

OUR FEDERALISM AND OUR NATIONAL DEMOCRACY: COMPLEMENTS OR FOES?

AZIZ Z. HUQ*

This Essay reflects on the relationship between “federalism” and “national democracy.” More specifically, it considers the way in which the operation of formal state institutions can change the quality of national bodies necessary to democratic politics. State-level action can reduce the quality of national democracy even if it is motivated by national partisan forces. For example, state-level instruments can influence the possibility that national institutions either do or do not experience capture by minority factions, and are instead capable of roughly tracking the ebb and flow of majoritarian preferences over time. Without state institutions, national actors would lack instruments to achieve such certain anti-democratic effects. The resulting descriptive taxonomy illustrates the ways by which state institutions can serve as vehicles for democratic backsliding in the operation of national representative institutions. As such, it provides a cautionary analysis of state institutions having a net-negative aggregate effect on the quality of a nation’s democracy.

Introduction	1792
I. The Conventional Wisdom about Federalism (and Its Limits)	1792
II. The Conventional Wisdom about Democratic Backsliding (or How to Forget and Then Remember Federalism)	1796
A. Revealing Possibilities	1798
B. Ex Ante Deck Stacking	1800
C. Ex Post Gaming of Election Results	1803
D. Petri Dishes for Polarization	1806
E. Arenas of Intraparty Competition.....	1807
F. Democracy Destabilization Rights.....	1809
G. Holdouts and Authoritarian Reservoirs	1812
H. A Summary.....	1813
III. The States’ Role on Democratic Backsliding Reconsidered ..	1814
Conclusion	1816

* Frank and Bernice Greenberg Professor of Law, University of Chicago Law School. Thanks to Ganesh Sitaraman for challenging and stimulating feedback, and to the editors of the *Wisconsin Law Review*, especially T. J. Clark and James Moes, for their careful work.

INTRODUCTION

Is the federal design of our Constitution a net positive or a net negative when it comes to maintaining democratic norms at the national level? Understanding the relationship between state and national processes has become a more urgent matter after the efforts to thwart the legitimate transfer of presidential power in 2020. But this question transcends the peculiar dynamics of any single election.

This Essay aims to sharpen our sense of this question by drawing attention to several mechanisms by which state institutions can work, or fail to work, as vectors of *national* anti-democratic effect. The focus here is on the distinctive function that can be performed, and can be observed being performed, by formal governmental institutions at the level of the state (*e.g.*, legislatures, state courts, appointed officials, litigation on behalf of such bodies), and their effect upon the capacity of national-level bodies and processes to capture and convey democratic sentiment. In particular, it focuses on the question of how the actual operation of state-level politics changes the direction and quality of national democratic bodies. The coverage in this Essay is concededly and deliberately lopsided. But by mapping out the less healthy interactions between state institutions and national democracy, I hope to fill in a little more of a concededly complex picture—and to resist a tendency in the literature to fall into optimistic bromides about the interactions between our federalism and our democracy.

That conventional wisdom, indeed, is a useful place to start before turning to the taxonomy of anti-democratic effects that is the core of this Essay.

I. THE CONVENTIONAL WISDOM ABOUT FEDERALISM
(AND ITS LIMITS)

There is a long line of eminent thinkers in political science and jurisprudence who have perceived and celebrated a tight connection between the quality of our national democracy and the American practice of diffusing political authority down to state elective and judicial bodies. A political variant on “Our Federalism,”¹ as it has come to be known, is often said to vouchsafe to the American citizen at least two kinds of

1. The phrase originates in *Younger v. Harris*, 401 U.S. 37, 44 (1971), and originally concerns abstention doctrine. This Essay invokes it here in a much more general way to capture a sense of the distinctive role that states play in the American constitutional order.

democratic representation. This amplifies their democratic choice for the simple reason that two is better than one.²

And there is more: had the 1789 Constitution created a unitary state and stopped there, we who are its citizens would have at best distant and fragile relations to our representatives. Adding into the political mix a franchise or two in relation to the workings of state governments means that we benefit from a second level of representation, one that is also closer—by geography, temperament, and sympathy—to us than the distant marionettes of Beltway drama.³ For those of us doomed never to identify with a national majority, states thereby offer the comfort of a second, subnational shot at representation that is not predestined to fail.⁴ In so doing, they also create opportunities for intraparty contestation that might be lost if the national stage had a monopoly.⁵ In a diverse and disputatious nation, the fragmentation of democracy between the nation-state and the subnational state is supposed to reduce the risk that some will be reduced to a perpetual minority.⁶ Overall, it means that any one of us is much less likely to be an endless loser in the legislative merry-go-round.

Still there is more: competition between the fifty subnational sovereigns leads to states adopting quite different bundles of public policy.⁷ In addition to the knowledge we gain by watching different laws

2. For a clear statement of the conventional wisdom described in this paragraph, see Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 824–25 (2004) (“Federalism, on this view, naturally furthers the project of democracy by constitutionally preserving multiple points of democratic engagement throughout the system. Federalism and democracy are therefore not in conflict with one another, but mutually reinforcing values.”).

3. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1498 (1994) (explaining why state government is likely to be “more democratic and constitutive of popular self-government”). For a recent judicial affirmation of the same sentiment, see *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29–30 (2020) (Gorsuch, J., concurring) (denying application to vacate stay).

4. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (book review) (arguing that “local laws can be adapted to local conditions and local tastes, while a national government must take a uniform—and hence less desirable—approach”).

5. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1124 (2014).

6. See, e.g., Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10 (2010) (praising “minority rule at the local level”); Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1060 (2015) (“By giving groups that are out of power at the national level a chance to exercise power in a state, federalism protects liberty in a third way: by fostering political circulation.”); DAVID L. SHAPIRO, *FEDERALISM* 115 (1995) (describing states as “refueling stations” for the party out of power at the national level).

7. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as “laboratories” of democracy).

being implemented across the country, this variety also enables a distinctly democratic good. Citizens can choose between the states based on their personal preferences. The resulting migration and matching—which is called Tiebout sorting⁸—adds a third flavor of democratic choice to the mix.⁹ Federalism, in other sorts, might seem to be an unqualified democratic good for overdetermined reasons.

Against this seemingly insuperable tally of reasons for celebrating the democratic credentials of our federalism, a new breed of scholars have struck a dissonant, dissenting chord.¹⁰ The political scientist Jacob Grumbach, for instance, has identified the possibility that states can serve as “Laboratories of Democratic Backsliding.”¹¹ In a recent article and related book,¹² Grumbach shows that the quality of subnational democracies has remained constant in the aggregate in recent years.¹³ But this steady state equilibrium masks substantial declines that are concentrated in red states and causally associated with Republican Party control.¹⁴ This is, to be clear, a finding about the quality of state-level democracy, not the effects of federalism on national politics (which is my topic here). But Grumbach’s finding is consistent with a broader literature stressing the asymmetrical character of partisan polarization nationally, in which the “Republican Party has made a much more pronounced shift toward extremism” than its Democratic counterpart.¹⁵ The Republican electorate in particular “ha[s] become more comfortable viewing policy as a means of demobilizing . . . political adversaries . . . by making it harder for Democratic-leaning

8. For a formal presentation of the theory, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 423–24 (1956).

9. See Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 503–04 (1997) (describing this process).

10. Earlier work challenged elements of the conventional wisdom respecting the link between federalism and democracy. For instance, Jacob Levy argued that states are “too few, too large, too rigid, too constitutionally entrenched, and too tied to ethnocultural identit[ies]” to allow Tiebout sorting. Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459, 459 (2007).

11. Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 AM. POL. SCI. REV. 967, 967 (2023) [hereinafter *Democratic Backsliding*].

12. JACOB M. GRUMBACH, *LABORATORIES AGAINST DEMOCRACY* (2022).

13. *Id.* at 153 (“On average, state-level democracy is mostly stable since 2000 . . .”).

14. *Id.* (“[A]ggregate stability, however, obscures major changes in democratic performance within states. . . [S]ome states, such as North Carolina, . . . [experienced] . . . precipitous drops in democratic performance after 2010.”); *id.* at 170–73 (reporting trend data across all states).

15. Paul Pierson & Eric Schickler, *Madison’s Constitution Under Stress: A Developmental Analysis of Political Polarization*, 23 ANN. REV. POL. SCI. 37, 51 (2020).

constituencies to vote.”¹⁶ This plainly bodes ill for democracy at the state level. But Grumbach also makes some observations about the implications of his empirical work for national-level democracy—findings to which this Essay will return to below.¹⁷

Working in a similar vein, Professor Miriam Seifter has described an increasing breakdown of majoritarian principles in state legislatures.¹⁸ State constitutions may trumpet their democratic credentials,¹⁹ but their legislatures tend to fall short of those promises.²⁰ Again, the bad news here is largely about state-level democracy. Yet, in other work, Seifter has struck a more hopeful note when it comes to states’ contributions to national-level democracy.²¹

Even if the quality of state democracy ebbs, per Grumbach and Seifter,²² this does not mean that our federalism is a net negative for democracy writ large. Two are still better than one even if one proves a dud. Or, perhaps not. Perhaps national and state democracies should *not* be understood as natural and healthy complements thriving in symbiotic codependency. Perhaps instead the rot in one can infect the other, weakening it by carrying poisons from local roots to national leaf-tips that would otherwise be kept out. Perhaps our federalism is our national democracy’s Achilles’ heel? Might affliction in one part induce crisis in the whole?

A threshold lesson here is that state-level action can reduce the quality of national democracy even if it is motivated by national partisan forces. As Grumbach and others have underscored, those pulling the levers of state bodies may well be acting on the basis of national, partisan impulses.²³ I do not disagree. Rather, I think it is useful to isolate the distinct *function* of state institutions—without which national actors would lack an instrument to achieve their ends. And it is useful to consider how these state-level instruments influence the possibility that

16. Alexander Hertel-Fernandez, *Asymmetric Partisan Polarization, Labor Policy, and Cross-State Political Power-Building*, 685 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 65 (2019) (citation omitted).

17. See *infra* Section II.A.

18. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1764–67 (2021) (documenting this finding).

19. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 869–79 (2021) (documenting an extensive, textual “state constitutional commitment to democracy”).

20. *Id.* at 862–63.

21. Miriam Seifter, *Saving Democracy, State by State?*, 110 CALIF. L. REV. 2069, 2082 (2022) [hereinafter *Saving Democracy*] (arguing that “states can act as counterweights to the minoritarian forces taking hold at the national level”).

22. GRUMBACH, *supra* note 12, at 152–53; Seifter, *supra* note 18.

23. GRUMBACH, *supra* note 12, at 6; Bulman-Pozen, *supra* note 5, at 1089–93.

national institutions either do or do not experience capture by minority factions and are instead capable of roughly tracking the ebb and flow of majoritarian preferences over time. The very modest contribution here is a descriptive taxonomy of ways by which state institutions can serve as vehicles for democratic backsliding in respect to the quality of national representative institutions.

Such a tally, to be clear, does not prove that federalism is “bad” for national democracy in any absolute sense. I will pull together a neat and analytically helpful sheaf of solely those pathways of state institutional action that can *damage* the quality of national democracy.²⁴ But it is still an open, empirical question whether state institutions have a net positive or negative effect on the quality of a nation’s democracy (one in which the way we conceptualize and measure democracy no doubt will have a shaping effect). The nonquantitative I offer here is at best a prelude to more careful, empirically informed judgments about such an aggregate effect. Set alongside Seifter’s fine work, I thus hope that this Essay adds a touch more nuance to the traditional wisdom in both the federalism and the democratic backsliding literatures.

II. THE CONVENTIONAL WISDOM ABOUT DEMOCRATIC BACKSLIDING (OR HOW TO FORGET AND THEN REMEMBER FEDERALISM)

It is a fair generalization to say that scholars of the recent wave of democratic backsliding take the latter to be a largely top-down process and not than one that bubbles up from below. Exhibit number one for this generalization is my own work with Tom Ginsburg, which expresses agnosticism about the causal effect of federalism upon national democratic decline.²⁵ Ginsburg and I pointed to system-wide dynamics, such as the rise of charismatic populists and the breakdown of established national party systems, as proximate causes of democratic backsliding.²⁶ Other recent diagnoses of global trends in democratic quality take a

24. This is not the forum in which to offer an exhaustive canvassing of the ways in which state institutions have been used since the founding, say, to resist the project of national democracy—a task that, in any case, would require a whole book. So, I do not address here the opposite possibility: those same institutions can play a salutary role in advancing national democracy. This omission is not because there is no story to tell there. Rather, I think that Seifter in particular has already offered an excellent account of how that happy story can unfold. *See, e.g., Saving Democracy, supra* note 21; Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 *DUKE L.J.* 275, 280 (2022) (arguing that “state institutions offer crucial *democratic opportunity* that federal institutions thwart: the opportunity for popular majorities to rule on equal terms”).

25. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78, 161 (2018).

26. TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 78–90 (2018).

similar top-down approach.²⁷ Influential takes on the U.S. situation likewise focus predominantly on national dynamics.²⁸

To be fair, we were first writing in late 2016, and there was a lot going on. Ginsburg and I did briefly suggest that “subnational entities wielding substantial regulatory authority” would “almost certainly play an active role should there be a push toward democratic erosion.”²⁹ But we said nothing about what an active role for a subnational actor in a campaign against national democracy might look like beyond a vague warning that federalism might create subnational units that act as “laboratories for despotism” and offer “an alluring network of channels for retrogressive contagion.”³⁰

Mea culpa. I should have said more at that time about subnational dynamics. The ensuing five years of U.S. experience, indeed, offer ample evidence that our oversight was an unfortune one. What I hope to do in the balance of this Part is to start making good on that vague, and now long overdue, promissory note. I aim to do so by mapping out some of the ways in which state institutions can serve as instruments for democratic backsliding. What follows, therefore, is an effort to stake out the various pathways that, under existing legal and institutional rules, state bodies can (and cannot) use to destabilize national democracy. For the most part, I will stress those paths that merit the gravest concern based on the available evidence. But I will also identify possible causal vectors that—again, based on the evidence—do not justify renewed attention. My aim is to develop a clear-eyed measure of the mechanisms by which a federal division of authority can (and perhaps already do) contribute to the decay of a national democracy. That descriptive enterprise, to be clear, does not necessarily carry a normative charge in respect to federalism (or any particular one of its aspects). But it is a good place to start when one turns to more normative reasoning.

27. See, e.g., GIDEON RACHMAN, *THE AGE OF THE STRONGMAN: HOW THE CULT OF THE LEADER THREATENS DEMOCRACY AROUND THE WORLD* (2022); RUTH BENGHIAT, *STRONGMEN: HOW THEY RISE, WHY THEY SUCCEED, HOW THEY FALL* (2020).

28. JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 49 (2020) (identifying political polarization, economic inequality, a loss of trust in the political system, and policy disasters as “the four basic causes of ‘constitutional rot’”). Other analyses have identified the national Republican Party as the cockpit of growing radicalization in respect to democratic values. See, e.g., JACOB S. HACKER & PAUL PIERSON, *LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY* 41–75 (2020); LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* 115–20 (2020).

29. GINSBURG & HUQ, *supra* note 26, at 149.

30. *Id.* at 150.

A. Revealing Possibilities

A noteworthy finding in Grumbach's empirical work is related to the timing of institutional change. He finds that the state to experience the sharpest and largest drop in democratic quality was North Carolina—in 2011—some five years before public attention homed in upon the Trump campaign and its attendant challenges to democratic norms.³¹ The finding resonates and surprises because most commentators have focused on 2016 as a pivot point not just in the national quality of democracy, but more specifically in North Carolina politics.³² Attention has focused on the Republican legislature's high-profile effort to lock in political gains by eliminating the (recently elected) Democratic governor's powers.³³ Grumbach, however, notes that North Carolina made a "series" of changes to election law from 2011 to 2012, including a legislative gerrymander that translated a bare 50.3 percent majority into a 77 percent Republican supermajority; a "strict" voter identification law; and limits on early voting in "areas with heavier concentrations of Black voters."³⁴ These changes, notably, were implemented a year before the Supreme Court struck down the coverage formula of the Voting Rights Act.³⁵ That is, their timing belies the standard causal story holding that the Supreme Court's weakening of the Voting Rights Act caused states to enact a raft of new "voter suppression" measures.³⁶

Instead, the timing of North Carolina's initial shift away from democratic norms suggests that state institutions can perform the function

31. GRUMBACH, *supra* note 12, at 171–72.

32. *See, e.g.*, Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1, 31 (2019) (focusing on 2016–17 as the moment of political lock-up in North Carolina).

33. *See, e.g.*, Richard Fausset, *North Carolina Governor Signs Law Limiting Successor's Power*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/us/politics/pat-mccrory-roy-cooper-north-carolina.html>.

34. *Democratic Backsliding*, *supra* note 11, at 973–74.

35. *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013).

36. Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression> [<https://perma.cc/L6C3-9SLP>] (“Over the past decade, half the states in the nation have placed new, direct burdens on people’s right to vote, abetted by a 2013 Supreme Court decision that struck down a key provision of the Voting Rights Act. And the racial cause and effect of these seemingly race-neutral laws are hard to escape.”). North Carolina, however, enacted additional restrictions on voter access after *Shelby County*. *See, e.g.*, Alexandra Olgin, *Early Voting Changes in North Carolina Spark Bipartisan Controversy*, NPR (Oct. 17, 2018, 5:01 AM), <https://www.npr.org/2018/10/17/657928248/early-voting-changes-in-north-carolinaspark-bipartisan-controversy> [<https://perma.cc/56HD-2GC2>] (“[A] new law passed by the Republican-controlled legislature will result in nearly 20 percent fewer places to cast votes before Election Day.”).

of revealing information relevant to democratic backsliding. The state legislature in this case plausibly revealed information about the political acceptability, the risk of backlash, and the partisan-political payoffs of previously untested measures aimed at locking-up the democratic process in one party's favor. They thus offered an epistemic service to other antidemocratic actors within the system. In this way, they create conditions of political possibility where none existed before for competition-squelching legal change of national reach and effect.

This revelation function is, in a sense, a malign variant on what Lani Guinier and Gerald Torres have characterized as a “miner’s canary” dynamic.³⁷ Drawing on the practice of miners who would bring canaries into the mines, Guinier and Torres explained that “[t]he canary’s more fragile respiratory system would cause it to collapse from noxious gases long before humans were affected, thus alerting the miners to danger.”³⁸ The canary supplies information that would otherwise not be available about possible risks. So too, on Guinier and Torres’s account, does minorities’ exposure to a particular harm presage the wider diffusion of that harm.³⁹ Here, the dynamic is similar, but runs in a different direction: North Carolina is the miner’s canary in the sense that the state’s actions from 2011 to 2012 revealed a greater comfort with antidemocratic measures among Republican voters (and perhaps among independents) than might otherwise have been anticipated. That is, the state legislature revealed information that otherwise would not have been available to political actors about the strength of voters’ preferences in respect to democratic norms. Indeed, it was not until 2020 that Milan Svobik and Matthew Graham would publish path-marking empirical findings that demonstrated the fragility of American’s fundamental democratic commitments.⁴⁰ A year later, Jenna Bednar would note that polarization within states can interact with “out-group aversion” in ways that “lead to the underadoption of beneficial innovations,” and perhaps also overadoption of harmful ones.⁴¹

The revelation function of state policymaking has obvious implications for the expected payoffs from subsequent political action. It

37. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (Harvard University Press, paperback ed. 2003).

38. *Id.* at 11.

39. *Id.* at 11–12.

40. Matthew H. Graham & Milan W. Svobik, *Democracy in America? Partisanship, Polarization, and the Robustness of Support for Democracy in the United States*, 114 AM. POL. SCI. REV. 392, 392–93 (2020).

41. See Jenna Bednar, *Polarization, Diversity, and Democratic Robustness*, 118 PROC. NAT’L ACAD. SCI., Dec. 14, 2021, at 1, 2–3, <https://www.pnas.org/doi/epdf/10.1073/pnas.2113843118>.

also has implications for scholars. It seems plausible, given the timing of North Carolina's shift away from democratic norms, that the change in voters' underlying preferences respecting democratic norms started well before 2016 (which is commonly viewed as a turning point for democracies in North America and Europe⁴²). It may also lend some further credence to the account that Adam Tooze has offered, which links the 2008–09 financial crisis to the emergence of anti-democratic sentiments.⁴³ The effects of that financial shock upon Eastern European nations that have turned away from democracy has been carefully studied.⁴⁴ The same question may warrant more attention in the U.S. context.

B. Ex Ante Deck Stacking

Once democratic erosion has begun, state institutions play the familiar role of incubators for legal and policy changes that impinge on the quality of national democracy. Under Article I, Section 4 of the Constitution, states have the “duty” to “prescribe the time, place, and manner of electing Representatives and Senators,” subject to alteration by Congress.⁴⁵ This formal power, coupled with the regular concurrence of state and federal elections at the same times and places, means that state bodies (most importantly state legislators, governors, and secretaries of state) have ample scope to alter the practical operation of federal elections in ways that have predictable partisan effects. That is, once a state such as North Carolina opens the gate to legal changes that squelch democratic competition, state actors have a wide and deep toolkit

42. See e.g., J. Eric Oliver & Wendy M. Rahn, *Rise of the Trumpenvolk: Populism in the 2016 Election*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 189, 190–201 (2016); Laura Silver, *Populists in Europe – Especially Those on the Right – Have Increased Their Vote Shares in Recent Elections*, PEW RSCH. CTR. (Oct. 6, 2022), <https://www.pewresearch.org/short-reads/2022/10/06/populists-in-europe-especially-those-on-the-right-have-increased-their-vote-shares-in-recent-elections/> [<https://perma.cc/2KRN-MYKX>].

43. See generally ADAM TOOZE, *CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD* (2018) (arguing that the global economic, political, and geopolitical responses to the 2008–09 financial crisis are necessary to understanding contemporary democracy).

44. See, e.g., Michael Bernhard, *Democratic Backsliding in Poland and Hungary*, 80 SLAVIC REV. 585, 596–97 (2021) (“EU membership . . . failed to protect Europe from a deep economic crisis and provoked a wave of xenophobia as millions of refugees flooded into the Schengen area. The rehabilitation of past national narratives . . . and arguments for protecting citizens against the uncertainties of the market gave [populist parties] solid governing majorities that have allowed them to undertake their illiberal agendas.” (footnote omitted)).

45. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013); U.S. CONST. art. I, § 4.

through which to “arbitrage” a temporary hold on state-level power into a more durable grip on national political offices.⁴⁶

Of course, the most important measure used to dilute the competitiveness of federal elections is the gerrymander. In North Carolina, a newly constituted state supreme court in March 2023 withdrew a previous ruling and allowed the Republican supermajorities in the state legislature “to aggressively gerrymander the congressional map, which is currently represented by seven Democrats and seven Republicans. . . . [N]etting as many as four seats [for the Republican Party].”⁴⁷ Note that this comes against the backdrop of previous congressional elections in North Carolina in which Democrats won nearly half of the votes cast but only three of the thirteen House seats.⁴⁸ South Carolina similarly allegedly used the post-2020 redistricting to dilute Black Democrats in particular.⁴⁹ In Pennsylvania in 2012, Democrats won fifty-one percent of the statewide vote for the House of Representatives but only five of Pennsylvania’s eighteen House seats.⁵⁰ As Grumbach has documented, state legislators are acutely conscious of how they can “take advantage” of the dispersion of electoral authority across different geographic levels, and indeed of how they can fundraise explicitly by touting their ability to stitch-up not just state, but also federal elections.⁵¹

And gerrymanders hardly exhaust the instruments available to state legislators for shaping the outcomes of federal elections. A very partial list of measures deployed to this end would include the following: voter

46. In other work, I have used the idea of “arbitrage” to describe the particular, important function played by the federal courts in democratic lock-ups. Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 Nw. U. L. REV. 1099, 1105 (2023). The same analytic lens can be usefully applied here too.

47. Zach Montellaro, Josh Gerstein & Ally Mutnick, *North Carolina Supreme Court Clears Way for Partisan Gerrymandering*, POLITICO, <https://www.politico.com/news/2023/04/28/north-carolina-supreme-court-clears-way-for-partisan-gerrymandering-00094433> [https://perma.cc/6XCW-8Z8R] (Apr. 28, 2023, 3:10 PM).

48. LARRY DIAMOND, *ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY* 96 (2019).

49. Hassan Kanu, *U.S. Supreme Court Enabled Racial Gerrymandering in South Carolina*, REUTERS (Jan. 17, 2023, 11:16 AM), <https://www.reuters.com/legal/government/us-supreme-court-enabled-racial-gerrymandering-south-carolina-2023-01-17/> [https://perma.cc/JP7T-27T5?type=image].

50. Christopher Ingraham, *How Pennsylvania Republicans Pulled Off Their Aggressive Gerrymander*, WASH. POST (Feb. 6, 2018, 2:19 PM), <https://www.washingtonpost.com/news/wonk/wp/2018/02/06/how-pennsylvania-republicans-pulled-off-their-aggressive-gerrymander/>.

51. GRUMBACH, *supra* note 12, at 3.

identification laws;⁵² a narrowing of early voting windows;⁵³ the imposition of new ministerial requirements about the way in which ballots are completed;⁵⁴ reallocation of administrative resources in ways that in effect create long lines at some, but not all, polling places on election day;⁵⁵ the scrapping of drop boxes used to collect absentee ballots;⁵⁶ and proof-of-citizenship laws that apply to both federal and state polls.⁵⁷

To be sure, the animating force behind many of these measures are national organizations, party organizations, and national interest-groups, such as the American Legislative Exchange Council, which have become “more polarized and party-aligned.”⁵⁸ Therefore, state-level changes do originate in national political dynamics in an important sense. But national forces turn to states as labs of anti-democracy for a reason. Without the constitutionally endorsed powers of state institutions in relation to the federal legislative process, these efforts to narrow

52. See, e.g., GA. CODE ANN. § 21-2-417 (2023); IND. CODE § 3-5-2-40.5 (2023); MO. REV. STAT. § 115.427 (2022); TENN. CODE ANN. § 2-7-112 (2023); WIS. STAT. § 6.79(2) (2021–22). See generally Sari Horwitz, *Getting a Photo ID So You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016, 8:30 PM), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html.

53. See, e.g., Matt Dixon, *Gov. Rick Scott Signs Election Bill That Cuts Early-Voting Days*, FLA. TIMES-UNION (May 19, 2011, 7:30 PM), <https://www.jacksonville.com/story/news/politics/2011/05/19/gov-rick-scott-signs-election-bill-cuts-early-voting-days/15903217007> [<https://perma.cc/J5JP-SW2A>].

54. See, e.g., Marcelino Benito, *'It's a Red Flag': Counties See Increase in Rejected Mail-In Ballot Applications Under New Texas Voting Rules*, KHOU 11, <https://www.khou.com/article/news/politics/texas-counties-increase-rejected-mail-in-ballot-applications/285-8746be6e-0d32-4f18-8802-08c3394fa6be> [<https://perma.cc/ZSZ3-43L2>] (Jan. 19, 2022, 4:56 PM).

55. See, e.g., Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait in Line for Hours? Too Few Polling Places*, NPR (Oct. 17, 2020, 5:01 AM), <https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl> [<https://perma.cc/88QB-JDE7>].

56. See, e.g., Jolie McCullough, *Texas Counties Will Be Allowed Only One Drop-off Location for Mail-in Ballots, State Supreme Court Rules*, TEX. TRIB. (Oct. 27, 2020, 6:00 PM), <https://www.texastribune.org/2020/10/27/texas-voting-elections-mail-in-drop-off/> [<https://perma.cc/Q588-V6PW>].

57. See, e.g., Ben Giles, *Arizona Republicans Enact a Controversial New Proof-of-Citizenship Voting Law*, NPR (Mar. 30, 2022, 7:13 PM), <https://www.npr.org/2022/03/30/1089809421/arizona-republicans-enact-acontroversial-new-proof-of-citizenship-voting-law> [<https://perma.cc/LR5G-7WYW>].

58. Pierson & Schickler, *supra* note 15, at 45 (citation omitted). See also ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE 78–80* (2019) (discussing ALEC's role with respect to lawmaking); GRUMBACH, *supra* note 12, at 131 (discussing same).

democratic competition would not be feasible: backsliding efforts would have to take a different, potentially more costly, and less effective route.

C. *Ex Post Gaming of Election Results*

The states' significant role in the administration of federal elections, which are concurrent and entangled with state ones, creates opportunities for ex post as well as ex ante strategic action by state-level actors. Former President Trump's efforts to thwart the accurate counting of votes and the peaceful transition of power in the wake of the November 2020 election had several strands of this sort involving efforts to leverage the powers vested in official actors at the state level.⁵⁹

Initially, Trump and his allies looked to the courts. His campaign filed more than forty lawsuits aimed at deferring the certification of electors in several pivotal states beyond a federal statutory "safe harbor,"⁶⁰ such that those elector slates would no longer be conclusively valid when they reached Congress.⁶¹ Later, they turned outside the law to brute force. On January 6, Trump and his allies used fiery rhetoric to stoke violent protests, which spilled into the U.S. Capitol and caused at least five deaths.⁶² These legal and paramilitary instruments of presidential election subversion did not involve state institutions. But

59. Joe Walsh, *Who Is Rusty Bowers? Arizona's GOP House Speaker Who Defied Trump Speaks to Jan. 6 Committee.*, FORBES, <https://www.forbes.com/sites/joewalsh/2022/06/21/who-is-rusty-bowers-arizonas-gop-house-speaker-who-defied-trump-speaks-to-jan-6-committee/?sh=5e6f27804cc9> [https://perma.cc/E4CQ-HXCF] (June 21, 2022, 1:59 PM) (detailing efforts by Trump to overturn the 2020 election, including speaking with Speaker Bowers).

60. The "safe harbor" is found in 3 U.S.C. § 5.

61. See generally Jacob Shamisan & Sonam Sheth, *Trump and His Allies Filed More Than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed.*, INSIDER, <https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11> [https://perma.cc/PU4T-Q5KD] (Feb. 22, 2021, 4:03 PM). See also Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 331 (2019) (discussing the safe harbor provision and its actual and possible effects in 2000 and 2020 respectively).

62. Brian Naylor, *Read Trump's Jan. 6 Speech, a Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [https://perma.cc/T4V5-8EBQ] (quoting President Trump) ("Our country has had enough. We will not take it anymore and that's what this is all about. And to use a favorite term that all of you people really came up with: We will stop the steal."). On the rhetoric of January 6, see Aziz Z. Huq, *On the Origins of Republican Violence*, BRENNAN CTR. FOR JUST. (June 29, 2021), <https://www.brennancenter.org/our-work/research-reports/origins-republican-violence> [https://perma.cc/3CYC-VSSB].

other elements of that campaign leveraged their distinctive functionalities.

Perhaps most importantly, the Electoral College, which was initially defined in Article II of the Constitution, directs that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”⁶³ The constitutionally embedded role of the states in the presidential selection process opened the door to at least three distinct efforts at ex post strategic action by the former president and his allies. First, lawyers aligned with Trump in the Department of Justice pushed state legislatures to cast aside reported vote counts and simply appoint Trump electors directly.⁶⁴ Second, Trump himself called election officials—most notably in Georgia—demanding that they “find” enough additional votes to push the vote in his favor.⁶⁵ Finally, there was a concerted effort across several states in which Biden had prevailed by narrow margins to create alternate slates of presidential electors.⁶⁶ Some of these efforts involved federal officials, such as Wisconsin Senator Ron Johnson.⁶⁷ Others, however, flowed through state bodies.⁶⁸

63. U.S. CONST. art. II, § 1, cl. 2.

64. See generally MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 117TH CONG., *SUBVERTING JUSTICE: HOW THE FORMER PRESIDENT AND HIS ALLIES PRESSURED DOJ TO OVERTURN THE 2020 ELECTION* (Comm. Print 2021).

65. *Transcript: President Trump’s Phone Call with Georgia Election Officials*, N.Y. TIMES, <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-georgia-call-transcript.html> (Jan. 5, 2021).

66. Luke Broadwater & Alan Feuer, *Panel Ties Trump to Fake Elector Plan, Mapping His Attack on Democracy*, N.Y. TIMES (June 21, 2022), <https://www.nytimes.com/2022/06/21/us/politics/trump-pressure-state-officials.html>; Aishvarya Kavi, *No, Republican Attempts to Organize ‘Alternate’ Electors Won’t Affect the Official Electoral College Tally*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/us/no-republican-attempts-to-organize-alternate-electors-wont-affect-the-official-electoral-college-tally.html> (quoting Stephen Miller, a senior advisor in Trump’s administration) (“[A]n alternate slate of electors in the contested states is going to vote and we are going to send those results up to Congress.”).

67. Jeremy Herb, *Texts Between Aides Reveal Role Sen. Ron Johnson Played in Pushing ‘Fake’ Trump Electors*, CNN (June 21, 2022, 10:28 PM), <https://www.cnn.com/2022/06/21/politics/ron-johnson-fake-electors-scheme-trump/index.html> [<https://perma.cc/B8ZW-K7BJ?type=image>].

68. See, e.g., Ronald J. Hansen, *Fake Electors Try to Deliver Arizona’s 11 Votes for Trump*, AZ CENTRAL, <https://www.azcentral.com/story/news/politics/elections/2020/12/14/arizona-groups-fake-electors-try-cast-11-electoral-votes-trump/6536056002> [<https://perma.cc/9EJN-3LVV>] (Dec. 14, 2020, 5:38 PM); Craig Mauger, *Michigan Supreme Court Again Tells State Board to Certify Unlock Michigan*, DETROIT NEWS, <https://www.detroitnews.com/story/news/politics/2021/07/09/michigan-supreme-courtunlock-michigan-order-state-canvassars-certify-petitions-repeal-1945->

The observation that state institutions provided a venue for ex post strategic action aimed at thwarting accurate vote counting need not have a normative bite. Elections have to be administered. There is no getting away from the practical need to empty ballot boxes, count votes, and (if you are in Florida) sort hanging from swinging or dimpled chads. It is vital that whoever does all this turns square corners. Criticism of state institutions is inapt, therefore, unless there is some reason to believe that there is some other actor who would do a better job at these mundane tasks. But the obvious alternative for all these responsibilities—a federal agency tasked with administering elections—may well be *more* vulnerable to improper efforts at influence than state bodies. Did Trump not, after all, find lawyers within the Justice Department to endorse and press his spurious claims of voter fraud?⁶⁹ Why should a centralized entity, potentially subject to direct White House pressure, be any more reliable than the various, dispersed agencies and officials acting under state law—especially in an era of increasing judicial solicitude for the so-called unitary executive?⁷⁰

How one in the end evaluates the desirability of state institutions' involvement in national electoral processes thus depends on a comparative, empirical inquiry into whether they are likely to perform better than the available alternatives. I am not sure there is a clear answer to this question. Several federal institutions, including the Department of Justice and the Internal Revenue Service, appear to have been relatively successful in resisting efforts of overt politization during the Trump presidency (although perhaps such efforts occurred and were successfully hidden from public view). While states are more dispersed, and hence take more time to capture, there are a predictable and small subset of states that are likely to be competitive in a presidential election. The state institutions responsible for counting votes and assembling a slate of presidential electors may be relatively easy to target. They may also not be fortified by the institutional culture of legality that is often said to characterize the Department of Justice. The underlying comparison between federal and state institutions rests on empirical facts that are not readily available. I, for one, am uncertain as to where those facts point.

law/7920744002 [https://perma.cc/74DB-C8UT] (July 9, 2021, 9:06 PM) (describing a board of state canvassers's refusal to fulfill "a clear legal duty" to certify petition signatures).

69. See Randall D. Eliason, Opinion, *What Makes Jack Smith's New Trump Indictment So Smart*, N.Y. TIMES (Aug. 2, 2023), <https://www.nytimes.com/2023/08/02/opinion/jack-smith-trump-indictment.html> (charging Trump with conspiracy for "[t]rying to corrupt the Justice Department to further the [fake election] scheme").

70. See generally Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83.

All that said, this is a good place to underscore again what I said at the beginning of this Part: my aim here is to map the existing landscape to discern existing negative-valence pathways between federalism and national democracy. Whether we can do better, once a vulnerability is identified, is a different question, albeit also one of great interest.

D. Petri Dishes for Polarization

It is familiar fare that the polarization of a polity into distinct and ideologically distant political factions is likely to destabilize a democracy.⁷¹ When a group of partisans view those across the aisle with enough loathing, they may be willing to tolerate violations of norms they would ordinarily defend. At its most extreme, partisan identification can drive individuals toward a belief that the use of violence to maintain their side's control of government is acceptable.⁷² Partisanship is on the rise in the United States.⁷³ This trend likely springs from many sources. At least one, however, takes advantage of the distinctive political surround created by state political institutions.

A recent model derived by Naomi Leonard and her colleagues posits that a “positive feedback” loop between elected representatives and their constituents is a necessary component of the asymmetrical polarization of the sort observed in the United States.⁷⁴ Their model implies increasing returns from elite investment in polarizing “[p]olicy making, rhetoric, [and] media.”⁷⁵ In particular, Leonard and her coauthors identify that “the laws legislators make” influence public opinion, which “in turn

71. Jennifer McCoy & Murat Somer, *Overcoming Polarization*, J. DEMOCRACY, Jan. 2021, at 6, 6 (noting that “elected officials around the world are subverting democracy from within by using polarizing political strategies in their bids to gain or retain power”). See generally Milan W. Svobik, *Polarization Versus Democracy*, J. DEMOCRACY, July 2019, at 20.

72. See NATHAN P. KALMOE & LILLIANA MASON, RADICAL AMERICAN PARTISANSHIP 3 (2022) (showing “how many ordinary partisans endorse violence, who they are, and how that radicalization happens”).

73. Lilliana Mason, “I Disrespectfully Agree”: *The Differential Effects of Partisan Sorting on Social and Issue Polarization*, 59 AM. J. POL. SCI. 128, 128 (2015) (finding that “sorting has brought partisan and ideological identities into alignment,” while “levels of partisan bias, activism, and anger have increased”).

74. Naomi Ehrich Leonard, Keena Lipsitz, Anastasia Bizyaeva, Alessio Franci & Yphtach Lelkes, *The Nonlinear Feedback Dynamics of Asymmetric Political Polarization*, PROC. NAT'L ACAD. SCI., Dec. 14, 2021, at 1, 10, <https://www.pnas.org/doi/epdf/10.1073/pnas.2102149118> (“[P]olitical processes reinforce themselves and each other through positive feedback [P]rocesses such as polarization are dynamic . . . and . . . explanations that do not account for positive feedback cannot account for the historical patterns of polarization.” (citations omitted)).

75. *Id.* at 3 fig.2.

drives the feedback dynamics of political elites.”⁷⁶ Indeed, it is plausible to speculate that legal enactments will be a particularly important kind of basis for generating positive feedback loops. Laws and executive orders, after all, tend to have an immediate effect on people’s lives. They are more likely, all else being equal, to attract public attention.⁷⁷ Unlike casual statements to reporters or in CNN town halls, they are less easy to write off as cheap talk. Hence, the easier that it is for political elites to generate polarizing legal action, the more they are able to generate positive feedback loops.

Leonard and her co-authors’ formal model does not distinguish between different geographic levels of political activity (and indeed, it can be read to assume solely a national political stage). But state legislative and executive action offers a greater opportunity set than their national equivalents for political elites wishing to reap the increasing partisan returns available from polarization. One reason for this is that the federal lawmaking process is often characterized by gridlock, which arises in Congress when “ideological fragmentation and supermajoritarian lawmaking institutions act together to stymie the efforts of legislative majorities to change status quo policies.”⁷⁸ Because state legislation is likely (all else being equal) to be generated more frequently and at lower transaction costs than national policy,⁷⁹ a political elite actor concerned with taking advantage of Leonard’s positive feedback loop is more likely to deploy a state rather than a federal stage.

States, in short, may well serve as a kind of echo chamber that nurture not stable but rising levels of partisan fury. In the absence of state-level institutions capable of producing formal state action, this would not be feasible. In the absence of such institutions, the Leonard model suggests, it would be more difficult for democracy-endangering polarization to get off the ground.

E. Arenas of Intraparty Competition

Might the organization of American territory into states drive polarization in other ways? There are two theories that might support this

76. *Id.* at 1.

77. See Milena Djourelouva & Ruben Durante, *Media Attention and Strategic Timing in Politics: Evidence from U.S. Presidential Executive Orders*, 66 AM. J. POL. SCI. 813 (2022) (finding “robust evidence that executive orders are more likely to be signed on the eve of days when the news is dominated by other important stories that can crowd out coverage of executive orders” and that this “effect is driven by executive orders that are more likely to make the news and to attract negative publicity”).

78. Alexander Bolton, *Gridlock, Bureaucratic Control, and Nonstatutory Policymaking in Congress*, 66 AM. J. POL. SCI. 238, 240 (2022).

79. *Id.* at 238.

conclusion. Neither, however, ultimately provides good reason for assigning state institutions a distinctive responsibility either for driving polarization (understood as an antecedent of democratic backsliding) or for directly undermining democracy. Before moving on from the topic of polarization, I want to consider and reject these two possibilities.

The first such theory focuses on the way that the structure of state-level party primaries shape the preferences of elected officials. On this view, the choice to limit primaries to registered party members, as opposed to opening them to a wider array of voters, drives each party to extremes.⁸⁰ Yet studies of the choice between open and closed preferences reveal no evidence of this centrifugal effect.⁸¹ The second such theory trains instead on the ways in which states as such enable geographic sorting by partisan preferences.⁸² This would result in more politically homogenous electorates, and hence a greater risk of destabilizing affective polarization. The problem with this argument is not that residential sorting by partisan identity does not happen; it surely does in material ways.⁸³ The problem rather is that such sorting occurs between different kinds of neighborhoods—rural, suburban, and urban—

80. See SETH MASKET, *CTR. FOR EFFECTIVE PUB. MGMT., BROOKINGS INST., MITIGATING EXTREME PARTISANSHIP IN AN ERA OF NETWORKED PARTIES: AN EXAMINATION OF VARIOUS REFORM STRATEGIES* 4 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/Masket_Mitigating-Extreme-Partisanship-in-an-Era-of-Networked-Parties.pdf [https://perma.cc/XD2T-6FJ6] (“Behind it is the theory that elected officials are as polarized as they are because nearly all of them are nominated via partisan primary elections, and those elections tend to be dominated by ideologically extreme voters.”).

81. See, e.g., Eric McGhee, Seth Masket, Boris Shor, Steve Rogers & Nolan McCarty, *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology*, 58 *AM. J. POL. SCI.* 337, 337 (2014); Will Bullock & Joshua D. Clinton, *More a Molehill than a Mountain: The Effects of the Blanket Primary on Elected Officials’ Behavior from California*, 73 *J. POL.* 915, 917 (2011); MASKET, *supra* note 80, at 5 (“The existing political science literature, however, is not very encouraging for the prospects of primary reform. . . . [T]he most thorough study done to date, examining the behavior of state legislators nominated via different primary systems and even those same states when they change primary systems, finds no effect at all of primary rules on partisanship.” (citations omitted)). For a potential explanation, see Paul Frymer, *Debating the Causes of Party Polarization in America*, 99 *CALIF. L. REV.* 335, 343–44 (2011) (pointing to the “countervailing” effect of competition for the median voter in general elections).

82. See Gregory J. Martin & Steven W. Webster, *Does Residential Sorting Explain Geographic Polarization?*, 8 *POL. SCI. RES. & METHODS* 215, 216 (2020) (finding that “political tastes are, in fact, predictive of where individuals choose to move”).

83. *Id.* (finding that “Americans move frequently enough, and the partisan biases in location choice . . . are small enough, that repeated rounds of sorting quickly homogenize the geographic distribution of partisanship”).

within a given state.⁸⁴ It is not the existence or legal operation of the state as such that enables partisan sorting by residence, but the neighborhood.

Why then are members of Congress increasingly polarized in ways that undermine their incentives to conform to the norms necessary for democratic life? Political scientist Seth Masket argues that members of Congress in both politically homogenous and heterogenous districts have become less sensitive to median voter preferences because of the “resurgence of party organization at the local level.”⁸⁵ In particular, he points to the existence of “informal party organizations” that play a gatekeeping role in respect to federal office, and that “tend to seek the most ideologically extreme candidate they feel can get elected in a general election.”⁸⁶ If Masket is correct,⁸⁷ the blame for destabilizing polarization does not lie with state institutions. It is even more local than that.

F. Democracy Destabilization Rights

In one of the most influential papers on the relationship between democracy and institutional design, political scientist Juan Linz argued that a national polity mired in gridlock, where winning popular coalitions persistently feel “cheated” of their policy preferences, is not likely to prove stable.⁸⁸ Linz was concerned with the effect of presidentialism as distinct from parliamentary constitutional design.⁸⁹ But the same kind of argument could be crafted in respect to certain state institutions: if state-level bodies could consistently destabilize efforts by national popular coalitions to make their preferences into law, then Linz’s argument could be extended to a critique of those bodies.

Consider, for example, the role of state attorneys general in challenging national policy embodied in either federal statutes or executive orders. In the Supreme Court term that ended in June 2022, litigation propelled by state attorneys general resulted in major decisions on environmental law and immigration policy.⁹⁰ More generally, the Supreme Court has become perhaps “the most prominent venue for state

84. *Id.* at 218–21 (finding effects in a within-state study).

85. SETH MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 8 (2011).

86. *Id.* at 9 (emphasis omitted).

87. Masket’s study focused on California alone, so there is a question of external validity. *See id.*

88. Juan J. Linz, *The Perils of Presidentialism*, J. DEMOCRACY, Winter 1990, at 51, 66.

89. *See generally id.*

90. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (dramatically limiting agency’s authority in respect to climate change policy); *Biden v. Texas*, 142 S. Ct. 2528, 2535 (2022) (reviewing the legality of the “Remain in Mexico” program).

litigation” by both liberal and conservative states⁹¹ even though it is not at all clear that the judiciary is more attuned to the interests of states than Congress.⁹² States’ petitions for review to the high court, indeed, have an elevated chance of being granted.⁹³ Texas’s former Attorney General—tellingly, now Governor—Greg Abbott alone filed some forty-four suits against the Obama Administration alone.⁹⁴ Of course, these efforts are shared by partisan as well as personal politics. Almost all state attorneys general are elected to office.⁹⁵ And in the last two decades, the nature of their interventions have become “decidedly more partisan, particularly among Republican [attorneys general].”⁹⁶ In the first hundred days of the Biden Administration, members of the Republican Attorneys General Association filed almost twenty suits in federal court challenging the new president’s policies.⁹⁷ The intended (and actual) effect of these suits, of course, is to “thwart presidential priorities and shape national policy.”⁹⁸

With these observations in hand, the extension of Linz’s argument is obvious enough: Litigation by state attorneys general has become a significant, if predictably partisan, instrument through which national policies (whether in the form of laws or executive orders) can be delayed or derailed. State litigants can commonly select a district court in which they can be confident of a getting a sympathetic hearing,⁹⁹ so they can be

91. Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 73 (2018).

92. For a skeptical view, see Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 292–99 (2014).

93. Greg Goelzhauser & Nicole Vouvalis, *State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court*, 41 AM. POL. RSCH. 819, 826 (2012) (finding that 21.9 percent of states’ petitions succeeded during the Court’s 2001–09 terms, compared to a 4.2 percent success rate for all paid petitions during the same period).

94. Dan Frosch & Jacob Gershman, *Abbott’s Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration*, WALL ST. J. (June 24, 2016, 10:36 AM), <https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976>.

95. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2104 n.10 (2015).

96. Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1234 (2015).

97. Tyler Olson, *GOP AGs Bring Barrage of Suits Against Biden in First 100 Days, After Dems Touted Litigation Against Trump*, FOX NEWS (Apr. 26, 2021, 3:11 PM), <https://www.foxnews.com/politics/repUBLICan-attorneys-general-biden-administration-lawsuits-100-days> [https://perma.cc/3VFA-G6HF].

98. Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 ARIZ. ST. L.J. 359, 363 (2022).

99. *Id.* at 398. See also, e.g., Nate Raymond, *Abortion Pill Lawsuit Faces Texas Judge Who Often Rules for Conservatives*, REUTERS, (Feb. 13, 2023, 2:48 PM)

assured of at least a temporary win, which can gum up policy. And with a high court that leans further to the right than it has in decades (if not a century),¹⁰⁰ Republican litigants in particular can be relatively more confident about the prospect of ultimate success.¹⁰¹ The net effect is a destabilization of federal policymaking, especially on the part of Democratic presidential administrations.

How much does this kind of state-initiated litigation matter? In previous work, I have expressed skepticism about the thesis that the failure of state attorneys general to bring suit would leave no litigant with Article III standing.¹⁰² In contrast, Payvand Ahdout has suggested that the “resources, expertise, [and] publicity” that different litigants (including states) bring to bear “can impact the disposition of the suit.”¹⁰³ She could have added that the regulated parties who are bringing suit instead of states have very different incentives and agendas from state attorneys general. In many areas of federal regulation, for example, the private parties that one might expect to bring suit are surprisingly quiescent. Ahdout’s hypothesis is suggestive but hard to test. We simply do not know whether suits presently brought by states would be litigated to the same outcome and effect as the suits filed by private parties in their absence.¹⁰⁴ But it is also difficult to reject entirely. The increase in state-led litigation challenging the outputs of federal bodies was surely driven by a perception on plaintiffs’ part that they were filling a gap. Attorneys

<https://www.reuters.com/legal/abortion-pill-lawsuit-faces-texas-judge-who-often-rules-conservatives-2023-02-10/> [<https://perma.cc/R5BH-5CYP?type=image>] (discussing how anti-abortion groups sued the Biden administration in Amarillo, Texas, “where a local order assigns 95% of federal civil cases to the lone U.S. district judge there, . . . an appointee of former Republican president Donald Trump”).

100. Since 2020, the Supreme Court has moved sharply away from the preferences of the average American and embraced views closely aligned with the average Republican. Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative Than the Public*, PROC. NAT’L ACAD. SCIS., June 14, 2022, at 1, 1 <https://www.pnas.org/doi/epdf/10.1073/pnas.2120284119>.

101. Paul Nolette, *The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization*, 47 PUBLIUS: J. FEDERALISM 342, 355–60 (2017) (documenting some of these successes).

102. Aziz Z. Huq, *State Standing’s Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2147–48 (2019) (“The possibility that a repudiation of state standing would vitiate all federal court review of a specific legal question . . . is . . . not a severe problem . . .”).

103. Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 989 (2022).

104. See, e.g., David Zaring, *The Corporatist Foundations of Financial Regulation*, 108 IOWA L. REV. 1303, 1322 (2023) (finding that “banks very rarely sue the regulators for making a decision that is arbitrary, capricious, or otherwise not in accordance with law”).

general likely perceived themselves as advancing more than their own careers when they bring such cases.¹⁰⁵ And it is hardly implausible to think that the ideological tug of federalism values (however exactly that term is understood) changes either the way that opinions are crafted, or their effect on political discourse.

The positive, descriptive point nevertheless remains: We cannot know with any level of certainty what would happen if the rules for state standing under Article III were more restrictive than they presently are. Nor can we observe how that litigation would play given different expressed policy preferences on the part of the Supreme Court. But we can observe that state officials, in fact, play a large role in limiting the ability of duly elected national actors from advancing their policy interests. It is state officials, and not private litigants, who have and who effectively exercise what might be called “destabilization rights”¹⁰⁶ against national democracy.

G. Holdouts and Authoritarian Reservoirs

Like the United States, Mexico is a federal system with many subnational units (thirty-one, to be precise).¹⁰⁷ Until 2000, the national government was firmly under the thumb of the *Partido Revolucionario Institucional* (PRI).¹⁰⁸ But even after the Partido Acción Nacional broke the PRI’s enduring lock on national power, there remained states in which PRI hegemony lingered on. One of these was the southern state of Oaxaca, where a PRI-instituted electoral system forbade “the participation of political parties in municipal elections, formally exclude[d] women and other groups, and [prohibited the use of] public ballots.”¹⁰⁹ In effect, the existence of subnational units of governance provided the PRI with a locus for preserving antidemocratic norms and practices. Between 2004 and 2010, the PRI Governor of Oaxaca, Ulises Ruíz Ortóz, closed the main independent newspaper, ordered the

105. See Devins & Bangalore Prakash, *supra* note 95, at 2144.

106. This term was originally used to describe “claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.” Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1020 (2004). Here, by contrast, litigation destabilizes democratic outcomes without regard to whether or not ordinary forms of political accountability are working.

107. Allyson Lucinda Benton, *Bottom-Up Challenges to National Democracy: Mexico’s (Legal) Subnational Authoritarian Enclaves*, 44 COMPAR. POL. 253, 255 (2012).

108. *Id.*

109. *Id.* at 255, 268.

imprisonment of his main political opponent, and “presided over a wave of kidnappings, murders, and attacks against opposition groups.”¹¹⁰ This combination of national democracy and subnational authoritarianism is known as “regime juxtaposition.”¹¹¹

Thankfully, Oaxaca’s experience has not been repeated to date in the United States. But the persistence of regime juxtaposition is linked to the resurgence of authoritarianism at a national level.¹¹² In effect, the existence of antidemocratic enclaves exercising a kind of formal, legal authority within a federal structure gives vanquished authoritarians a haven. They have a place to lick their wounds, learn their lessons, and plot their return. The diffusion of power enabled by federalism, therefore, can be leveraged by antidemocratic forces in the face of a defeat. It offers them structural shelter until such time that they can leverage a specific conjuncture to their advantage.

In his allegorical novel *The Plague*, Albert Camus captured the point well when he talked of a “plague bacillus” that “can lie dormant for years and years in furniture and linen-chests,” where it “bides its time in bedrooms, cellars, trunks and book-shelves; and that perhaps the day would come when, for the bane and the enlightening of men, it roused up its rats again and send them forth to die in a happy city.”¹¹³ It should go without saying that these lines, written in the wake of World War II, were not then nor are now about the hazards of a bacillus or a virus alone.

H. A Summary

The dominant accent in discussions of American federalism has been celebratory. This is especially true among judges.¹¹⁴ Excluding allegedly aberrant moments such as Jim Crow, the story goes, the fragmentation of sovereignty between the national government and the several states has had happy consequences for the nation’s democracy. It has allowed for a richer, more varied kind of plural representation, and it has spurred beneficial policy competition between states that has further enriched voters’ choices.

110. James Loxton, *Authoritarian Vestiges in Democracies*, 32 J. DEMOCRACY 145, 150 (2021) (quoting EDWARD L. GIBSON, *BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES* 142 (2012)).

111. EDWARD L. GIBSON, *BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES* 149–50 (2012).

112. Loxton, *supra* note 110, at 151 (offering the example of Russia under Putin).

113. ALBERT CAMUS, *THE PLAGUE* 308 (Stuart Gilbert trans., Vintage Int’l ed., 1991).

114. See Goelzhauser & Vouvalis, *supra* note 93, at 833 (noting the Supreme Court is “continu[ing] to develop its interest in federalism”).

I do not doubt that there is some truth in these claims (although how aberrant was the seventy-plus years of Jim Crow in the larger sweep of U.S. history?). But they should not hide from view other, more sinister possibilities about the effects of subnational diffusion of authority. The important point here is that there exists a multiplicity of plausible pathways by which antidemocratic dynamics can travel from state institutions to the national level. Federalism is very much a double-edged sword for democracy at large.

III. THE STATES' ROLE ON DEMOCRATIC BACKSLIDING RECONSIDERED

What should we make of the fact that state institutions can and do play an important role in the dynamics of national democratic backsliding? The sheer range of antidemocratic vectors gathered above suggests that national-state interactions not only have great potential to generate damaging pressure on national democracy, but have done exactly that over the past decade. But, to reiterate a point I made above, this is no cause to rush to judgment about federalism at large. Seifter's work is a salutary reminder that state institutions can also exercise a beneficial effect on national democracy.¹¹⁵ And I have stressed that the states might be the best available venue for certain democratic functions, and that the most obvious alternatives would be even more vulnerable to antidemocratic pressure.¹¹⁶ Any aggregate judgment about the states' role in this domain must rest on the empirical facts—many of which are difficult even to estimate.

Without trying to offer any kind of all-things-considered judgment, I want to conclude by offering some reasons for overall pessimism about the normative valence of state institutions' role in our national democracy. Call this a prophylactic correction: The dominant tenor of recent scholarly accounts of what might be called the political dimension of federalism has been optimistic.¹¹⁷ But, in line with the tally presented in Part II, I think there is good reason for being a little more cautious.

The first reason is that familiar encomiums to federalism's democratization potential rest on a fallacy. They start from the seemingly reasonable premise that two are better than one: If citizens have plural options to express their views, this must be better than an institutional set-up in which they have one only form of representative.

115. See e.g., *Saving Democracy*, *supra* note 21.

116. See *supra* notes 69–70 and accompanying text.

117. See GRUMBACH, *supra* note 12, at 155–56 (summarizing the “progressive federalism” literature).

However, this simple additive logic can be misleading. It ignores the fact that the two of levels of democratic choice can interact, and that this interaction can damage the net democratic quality of the system as a whole. That is, as Part II suggested, state institutions can be used limit the openness and competitiveness of national elective bodies. These in turn can use their tools—say, the selection of federal judges hostile to voting rights, and especially the enfranchisement of the poor and racial minorities—as a means to entrench their decentralized allies. If we want to understand the effects of federalism on national democracy, in other words, it is not wise to take a static view of our political system. Instead, we must analyze that system dynamically, and pay particular attention to the possibility of positive feedback loops.

Alternatively, consider the working out of democratic choice in a federal system from the perspective of an individual voter. She may select a state legislative or gubernatorial candidate who has made campaign promises to pursue antidemocratic policies—say, limiting access to the ballot or gerrymandering congressional districts. These promises might be a matter of indifference for our voter, who is more interested in bread-and-butter issues of taxes and services. But it is quite rational for our voter to ignore the costs of her vote to the quality of national democracy. After all, most of those costs fall onto other people in other states. Stated with a bit more jargon, the point is this: The division of political power between the nation and the states creates a possibility of negative externalities from state elective choice undermining the quality of national democracy. Importantly, this tendency is systematic: It is built into the choice to have separate, geographically defined layers of electoral choice. Moreover, it does not depend on any kind of polarization or antipathy to democracy on voters' part. It simply assumes that voters behave in a self-regarding and minimally rational way.

Indeed, there is a sense in which our rational voter solves a difficulty that would otherwise face in respect to democracy. Fifty years ago, the philosopher Richard Wollheim identified what he took to be a “paradox” in democracy theory.¹¹⁸ This required citizens, Wollheim thought, to want policy A, but also to want policy not-A because it has been selected by a majority of the polity.¹¹⁹ I am not sure this is a “paradox” as such. But I think Wollheim’s argument illustrates a useful point here: our voter can vote to advance their preferences, and at the same time vote to constrain others from expressing inconsistent preferences at the national

118. Richard Wollheim, *A Paradox in the Theory of Democracy*, in *DEMOCRACY* 177, 177–78 (Ricardo Blaug & John Schwarzmantel eds., 2016).

119. *See id.*

level. Hence, a voter's use of the franchise at the state level alleviates some of the tension expressed by Wollheim's paradox.

A different way to make some headway here is to ask whether we have a reason to think that federalism stacks the deck either for or against national democracy, Jacob Grumbach and Jamila Michener have recently observed that "federalism [is] a critical institution structuring key conditions of democratic inequality."¹²⁰ They point out that wealthy interest groups can gather more information about likely political outcomes, move more often between federal and state political venues, and shift more frequently between states—all to maximize their political advantage.¹²¹ Democratic backsliding is almost never pursued solely by a single autocratic leader; it has the support of a substantial tranche of a nation's elites.¹²² If democratic backsliding is necessarily an elite project, and the political affordances of federalism empower elites relative to diffuse and less-resourced actors, then it follows that federalism is (all less being equal) a political playing field tilted against national democracy.

CONCLUSION

I hope to offer here a small contribution to our understanding of the role of state institutions can play in processes of national democratic backsliding. Dispelling concerns about some possibilities, and underscoring certain other risks, I have tried at least to lay some groundwork for thinking about the distinctive, transformative role of state bodies in a period of potential democratic transition (largely for the worse).

The taxonomy offered here, as well as the larger project to which it contributes, raises a more abstract and difficult question: what is the relationship more generally between the federal design of a political constitution and prospects for national democracy. That is, over the long historical view, does the diffusion of political authority to subnational units help or harm the national democratic project?

There are a number of different ways in which that question might be answered (although I think we would need a good deal more empirical

120. Jacob M. Grumbach & Jamila Michener, *American Federalism, Political Inequality, and Democratic Erosion*, 689 ANNALS AM. ACAD. POL. & SOC. SCI. 143, 153 (2022).

121. *Id.* at 146–53.

122. Jennifer Gandhi, *The Institutional Roots of Democratic Backsliding*, 81 J. POL. e11, e13 (2019) ("Support from elites is critical for the emergence and survival of autocratic rule."). On the other hand, elites are also often pivotal to resisting democratic backsliding. See Tom Ginsburg & Aziz Huq, *Democracy's Near Misses*, J. DEMOCRACY, Oct. 2018, at 16, 20.

information before we could choose between them). One possibility is that federalism is procyclical: when national democracy is on the march, state institutions aid it, and when it is waning, the states accelerate that downturn. A second possibility is that federalism is the opposite—that it is countercyclical. This would theorize states as acting as brakes on the democratization of the nation when that was in the offering, but then as braking a slide into semi-authoritarianism or its ilk. (As I read the broad literature on federalism from academic lawyers, my sense is that this second view is a dominant one, even if it is not always fully theorized.) Yet a third possibility is that federalism cuts in one direction—either for or against democracy—despite changes in the overall political atmosphere.

It is rather striking that, two centuries into the American experiment, there is no clear answer to the question of which of these three models best fits the data—and no way to be certain whether the empirical result of this inquiry for the United States would generalize to other federal contexts. We are, in other words, profoundly in the dark about the relationship between two key values in the lexicon of American constitutionalism—federalism and democracy. If nothing else, that dose of uncertainty ought to counsel for a greater degree of humility in making predictions about the wheres, the whys, and the hows that can be posed about the clash, the spark, or the convergence of our national democracy with our federalism.

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