue of recourse is not likely to offer much opportunity for influence.<sup>250</sup>

American states also have long enjoyed informal avenues of influence on federal policy by working through professional, agency-to-agency contacts in the federal bureaucracy.<sup>251</sup> It seems safe to presume that a federal bureaucracy controlled by an authoritarian president will not remain receptive to such contacts. President Trump worked constantly to undermine the independence, impartiality, and professionalism of the federal bureaucracy, and presumably such efforts would continue.<sup>252</sup>

In many federal states, subnational units influence national policy informally through cooperative bargaining and negotiation.<sup>253</sup> However, the possibilities for intergovernmental cooperation with liberally democratic states, we may safely assume, will be substantially reduced when the central government is authoritarian, though this depends greatly on contingencies of governmental objectives and relative bargaining power. In short, what seems very likely to disappear almost immediately

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249. Of the Supreme Court appointments in the last half century, fifteen of nineteen have been by Republican presidents; the last time a Democrat appointed the Chief Justice was 1946. *Justices 1789 to Present*, SUP. CT., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/GS5R-K5DF>] (last visited Sept. 28, 2021); see also STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008) (discussing the long-term Republican strategy to remake the federal judiciary); TERRI JENNINGS PERETTI, *PARTISAN SUPREMACY: HOW THE GOP ENLISTED COURTS TO RIG AMERICA'S ELECTION RULES* (2020) (same); Gardner, *supra* note 44, at 884–90 (discussing state-level efforts); James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 *FORDHAM L. REV.* (forthcoming 2021) (discussing impact of judicial appointments on election law); Ann E. Marimow & Matt Kiefer, *Judges Nominated by President Trump Play Key Role in Upholding Voting Limits Ahead of Election Day*, WASH. POST (Oct. 31, 2020), <https://www.washingtonpost.com/politics/2020/10/31/trump-judges-voting-rights/> [<https://perma.cc/W9U8-DJWP>].

250. See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 2* (2019) (“[P]arty polarization [has] turned the Supreme Court into a Court in which ideological divisions follow party lines.”).

251. Gardner, *supra* note 68, at 563–65.

252. For example, he repeatedly denigrated the civil service as a disloyal “deep state”; fired the FBI Director and numerous inspectors general for undertaking impartial investigations of wrongdoing; disregarded longstanding informal norms regarding the independence of the Justice Department; and undermined CDC cooperation with state officials in responding to the pandemic, among many other flagrant violations. Peter Stone, *The Real Deep State Is Trump*, NEW REPUBLIC (Oct. 2, 2020), <https://newrepublic.com/article/159551/real-deep-state-trump> [<https://perma.cc/P8VC-Q8MC>]; Jen Kirby, *Trump's Purge of Inspectors General, Explained*, VOX (May 28, 2020), <https://www.vox.com/2020/5/28/21265799/inspectors-general-trump-linick-atkinson>; Martha Kinsella, Gareth Fowler, Julia Boland & Daniel I. Weiner, *Trump Administration Abuses Thwart US Pandemic Response*, BRENNAN CTR. FOR JUST. (Aug. 6, 2020), <https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response> [<https://perma.cc/SW3Q-FXZ8>].

253. Gardner, *supra* note 68, at 551–55.

with a full authoritarian takeover at the national level would be every form of subnational influence that relies on methods that are fundamentally cooperative; that is, “cooperative federalism”<sup>254</sup> itself is likely to be an immediate casualty.<sup>255</sup>

It follows that, of the pathways of subnational influence now routinely exploited by American states, those remaining will rely mainly on negative tactics, ranging from the withholding of voluntary cooperation to outright defiance. Thus, states might refuse to participate in administering or enforcing illiberal federal programs, or if they felt it important to maintain the appearance of cooperation, they might veil their non-cooperation behind a highly formalistic process of endless foot-dragging.<sup>256</sup> In some federal states, such as those holding membership in the European Union, it is possible for subnational units to leapfrog their own national governments and protect themselves by invoking the coercive power of a supranational actor,<sup>257</sup> but no such possibility exists in the U.S. context.

At the extreme, American states might openly defy national authority by simply refusing to do things national law or the national government demand of them, risking the possibility of a coercive federal response.<sup>258</sup> Liberal democratic states could threaten secession<sup>259</sup> or actually attempt it, but that risks a genuinely dangerous and violent counter-response; Trump threatened violence against states and localities upon far lesser provocations.<sup>260</sup> Unlike the circumstances in which Catalonia found itself in the seventeenth century, no nearby powerful foreign state is available with which an American state could form an effective alliance.

More broadly, however, the problem with negative tactics is that they are principally defensive in character and thus do not actually advance

254. “Cooperative federalism” describes a system oriented toward the need for joint action by both levels of government in a coordinated way “in order to reduce conflicts, to increase efficiency and avoid duplication.” PALERMO & KÖSSLER, *supra* note 55, at 46.

255. See Thomas A. Birkland, Kristin Taylor, Deseraï A. Crow & Rob DeLeo, *Governing in a Polarized Era: Federalism and the Response of U.S. State and Federal Governments to the COVID-19 Pandemic*, 51 PUBLIUS 650, 654 (2021) (observing that “cooperative federalism had begun to break down” during the earliest years of the Trump administration).

256. Gardner, *supra* note 68, at 536–37, 540–41.

257. *Id.* at 538–39.

258. *Id.* at 535–36.

259. There was a good deal of casual talk of this kind during the Trump years. Sometimes it went beyond talk: a ballot initiative supporting California secession was circulated in 2018, though it never appeared on the ballot. *California Independence Referendum in 2021 Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Independence\\_Referendum\\_in\\_2021\\_Initiative\\_\(2020\)](https://ballotpedia.org/California_Independence_Referendum_in_2021_Initiative_(2020)) [<https://perma.cc/2REF-5CBY>] (last visited Sept. 28, 2021).

260. See Lara Seligman, *In Crisis Mode, Trump Again Leans on the Military*, POLITICO (June 2, 2020, 3:48 PM), <https://www.politico.com/news/2020/06/01/trump-deploy-federal-assets-protests-294298> [<https://perma.cc/PT4L-LSTK>].

subnational goals; they merely hold off further deterioration in the possibility of realizing existing goals, pending a change of circumstances.

### *B. Pathways of Influence Gained*

An authoritarian takeover of the U.S. national government, however, would not mean the complete loss of all forms of positive or cooperative influence at the central level; it would mean only that the pathways by which such influence might be exerted will be different—they would be of the kind that offer themselves in an autocracy. At the cooperative end of the spectrum, as we have seen, any inventory of pathways of subunit influence in an autocracy surely must begin with the supplication of imperial officials.<sup>261</sup> In a sense, the very essence of autocracy is to narrow the channels of decision-making so that all of them run through the naked will of the supreme ruler or his designees.<sup>262</sup> Presumably, provincial subjects who enjoy status sufficient to gain on a regular basis the attention of imperial officials eventually will develop a keen sense of the kind of appeals to imperial will that will be successful and will cultivate the necessary rhetorical skills. We may thus expect American state officials to devote some effort to learning how effectively to supplicate officials high in the national governing apparatus.<sup>263</sup>

Given the reliance of imperial governance on personal relationships of clientelism and elite co-optation, subnational officials may also be able to exercise influence centrally by cultivating allies among the imperial

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261. Supplication has a long history of use even in democracies, where it has been used by the powerless to make demands upon government. DANIEL CARPENTER, *DEMOCRACY BY PETITION* 23–24 (2021).

262. Paul M. Johnson, *Autocracy*, in *A GLOSSARY OF POLITICAL ECONOMY TERMS* (2005), <http://webhome.auburn.edu/~johnspm/gloss/autocracy.phtml> [<https://perma.cc/XMN4-C7ZN>].

263. Lest readers think this too extravagant a claim, I note that the process has already begun. In 2021, former President Trump accused several Wisconsin Republican leaders of “working hard to cover up election corruption” in the Wisconsin results. Among those he accused was Chris Kapenga, president of the Wisconsin senate. In an open letter to Trump denying any such disloyalty, Kapenga wrote, “Let me first say that very few people have the honor of being named publicly by a United States president . . . I feel I need to respond even though you will likely never hear of it, as the power of your pen to mine is like Thor’s hammer to a Bobby pin.” Michelle Cottle, Opinion, *Dear Leader: A Near-Perfect Letter from a Trump Sycophant, Annotated*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/06/30/opinion/trump-letter-chris-kapenga.html> [<https://perma.cc/9DKA-82EQ>]. That is certainly the way it’s done. As Xavier Márquez writes in a forthcoming work, bizarrely inflated flattery serves as a form of “loyalty signaling” in political regimes whose leader is the subject of a “personality cult[.]” Ambitious sycophants can even generate an inflationary cycle of praise and flattery so as to distinguish themselves from mere ordinary sycophants. Xavier Márquez, *The Mechanisms of Cult Production*, in *RULER PERSONALITY CULTS FROM EMPIRES TO NATION-STATES AND BEYOND* 21, 21–22 (Kirill Postoutenko & Darin Stephanov eds., 2021) (forthcoming 2021).

ruling class—Republicans—either locally, within an aspiring shadow state government, or in Washington. Presumably, the mutual exchange of favors, in the form of financial benefits, honors, or privileges, could be a powerful currency in this enterprise. Other forms of largely cooperative influence include direct negotiation and bargaining when circumstances permit—that is, when the bargaining position of the central government is sufficiently weakened by external circumstances such that it needs to obtain voluntary cooperation from its subunits.<sup>264</sup>

In the bargaining context, among the constraints that might face an authoritarian U.S. national government may be a perceived need to maintain the outward appearance of democracy and even the need to retain a demonstrable possibility that the opposition might actually win office now and then. This requirement serves as a meaningful constraint on the behavior of authoritarians elsewhere in the world, a factor that has led to a change globally in the methods by which authoritarians gain power, from outright military coups in the mid-twentieth century to the contemporary preference for gaining power democratically and then maintaining it by rigging the electoral rules<sup>265</sup>—“competitive authoritarianism,” in the terminology of Levitsky and Way.<sup>266</sup> If so, then it is possible that such a constraint, in the context of the kind of clientelistic relationship typically relied upon by authoritarian regimes, could actually give an American state some bargaining power. In Argentina, for example, a federal state in which federal-provincial relations have been clientelistic during both authoritarian and liberal national regimes, provincial governors have long been able to extract fiscal concessions from the central government in exchange for providing political and electoral support to members of the incumbent or dominant party, in turn putting governors in a position to shore up their own popularity at home by distributing to voters the extracted resources.<sup>267</sup> Thus, an American governor who is in a position to deliver votes to a nationally authoritarian government may be able to extract some concessions that could help preserve the state’s autonomy.

The obvious problem here, however, arises from attempting to protect principles of subnational liberal democracy by using the means of influence afforded in a centrally authoritarian state: the most effective strategies tend to be ones that are inconsistent with the very democratic liberalism state officials would be trying to preserve. Supplicating central

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264. See *supra* Section III.C.

265. Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 13 (2016).

266. LEVITSKY & WAY, *supra* note 138, at 7–8.

267. Martín Ardanaz, Marcelo Leiras & Mariano Tommasi, *The Politics of Federalism in Argentina and Its Implications for Governance and Accountability*, 53 WORLD DEV. 26, 27–30 (2014). According to González, “[i]n Argentina, districts loyal to the president receive on average almost 60 percent more infrastructure funds than the opposition.” Lucas González, *Presidential Popularity and the Politics of Distributing Federal Funds in Argentina*, 46 J. FEDERALISM 199, 201 (2016).

authoritarians in terms they would find attractive or engaging in clientelistic swapping of electoral cheating for fiscal cheating are antithetical to the values on which liberal democracy is based.<sup>268</sup> Engaging in such behavior, not occasionally but routinely, with or without the approval of the state populace, could have badly deforming effects on the local character, rendering it ultimately unfit for the very democratic self-governance its actions are meant to preserve.<sup>269</sup>

#### CONCLUSION

Whether federalism would protect subnational liberal democracy against the effects of authoritarianism at the national level depends upon a host of contingencies: the particular structure of the federal state in question; the specific pathways of influence available to subnational units to protect their autonomy; and the goals, motivations, and determination of governments and populations at both levels. As a general proposition, these contingencies make it difficult to predict the results of an authoritarian takeover of the national government in the United States or any other federal state.

However, a few considerations suggest that the outcome in any particular case, though contingent on many details, might nonetheless be subject to certain general tendencies, and these tendencies by and large work in favor of an eventual strangling of subnational liberal democracy. First, as we have seen, autocratic tolerance for the exercise of subnational autonomy has tended to extend only to matters of indifference to the central state. In today's world, however, the scope of state responsibilities, and thus of state interest, has expanded far beyond basic matters of revenue collection and military affairs so that there are many fewer matters as to which an authoritarian central government is likely to be indifferent. In Singapore, it is a crime to sell chewing gum; in China to connect to an unauthorized web site; in Saudi Arabia, until 2017, for a woman to drive a car.<sup>270</sup> This suggests far less available space for meaningful subnational autonomy.

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268. *How Corruption Weakens Democracy*, TRANSPARENCY INT'L (Jan. 29, 2019), <https://www.transparency.org/en/news/cpi-2018-global-analysis> [<https://perma.cc/7H6J-N8U5>].

269. See Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 AM. J. POL. SCI. 328, 328–39 (discussing how corruption erodes the “domain of democracy”).

270. Leo Benedictus, *Gum Control: How Lee Kuan Yew Kept Chewing Gum Off Singapore's Streets*, GUARDIAN (Mar. 23, 2015, 2:27 PM), <https://www.theguardian.com/lifeandstyle/shortcuts/2015/mar/23/gum-control-how-lee-kuan-yew-kept-chewing-gum-off-singapores-streets> [<https://perma.cc/8H2Q-9E7X>]; Yaqiu Wang, *In China, the 'Great Firewall' Is Changing a Generation*, HUM. RTS. WATCH (Sept. 1, 2020), <https://www.hrw.org/news/2020/09/01/china-great-firewall-changing-generation/> [<https://perma.cc/X9WR-MJF2>]; Megan Specia, *Saudi Arabia Granted Women the Right to Drive. A Year On, It's Still Complicated*, N.Y. TIMES (June 24, 2019),

Second, the tendency in all autocracies, as they become better established, has been continually to tighten social and political controls.<sup>271</sup> The principal goal of authoritarian regimes, after obtaining power, is to retain it.<sup>272</sup> Tightening control over social and political behavior makes successful opposition to the regime increasingly unlikely as time passes.<sup>273</sup>

Third, liberal democratic subnational units in an authoritarian federal state face a difficult dilemma in trying to influence national decision-making in their favor. On one hand, they have available to them a menu of uncooperative tactics, but such tactics serve at best as holding actions against central authoritarian policies; they do not advance the liberal goals of liberal subnational units, nor do they create any kind of margin of safety for subnational liberalism. They are veto tools and nothing more. On the other hand, more affirmative subnational pathways of influence of the kind that might actually secure a margin of safety for subnational liberal democracy tend to be self-defeating because they require tactics—bribery, exchange of favors, catering to authoritarian whims—that are largely incompatible with the liberal democracy they would be meant to preserve.

Thus, it seems to me that the survival of subnational liberal democracy in a centrally authoritarian federation, although not theoretically impossible, would require a confluence of highly favorable contingencies: a weak and distracted national government with very modest goals and little stomach for long-term strategizing and struggle, combined with considerable strength, resources, determination, and patience at the subnational level. Success, even indefinitely, might thus be possible against an authoritarian leader like Donald Trump, who had no plans and was concerned mainly with personal attention and adulation and perhaps the material benefits of kleptocracy.<sup>274</sup> But against a smart, effective, and determined authoritarian leader like Hungary's Victor Órban, Russia's Vladimir Putin, or Venezuela's Hugo Chávez, the odds seem to me much lower.

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<https://www.nytimes.com/2019/06/24/world/middleeast/saudi-driving-ban-anniversary.html> [<https://perma.cc/D2CL-ETWU>].

271. See Marie-Eve Reny, *Autocracies and the Control of Societal Organizations*, 56 *GOV'T & OPPOSITION* 39, 39–40 (Apr. 2, 2021).

272. Indeed, authoritarians typically consider public office and power a kind of personal property of which they cannot involuntarily be divested. GÜNTER FRANKENBERG, *AUTHORITARIANISM: CONSTITUTIONAL PERSPECTIVES* 134 (2020).

273. See, e.g., Lauren Mooney, *The Autocrats' Comeback: A Cautionary Tale*, *GEO. J. INT'L AFFS.* (July 27, 2018), <https://gjia.georgetown.edu/2018/07/27/autocrats-comeback/> [<https://perma.cc/QJ6T-22LG>].

274. Timothy K. Kuhner, *American Kleptocracy: How to Categorise Trump and His Government*, 28 *KING'S L.J.* 201, 202 (2017).