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INTRASTATE FEDERALISM

Rick Su^{*}

ABSTRACT

In debates about the role of federalism in America, much turns on the differences between states. But what about divisions within states? The site of political conflict in America is shifting: battles once marked by interstate conflict at the national level are increasingly reflected in intrastate clashes at the local. This shift has not undermined the role of federalism in American politics, as many predicted. Rather, federalism's role has evolved to encompass the growing divide within states and between localities. In other words, federalism disputes—formally structured as between the federal government and the states—are increasingly being used to negotiate intrastate conflicts. This article describes how and why this transformation has taken place. Foregrounding this development shines light on the local roots of many of the most sensational federalism disputes in recent years—from immigration to drug policy. It also explains why, contrary to traditional models, federalism battles frequently involve states that are fiercely divided and undergoing political change.

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INTRODUCTION

Federalism in America is organized around the relationship between the federal government and the several states. Yet we cannot truly understand federalism without accounting for the divide *within* states. Consider the following examples:

In 2010, the federal government sued Arizona, arguing that its immigration enforcement law, S.B. 1070, infringed upon the federal government's power over immigration.¹ Arizona stood firm in its opposition to the federal government. Cities and other local governments within Arizona, however, were fiercely divided. While Maricopa County backed the state, cities like Phoenix, Tucson, and Flagstaff stood behind the federal government.² Indeed, long-standing conflicts between Arizona localities contributed not only to

¹ See *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

² See, e.g., Amicus Curiae Brief of the Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton in Support of Plaintiff-Appellee, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645), 2011 WL 5162523; Amicus Curiae Brief Submitted by the City of Tucson in Support of Plaintiff-Appellee, *United States v. Arizona*, 614 F.3d 339 (9th Cir. 2011) (No. 10-16645), 2010 WL 5162523; Brief of Joseph M. Arpaio, Maricopa County Sheriff as Amici Curiae in Support of Petitioner, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 506642.

the enactment of S.B. 1070, but also to the federal government's decision to challenge it in court.³

In 1996, California became the first state to decriminalize medical marijuana, placing it at odds with federal law, which categorically prohibits its use.⁴ This laid the groundwork for a federal-state showdown. But thus far, the federalism controversy appears to be playing out mostly within the state itself. While cities like Oakland and San Francisco invoked state law to resist federal enforcement efforts in their communities,⁵ others like San Diego, Riverside, and Garden Grove actively worked with federal authorities and invoked federal preemption to defend their efforts to restrict marijuana.⁶

In 1990, the Supreme Court issued a landmark decision in *New York v. United States*, holding that the federal government cannot "commandeer" states by requiring them to dispose of low-level radioactive waste produced within their borders.⁷ A decade earlier, however, New York was part of the coalition of states that designed the federal law it was now challenging.⁸ What changed was the fierce opposition that New York faced when it tried to place the waste disposal facilities in Allegany and Cortland counties—rural communities that had long felt disconnected from the state.⁹ Indeed the architects of the lawsuit were the counties themselves, whose initial complaint was that they were being "commandeer[ed]" by the state.¹⁰

³ See *infra* notes 86–96.

⁴ See *Gonzales v. Raich*, 545 U.S. 1, 5–6 (2005) (noting that the challenged California state law was in conflict with federal law).

⁵ See Lee Romney, *Bay Area Cities Battle U.S. in Bid to Save Marijuana Dispensaries*, L.A. TIMES (July 3, 2013), <http://articles.latimes.com/print/2013/jul/03/local/la-me-ln-bay-area-pot-dispensaries-20130703> (discussing local efforts to defend against enforcement of federal marijuana prohibitions); see also Frances Dinkelspiel, *Officials Oppose Feds' Suit to Shut Pot Dispensary*, BERKELEYSIDE (May 8, 2013), <http://www.berkeleyside.com/2013/05/08/officials-oppose-federal-suit-to-shut-berkeley-cannabis-dispensary/>.

⁶ See David G. Savage, *Supreme Court Action Upholds California's Medical Pot Law*, L.A. TIMES (May 19, 2009), <http://articles.latimes.com/print/2009/may/19/nation/na-court-marijuana19> (reporting on local efforts to enforce the federal ban on marijuana); see also Wes Woods, *Medical Marijuana and States Rights: Pot Dispensary Owner Faces 10 Years in Jail for Violating Federal Laws*, INLAND VALLEY DAILY BULL. (Nov. 17, 2012), <http://www.sbsun.com/health/20121117/medical-marijuana-and-states-rights-pot-dispensary-owner-faces-10-years-in-jail-for-violating-federal-laws>.

⁷ *New York v. United States*, 505 U.S. 144, 149 (1992).

⁸ See DANIEL J. SHERMAN, NOT HERE, NOT THERE, NOT ANYWHERE: POLITICS, SOCIAL MOVEMENTS, AND THE DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE, 154–155 (2011) (discussing the impact of local opposition to the disposal of radioactive waste and the eventual challenge to the law in *New York v. United States*).

⁹ *Id.*

¹⁰ *Id.* at 169.

Federalism in the United States is structured around competition between the federal government and the states. But many federalism disputes are the product of intrastate conflicts at the local level. Competing localities spur federalism disputes by recruiting the federal government and the states to fight on their behalf. They invoke federalism to defend local policies from state or federal intervention. They challenge the design of state and federal programs on federalism grounds to advance their interests vis-à-vis those of their neighbors. Growing intrastate divides mean that a major site of political conflict today is within states and between localities. Federalism, however, is increasingly the framework through which these disputes are resolved. The point here is not just that federalism disputes divide states, with some local actors favoring the federal position while others preferring that of the state. Rather, it is that intrastate conflicts are often the reason why many federalism disputes break out in the first place.

I refer to this development as “intrastate federalism,” and I argue that it is reshaping the role of federalism in American politics. At the most basic level, intrastate federalism provides an alternative account of why federalism disputes arise. Expanding the scope beyond the “tug-of-war” between federal power and state rights,¹¹ I show that local political cleavages within states provide an alternative explanation for why many states get embroiled in battles with the federal government. Indeed, contrary to traditional models of federalism, I argue that federalism disputes frequently involve states that are fiercely divided and experiencing tremendous amounts of political change. Evaluating federalism from the ground up reveals the local roots of many of America’s most sensational federalism battles—roots that are often obscured when federal-state alignment of federalism disputes is taken at face value. This approach also highlights the political incentives that lead so many intrastate conflicts to become federalism disputes. In short, I show that there is a political logic behind why federalism concerns continue to dominate even as the divide within states is starting to overshadow the divide between states.

Intrastate federalism is not only a useful framework for assessing the nature and origins of federalism disputes today. It also offers a unique lens on the history of American federalism. If the conventional account centers on the shifting balance of federal and state

11 See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN 1* (2011) (exploring the theoretical conflict between federal and state power throughout American history and examining alternative models of federalism in light of contemporary political issues).

power throughout American history,¹² I show how this balance has long been mediated through federal and state relationships with localities. The dominance of states in the nineteenth century came about through developments in American law that enabled states to consolidate their power over cities, towns, and other local governments within their territories. When the federal government overtook states in the twentieth century, it did so in part by forging federal-local relationships that explicitly bypassed the states. The history of these cross-cutting relationships offers further explanations for why intrastate conflicts today are increasingly channeled into the federalism arena. It also casts light on the often neglected role of localities in the development of American federalism more generally.

All of this, I suggest, offers a new perspective on some of the most contentious debates in the federalism literature. For decades, federalism scholars have clashed over the purpose of federalism in American politics. Is federalism necessary to accommodate distinctive states and the fractured political identities they generate among the American people?¹³ Or are federalism disputes simply the product of national partisan competition that spills over into state politics?¹⁴ Intrastate federalism suggests that we need not arrive at a coherent or cohesive account of states as a socio-economic community to believe that federalism continues to be used to negotiate the spatial rifts in American society. At the same time, intrastate federalism reminds us that the national partisan divide is in many ways a reflection of geographic divisions at the local level—between cities and suburbs, urban and rural, one community from the next. This may not be the

¹² See, e.g., DAVID BRADSTREET WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* 39–174 (1995); LARRY N. GERSTON, *AMERICAN FEDERALISM: A CONCISE INTRODUCTION* 54–62 (2007).

¹³ See, e.g., DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 14–25, 109–12 (2d ed. 1972) (measuring and analyzing intrastate political cohesion and deviation from national trends from state to state); Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System*, SSRN ELECTRON. J. 1, 44–45 (2015), <http://ssrn.com/abstract=2552866> (analyzing the academic discussion of the “death of state identity”).

¹⁴ See, e.g., Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079 (2014) (arguing that national partisan competition explains why states get embroiled in federalism battles with the federal government); James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J. LAW POLIT. 1, 1 (2013) (observing that the development of national political parties created a two-way street where states can influence national politics, and national politics impacts state politics); see generally Larry D. Kramer, *Putting The Politics Back Into The Political Safeguards Of Federalism*, 100 COLUM. L. REV. 215–93 (2000) (examining the Founders’ belief that state power would be protected through the political process, the development of national political parties, and the modern Supreme Court’s federalism jurisprudence).

original intent of federalism as a legal or political framework. Nor is it clear that federalism is a particularly apt framework for this kind of intrastate negotiation. Yet if we are to understand the role and nature of federalism disputes today, it is important that we recognize the scale at which America is fractured, and the nature of that divide.

This article proceeds in four Parts. Part I sets out the theory of intrastate federalism, which I use to explain why intrastate conflicts so often underlie federalism controversies. Part II provides a historical account of the development of federal and state power, in which I show that localities and intrastate conflicts played an important part. Part III examines contemporary federalism theories in light of the model that I have outlined. This is followed in Part IV with consideration of how federalism is shaping the very intrastate divides that it is now being called upon to negotiate.

I. THE INTRASTATE DIMENSIONS OF FEDERALISM DISPUTES

Federalism disputes serve many purposes in American politics. One such purpose, I argue, is as a means of negotiating intrastate conflicts. As political divides within states grow, the front lines of controversial policy disputes are increasingly at the local level. But because of the structure of our federal system, local political actors often steer intrastate conflicts into the federalism arena. From this perspective, federalism is about more than the federal-state relationship around which it is legally framed. Instead, I argue, federalism's role in American politics is defined in part by the internal conflicts within the states themselves.

The use of federalism in this manner is not new or novel. Indeed, intrastate conflicts underlie some of the most sensational federalism disputes in recent decades. Federal-state showdowns over civil rights in the 1960s and immigration regulations in the 2010s both had roots in contentious intrastate struggles, in which competing local forces sought the assistance of the federal government and the state. Federalism concerns surrounding the recent federal-state divide over marijuana are also being raised by local political actors, who strategically invoke competing federalism claims to defend local policies. Intrastate conflicts have also contributed to federalism controversies over the design of federal programs, from those pertaining to the disposal of low-level radioactive waste to the use of federal block grants in President Ronald Reagan's "New Federalism" initiatives.

In other words, federalism disputes often have intrastate conflicts at their core. This Part advances a theory, which I call "intrastate federalism," to explain why. My theory is based on two observations

about the structure of the federal system. The first is that states are internally divided and institutionally fragmented. As a result, the site of political conflict is often at the local level and within states. The second is that federalism remains the dominant framework for political controversies. What this means is that local political actors often compete to navigate policy disputes into the federalism arena. Taken together, these two aspects of the federal system offer an explanation of why federalism is increasingly involved in negotiating intrastate conflicts.

A. *Politics of Divided States*

New York is a liberal hotbed, except of course for the large swath of territory that lies “upstate.”¹⁵ Texas is a conservative stronghold, unless of course you happen to live in the metropolitan regions of Austin, Houston, Dallas, or San Antonio.¹⁶ Virginia, once the capital of the Confederacy, now finds itself internally divided between north and south—the former having become a part of the sprawl that is metropolitan Washington, D.C.¹⁷ Then there is California, which includes not only some of the most liberal cities in the country, but also some of the most conservative.¹⁸

Federalism is historically rooted in the distinctiveness of the several states.¹⁹ Yet there is considerable doubt that state distinctiveness plays much of a role in federalism disputes today.²⁰ After all, the divi-

¹⁵ See, e.g., EDWARD V. SCHNEIER, JOHN BRIAN MURTAUGH & ANTOINETTE POLE, *NEW YORK POLITICS: A TALE OF TWO STATES* 65–66 (2d ed. 2010) (detailing the connection between geography and political party support in the state of New York).

¹⁶ See Josh Kron, *Red State, Blue City: How the Urban-Rural Divide is Splitting America*, THE ATLANTIC (Nov. 30, 2012), <http://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/> (noting differences between political party affiliation in urban and rural areas of Texas); Richard Parker, *Will Cities Turn Texas Purple?*, N.Y. TIMES (Oct. 5, 2014), http://www.nytimes.com/2014/10/06/opinion/will-cities-turn-texas-purple.html?_r=0 (detailing the realignment from conservative to liberal politics in the large, urban areas of Texas).

¹⁷ See LILIOKANAIO PEASLEE & NICHOLAS J. SWARTZ, *VIRGINIA GOVERNMENT: INSTITUTIONS AND POLICY* 125 (2014) (discussing the cultural divide between northern and southern Virginia).

¹⁸ See Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POLIT. SCI. REV. 605, 609 (2014) (placing large U.S. cities on a spectrum according to conservative policy preference and ranking San Francisco the least conservative while finding Anaheim, California, among the top ten most conservative).

¹⁹ See ELAZAR, *supra* note 13; cf. generally MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2009) (discussing the ways in which geographical differences often create distinct identities among people).

²⁰ See FEELEY & RUBIN, *supra* note 19, 115–16 (2009) (contesting geographic distinctiveness as a basis for federalism in contemporary America).

sions between states are fading—eroded by decades of interstate mobility, growing economic integration, and the emergence of a national culture.²¹ Moreover, given the dominance of the two-party system and its “colonization” of state politics,²² many now argue that states no longer serve the values that federalism aims to promote: as a check on centralized power, a site for policy innovation and experimentation, or a means of satisfying divergent preferences on the ground.²³ As a result, theories of federalism are increasingly turning away from subnational distinctiveness in their effort to explain federalism’s role in American politics.²⁴

But if one looks *within* states, geographic distinctiveness and competing identities are alive and well. Moreover, they seem to be reproducing many of the political dynamics long associated with federalism and the federal-state divide. On a growing number of controversial policy disputes, the boundaries between local communities better reflect the fault lines in American politics than the traditional red-state, blue-state divide.²⁵ Channeled through local governments, these divides are creating patchworks of local policies that highlight rather than conceal the political cleavages within states.²⁶ All the while, local policy initiatives are being celebrated as innovations and experiments even—or especially—when they challenge existing state or federal law.²⁷

21 See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 830 (1992) (arguing that differences between state constitutions are not attributable to character and value differences between the people living in one state versus people living in another).

22 See generally Gardner, *supra* note 14.

23 See FEELEY & RUBIN, *supra* note 19, at 26–28 (discussing outmoded rationales for federalism and the need for centralized authority).

24 See ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 5–9 (2009) (arguing that it is time to move beyond distinctiveness as a basis for federalism and proposing an alternative).

25 See, e.g., JAMES G. GIMPEL & JASON E. SCHUKNECHT, PATCHWORK NATION: SECTIONALISM AND POLITICAL CHANGE IN AMERICAN POLITICS 17 (2004) (reviewing evidence that suggests that most regional political conflict today is not between different states but rather is found in geographic divisions within states).

26 See, e.g., Paul A. Diller, *Intrastate Preemption*, 87 BOST. UNIV. L. REV. 1113, 1117–22 (2007) (discussing attempts by interest groups to achieve locally what they could not achieve state-wide or nationally).

27 See generally Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1221 (2014) (examining efforts by big cities to combat obesity and tobacco use that go beyond state and federal measures); see also Charles R Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from US Cities to States*, 50 AM. J. POL. SCI. 825, 825–826 (2006) (discussing the impact of city-level policies on state-level enactments); BENJAMIN R. BARBER, IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES 5–12 (2013) (discussing the challenge of local

American states are diverse, and that diversity is not evenly distributed.²⁸ From urban to rural, from suburb to city, from one region to another, one can find in every state a patchwork of distinct communities, each one more different than the next. Traditional markers of segregation like race and class play a significant role.²⁹ Also reflected are cultural differences that are harder to measure but no less real. And while some of these divides are the product of historical processes such as where urbanization occurred and the diverging economic trajectories of different regions, much of it is also the outcome of generations of selective mobility and residential sorting.³⁰ Young people gravitate to cities.³¹ Rich people enclose themselves in suburbs.³² Republicans move out to the countryside.³³ To be sure, the specific manner in which each state is divided is often unique. Yet the fact that they are divided is increasingly a shared feature of every state.³⁴

But intrastate fragmentation is more than a demographic phenomenon; it is also embedded in the institutional structure of states. Cities, counties, towns, villages—the organization of state govern-

participation and centralized power and noting the pragmatism and innovation of mayors as a result of the fact that they are structurally closer to the citizens they represent).

28 See GIMPEL & SCHUKNECHT, *supra* note 25, at 15–16 (noting that political diversity is not evenly distributed within states, which leads to “geographic sectionalism”); *see also* LIVING BLUE IN THE RED STATES 3 (David Starkey ed.) (2007) (discussing political differences in different parts of the same state).

29 *See, e.g.*, ANDREW GELMAN ET AL., RED STATE, BLUE STATE, RICH STATE, POOR STATE: WHY AMERICANS VOTE THE WAY THEY DO 5 (2009) (“Income varies much less among states than within states . . .”).

30 *See* BILL BISHOP & ROBERT G. CUSHING, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 42–47 (2008) (discussing evidence of people moving to be close to others who share their characteristics, interests, and political leanings); GIMPEL & SCHUKNECHT, *supra* note 25, at 28 (noting that people who move, especially those who move long distances, are not a random and representative sample of the overall population of the U.S.).

31 *See* Michael Barbaro, *With Farms Fading and Urban Might Rising, Power Shifts in Iowa*, N.Y. TIMES (Oct. 20, 2014), <http://www.nytimes.com/2014/10/21/us/politics/iowa-senate-election.html> (“Those changes have turned Iowa’s older, Republican precincts even redder and its younger, Democratic districts even bluer, while giving rise to suburbs whose politics can be harder to categorize . . .”).

32 *See* ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA ix–x, 6 (2008) (discussing the compositional makeup of American suburbs); FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 1–3 (1997) (describing the various reasons why over 3 million Americans have moved into gated communities).

33 *See* Wendy K. Tam Cho, et al., *Voter Migration and the Geographic Sorting of the American Electorate*, 103 ANN. ASSOC. AM. GEOGR. 856, 862–63 (2013).

34 *See* GIMPEL & SCHUKNECHT, *supra* note 25, at 15 (noting that geographic separation based on political party affiliation is present in all states).

ments in America is highly decentralized.³⁵ Many of the roles and responsibilities ascribed to states in the federalism literature are, in practice, the province of its myriad local governments.³⁶ And there is growing evidence that segregation in America is proliferating largely along municipal lines.³⁷ Residents sort themselves into particular localities in order to access government resources allocated on the basis of local residency—from access to public schools to the tax bases that fund them.³⁸ They also choose particular cities or towns on the basis of the culture and “feel” of those communities.³⁹ Of course, this kind of local sorting is for many far from voluntary. Zoning regulations, for example, and their effect on the type and cost of housing have long been used by communities to fence out “undesirable” residents—be it racial minorities, immigrants, or the poor.⁴⁰ Regardless of the specific mechanisms that lead to intrastate sorting, however, the outcome is the same: intrastate divisions today map surprisingly well onto the local government jurisdictions that already subdivide the state.

Local governments not only provide an institutional framework through which intrastate divides can be spatially organized, they also provide an outlet through which diverging policy preferences can be expressed. As democratic institutions, local governments are politi-

³⁵ See NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS* 16 (1994) (discussing the reasons for the formation of local governments in America).

³⁶ *Id.*

³⁷ Among the various scales at which intrastate cleavages can arise—from broad regional divides to neighborhood or even block-level delineations—social segregation appears to be growing fastest at the scale of local governments. See generally Claude S. Fischer et al., *Distinguishing the Geographic Levels and Social Dimensions of U.S. Metropolitan Segregation, 1960–2000*, 41 *DEMOGRAPHY* 37–59 (2004) (assessing trends in residential segregation in the United States from 1960 to 2000 along several dimensions of race and ethnicity, class, and life cycle); see also D. T. Lichter, D. Parisi & M. C. Taquino, *Toward a New Macro-Segregation? Decomposing Segregation Within and Between Metropolitan Cities and Suburbs*, 80 *AM. SOC. REV.* 843, 844 (2015) (“We show increasing segregation between places: city-to-suburb segregation and suburb to suburb. Places, rather than neighborhoods, are administrative actors that often act to include or exclude low income populations through their local policies, e.g., accepting or not of mixed-income housing or the imposition of density zoning.”).

³⁸ See Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the Get What You Pay For Model of Local Government*, 56 *FLA. L. REV.* 373, 390–91, 432–35 (2004) (exploring the differences between various local forms of dues versus taxes and how these funds aid different members of society).

³⁹ See GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 11–13 (2001).

⁴⁰ See generally SIDNEY PLOTKIN, *KEEP OUT: THE STRUGGLE FOR LAND USE CONTROL* (1987) (discussing the historical use of zoning laws to manipulate the makeup of particular neighborhoods to the exclusion of particular groups).

cally accountable to their residents. In turn, residents use local governments as a political outlet to further their interests and define the character of their communities. As political observers have long known, different types of communities prefer different kinds of policies. Urban communities tend to support gun control and environmental regulations more strongly than their rural counterparts.⁴¹ Suburban residents tend to favor criminal prosecution and harsher penalties compared to those in the central cities.⁴² Growing intrastate fragmentation concentrates like-minded individuals in geographic communities. When those divides are aligned along municipal boundaries, local governments provide an outlet for those divergent preferences to manifest through policies that further set communities apart from one another or the state as a whole. To be sure, partisanship is frequently the lens through which intrastate policy divides are described: cities are “blue,” rural communities “red,” and suburbs somewhere in between.⁴³ Yet doing so often overlooks the degree to which many partisan divides are themselves an expression of how controversial policy issues affect different communities in different ways. While guns are associated with gang violence in the inner-city, they are associated with hunting, sport, and self-defense in rural communities.⁴⁴ While coal mining and “fracking” represent jobs and tax revenues in some communities, they are considered environmental hazards in others.⁴⁵ From this perspective, partisan divides are of-

41 See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (distinguishing general gun attitude of urban versus rural populations); see also Kirk Johnson, *Oregon's Gun Debate Goes Beyond Liberals vs. Conservatives*, N.Y. TIMES (Oct. 2, 2015), <http://www.nytimes.com/2015/10/03/us/oregons-gun-debate-goes-beyond-liberals-vs-conservatives.html> (“In many parts of the state, Portland is seen as alien, a place that does not understand the real Oregon.”).

42 See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 38 (2011) (discussing the trend of suburban residents to prefer harsh penalties to deter further crime in their areas).

43 This is borne out in terms of partisan control. “Indeed, of the nation’s 30 largest cities, just four (San Diego, Indianapolis, Fort Worth, and Oklahoma City) have Republican mayors, and even they have to swim with the urban tides. Mayor Greg Ballard of Indianapolis supported increased federal aid to mass transit and opposed his state’s ban on same-sex marriage.” Harold Meyerson, *The Revolt of the Cities*, AM. PROSPECT (Apr. 22, 2014), <http://prospect.org/article/revolt-cities>.

44 See Blocher, *supra* note 41, at 90–107 (exploring the differences between urban and rural gun culture, and the significance of these differences).

45 See David Weigel, *In Rural America, a Startling Prospect: Voters Obama Lost Look to Sanders*, WASH. POST (Oct. 5, 2015), https://www.washingtonpost.com/politics/in-rural-america-a-startling-prospect-voters-obama-lost-look-to-sanders/2015/10/04/5465ce22-6883-11e5-8325-a42b5a459b1e_story.html (discussing voting behavior in states such as West Virginia, where the presidential candidate Bernie Sanders’ embrace of environmental issues turned off voters in coal mining communities); see also Thomas Kaplan, *Citing Health*

ten the result, rather than the cause, of the policy divide between different communities.

These two role of local governments—as institutional units for intrastate sorting, and as policy outlets for local differentiation—are mutually reinforcing. People may look to local policies on, say, LGBT rights in deciding where to live within a given state. These choices then make it more likely that further policies protecting LGBT rights will be enacted in those communities going forward. Sorting in this manner not only explains why Americans’ famed mobility exacerbates rather than diminishes America’s geographic divides. Moreover, it suggests that interstate mobility, which is often credited for reducing the divide between states, can actually increase the political divide within states. Consider the state of Colorado: while explosive in-migration of new residents from “blue states” has moved the state as a whole toward the partisan middle, the concentration of this growth in communities like Denver, Boulder, and Aspen accentuated the political tensions between those communities and the rest of the state.⁴⁶ It is no wonder then that one of the earliest legal battles over LGBT rights was in Colorado at the time this political transition was in full swing. Denver, Boulder, and Aspen were some of the earliest cities in the country to prohibit discrimination on the basis of sexual orientation. Perceiving this as an affront to the state’s conservative roots, residents of Colorado Springs and the state’s many rural regions organized a successful ballot initiative to overturn these laws at the state level.⁴⁷ In response, the cities turned to federal courts. In *Romer v. Evans*, the Supreme Court struck down the state law on federal equal protection grounds.⁴⁸ But the intrastate dynamics underlying the dispute were not lost on Justice Antonin Scalia, who, in dissent, characterized the state ballot initiative as an effort “to counter both the geographic concentration and the disproportionate political power of homosexuals” in Colorado.⁴⁹

Risks, Cuomo Bans Fracking in New York State, N.Y. TIMES (Dec. 18, 2014), <http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html> (citing health risks for New York Governor Andrew Cuomo’s ban on fracking in the state, despite the practice’s potential “as a source of economic revival for depressed communities along New York’s border with Pennsylvania”).

⁴⁶ See BISHOP & CUSHING, *supra* note 30, at 57 (describing the tensions between the new “blue” residents of Colorado’s metropolitan areas and the traditionally “red” rural citizens).

⁴⁷ See generally Richard K. Ormrod & David B. Cole, *Tolerance and Rejection: The Vote on Colorado’s Amendment Two*, 48 PROF. GEOGR. 14 (1996) (discussing the differing views on gay rights of those living in urban and rural areas in Colorado).

⁴⁸ 517 U.S. 620 (1996).

⁴⁹ *Id.* at 647 (Scalia, J., dissenting).

In this regard, intrastate divisions not only represent a particular organization of American society. Channeled through local governments, they also represent a different kind of politics. With their bicameral legislatures and formal divisions of power, the structure of state government is certainly designed with intrastate conflicts in mind.⁵⁰ But when the front lines of political disputes are aligned along municipal boundaries, it becomes more likely that competing local legislatures, rather than representatives in the state house, will lead the initial charge. Thus, for a growing number of controversial issues today, the first sign of conflict is the emergence of a patchwork of local laws that subdivide the state. While one local community bans “fracking,” another promotes it.⁵¹ While one provides “sanctuary” for undocumented immigrants, another is committed to their removal.⁵² This is why the geographic element of intrastate fragmentation matters. It is not simply that diverse constituents within a state desire different policies. Rather, channeled through the institutions of local governments, political disagreements are often manifested through competing policies on the ground.⁵³

Thus far, I have focused on how intrastate divides highlight the horizontal competition between competing localities. This horizontal competition, however, also frames the vertical competition between localities and the state. Few in the federalism literature now believe that actions by the federal government are the same as actions taken by the “united” states.⁵⁴ The same is true of actions taken by states with respect to their localities. Cities have long complained about the suburban and rural biases in state governments.⁵⁵ Rural communities are equally insistent about their oppression by urban

⁵⁰ See Daniel B. Rodriguez, *State Constitutional Failure*, U. ILL. L. REV. 1243, 1243 (2011) (exploring methodologies of assessing state constitutional failures using specific examples of constitutional architectures).

⁵¹ See Sabrina Tavernise, *As Gas Drilling Spreads, Towns Stand Ground Over Control*, N.Y. TIMES (Dec. 14, 2011), <http://www.nytimes.com/2011/12/15/us/towns-fighting-to-stand-ground-against-gas-drillers.html> (citing counties opposed to gas drilling in the states of Pennsylvania, Colorado, and Texas as examples).

⁵² See Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1633–42 (2008) (discussing different local responses to immigration).

⁵³ See Heather K. Gerken, *Dissenting by Deciding*, STAN. L. REV. 1745–1805 (2005).

⁵⁴ See Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW 553, 557 (1987) (“Some early federalists might have thought that there was no distinction between creating the federal government and ensuring cooperation among states But clearly, others recognized, as we do, that these two concepts can be very different from each other”).

⁵⁵ See Gerald Gamm & Thad Kousser, *No Strength in Numbers: The Failure of Big-City Bills in American State Legislatures*, 107 AM. POLIT. SCI. REV. 663, 664 (2013) (highlighting the hardships faced by large cities in advancing their interests at the state level).

and metropolitan interests.⁵⁶ Whether a structural bias exists in state government, and what that bias might be, is a subject of considerable dispute.⁵⁷ What is important for our purposes is to recognize that in an era of intrastate fragmentation, state actions are often viewed through the lens of interlocal competition. Thus, when the Pennsylvania state legislature prohibited local governments from enacting gun control legislation, local leaders in Philadelphia and Pittsburgh, who had their gun control legislation invalidated, immediately saw this as an attack by rural communities: “I’m not going to continue to allow some state legislator from Lackawanna County or East Giblip County to tell us what we can do in the City of Philadelphia.”⁵⁸ Similarly, when New York State enacted the SAFE Act, a gun control measure, sheriffs in upstate communities revolted, claiming that the law was motivated by downstate interests in and around New York City.⁵⁹ These cases are not unique.⁶⁰ Across a host of different controversial issues, it is increasingly common for state policies to specifi-

56 See, e.g., MICHAEL B. KATZ & MARK J. STERN, *ONE NATION DIVISIBLE: WHAT AMERICA WAS AND WHAT IT IS BECOMING* 25 (2006) (discussing the American urban hierarchy throughout history); Greg Brophy & Kit Carson, Opinion, *The Democrats’ Attack on Rural Colorado*, DENV. POST (May 11, 2013), <http://www.denverpost.com/2013/05/10/the-democrats-attack-on-rural-colorado/> (Democratic legislators have crafted many urban-centered policies and forced them down the throats of rural Coloradans.”).

57 Compare Nancy Burns & Gerald Gamm, *Creatures of the State State Politics and Local Government, 1871–1921*, 33 URBAN AFF. REV. 59 (1997) (“[In] three states from 1871 through 1921 . . . local government and state politics appear to be coterminous.”), with Gamm & Kousser, *supra* note 55, at 663–64 (finding that big city delegations to state governments have been historically thwarted in state politics because the size of city delegations lead to internal divisions).

58 LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 4 (2008); see also Luke Ranker, *Cities Navigate New Kansas Law Prohibiting Gun Regulations*, KAN. CITY STAR (July 1, 2014), <http://www.kansascity.com/news/local/community/joco-913/overland-park-leawood/article656910.html> (“Clayton said open carry might have a place is [sic] rural areas, but not in the metro area. ‘We don’t go to western Kansas and tell them how to live,’ she said.”).

59 See Thomas Kaplan, *Cuomo’s Gun Law Plays Well Downstate but Alienates Upstate*, N.Y. TIMES (Oct. 24, 2014), <http://www.nytimes.com/2014/10/25/nyregion/with-gun-act-cuomo-alienates-upstate-new-york-constituency.html> (discussing debate between rural conservative New York voters upstate, and urban liberal voters downstate).

60 Lawmakers in Missoula, Montana expressed similar sentiments when state lawmakers passed a state bill expressly repealing the city’s ordinances deprioritizing marijuana enforcement and extending anti-discrimination protections for gays and lesbians: “Leave us alone. For heaven’s sake. We’re one little town in a corner of Montana that has nothing to do with you.” Charles S. Johnson, *House Bill Would Overturn Missoula’s Anti-Discrimination Ordinance for Gays, Lesbians*, BILLINGS GAZETTE (Feb. 22, 2011), http://billingsgazette.com/news/state-and-regional/montana/house-bill-would-overturn-missoula-s-anti-discrimination-ordinance-for/article_0262e838-5576-586d-9e51-2c55e4082bce.html. It is worth noting that Missoula is the second largest city in the state.

cally target certain localities,⁶¹ while localities and local officials are ever more willing to ignore or deprioritize state mandates.⁶²

B. Federalism as a Framework for Intrastate Conflicts

The site of political conflict is increasingly within states and at the local level. But what does this have to do with federalism? Federalism, commonly understood, concerns the relationship between the federal government and the states. The central debate is imagined to be the balance between federal power and state rights. On its face, intrastate conflicts seem an odd fit. If anything, one would expect federalism to become less important as the site of political conflict shifts from the national to the local.

It is no wonder when intrastate divides come up in the federalism literature, it is usually as a challenge to federalism's relevance,⁶³ or as an obstacle that modern theories of federalism must overcome.⁶⁴ But if intrastate divides challenge traditional accounts of federalism's role, they also offer an alternative explanation for its continued dominance in American politics. Intrastate conflicts may begin at the local level. They have a tendency, however, to escalate into federalism disputes at the national. This transformation occurs when competing localities successfully lobby the federal government and the states to fight on their behalf. It manifests when localities appropriate federalism claims to defend local policies—sometimes on behalf of “federal power,” sometimes on behalf of “state rights.” It also arises when different communities vie for an increased role in state and federal programs, especially with regard to how funds and other governmental resources are allocated among different communities. In each of these cases, the central divide is at the local level and within states.

⁶¹ See, e.g., Shaila Dawn, *States are Blocking Local Regulations, Often at Industry's Behest*, N.Y. TIMES (Feb. 24, 2015), <http://www.nytimes.com/2015/02/24/us/govern-yourself-state-lawmakers-tell-cities-but-too-much.html>.

⁶² See, e.g., Erica Goode, *Sheriffs Refuse to Enforce Laws on Gun Control*, N.Y. TIMES (December 15, 2013), <http://www.nytimes.com/2013/12/16/us/sheriffs-refuse-to-enforce-laws-on-gun-control.html>; Taylor Wofford, *Indianapolis Mayor Orders City Employees to Ignore Religious Freedom Restoration Act*, NEWSWEEK (Mar. 30, 2015), <http://www.newsweek.com/indianapolis-mayor-orders-city-employees-ignore-religious-freedom-restoration-318068>.

⁶³ See FEELEY & RUBIN, *supra* note 19, at 117 (“[T]he invocation [of federalism] is largely rhetorical and constitutes the underanalyzed invocation of an outdated cultural icon.”).

⁶⁴ See Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POLIT. SCI. REV. 459, 459 (2007) (“To be precise, federalism has been discussed in terms that, if taken seriously, would recommend institutions that are much more decentralized and much more flexible than federalist institutions really are.”).

Federalism, however, serves as the framework through which they are resolved.

Why would local actors turn to federalism? One reason is what federalism brings to the table. To be sure, federalism means many different things to different people. But for our purposes, suffice it to say that it is one of the dominant frameworks for political conflict in the United States. There is a long tradition in American politics of framing controversial policy disputes along the federal-state divide. And there are good reasons why political actors do so. Federalism comes with a set of stock arguments, can easily be deployed across a number of substantive policy areas, and is conducive to political mobilization—all of which help when the substantive arguments for a policy position start to lose ground. “State rights,” for example, proved to be an effective rallying cry for defenders of Jim Crow when public sentiment turned against the racist justification that underlay its creation.⁶⁵ A similar rhetorical shift also appears to be taking place today in the same-sex marriage debates.⁶⁶ Federalism is also an attractive forum for political actors because, as a matter of power, the federal government and the states are the most evenly matched. As a result, if one side in a policy dispute prevails at the federal level, the easiest way for the other side to compete is to turn to the states, and vice versa. The point here is not that something unique about the federal-state relationship explains why federalism disputes are rife in American politics. Rather, it is the opposite: the usefulness of federalism as a framework is what compels political actors to align ongoing policy disputes along federal-state lines.

Given this, political actors often compete to reposition their disputes as federalism controversies. And local political actors are no exception. Federalism scholars usually do not become interested in a policy issue until it has evolved into a federal-state dispute. As such, they tend to focus narrowly on the federalism claims that are made, rather than the process by which the issue was cast as a federalism dispute at all. But that process is important. The Supreme Court may describe the federal system as a sorting device: national matters

⁶⁵ See KIMBERLEY JOHNSON, REFORMING JIM CROW: SOUTHERN POLITICS AND STATE IN THE AGE BEFORE *BROWN* 9–10 (2010) (discussing the ways in which white Southern conservatives attempted to delay the full-implementation of the Jim Crow reforms).

⁶⁶ See, e.g., Aaron Blake, *Gay Marriage Opponents are Suddenly All About States' Rights. Wonder Why.*, WASH. POST (June 11, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/06/11/gay-marriage-opponents-are-suddenly-all-about-states-rights-wonder-why/> (“Just nine years after a clear majority [of gay marriage opponents] said [same-sex marriage] was a federal issue, 72 percent say it should be decided at the state level.”).

to the federal government, local matters to the states.⁶⁷ But accounts of our federal system in the political science literature have long emphasized its fluidity. As Frank R. Baumgartner and Bryan D. Jones argue, policy battles are often won by political actors who are able to navigate policy issues up and down the federal system in search of more advantageous ground.⁶⁸ For local political actors then, the federal system is foremost an institutional map that they can compete to navigate.

The advantages that federalism offers provide some explanations for why intrastate conflicts become federalism disputes. Yet the attractiveness of federalism is also rooted in the unique limitations that local governments face in American law. Local governments are constrained on multiple fronts. They have little influence over the policies of their neighbors, even when those policies frustrate their own.⁶⁹ Their policies are subject to being overturned at the state and federal level, especially when they are in direct conflict.⁷⁰ Moreover, given their limited power to raise taxes and borrow money, localities are distinctly beholden to state and federal funding and compete over how those are allocated among them.⁷¹ The ability to successfully navigate the federal system offers localities a means of overcoming these constraints—sometimes even turning them to their advantage. By doing so, federalism is often drawn into an intrastate dispute.

Consider, for example, intrastate conflicts over the spillover effects of competing local policies. Short of escalating the dispute up the federal hierarchy, there is not much that a locality can do on its own in response to local policies in neighboring jurisdictions that hinder their own. A ban on handgun or alcohol sales in one local community, for example, is easily frustrated if neighboring localities freely allow those to be sold. Similarly, land use decisions foreclosing affordable housing in suburban communities might impose economic and social harms on the central city where low-income residents

67 See, e.g., *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”).

68 See generally FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 216 (2010).

69 See GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 39 (2013) (discussing the general complexities of local autonomy).

70 See Diller, *supra* note 27, at 1224 (“[C]ourt challenges and attempts to preempt at higher levels can greatly affect a regulation’s potential for diffusion . . .”).

71 See FRUG, *supra* note 39, at 17–18 (“City income is largely based on something cities cannot control: the willingness of taxpayers to locate or do business within city boundaries.”).

are concentrated.⁷² State and federal laws can address these spillover effects by imposing a uniform policy that all localities must follow. However, competition over whether such a policy should be adopted, and, if so, what that policy might be, often pits localities against one another in seeking the involvement of the federal government and the state.

Localities also have limited ability to check state or federal power *as localities*, especially when local policies conflict with state or federal law. Unlike states, localities are accorded no privileged position in the federal system vis-à-vis the federal government. And while many states have granted “home rule” powers to their localities, courts have been reluctant to uphold these powers in the face of countervailing state law, especially on controversial issues.⁷³ As a result, “localism,” which focuses specifically on the power and standing of local governments, offers little legal or political recourse for localities facing state or federal opposition. To check state law then, localities look to the federal government. To check federal law, localities look to the state. Thus, when states started banning their cities from providing municipal broadband service in competition with private Internet providers, the cities turned to the federal government to preempt these state laws.⁷⁴ Similarly, when federal law prohibited cities from refusing to participate in immigration enforcement efforts, New York City defended its “sanctuary” policy by invoking “state rights” and arguing that the federal government was impermissibly “commandeering” it as an instrumentality of the state.⁷⁵ Reframing like this does not ensure success. Yet it often provides localities with avenues for defending local policies that are not otherwise available.

72 See *So. Burl. Cty. NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 722–24 (1975) (noting that suburban exclusionary zoning laws concentrated poverty in cities, which caused a “critical erosion of the city tax base and inability to provide the amount and quality of those governmental services—education, health, police, fire, housing and the like—so necessary to the very existence of safe and decent city life”).

73 See FRUG, *supra* note 39, at 5 (“[I]n our highly urbanized country, the American legal system has chosen to create cities that are powerless to act on their own initiative.”); see also ELAZAR, *supra* note 13, at 205 (arguing that the degree to which municipalities can develop initiatives depends upon the culture and political system of the state).

74 See *Nixon v. Miss. Mun. League*, 541 U.S. 125, 129 (2004) (describing the efforts of municipalities petitioning the FCC to overturn a state law banning cities from providing broadband service); Thomas Gryta, *FCC Votes to Allow Municipal Broadband, Overruling Two States’ Laws*, WALL ST. J. (Feb. 26, 2015), <http://www.wsj.com/articles/fcc-votes-to-allow-municipal-broadband-overruling-two-states-laws-1424969156> (describing FCC ruling allowing some municipalities to provide broadband service).

75 *City of New York v. United States*, 179 F.3d 29, 33 (2nd Cir. 1999).

In addition, localities are uniquely dependent on state and federal funds. These funds allow them to meet the cost of routine expenditures, especially when their ability to raise revenue is legally restricted or jurisdictionally constrained.⁷⁶ State and federal funds also enable localities to pursue special projects or initiatives that would be difficult for them to undertake on their own. Of course, this reliance of localities is mirrored by the fact that the state and federal governments also rely on local governments to carry out their programs and policies. This mutual dependence in turn makes localities particularly interested in how governmental programs are designed. Indeed, competition over how those funds are allocated and the purpose for which they can be used often pits local governments against one another. And much of that conflict turns on which level of government ultimately controls how local funds are allocated—the federal government or the state.

Intrastate federalism presents an alternative account of how federalism disputes arise. In turn, it also presents a different account of the type of states that get embroiled in federalism disputes. Conventional accounts of federalism often assume that its purpose is to accommodate the interests of outlier states.⁷⁷ From this perspective, the states most likely to initiate a federalism challenge against the federal government are those most out of step with the national norm, especially if they deviate in ways that are rooted in the unique cultural and political history of the state. Intrastate federalism, however, suggests that federalism is also likely to be invoked when the opposite is true: by states that are internally divided, whose political identities are contested, and whose demographic composition is undergoing dramatic change. Divisions within states spur intrastate conflicts. These conflicts are more pressing when the political identity of the state is in flux. And a state's political identity is most likely to be contested when different demographic constituents lay claims. Of course, the ability of local political actors to navigate intrastate conflicts into the federalism arena often depends on their ability to align the federal government and the states on opposing sides. But intrastate federalism predicts that divided states are just as likely as homogeneous states to find themselves involved in federal-state controversies.

⁷⁶ See FRUG & BARRON, *supra* note 69, at 16 (discussing the limiting effect of state laws on municipal power).

⁷⁷ See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1939–47 (1995) (describing how conditional grants of funds are used to entice “outlier” states into changing their laws).

Given the local roots of intrastate federalism disputes, the theory also suggests that local policies may play a larger role in federalism disputes than traditional theories suggest. Many have commented on how shifts in the federalism balance can benefit specific localities, sometimes in counterintuitive ways.⁷⁸ But, for the most part, they portray this as an incidental effect and not itself a causal factor. In negotiating the federal-state balance, the argument goes, the state-local or local-local relationship is also affected. Intrastate federalism, however, suggests that sometimes the purpose is reversed: federalism can be used as a means of determining which local policy survives and which fails. As a result, it predicts that federalism disputes will often revolve around both efforts to restrict and efforts to empower certain localities to the benefit or detriment of others. This is especially likely when local governments are at the front lines of the particular issue being debated.

In short, intrastate federalism assumes that localities are self-interested. It recognizes, however, that in many cases this self-interest is best served by appealing to the federal government or the state. Local political actors may have no particular interest in the federal-state balance of power as such. Nor are they necessarily likely to see their interests aligned with either the federal government or the states across all policy matters, especially as political control at both levels changes over time. Nevertheless, in order to advance local interests, the structure of our federal system and the standing of local governments create strong incentives for local political actors to look to federalism as a forum for intrastate conflicts. As Edward Purcell Jr. argues, the myriad ways that local interests selectively turn to the federal government and the states to achieve tangible policy outcomes produces a “kaleidoscope politics” that makes it hard to figure out what the federal or state interests actually are.⁷⁹ But that, in many ways, is part of the point: federal and state interests are in many cases proxies for competing local interests within states.

⁷⁸ See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 961 (2007) (arguing that courts have allowed local governments to invoke federal authority to resist state government action); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999) (discussing the delegation of federal power to state and local institutions against the will of state legislatures).

⁷⁹ See EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* 93–107 (2007) (describing power struggles between city, town, and county governments).

C. *Intrastate Federalism in Action*

My argument thus far is that intrastate conflicts are often at the heart of federalism disputes. The usefulness of this model, however, depends on how well it explains federalism controversies on the ground. A few examples have been introduced thus far to illustrate some of the structural foundations of my theory. The goal in this section is to examine in more detail how intrastate federalism plays out in a number of concrete federalism disputes.

1. *Dual Federalism and the Competition for Federal and State Support*

The most basic understanding of federalism in America is as a system of dual sovereignties, in which the federal government and the states occupy separate and independent spheres of power.⁸⁰ As a result, the quintessential federalism dispute is often imagined to be a jurisdictional battle that directly involves the federal government and the states. Under this view, federalism disputes arise when one side of the federal-state divide attempts to expand the scope of its power beyond its prescribed limits. And federalism disputes are resolved when the lines between the federal and state power are clarified, either by the courts or through the political process.

Direct federal-state conflict of this kind is a staple in American politics. The confrontation between federal marshals and state troopers over segregation in states like Alabama during the 1960s is one such example. It can also be seen in recent controversies, such as the federal government's lawsuit challenging the constitutionality of Arizona's immigration enforcement law, S.B. 1070. Federalism showdowns such as these are often upheld as examples of the continued salience of the federal-state divide. They are also invoked to call attention to interstate divisions, particularly how certain states, like Alabama and Arizona, fall outside of the national norm. But, as I argue here, intrastate disputes play as much of a role as the jurisdictional divide between the federal government and the states.

How are intrastate conflicts involved when claims of federal power and state rights collide? Let's start with the federalism standoff over civil rights in the 1960s. The conventional civil rights narrative hews closely to the traditional federalism framework. Civil rights, we are told, divided the North from the South, the federal government from

⁸⁰ See, e.g., RYAN, *supra* note 11, at 3 (describing this conception of federalism as "idealizing the state and federal governments as operating in mutually exclusive jurisdictional spheres").

the states. Yet violent opposition to desegregation broke out in northern and southern states alike.⁸¹ Moreover, when federal-state conflicts arose, it often involved states that were themselves fiercely divided. Few can forget the iconic image of then-Governor George Wallace of Alabama physically barring the entry of black students and federal marshals from entering segregated schools. But what is often overlooked is the extent to which this federalism showdown was precipitated by years of local tensions in which competing sides clamored for state and federal support. Whites who supported Jim Crow marshalled the power of local governments and sought the support of the state in resisting federal desegregation orders.⁸² At the same time, Blacks and their supporters countered local resistance in court and repeatedly appealed for assistance from the federal government.⁸³ By the time federal and state officials met on the steps of Alabama schools, the intrastate conflict over desegregation and civil rights had become so volatile and well publicized that it was impossible to ignore.⁸⁴ Indeed, by many accounts, it was only because the intrastate conflicts had reached a boiling point that the federal government finally intervened on behalf of the local actors seeking their involvement.⁸⁵

As it was in the past, intrastate conflict also appears to be at the center of federal-state showdowns today. Consider the recent federalism controversy over Arizona's controversial immigration enforcement law, S.B. 1070. When the state enacted the law in 2010, it claimed that states had inherent powers to regulate and enforce im-

81 See generally THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008) (discussing the movement for racial equality in the northern states).

82 See CLIVE WEBB, *MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION* 25–26 (2005).

83 See JACK M. BLOOM, *CLASS, RACE, AND THE CIVIL RIGHTS MOVEMENT* 151–52 (1987) (describing the difficulties that Blacks faced in securing assistance from the federal government).

84 See TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965–68*, at 54–57, 119–120, 122–23 (2006) (describing the violence associated with the Selma to Montgomery marches of 1965).

85 See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004) (describing the movement for racial equality with a focus on the actions of the Supreme Court); DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* (2014). Not surprisingly, it was also intrastate divides that ended up being used to maintain segregation, now along municipal boundaries, following the legal dismantling of Jim Crow in the South. See KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* 8 (2013).

migration within its state.⁸⁶ Upon its enactment, however, the federal government filed suit challenging the law for infringing on its “plenary power” over immigration.⁸⁷ States from across the country quickly joined the litigation, lining up behind both Arizona and the federal government.⁸⁸ Cities and other local governments in Arizona, however, also did the same. On the one hand, local officials and representatives from Phoenix, Flagstaff, Mesa, Tucson, among others, submitted affidavits and amicus briefs in support of the federal government, with some filing lawsuits of their own against the state.⁸⁹ On the other hand, the state drew support from Maricopa County, which encompasses Phoenix and its surrounding suburbs.⁹⁰

It is tempting to see the intrastate divide in Arizona as a byproduct of federal-state contestation over the constitutionality of the state’s law. Yet in many ways, intrastate conflicts over immigration both preceded and motivated the federalism dispute over S.B. 1070 that followed. Long before Arizona passed its immigration enforcement

⁸⁶ See Suzy Khimm, *The Man Behind Arizona’s Immigration Law*, MOTHER JONES (May 7, 2010), <http://motherjones.com/politics/2010/05/kobach-arizona-immigration-law> (describing the idea that states have “inherent authority to enforce federal immigration laws”).

⁸⁷ See Plaintiff’s Motion for Preliminary Injunction and Memorandum of Law in Support Thereof at 13–15, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-1413-NVW) (arguing that it is unlawful to set immigration policy at the state level).

⁸⁸ Compare Brief for the States of New York, California, Connecticut, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Oregon, Rhode Island, and Vermont as Amici Curiae in Support of Respondent, *Arizona v. United States*, 132 S.Ct. 2492, 2012 WL 1054493 (2012) (supporting the federal government’s position), with Brief of Amici Curiae State of Michigan and Fifteen Other States in Support of the Petitioners, *Arizona v. U.S.*, 132 S.Ct. 2492, 2012 WL 523350 (2012) (supporting Arizona’s position).

⁸⁹ See Declaration of Roberto Villaseñor, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), <http://www.justice.gov/opa/documents/declaration-of-roberto-villaseñor.pdf> (arguing that the Arizona law would divert police officers from their traditional “patrol and enforcement” duties); Declaration of Phoenix Police Chief Jack Harris, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), <http://www.justice.gov/opa/documents/declaration-of-jack-harris.pdf> (arguing that the Arizona law would have a negative effect on police relations with the community); Declaration of Tony Estrada, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), www.justice.gov/opa/documents/declaration-of-tony-estrada.pdf (arguing that the Arizona law would undermine law enforcement’s ability to set their own priorities); Amicus Curiae Brief of the Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton in Support of Plaintiff-Appellee, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), 2010 WL 5162523 (describing the budgetary and public safety problems posed by the Arizona law); Amicus Curiae Brief Submitted by the City of Tucson in Support of Plaintiff-Appellee, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), 2010 WL 516252 (arguing that the Arizona law would impose new burdens on the police force).

⁹⁰ See Brief of Joseph M. Arpaio, Maricopa County Sheriff as Amici Curiae in Support of Petitioner, *Arizona v. United States*, 132 S.Ct. 2492 (2012), 2012 WL 506642 (arguing that the Arizona law should be upheld).

mandate, Sheriff Joseph Arpaio of Maricopa County was already prioritizing immigration enforcement and carrying out sensational raids in cities like Phoenix and Mesa, which he considered to be illegal “sanctuaries” for undocumented immigrants.⁹¹ Long before the federal government challenged Arizona’s law in court, the mayor of Phoenix and the Police Chief of Mesa were already confronting Sheriff Arpaio and urging him to temper his enforcement efforts.⁹² As the conflict escalated, each side sought support at higher levels. Mayor Gordon of Phoenix famously sent an open letter to the federal Department of Justice demanding an investigation of Sheriff Arpaio’s practices.⁹³ When the federal government stripped Sheriff Arpaio of authorization to participate in immigration enforcement efforts following an investigation,⁹⁴ the Sheriff publically cast his support behind S.B. 1070, which essentially codified his county’s policies for the entire state.⁹⁵ For localities in Arizona then, the federal-state showdown over S.B. 1070 was foremost over which kind of local immigration policy would ultimately prevail. Indeed, the local stakes were precisely how the bill’s sponsor described the motivation behind the law: “Striking down . . . sanctuary city policies have always been the number one priority of SB 1070.”⁹⁶

Federalism framed the civil rights struggles of the 1960s and the battle over state immigration regulations in the 2010s. But in both, intrastate divides played an important role. Indeed, the fact that the

91 See Scott Wong, *Gordon: Sheriff Arpaio Giving State Bad Reputation*, ARIZ. REP. (Mar. 27, 2009), <http://archive.azcentral.com/news/articles/2009/03/27/20090327gordon0327-ON.html> (describing criticism of Sheriff’s Arpaio’s remark that Phoenix is a “sanctuary city” for undocumented immigrants).

92 See Ray Stern, *Mesa Police Chief George Gascón Stares Down Sheriff Joe Arpaio*, PHOENIX NEW TIMES (July 10, 2008), <http://www.phoenixnewtimes.com/news/mesa-police-chief-george-gascn-stares-down-sheriff-joe-arpaio-6426648> (describing the City of Mesa’s conflict over Maricopa County’s immigration enforcement strategy).

93 See *Gordon Calls for Inquiry into Arpaio*, ARIZ. REP., Apr. 13, 2008, ProQuest, Document ID 239056668 (providing excerpt from Mayor Gordon’s letter).

94 See Yvonne Wingett, *Arpaio Investigation Began in 2008*, ARIZ. REP. (July 11, 2010), <http://archive.azcentral.com/news/articles/2010/07/11/20100711joe-arpaio-probe-first-steps.html> (describing investigation into Sheriff Arpaio’s possible abuse of power); Randal C. Archibold, *U.S. Alters Disputed Immigration Rules for Police*, N.Y. TIMES (Oct. 16, 2009), <http://www.nytimes.com/2009/10/17/us/17immig.html> (describing federal policy requiring state and local law enforcement officers to adhere to federal anti-discrimination laws).

95 See CHARLES TILLY & LESLEY J. WOOD, *SOCIAL MOVEMENTS 1768–2012* 146 (3d ed. 2013) (discussing Sheriff Arpaio’s practices in Maricopa County and his support for S.B. 1070).

96 See Tim Steller, Sr. Reporter, *Sanctuary Cities in Arizona?*, TUCSON.COM (July 29, 2010), http://tucson.com/news/blogs/senior-reporter/sr-reporter-sanctuary-cities-in-arizona/article_871e8cd8-9b3c-11df-81d9-001cc4c03286.html (describing S.B. 1070’s prohibition on limiting immigration enforcement).

federal-state showdown centered on states like Alabama and Arizona was due in no small part to the degree of intrastate conflicts that existed in each. Alabama was a state divided on civil rights, with both sides seeking support from higher levels. Arizona was neither the only nor the first state to test the limits of federal power by enacting immigration enforcement laws.⁹⁷ But of the states that did, it was also the most internally fractured on the issue. Local forces locked in intrastate struggles appealed for the support of the federal government and the state. As the conflict escalated, these internal struggles prompted the federal government and the states to intervene. All the while, intrastate conflicts were reframed as federalism disputes at the national level.

2. *Federalism Claims and the Defense of Local Policies*

Federalism is about the relationship between the federal government and the states. But federalism controversies not only arise when the federal government or the states challenge one another directly: they also arise when federalism claims are invoked by third parties seeking to limit the application of state or federal law. Criminal defendants assert federalism claims to strike down federal laws with which they have been charged.⁹⁸ Private corporations argue that federal regulations displace state tort laws in defending themselves from civil liability.⁹⁹ Localities, I argue here, also invoke federalism claims in the same way.

Localities invoke “state rights” in challenging the federal government. Localities invoke “federal supremacy” in challenging the state. In each of these cases, the motivation is to protect local policies and practices from countervailing state or federal law. Yet federalism provided the legal framework for them to do so. On the one hand, modern federalism cases are filled with instances in which localities assert federalism claims on behalf of the state. Seminal cases like *Na-*

⁹⁷ See Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1380 (2012) (describing similar laws passed in Missouri, Oklahoma, South Carolina, Indiana, Georgia, and Alabama).

⁹⁸ See *United States v. Morrison*, 529 US 598, 617–618 (2000) (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”); *United States v. Lopez*, 514 US 549, 551 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeds Congress’s power under the Commerce Clause).

⁹⁹ See Catherine M Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL’Y 1013 (2007) (describing federal preemption of state laws in pharmaceutical cases).

tional League of Cities v. Usery,¹⁰⁰ *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁰¹ and *Printz v. United States*¹⁰² were all instigated by localities themselves. And while some Justices have expressed concerns over this practice,¹⁰³ the Supreme Court has largely acceded to treating states and localities as interchangeable in the federalism context. On the other hand, when faced with state preemption, localities also argue on behalf of the state. In these cases, local officials claim that following state law would force them to violate federal law. And given the supremacy of federal law under the U.S. Constitution, they argue, their allegiance to federal law takes precedence over their obligation to the state. For example, when the City of San Francisco found its policy of not reporting undocumented immigrant to federal immigration officials violated a California law requiring them to do so in certain circumstances, the city countered by arguing that the state law requirement was preempted by the federal government's plenary power over immigration.¹⁰⁴

In some controversial issues, federalism claims on behalf of the federal government and the states are raised at the same time as different localities take competing stances in defending local policies from conflicting state or federal law. Take, for example, the federalism controversy over marijuana. In 1996, California became the first state to decriminalize marijuana for medical use with the passage of the Compassionate Use Act.¹⁰⁵ Since then, twenty-three states and the District of Columbia have followed suit,¹⁰⁶ with some going even further to decriminalize recreational use as well.¹⁰⁷ Despite these developments at the state level, however, marijuana remains categorically

100 *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (invalidating a federal law requiring the payment of a minimum wage to state and local government employees).

101 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (upholding a federally-mandated minimum wage for employees of a municipal transit authority, overturning *Usery*).

102 *Printz v. United States*, 521 U.S. 898 (1997) (invalidating a federal law requiring state and local law enforcement officials to conduct background checks on prospective gun purchasers).

103 *See, e.g., id.* at 955–56 n.16 (Stevens, J., dissenting) (“If the federal judicial power may be exercised over local government officials, it is hard to see why they are not subject to the legislative power as well.”).

104 *See Fonseca v. Fong*, 167 Cal. App. 4th 922 (2008).

105 *See* PETER HECHT, *WEED LAND: INSIDE AMERICA'S MARIJUANA EPICENTER AND HOW POT WENT LEGIT 4* (2014) (describing Proposition 215 and the Compassionate Use Act for Medical Marijuana).

106 *See 25 Legal Medical Marijuana States and D.C.*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited June 28, 2016).

107 *See* HECHT, *supra* note 105, at 207 (describing Colorado and Washington initiatives allowing for the recreational use of marijuana).

prohibited under federal law.¹⁰⁸ Navigating this divide is difficult. But over the years, an administrative truce of sorts has emerged: federal officials follow federal laws, while state officials follow state laws.¹⁰⁹

But what about localities? This question is rarely asked because it is widely assumed that, as subdivisions of the state, localities *should* abide by state law. But in practice, localities with divergent interests on the issue often adopt conflicting approaches that take advantage of the federal-state divide. Some cities stand behind state laws legalizing marijuana and challenge federal efforts to enforce federal restrictions in their jurisdictions. Others aid and assist federal enforcement efforts, while standing behind federal law in defending their policies from claims of state preemption. In doing so, the long awaited federalism showdown between the federal government and the states is largely playing out within the states themselves.

Examples of intrastate conflicts over marijuana can be found in virtually every state that now permits its use.¹¹⁰ But nowhere is it more pronounced than in California, where the movement to legalize marijuana began. This might be surprising given California's reputation as a "liberal" state. On the ground, however, the political tensions within California over marijuana are fierce. On one side, cities like Oakland and San Francisco not only spearheaded the initiative petition that permitted the medical use of marijuana in the first place, but others including Berkeley and Santa Cruz have aggressively sought to limit federal enforcement efforts.¹¹¹ On the other side, cit-

108 See *Gonzales v. Raich*, 545 U.S. 1, 5–6 (2005) (discussing developments in California's marijuana laws and the conflict they present with federal law).

109 See Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719, 719–20 (2015) (conceding that, although the federal government has largely ceded control of marijuana laws to the states, the states are facing opposition from "within their own borders").

110 See, e.g., *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 534 (Mich. 2014) (resolving a conflict between Michigan state law governing the use of medical marijuana and the federal Controlled Substances Act ("CSA")); *People v. Crouse*, No. 12CA2298, 2013 WL 6673708, at *1 (Colo. App. Dec. 19, 2013) (holding that Colorado's marijuana amendment was not preempted by the CSA), *cert. granted*, No. 14SC109, 2015 WL 3745183 (Colo. June 15, 2015) (per curiam); Court's Letter Opinion from Josephine County Circuit Judge Pat Wolke to Counsel in *City of Cave Junction v. State of Oregon*, Case No. 14CV0588, at 3–5, (Oct. 16, 2014), <http://www.orcities.org/Portals/17/Cave%20Junction%20Trial%20Court%20Decision.pdf> (discussing the issue of preemption with regard to medical marijuana laws); Amended Brief of Appellant, MMH, LLC et al. v. City of Fife, No. 90780-3 (Wash. Feb. 10, 2015), <https://www.courts.wa.gov/content/Briefs/A02/467232%20Appellant%27s%202.pdf> (claiming a local zoning ordinance banning marijuana land uses conflicts with Washington's voter-approved recreational marijuana law); see also Mikos, *supra* note 109, at 719–20 (discussing the internal disagreement among localities in states with medical marijuana laws).

111 See Romney, *supra* note 5 (discussing the ongoing conflict between Bay Area cities and the federal government over medical marijuana laws); Malia Wollan, *Oakland Sues U.S. to Pre-*

ies like San Diego, Santa Ana, and Upland actively resisted the legalization of medical marijuana under state law, and worked closely with federal officials to prohibit the growth, sale, and use of marijuana in their communities.¹¹²

But this divide is reflected in more than just whether local officials sought or resisted federal involvement. It also extends into court battles as different localities invoked competing federalism claims in order to defend local policies. When the federal government sought to close medical marijuana dispensaries in Oakland and Berkeley, the cities intervened in support of the dispensaries and filed independent claims against the federal government.¹¹³ In both cases, the cities invoked state law in support of local interests against federal enforcement.¹¹⁴ Conversely, many communities in California have invoked federal preemption against the state. When the County of San Diego refused to issue identification cards to authorized marijuana users under state law, it defended its decision in court by arguing that it was simply complying with federal law, which preempted that of the

vent Closing of Medical Marijuana Dispensary, N.Y. TIMES, (Oct. 11, 2012), http://www.nytimes.com/2012/10/12/us/oakland-sues-to-prevent-closing-of-medical-marijuana-dispensary.html?_r= (covering Oakland's lawsuit to prevent the DOJ from seizing property leased to a medical marijuana dispensary).

112 See *Savage*, *supra* note 6 (discussing the failure of San Diego and San Bernardino Counties to challenge the state's medical marijuana law); Woods, *supra* note 6 (highlighting the court battle over Upland's zoning laws that ban medical marijuana dispensaries, despite the state law); Will Yakowicz, *Cops Raid Legal Cannabis Companies Despite Upcoming Recreational Vote*, INC., (Jul. 28, 2016), <http://www.inc.com/will-yakowicz/cops-still-raid-legal-california-cannabis-concentrate-companies.html> (discussing a raid by the San Diego Police Department of a "legal" medical marijuana company); Jeff McDonald, *Marijuana Business Owner Seeks Frozen Assets Back*, SAN DIEGO UNION-TRIBUNE, (Nov. 14, 2016), <http://www.sandiegouniontribune.com/news/watchdog/sd-me-cannabis-case-20161114-story.html> (discussing San Diego's use of civil asset forfeiture against marijuana companies); Alejandra Molina, *2 Santa Ana Pot Dispensaries Raided, Others Warned*, ORANGE COUNTY REGISTER, (Aug. 21, 2013), <http://www.ocregister.com/articles/marijuana-504798-stores-federal.html> (discussing Santa Ana's enforcement against marijuana dispensaries).

113 See *Romney*, *supra* note 5 (documenting the dispute between the federal government and the cities in the California Bay Area over medical marijuana laws); Wollan, *supra* note 111 (reporting Oakland's suit against the DOJ to prevent the Department from seizing property leased to a medical marijuana dispensary).

114 See *United States v. 2366 San Pablo Avenue*, No. 13-cv-02027-JST, 2015 WL 525711, at *2–4 (N.D. Cal. Feb. 6, 2015) (holding up the "fact that multiple states and localities have enacted medical marijuana laws" as evidence of a "public interest" that weighs in favor of Berkeley's request for a stay in a federal forfeiture action against a medical marijuana dispensary); Complaint for Declaratory and Injunctive Relief & Demand for Jury Trial at 1, 6–7, *City of Oakland v. Holder*, 901 F. Supp. 2d 1188 (N.D. Cal. 2013) (No. C-12-5245 MEJ), 2012 WL 4825003 (arguing that Oakland has a significant public interest in protecting the regulations it adopted concerning medical cannabis).

state.¹¹⁵ Similar federal preemption arguments were echoed by the City of Riverside in justifying its refusal to issue building permits for medical marijuana dispensaries within its jurisdiction,¹¹⁶ the City of Anaheim in defense of a local ordinance that criminalized the operation of a medical marijuana dispensary,¹¹⁷ and the City of Garden Grove and Butte County, which invoked federal law to defend their policies of seizing and destroying marijuana otherwise legally possessed under state law.¹¹⁸ Not surprisingly, state courts in California have not been kind to localities challenging state laws in this manner. But just like the cities themselves, the courts also rely on federalism arguments to justify their position.¹¹⁹

As we see in the marijuana context, federalism claims are sometimes invoked by localities on behalf of the federal government or their state. Other times, federalism claims arise when intrastate conflicts are recast as interstate fights. Take, for example, *White v. Massachusetts Council for Construction Employers*.¹²⁰ At issue in *White* was an executive order issued by the City of Boston requiring contractors working on city-funded projects to use a workforce at least half of which were residents of the city. The purpose of the order was to

115 See *County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 467–68 (Cal. Ct. App. 2008) (“[San Diego and San Bernardino] Counties argue the [state’s Medical Marijuana Program Act] is invalid under preemption principles, arguing the [Act] poses an obstacle to the congressional intent embodied in the CSA.”).

116 See *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 300 P.3d 494, 499 (Cal. 2013) (“The appellate court agreed with defendants that the City could not assert *federal* preemption of *state* law as authority for its total ban on medical marijuana dispensing facilities.”). The court did find, however, that the state marijuana law did not preempt local zoning powers, which permitted a city to control whether and how many medical marijuana dispensaries could be located within its borders. *Id.* at 496.

117 See *Qualified Patients Assn. v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 93 (Cal. Ct. App. 2010) (“Based [on] its conclusion federal law preempted the state’s medical marijuana laws, the trial court sustained the city’s demurrer to plaintiffs’ first cause of action, without leave to amend.”). Anaheim’s federal preemption argument was not successful at the appellate level, however. *Id.* at 92.

118 See *County of Butte v. The Superior Court of Butte Cty.*, 96 Cal. Rptr. 3d 421, 424–26, 429 (Cal. Ct. App. 2009) (holding that the Constitution and laws of the state provide an avenue for relief if the plaintiff can show that he had a legal right to possess marijuana); *City of Garden Grove v. Superior Court of Orange County*, 68 Cal. Rptr. 3d 656, 658–60 (Cal. Ct. App. 2007) (“Because marijuana possession is generally prohibited under federal law, the City contends the trial court’s order is legally flawed and constitutes an abuse of discretion.”).

119 See *Anaheim*, 115 Cal. Rptr. 3d at 109 (“Just as the federal government may not commandeer state officials for federal purposes, a city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana.”).

120 *White v. Mass. Council of Constr. Emp’rs, Inc.*, 460 U.S. 204 (1983).

combat the effects that widespread suburbanization and systematic discrimination had on the employment prospects of black residents living in the city.¹²¹

The Massachusetts Council for Construction Employers objected because it felt that the order discriminated against workers and companies that operated out of the many Boston suburbs.¹²² The conflict was largely an intrastate dispute. And as such, Boston had the advantage; the executive order in question had been issued with state support. If the conflict over Boston's special order largely centered on the divide between the city and its suburbs, the Massachusetts Council of Construction Employers realized that its strongest argument involved reframing the dispute as an interstate battle involving the federal power over interstate commerce. Few out-of-state workers were actually affected by Boston's preference for city residents.¹²³ Yet the Massachusetts Council rested its legal challenge primarily on defending the rights of those workers. This argument proved successful at the state court level. In striking down Boston's executive order, the Massachusetts Supreme Court held the order violated the federal government's exclusive power to regulate interstate commerce.¹²⁴ Massachusetts could not, under the Commerce Clause, discriminate against labor from neighboring states. Thus, the court held, Boston could not give preferences to city residents if it meant reducing the work opportunities of out-of-state residents.¹²⁵

But just as plaintiffs prevailed at the state court level by emphasizing the interstate dimensions of Boston's executive order, Boston prevailed at the Supreme Court level by turning the dispute back into an intrastate fight. To be sure, the Court's holding was formally premised upon its extension of the "market participant" doctrine, which exempts states from the Commerce Clause when they discriminate not as a governmental regulator, but as a market participant in the course of doing business.¹²⁶ Yet, as Gordon L. Clark argued in his case study of the *White* decision, much of Boston's success can be at-

121 See GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 85-92 (1985) (discussing the foundations for the executive order and the community's goal of getting "Boston jobs for Boston people").

122 See *id.* at 98-103 (analyzing the legal case against the executive order).

123 See *id.* at 96, 99-100 (discussing the arguments that Boston's policy violated the Privileges and Immunities Act, the Commerce Clause, and the National Labor Relations Act).

124 See *Mass. Council of Constr. Emp'rs, Inc. v. Mayor of Boston*, 425 N.E.2d 346, 354-55 (Mass. 1981) (holding that the Commerce Clause prevents the city from executing its executive order due to the limitations of the market participant exception).

125 See *id.*

126 See *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 214-15 (1983).

tributed to its strategy of emphasizing in oral arguments the intrastate nature of the dispute, and the economic decline and racial segregation brought upon the city by suburbanization—points that Boston had largely failed to make at the state court level.¹²⁷

3. *Cooperative Federalism and the Design of Federal Programs*

One way of describing American federalism is as a framework for intergovernmental competition. Another is as a structure for intergovernmental collaboration. “Cooperative federalism,” which many see as the dominant form of federalism in the twentieth century, describes the latter.¹²⁸ Rather than an affront to state sovereignty, cooperative federalism argues that federal laws are often designed in partnership with the states, and thus empower states to address issues in ways that they cannot alone. Moreover, it recognizes that even as the federal government expands, many of its programs rely on state participation and the sharing of federal funds. In spite of what the name might suggest, cooperative federalism is not without its share of conflicts. States demand a larger role in the design and implementation of federal initiatives.¹²⁹ They frustrate the implementation of federal programs by refusing to cooperate.¹³⁰ They sue to limit the kind of conditions the federal government can attach to federal funding.¹³¹

Like other forms of federalism, cooperative federalism is also a forum for intrastate conflicts. Localities play a significant role in federal programs that rely on federal-state collaboration. Local officials are on the front lines of a host of federal policy initiatives—from education to housing to criminal law enforcement. Localities are also major recipient of federal funds. Whether the federal government bypasses the states and works directly with localities, or uses states as

¹²⁷ See CLARK, *supra* note 121, at 103–08 (outlining the city’s argument in the *White* decision, specifically its strategy of “reestablish[ing] the importance of the executive order vis-à-vis the nature of Boston’s employment and racial problems”).

¹²⁸ See, e.g., MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 41–57 (1966) (“After 1913, and especially after 1935, [cooperative federalism] became supreme.”).

¹²⁹ See generally ANNE MARIE CAMMISA, *GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM* (1995) (tracing the role of state and local governments in shaping federal policymaking).

¹³⁰ See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (exploring what the authors call “uncooperative federalism” and showing that “[s]tates use their power as federal servants to resist, challenge, and even dissent from federal policy”).

¹³¹ See *King v. Burwell*, 135 S. Ct. 2480, 2480 (2015) (affirming a decision by the Fourth Circuit dismissing a lawsuit brought by Virginia residents against the IRS in connection with the implementation of the Affordable Care Act).

intermediaries, it has tremendous impact on state-local relationships and the intrastate competition between different localities. All of this raises a new set of federalism issues around which intrastate conflicts might arise.

Take, for example, the federalism concerns raised in *Lawrence County v. Lead-Deadwood School District*.¹³² At issue in the case was the federal "Payment in Lieu of Taxes" program, which provided federal payments directly to local governments to compensate for untaxed federal land located in their jurisdictions. Federal law allowed these payments to be used for "'any' governmental purpose."¹³³ South Dakota, however, imposed strict limits, including a mandate requiring local governments to give school districts the same proportion of the federal payments as they currently allocate out of their general funds. As the parties in the litigation revealed, the question of whether federal or state law controlled split local governments in the state. Lawrence County, with the support of other counties in the state and across the country, argued in favor of federal law.¹³⁴ The Lead-Deadwood School Districts, which had lobbied for the state law along with other independent school districts, argued that the state law controlled.¹³⁵ Before the Supreme Court, the school district challenged the design of the federal payment program for intruding on the right of states to regulate the actions of its subdivisions. In contrast, the county defended its freedom to spend the federal funds as it saw fit by asserting the supremacy of federal over state law.

Intrastate conflict over the design of federal programs also played a role in the much broader political battle over President Reagan's "New Federalism" initiatives in the 1980s.¹³⁶ "New Federalism" was intended to be a reversal of the federal expansion that took place in the early- to mid-twentieth century. It was critical of federal involvement in a host of issues that had been traditionally the province of states.

¹³² *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 256, 260–61 (1985).

¹³³ *Id.* at 261.

¹³⁴ See Motion for Leave to File Brief as Amici Curiae and Brief of National Association of Counties, et al., as Amici Curiae in Support of Appellants, *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) (No. 83-240), 1984 WL 565959.

¹³⁵ See *County Commissioners to Decide Next Month on PILT Case Appeal*, LEAD DAILY CALL (June 18, 1983) (discussing the battle between the school district and the county, which "has argued . . . federal law is 'supreme' over state law").

¹³⁶ See generally TIMOTHY J. CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM (2010) ("Federalist rhetoric notwithstanding, Reagan consistently favored federal over state and local authority whenever the former was supportive of free markets or private sector interests. . . . The Reagan administration even took local governments to court when they implemented objectionable policies").

New Federalism remained committed to cooperative federalism as a framework for federal-state relations. Yet it sought to rebalance that relationship by giving states a more prominent role in controlling the use and allocation of federal funds. To that end, many programs previously controlled at the federal level were converted into “block grants,” in which federal funds were given directly over to states along with increased discretion over their use.

But while New Federalism was celebrated for devolving governmental powers and responsibilities, local leaders saw it as a recentralization effort in favor of the state. Moreover, many urban communities saw this shift as an attack on their interests by rural and suburban communities seeking a larger slice of the federal funding pie. From President Franklin Roosevelt’s New Deal to President Lyndon Johnson’s Great Society, big cities benefitted tremendously from the expansion of the federal government. The federal government during these times was particularly interested in urban issues, and eager to dedicate funds to address them.¹³⁷ As a result, federal-local relationships proliferated, and many cities became accustomed to working with, and receiving funding directly from, Washington rather than going to their state.¹³⁸ When Presidents Richard Nixon and Gerald Ford redesigned the programs in the 1970s, one of their goals was to reduce the bias in favor of big cities, and to distribute federal funds more evenly among a number of different local communities.¹³⁹ When Reagan launched his “New Federalism” revival in the 1980s, many cities saw this as a further erosion of big cities’ unique standing in federal programs.¹⁴⁰ Nearly all federal-local funding streams were

137 See John Kincaid, *From Cooperation to Coercion in American Federalism: Housing, Fragmentation and Preemption, 1780–1992*, 9 J. L. & POL. 333, 384 (1993) (describing historical changes to the relationship between cities and the federal system).

138 See ROSCOE COLEMAN MARTIN, *THE CITIES AND THE FEDERAL SYSTEM* 146 (1965) (“Virtually all city spokesmen, whether political leaders or administrators, find the direct channel from city hall to the national capital agreeable; like Mayor Taft . . . they would rather ‘do business’ with the Washington agencies than with their state governments. This view is so generally held that it is not necessary to explore it further.”)

139 JOHN H. MOLLENKOPF, *THE CONTESTED CITY* 122–27 (1983).

140 See Peter Eisinger, *City Politics in an Era of Federal Devolution*, 33 URBAN AFF. REV. 308, 314 (1998) (“Indeed, the new state power came directly at the expense of cities: Of the categorical programs consolidated into block grants to the states, 47 had previously delivered funds directly to local governments.”); Helen F. Ladd, *Big-City Finances*, in *BIG-CITY POLITICS, GOVERNANCE, AND FISCAL CONSTRAINTS* 201, 214–221 (George E. Peterson ed., 1994) (“[C]ities faced significant additional cutbacks in federal aid at the hands of the Reagan administration and, in many states, a revolt against local and state taxes.”).

severed in 1981.¹⁴¹ Moreover, many believed that instituting states as the middlemen for federal funds would favor the suburban and rural communities that held sway in state government. In this regard, the political battle over “New Federalism” and the expansion of the states’ role in federal programs divided not only the federal government, but also localities in many states.

Intrastate conflicts over the role of localities in federal programs can prompt federal-state contestation over the design of these programs. Other times, states turn to federal-state contestation as a means of resolving or redirecting intrastate conflicts. The litigation over the Low-Level Radioactive Waste Policy Amendments Act in *New York v. United States*¹⁴² offers such an example. The federal law at issue made states responsible for the low-level radioactive waste that they generated—imposing upon them a mandate to dispose of it themselves or collectively through an interstate compact. Nevertheless, the law’s enactment was a prime example of cooperative federalism in action.¹⁴³ It was designed and endorsed by a coalition of state governors.¹⁴⁴ It was enacted by Congress at the states’ urging.¹⁴⁵ New York State actively participated on both ends.¹⁴⁶ Thus when the State challenged the regulatory regime ten years after it was enacted, and five years after it was amended, many saw it as a surprising about-face.

Cooperative federalism underlies the enactment of the Low-Level Radioactive Waste Policy Amendment Act. Intrastate federalism, however, explains New York’s change of heart. New York’s opposition was not the result of cultural or partisan tensions with Washington, or longstanding disagreements about how low-level radioactive waste should be disposed. Rather, it was rooted in the intrastate tensions that emerged when the State tried to develop its own disposal plan. When the State named Allegheny and Cortland Counties as finalists for its radioactive waste disposal facility, it faced swift and powerful opposition at the local level. Residents formed human chains to

¹⁴¹ See WALKER, *supra* note 12, at 256 (“The shifts [of federal financing of the states since the 1960s], of course, are emphasized in all of the fourteen new block grants enacted since 1981 and in the severing of nearly all the direct Federal-local grant ties since 1981.”).

¹⁴² *New York v. United States*, 505 U.S. 144 (1992).

¹⁴³ See *id.* at 194 (White, J., dissenting) (“In sum, the 1985 Act was very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction.”).

¹⁴⁴ See *id.* at 189–94 (White, J., dissenting) (describing the efforts of the National Governors’ Association to design and coordinate policy proposals between states).

¹⁴⁵ See *id.* at 191–92 (White, J., dissenting) (discussing the efforts of the National Governors’ Association to get Congress to enact policy amendments).

¹⁴⁶ See *id.* at 196–97 (White, J., dissenting).

block state officials from visiting potential sites,¹⁴⁷ shouted down state officials in town hall meetings, chased state officials out of the county in their cars,¹⁴⁸ and confronted state troopers while masked and on horseback.¹⁴⁹ All the while, the local government officials took the lead: towns threatened to close roads, counties mounted legal challenges to hold up the process, and local district attorneys dismissed charges against protesters who had been arrested by state troopers (opting instead to admonish the troopers).¹⁵⁰ After months of “massive resistance” the state abandoned plans to site radioactive waste disposal facilities in the two counties or anywhere else in the state.¹⁵¹ Instead, New York joined the counties in challenging the radioactive waste disposal regime at the federal level.

Waste facilities are never popular—radioactive ones even less so. Yet the opposition in New York was unique in its intensity,¹⁵² and much of that was due to the fact that it played into a longstanding divide within the state. Alleghany and Cortland are conservative rural upstate counties in a state widely believed to be dominated by liberal urban downstate interests.¹⁵³ Residents turned to their local governments because they did not believe they had much sway in state politics. And the counties supported their residents because of their own feeling of isolation from the state. All the while, New York State’s actions throughout seemed to support the counties’ sense of estrangement. The State seemed genuinely surprised by the local opposition that emerged. It also did not appear to have considered this possibility when it decided to dispose of the waste itself rather than entering into a state compact to dispose of it elsewhere (as many states had done). Pinned into a corner, New York had no option other than to redirect its efforts to challenging the federal law when it realized that siting a waste disposal facility in-state could not be easily achieved.

147 See Allan R. Gold, *Guerrilla Warfare Over Nuclear Waste*, N.Y. TIMES (Feb. 26, 1990), <http://www.nytimes.com/1990/02/26/nyregion/guerrilla-warfare-over-nuclear-waste.html?pagewanted=all&pagewanted=print> (“In December, and again in January, dozens of local residents have used their bodies and vehicles to keep officials [away.]”).

148 See William Kates, *Cortland County Expected to Throng Hearings on Radioactive Waste Site*, SCHENECTADY GAZETTE, Nov. 14, 1989, at 10 (“Taylor officials also have threatened to legally close its roads to sitting commission staff, while on another occasion, dump opponenets chased state employees out of the county in their cars.”).

149 See SHERMAN, *supra* note 8, at 118; see also THOMAS V. PETERSON, LINKED ARMS: A RURAL COMMUNITY RESISTS NUCLEAR WASTE 214–19 (2002).

150 See PETERSON, *supra* note 149, at 134.

151 See *id.* at 160.

152 Other states faced local opposition as well, but few came close to what New York faced. See *id.* at 71.

153 See *id.* at 30.

The state's eventual success at the Supreme Court established a powerful precedent regarding the federal government's ability to regulate states (even at the states' urging). But New York's motivation for doing so was largely to resolve the intrastate fight at home.

* * *

Federalism disputes are formally structured as contests between the federal government and the state. The examples here show, however, that conflicts within states and at the local level also play an important role. Told from this perspective, state and federal actors are not the only parties interested in using the federalism framework to resolve their disputes. Localities and local actors turn to federalism as well, especially as a way of negotiating their relationship with each other, their state, and the federal government. To be clear, intrastate federalism is not a universal account of federalism. In other words, I do not claim that *all* federalism disputes have intrastate conflicts at their core. Nevertheless, it both complicates and expands many of the conventional theories that seek to explain the role of federalism in American politics. Yet why have localities become so involved in politics at both the state and federal level? And how much of this is the result of legal developments? It is to these questions that I now turn.

II. THE LEGAL STRUCTURE OF INTRASTATE FEDERALISM

Contemporary developments—from the increasing fragmentation of states to the growing involvement of localities in state and federal politics—play an important role in why federalism has become a forum for intrastate conflicts. But the legal foundations of intrastate federalism also have deeper historic roots. In this Part, I argue that legal developments in the nineteenth and twentieth century set the stage for the kind of intrastate federalism disputes that we see today. More specifically, I focus on an aspect of law that is often overlooked in the federalism literature: the legal status of local governments and their evolving role in our federal system.

The purpose of this historical inquiry is twofold. First, it offers a new perspective on the history of federalism in the United States. Scholars have traditionally marked distinct periods of American federalism by the relative balance of federal and state power.¹⁵⁴ What I suggest here is that this balance between the federal government and

¹⁵⁴ See *supra* note 12.

the states has historically been mediated through their relationship with local governments. The dominance of states in the nineteenth century, I argue, was a product of their ability to consolidate formal power over their localities—a power that was not yet established at the time that the federal system was adopted. The dramatic expansion of the federal government in the twentieth century, I maintain, was made possible by its partnerships with localities, especially those that bypassed the states. The roots of intrastate federalism, therefore, are tied to the evolution of federalism more generally in American law and politics.

Second, this historical inquiry offers further explanation for why localities came to see the federal government and the states as avenues for local power. As states consolidated their power over localities, localities lost their independent status and were remade as “creatures” of the state. As the federal government expanded through partnerships with localities, localities became beholden to and dependent on federal policies. In the traditional telling, these developments undermined the power and standing of localities, which explains why localities came to see their fate tied to state and federal politics. In the context of intrastate conflicts, however, localities also found an alternative avenue to power that had not been available. They were now able to assert power against one another by going through the federal government or the state.

In short, intrastate federalism is not a recent or abrupt turn in the development of American federalism. Rather, it is part and parcel of the history of federalism’s role in American politics more generally.

A. State-Local Relations

1. Localities and the Consolidation of State Power

In setting up the governmental structure of the United States, the Constitution divided sovereign power between the federal government and the several states. But states did not emerge sovereign in the ways that we understand them today. The problem was not the scope of state power relative to that of the federal government. Rather, it was the extent to which states exercised power over localities within their borders. This was all the more important because most of the challenges that states faced with respect to their sovereignty during this time did not come from the federal government above. Rather, states in the nineteenth century were largely concerned about the challenges that they faced from below.

This may seem surprising given the traditional understanding of local governments in American law. After all, it is now well established that localities are mere creatures of the state; they possess only those powers that the state has seen fit to delegate.¹⁵⁵ But at the time that the federal system was first adopted, this was not yet settled law. Legal scholars today are fond of pointing out that local governments are nowhere mentioned in the Constitution. Yet at the time the Constitution was framed, there was no consensus on what the legal status of localities actually were, or whether they were “governments” at all. On the one hand, chartered cities like New York City and Philadelphia were legally recognized as “municipal corporations”—no different from what we would now recognize as private corporations.¹⁵⁶ And like their private counterparts, they exercised much of their power through the dispensation and management of property.¹⁵⁷ On the other hand, unchartered cities and towns were widely understood to be communal associations—their power derived from the social obligations and consent of their residents.¹⁵⁸ Indeed, Alexis de Tocqueville described the notable independence of early New England towns as “a natural consequence of the principle of the sovereignty of the people in the United States.”¹⁵⁹

Given this, localities in the early nineteenth century did not see states as a necessary forum for resolving questions about local power. Nor were states actively involved in managing local affairs. This would change, however, as the state-local relationship evolved over the course of the nineteenth century. As urbanization increased the size and economic might of cities, states began to see cities as a threat to their standing and influence. Moreover, as cities began to cultivate their own political base of power, especially one that drew support from Irish and German immigrants, states under the control of

155 See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”); see also FRUG, *supra* note 39, at 17–18 (describing how cities only possess power delegated by states and limited by judicial interpretation).

156 See SAM BASS WARNER, *THE PRIVATE CITY: PHILADELPHIA IN THREE PERIODS OF ITS GROWTH 100-02* (Revised ed. 1987); HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870* (1989).

157 See HARTOG, *supra* note 156, at 23, 33–68.

158 See FRUG, *supra* note 39, at 38 (explaining the quasi-corporate powers colonial localities exercised by virtue of being a group); 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 60 (Henry Reeve trans., London, Longman, Green, Longman, and Roberts 1862) (relating municipal independence to the principle of individual sovereignty).

159 TOCQUEVILLE, *supra* note 158, at 60.

protestant “Yankees” become fixated on constraining local power.¹⁶⁰ Of course, cities were not the only localities that raised the states’ ire. Towns and rural villages also became subjects of state concern. This was especially true as they became involved in various disastrous ventures, such as investments in railroads and other infrastructure.¹⁶¹ Through the course of the nineteenth century then, states became increasingly interested in controlling the actions of their localities. The question was whether they had the power to do so.

It was against this backdrop that jurists developed the now accepted legal concept of localities. First, as the number of charter corporations grew, legal distinctions were drawn between “municipal corporations” and what we now know as private corporations.¹⁶² While the former were made public and assimilated into the state, the latter were deemed to be private and accorded protections from the state. Second, localities were not only assimilated into the state, but eventually subjugated to the state as its creature and administrative subdivision.¹⁶³ The first stage of this transition—the distinction between private and public corporations—was formulated by the Supreme Court in the early nineteenth century through a pair of cases largely concerned about protecting the property rights of private corporations from regulation and appropriation by the state.¹⁶⁴ The second stage, however, which took place in the mid- to late-nineteenth century, was squarely focused on the standing of localities themselves, and their

¹⁶⁰ See FRANCES FOX PIVEN & RICHARD A CLOWARD, WHY AMERICANS STILL DON’T VOTE: AND WHY POLITICIANS WANT IT THAT WAY 78 (2000) (“Key city functions were reorganized and set up as independent agencies shielded from party influence . . . [a]nd many smaller municipalities whose machine leaders carried less weight in state government were simply put under the control of ‘expert’ city managers . . .”); see also Rick Su, *Urban Politics and the Assimilation of Immigrant Voters*, 21 WM. MARY BILL RTS. J. 653, 672 (2012) (pointing to the real reason for the state of Massachusetts to take over Boston’s police department in the late 1880s as “a strategic move by the native-controlled Republican statehouse to wrest control . . . from the increasingly Irish-controlled Democratic city”).

¹⁶¹ See Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 93–100 (1986).

¹⁶² See *id.* at 39–42 (detailing the development of the distinction between public and private corporations).

¹⁶³ See *Mount Pleasant v. Beckwith*, 100 U.S. 514, 524–25 (1879) (“[C]ities, towns, [and] counties[] are the auxiliaries of the State in the important business of municipal rule.”); *Comm’rs of Laramie Cty. v. Comm’rs of Albany Cty.*, 92 U.S. 307, 308 (1875) (claiming that counties, towns, and cities are “created by the authority of the legislature” and “invested with certain subordinate legislative powers”).

¹⁶⁴ See *Trs. of Dartmouth Coll. v. Woodward*, 17 US (4 Wheat.) 518 (1819) (denying the state of New Hampshire the ability to unilaterally alter the charter of the Dartmouth College because it was a private, not a public corporation); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815) (resolving a church/state land dispute between the Episcopal Church and members of the town of Fairfax, Virginia in favor of the Church);

increasingly controversial role in American life. John Dillon forcefully articulated this view when he penned his seminal treatise on municipal corporations.¹⁶⁵ Localities, he argued, possessed no powers other than those expressly delegated to them by the state. In turn, states not only ruled over localities, but had an obligation to supervise their actions and tailor their role.¹⁶⁶ Dillon's formulation did not go unchallenged, especially by those who believed that localities, as democratic institutions and communal associations, derived their powers in part from the people themselves.¹⁶⁷ Yet by the time the Supreme Court revisited the issue of municipal governments at the dawn of the twentieth century, it was able to state—as a matter of settled law—that localities were nothing more than “political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”¹⁶⁸

The increasing involvement of states in the affairs of localities, especially those of big cities, radically transformed the governance and politics of the localities themselves. Yet it also transformed the role of the states. States in the early years of the republic may have been content dealing with issues that affected all localities, leaving local issues to the localities themselves. As the nineteenth century progressed, however, and the state's formal authority over localities was established, states became involved in micromanaging nearly every aspect of local affairs. To be sure, much of this was in response to the behest of the localities themselves; requests for special legislation—state laws that affect only one or a few localities—accounted for nearly half or more of the bills considered by state legislatures for several states from the late 1800s through the turn of the century.¹⁶⁹ This was not surprising given the increasing acceptance that localities possessed only those powers delegated by the state. Yet states were also eager to intervene in local affairs even when they faced local opposition. By the mid-nineteenth century, it no longer seemed out of

¹⁶⁵ See 3 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (5th ed., 1911).

¹⁶⁶ See *id.* at 1600–01.

¹⁶⁷ See EUGENE MCQUILLIN, 1 A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 680–81 (1913) (arguing that even if a municipal corporation ceases to operate without being dissolved by a the legislature, “its dormant functions could be revived without action on the part of the sovereignty, the sources from which, in theory of law, corporate life originally came”).

¹⁶⁸ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

¹⁶⁹ See Burns & Gamm, *supra* note 57, at 70 fig.3 (depicting special legislation as a proportion of total bills for Alabama, Massachusetts, and Michigan between 1871 and 1921).

place for New York State's Governor to inform the state legislature that "the municipal affairs of [New York City] will undoubtedly require and receive a large share of your time and attention."¹⁷⁰ Nor was it surprising when a year later the state disbanded the city's police force and replaced it with one operated directly by the state.¹⁷¹ Whether at the behest of the localities themselves or in the face of local opposition, the states' increased involvement in the local affairs upends the standard account that localities were subjects of the states. As Nancy Burns and Gerald Gamm point out, if "[t]he ordinary work of state politics was local affairs," then in many ways it can be argued that "an ordinary branch of local government was the state legislature."¹⁷²

2. *States as Forums for Intrastate Conflicts*

Localities lost their independence and autonomy to the states throughout the course of the nineteenth century. The conventional view is that they were weakened as a result. But for many localities, state politics became an important avenue for expanding their jurisdictional power and political influence, especially relative to one another. One locality's subjugation may be another locality's gain. Thus in the context of intrastate conflicts, localities began to see state politics as a powerful tool for getting what they wanted. Local politics was now state politics. State power opened avenues that were not available to localities as independent actors. And as intrastate conflicts broke out, states became the forum in which the battles would be waged.

Cities, towns, and other localities in the early American republic may have initially celebrated their independence from state politics. But as time went on, many of them would eventually welcome state involvement. As urbanization expanded the size and complexity of many cities, local leaders embraced the expansive governmental powers that they had become able to exercise on behalf of the state. As local *governments*, they were able to petition for the power to regulate, tax, and exercise public authority in ways that were not available to corporations more generally, or under the grants they were ac-

¹⁷⁰ PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 127 (1996).

¹⁷¹ *See id.* at 127–28.

¹⁷² *See* Burns & Gamm, *supra* note 57, at 90; *see also* DAVID R. BERMAN, *LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS AND POLICY* 59 (2003) (describing the state as "spasmodic city councils").

corded through their initial charters.¹⁷³ Similarly, as trade across America expanded, cities and rural townships alike saw their future bound up with their ability to connect to rail and canal networks, which required the power, resources, and backing of the state to coordinate and fund.¹⁷⁴ For localities in the nineteenth century then, state intervention in local affairs could be understood as a means of expanding local power.

States not only proved to be helpful in expanding the nature and scope of local power. They were also necessary when conflicts between localities arose.¹⁷⁵ Indeed, demand for state intervention preceded the legal developments that subjugated localities to the state. Massachusetts towns in the late eighteenth century, for example, battled at the state level for the authorization to build bridges into Boston.¹⁷⁶ In other instances, states were drawn into inter-regional competition as competing localities vied for economic dominance. In the mid-nineteenth century, Pittsburgh and Philadelphia clashed over the former's effort to convince the state to authorize an extension of Maryland's Baltimore and Ohio Railroad to gain access to markets in the southern states.¹⁷⁷ But as cities, counties, and townships fought in the state house to secure their place in emerging regional economies, they also turned to the state to negotiate conflicts between neighboring localities seeking dominance at the local level.

Nowhere is this more evident than in the controversial battles over municipal annexation that took place around the turn of the twentieth century. Big cities appealed to states for the authority to expand their territorial boundaries into neighboring communities in order to absorb the land and tax bases they felt necessary for their continued

¹⁷³ See HARTOG, *supra* note 156, at 126–42 (tracing the developments of city power in early New York City).

¹⁷⁴ See PURCELL, *supra* note 79, at 87–88 (detailing the efforts of states to improve access to their markets).

¹⁷⁵ Intralocal disputes were also an important reason for state interference. Indeed, state politics over special bills were often an extension of political fights at the local level. Many of the most contentious instances of state interference in local affairs—a state bill locating Philadelphia's City Hall in Penn Square, a state law constraining the power of Cincinnati's city council—were urged by local forces who had lost at the local level. The state offered another opportunity to carry on the fight and in some cases prevail. See Jon C. Teaford, *Special Legislation and the Cities, 1865–1900*, 23 AM. J. LEG. HIST. 189, 211–12 (1979) (“Lawmaking authority was thus divided, but it was not divided between a centralizing and dictatorial state and a victimized city. Instead, it was divided between two sets of locally-elected officers, and in cities with independent park boards, police commissions, or boards of public works between three or four sets.”).

¹⁷⁶ PURCELL, *supra* note 79, at 94.

¹⁷⁷ *Id.* at 95.

growth and prosperity.¹⁷⁸ While many suburban communities were eager to consolidate in order to gain access to the utilities and services that big cities were able to provide, others turned to states to take over those utilities and services so that they could gain access without losing their independence.¹⁷⁹ State policies transitioned over this period from favoring metropolitan consolidation to fragmentation,¹⁸⁰ setting the stage for the kind of intrastate divides that we see today. But it was clear to localities that their fate was bound up with state politics.

It may not be surprising then that the Supreme Court's most important pronouncement on the legal standing of American localities—*Hunter v. City of Pittsburgh*¹⁸¹—would take place in the context of an intrastate fight. At issue in *Hunter* was the constitutionality of a Pennsylvania law that consolidated the City of Allegheny into its neighbor, the City of Pittsburgh. In response to this consolidation, residents of the now-defunct Allegheny filed suit, alleging that various constitutional rights had been violated when the state abolished their locality and made them residents of their former neighbor.¹⁸² In rejecting the residents' claim, the Supreme Court held that the City of Allegheny was but a "mere creature" of the State.¹⁸³ The State breathes life into localities. As a result, the State was free to abolish or reorganize them in any way that it saw fit. Neither Allegheny nor its residents, the Court held, had any claim of right against Pittsburgh or the State.

As a local government decision, *Hunter* confirmed the status of American localities as mere creatures of the states that created them. As a federalism decision, it also recognized the plenary power that states exercised over their subdivisions, and the judicial restraint that federal courts should exercise in reviewing how states exercised that power. But all of this took place in the context of a battle between Pittsburgh and Allegheny over their respective standing in the emerging metropolis. Pittsburgh had long sought to annex Allegheny, which it saw as its most potent economic rival. Allegheny had long resisted Pittsburgh's efforts, given that it had begun to match, if not

178 See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 144–46 (1985) (detailing the motives of cities when seeking to expand their territorial boundaries).

179 See *id.* at 146–51 (discussing the city annexations of suburban areas and how resistance to them changed over time).

180 *Id.* at 152.

181 207 U.S. 161 (1907).

182 *Id.* at 176–78.

183 *Id.* at 178.

exceed, Pittsburgh in terms of industrial output and was attracting many of Pittsburgh's wealthier residents.¹⁸⁴ Pittsburgh gained the upper hand only by going to the state. Losing at the state level, Allegheny had no choice but to turn to federal courts and the U.S. Constitution. The reasoning of *Hunter* was couched in the language of state power and federalism principles. But for the parties involved, the outcome was profoundly local: Allegheny lost and Pittsburgh won. The future of Pittsburgh, at least for the time being, was secure.

As *Hunter* showed, localities' subordination to states also turned states into an avenue for their empowerment. The localist relationship between the state and its localities is always double-sided when intrastate conflicts are at play. When state-enabled annexations were the norm, many cities benefited from their ability to absorb surrounding communities. Pittsburgh was only one example; cities all across the country turned to the state as a means of expanding their power and influence, not only with respect to their residents and businesses, but also vis-à-vis their regional neighbors. To be sure, state involvement was not always to a locality's advantage. Widening political gaps between state houses and city halls meant that states often sought to take over institutions of local government in order to bring them under state control. But the lessons for cities and other localities were all the same. In an era of intrastate conflict and local subordination to states, the ability to navigate state politics was the only sure way for a local community to protect and advance its interests.

3. *Home Rule and Continued State Involvement*

As a matter of law, the "state creature" idea of local governments, and the deference to state power mandated by Dillon's Rule, gave way to the success of the "Home Rule" movement of the early twentieth century. In states that adopted Home Rule, localities were granted the power to act without state authorization and provided certain protections from state interference.¹⁸⁵ Yet the lessons that localities learned about the significance of state politics endured. Judicial deference to states meant that localities could never rely on Home Rule to free themselves from the interference of states. At the same time, Home Rule equalized the legal standing of nearly all local governments, which in turn shifted the intrastate balance between localities,

184 See generally LISA A. MILES, RESURRECTING ALLEGHENY CITY: THE LAND, STRUCTURES & PEOPLE OF PITTSBURGH'S NORTH SIDE (2007).

185 See DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 11-12 (2001).

especially among cities and their suburban neighbors. As a result, state politics continued to play an important role in how localities defined their power and authority.

Home Rule was proposed as a response to the growing involvement of states in local affairs. It urged greater autonomy for localities. It also sought to restrict their micromanagement by the state. The Home Rule movement sought to achieve the former by urging states to delegate broad—and at times exclusive—powers to localities over “local affairs.” The latter was addressed through state constitutional limitations over the ability of states to enact “special legislation” that only affected one or a small number of localities. Support for Home Rule came from many competing political circles, each with different visions of the role of localities.¹⁸⁶ Yet the movement was widely successful. By the mid-twentieth century, Home Rule had eclipsed Dillon’s Rule in a majority of states.¹⁸⁷

Yet the practical effect of Home Rule never lived up to its promise. On the one hand, state courts routinely ignored prohibitions on special legislation.¹⁸⁸ Many states wrote around these prohibitions by enacting general laws that could only apply to one locality; Alabama, for example, created the position of treasurer for all counties with populations between 21,425 and 21,450.¹⁸⁹ And not only did state courts largely accept these end runs, but localities, many of which were requesting special legislation, often agreed. On the other hand, state courts largely embraced a limited construction of “local affairs” in interpreting Home Rule authority, especially when states expressed interest on an issue. This is not to say that the grants of power under Home Rule are toothless. Rather, it is to suggest that because they are open to judicial interpretation and state interference, relying on Home Rule is often less secure than simply requesting specific powers to act from the state. Indeed, in a study of Home Rule in Massachusetts—traditionally considered a strong Home Rule state—most local officials understood Home Rule primarily as a mechanism for asking

186 See generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (discussing the arguments of adversaries to Home Rule and their suggestions for what should operate in its stead).

187 See DALE KRANE, ET AL., *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* (2001).

188 See JOSEPH F. ZIMMERMAN, *STATE-LOCAL RELATIONS: A PARTNERSHIP APPROACH* 21 (1995) (“Enforcement of the prohibition [on special legislation] is not automatic. The Arkansas Supreme Court in effect ignored the prohibition for many years, until 1984, when it began to enforce the prohibition.”).

189 Burns & Gamm, *supra* note 57, at 64.

the state for permission (via the “Home Rule Petition”), rather than a source of authority outside of state authorization.¹⁹⁰

Where Home Rule may have had its most significant effect is with respect to the mutual standing of localities relative to one another. Home Rule may not have been all that successful in freeing localities from state interference or granting localities a protected sphere of local authority. Yet it has been consistently invoked to protect the territorial integrity of localities, and has at times limited state efforts to redistribute local funds to neighboring jurisdictions.¹⁹¹ This is not insignificant; Home Rule provides a defense against the kind of reorganization that abolished the City of Allegheny in *Hunter v. Pittsburgh*. But the protection that Home Rule provided also limited the power that localities, especially struggling cities in the mid-twentieth century, were able to exercise through the state. Indeed, despite the promises of Home Rule, many now see it largely as a force for parochialism and fragmentation, especially in favor of suburban jurisdictions.¹⁹² In short, Home Rule did little to disentangle state and local politics. Nor did localities turn away from state politics as a forum for intra-state conflicts. Like Dillon’s Rule before it, Home Rule worked to the benefit of certain localities relative to others—a shift that was already occurring in state law and politics both before and after Home Rule was adopted. But by the time Home Rule was widely adopted, states were no longer the only political forum in which localities sought to advance their interests.

190 David J. Barron, Gerald E. Frug & Rick T. Su, *Dispelling the Myth of Home Rule: Local Power in Greater Boston*, in 3 GOVERNING GREATER BOSTON xi–xiii (Rappaport Inst. for Greater Bos. ed., 2004).

191 See *Owens v. Colo. Cong. of Parents, Teachers, and Students*, 92 P.3d 933, 935 (Colo. 2004) (holding that state programs requiring payments for special programs from parents of children who were underperforming are unconstitutional); *Buse v. Smith*, 247 N.W.2d 141, 143 (Wis. 1976) (holding that provisions by which certain school districts would be required to pay a portion of their property tax revenues into the general state fund for redistribution to other school districts violated the state constitutional rule of uniform taxation).

192 See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1–2 (1990) (“Localism reflects territorial economic and social inequalities and reinforces them with political power.”); COLIN GORDON, MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY 10 (2009) (“In St. Louis, home rule simultaneously emancipated the City and enslaved it. . . . The city of St. Louis is but one of *hundreds* of local political units [in its metropolitan area.]”).

*B. Federal-Local Relations**1. Cities and the Expansion of Federal Power*

If the federalism balance in the nineteenth century favored the state, then the twentieth century was the era of the federal government. The public support and industrial mobilization needed to fight the two World Wars gave rise to a distinctly national consciousness. The rise of mass media and mass marketing fashioned a conspicuous American culture. All the while, the federal government dramatically expanded the scope and reach of its laws. Work standards and labor relations, housing and poverty, crime and moral legislation—no issue was too small for federal regulation. To be sure, as Jon Teaford points out, states did not wither away in the face of federal expansion.¹⁹³ But the ascendance of the federal government certainly reoriented the federalism balance away from states.

The growth and expansion of the federal government in the twentieth century is ordinarily thought of as an era of centralization. As a result, one might assume that this development undermined the political standing of localities. But that view is too simplistic; it ignores the fact that the rise of federal power rested in part on the federal government becoming more deeply involved in local affairs. As the attention of the federal government turned inwards and downwards, localities presented themselves as willing and able participants in federal programs. In turn, many localities received resources and political support that bypassed the state.

If the expansion of the federal government challenged state power, it was largely because federal programs upended the state-local relationship. From President Roosevelt's "New Deal" policies of the 1930s, to President Johnson's "Great Society" initiatives in the 1960s, Democratic administrations steered the federal government towards urban issues and became heavily involved in the plight of American cities. Federal transfers filled holes in big city budgets. Federal funds were used to build up urban infrastructure. Federal attention also turned towards issues like housing, poverty, and industrial labor relations. In turn, Republican administrations led by Eisenhower, Nixon, and Reagan retooled federal urban programs to promote the rise of suburbs, giving way to the increasing fragmentation of the American

¹⁹³ See generally JON C. TEAFORD, *THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT* (2002) (claiming "that previous reports of the states' death and rebirth have been exaggerated" and that "states have been vital actors from the 1890s onward").

metropolis. Federal mortgage standards made it cheaper for developers to build, and easier for Americans to buy new housing at the suburban periphery than in the urban core.¹⁹⁴ Federal highway construction expanded the places where one could relocate residentially while still commuting into the city for work.¹⁹⁵ Urban renewal cleared inner-city neighborhoods for commercial development, while shifting Blacks and other minorities into geographically isolated ghettos.¹⁹⁶

Given the emergence of America as an urban nation in the early twentieth century, it is hardly surprising that the federal government would shift its attention downwards and towards American cities. Federal attention may have been focused in the nineteenth century on rural communities and frontier settlements: homesteading, Native American removal, and the pricing of agricultural goods. But as the twentieth century unfolded, it was clear that America was entering a new era: the frontier was closed, farms were giving way to factories, and by the 1920s, a majority of Americans were living in cities.¹⁹⁷ And in this urban century, cities also became the site of America's most pressing challenges. Labor unrest and contentious strikes swept through countless cities, each time prompting national attention towards labor relations.¹⁹⁸ Urban race riots broke out as Blacks, who had left the South for the big industrial cities of the Northeast and the Midwest, faced segregation and discrimination, each time driving calls for federal attention towards race relations.¹⁹⁹ Even America's transition from an industrial to a post-industrial economy was playing out in the rise and decline of cities across the country. In the twentieth century, America had become an urban country. And as a result, national attention turned to urban issues.

194 See JACKSON, *supra* note 178, at 203–18 (outlining the impact of the Federal Housing Administration on the American housing market since its creation in the New Deal).

195 See generally JOSEPH F. DiMENTO & CLIFF ELLIS, *CHANGING LANES: VISIONS AND HISTORIES OF URBAN FREEWAYS* (2013) (exploring the development of America's freeways since the 1930s and their effect of "reconfigur[ing] the urban form" and "supplant[ing] many neighborhoods").

196 See EDWARD G. GOETZ, *NEW DEAL RUINS: RACE, ECONOMIC JUSTICE, AND PUBLIC HOUSING POLICY* 168–73 (2013).

197 ERIC H. MONKKONEN, *AMERICA BECOMES URBAN: THE DEVELOPMENT OF US CITIES & TOWNS, 1780–1980* 72 fig.2 (1990).

198 See, e.g., Susan Olzak, *Labor Unrest, Immigration, and Ethnic Conflict in Urban America, 1880–1914*, 94 AM. J. SOC. 1303, 1303–04 (1989) (discussing the link between labor unrest and racial conflict in urban America).

199 See THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 29 (2014) (describing the race riots that broke out during the 1940s in cities such as Detroit, Los Angeles, Philadelphia, and Chicago).

But it was more than policy challenges that directed federal attention toward the cities. It was also politics. As John Mollenkopf argues, the federal turn towards urban policies was also driven by democratic entrepreneurs who sought to “construct[] new political alignments and new coalitions around the framework of federal urban development programs.”²⁰⁰ The local level generally, and cities more specifically, was where political organizing was strongest: political machines and the reform movement, labor unions and local businesses organizations, churches and ethnic aid societies are prominent organizations in civic life. In their effort to build a stable national coalition, Democrats picked issues that they believed could mobilize urban constituents as a whole and cut across the lines that divided them. They also fostered new patterns of political mobilization that united the various elements that had once divided urban politics.²⁰¹ Urban residents in the twentieth century did not necessarily support the Democrats because they were partisan stalwarts following their party’s lead. Rather, the Democratic party actively sought urban support, and reoriented the platform of the party to build an urban coalition.

For their part, cities and other localities eagerly welcomed federal intervention in local affairs. The federal government provided resources that the state was unable to match, especially as the Great Depression drained state coffers.²⁰² They provided support for large scale development programs that cities were unable to pursue otherwise, from highways to subways to airports. More importantly, they provided an outlet for pursuing local interests. Indeed, for the big cities that had long complained about their treatment at the hands of state legislatures, congressional support at the federal level and direct access to federal agencies offered a new avenue to power. Tellingly, both the U.S. Conference of Mayors and the National League of Cities were formed during this era, and largely for the purpose of lobbying the federal government.²⁰³ In short, the era of federal expansion

200 MOLLENKOPF, *supra* note 139, at 15.

201 See 3 SAMUEL LUBELL, *FUTURE OF AMERICAN POLITICS* 43–68 (1965) (“[In sharpening American class divisions, Roosevelt] subordinated the old nativistic prejudices of race and religion, which had devided the lower half of American society for so long, bringing . . . a greater degree of social unity than they had ever shared before.”).

202 See TED ROBERT GURR & DESMOND KING, *THE STATE AND THE CITY* 116–17 (1987) (detailing how the federal government stepped in to relieve cities during the Depression in part because the states could not).

203 See Raymond A Mohl, *Shifting Patterns of American Urban Policy since 1900*, in *URBAN POLICY IN TWENTIETH-CENTURY AMERICA* 8–9 (Arnold R. Hirsch & Raymond A. Mohl eds., 1993)

was also an era of federal-local collaboration. And in many cases, the collaboration circumvented the states.

2. Federal Policies and Intrastate Conflicts

Federal involvement in urban policy reshaped intergovernmental relations in the twentieth century. As a matter of law, localities remained creatures of the state. But as a matter of policy, localities in general, and cities in particular, saw opportunities in federal policies that were not available at the state level. The effect of federal expansion on the vertical relations in the federal system, however, is only one part of the story. Another equally important dimension is how the rise of the federal government affected the horizontal relationship between localities within states.

Metropolitan fragmentation exploded in the twentieth century.²⁰⁴ State policies at the turn of the twentieth century set the stage by making it harder for cities to annex their neighbors and easier for suburban communities to remain independent.²⁰⁵ The advent of zoning made it possible for suburbs not only to control the type of land-use development that occurred in their jurisdiction, but also through minimum lot sizes and regulations on multifamily housing to control the type of people that could become residents.²⁰⁶ All the while, preferences were changing. The post-war generation gravitated to the open space and new builds that the suburbs offered.²⁰⁷ Persistent racial discrimination persuaded whites to flee transitional neighborhoods in the city for the security of the suburbs, especially as civil rights litigation dismantled segregated neighborhoods, schools, and public facilities.²⁰⁸ All across the country, localities were looking less and less like administrative subdivisions of the state. They were be-

(“In the face of unprecedented need, an urban lobby emerged to press the case for a national program of urban assistance.”).

204 See generally JON C. TEAFORD, *CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850–1970* (1979) (“The result of this fragmentation is inefficiency, confusion of authority, and disparity in shouldering the burdens of the metropolis.”).

205 See JACKSON, *supra* note 178, at 138–56 (tracing the “rise and fall of municipal annexation”).

206 See MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 74–76 (1976) (showing how various land use restrictions raise housing costs and thus affect community diversity).

207 See JON C. TEAFORD, *THE METROPOLITAN REVOLUTION: THE RISE OF POST-URBAN AMERICA* 83–84 (2006) (“The crowded city—with its noise, crime, polluted air, and lack of open space—was deemed an undesirable atmosphere for youngsters; good parents were expected to move their children to suburbia.”).

208 See KRUSE, *supra* note 85, at 7–10.

coming insular and distinctive communities with their own racial, class, and cultural identities.²⁰⁹

Metropolitan fragmentation also shaped federal politics. And nowhere is this more evident than how federal urban policies were directed towards different constituencies. As noted earlier, Democrats built their twentieth century political coalition around urban voters, particularly those in established big cities in the Northeast and the Midwest. Not surprisingly, Republicans responded by targeting their policies towards suburban voters, growing cities in the South and the Southwest, and rural communities.²¹⁰ Despite some lip service to the contrary, neither party seriously sought to dismantle federal urban programs. Instead, each party shaped federal urban policies, and allocated federal funds, to support their local constituency. The intrastate dimensions of this partisan struggle eventually came to define how federal policies shaped the metropolitan landscape. It would also come to define much of the federalism debate in American politics for the latter half of the twentieth century.

At the same time that federalism was being used to negotiate the intrastate dynamics of national partisan politics, a similar development was also occurring in the Supreme Court. Indeed, intrastate fragmentation also became an important foundation for the Court's "federalism revival" in the 1970s. Much has been said about the motivations and ideology of the Justices that pioneered the return of federalism as a matter of judicial concern. For our purposes, however, what is worth noting is the extent to which the invocation of federalism during this era focused not on the unique and distinct role of states specifically, but rather the integrity and autonomy of local communities—cities, towns, and counties—within them. Localism, in other words, was the framework through which federalism was revived, and the resolution of intrastate conflicts appeared to be the purpose for which federalism was used.

Two cases illustrate the sudden emergence of local autonomy at the heart of the Supreme Court's federalism jurisprudence. And both involved equal protection challenges directed at the manner in which states structured their delivery of public education. In *San An-*

209 See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (claiming that the equivocal legal language in America that defines communities has political and racial implications).

210 See MOLLENKOPF, *supra* note 139, at 45–49 (characterizing Republican policy since the New Deal as “anti central-city”); see also BAUMGARTNER & JONES, *supra* note 68, at 147 (emphasizing the “Republican attempt to redefine urban problems as local problems” in the Nixon Administration).

tonio School District v. Rodriguez, the Court dismissed a challenge against Texas's funding scheme for local public schools, which relied heavily on local property taxes. Drastically disparate tax bases among local communities in Texas—which reflected the class and racial divides between them—meant that prosperous districts were able to provide nearly five times more per-pupil spending than poor districts.²¹¹ A year later, in *Milliken v. Bradley*, the Court reversed a district court desegregation plan that involved busing students from the nearly all-black Detroit school district to nearly all-white suburban districts like Allen Park and Grosse Pointe.²¹² The Court did not deny that unconstitutional racial discrimination had occurred; it held however that the remedy could not extend into suburban school districts even if that was the only way meaningful desegregation could be effectuated.²¹³

Rodriguez and *Milliken* were dismissed by the Supreme Court on equal protection grounds. Yet the reasoning in both relied strongly on federalism arguments. Federalism, the Court explained in *Rodriguez*, must be considered in “determining whether a State’s laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.”²¹⁴ Indeed, in rejecting the equal protection challenge, the Court explained: “we do no violence to the principles of federalism and separation of powers by staying our hand.”²¹⁵ Similarly, in *Milliken*, the Court held that federal courts should tread lightly in formulating equal protection remedies that would intrude upon the legislative judgment of the state. As a prelude to the “commandeering” cases yet to come,²¹⁶ the Court reversed the desegregation plan in part because of fears that it would effectuate “a complete restructuring of the laws of Michigan relating to school districts [and] the District Court will become first, a *de facto* ‘legislative authority’ to resolve these complex questions, and then the ‘school superintendent’ for the entire area.”²¹⁷

The federalism principles that the Court invoked in these cases, however, were not limited to its deference to states. What was most striking was the extent to which federalism served as a means of pro-

211 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 8, 11–15 (1973).

212 *Milliken v. Bradley*, 418 U.S. 717 (1974).

213 *Id.* at 744–45.

214 *See Williams*, *supra* note 161, at 105–15.

215 *Rodriguez*, 411 U.S. at 58.

216 *See, e.g., New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898, 902 (1997).

217 *Milliken*, 418 U.S. at 743–44.

tecting, in the Court's words, "local autonomy" and "local control."²¹⁸ To be sure, it is not uncommon for courts to use "state" and "local" interchangeably in the federalism context, confusing the jurisdictional divide between states and their subdivisions. But there was no confusion here. Indeed, the Court's use of "local" could not have been any more precise. Using federalism language usually reserved for states, the *Rodriguez* Court praised educational systems like the one in Texas for allowing "[e]ach *locality* . . . to tailor local programs to local needs," while at the same time "afford[ing] opportunity for experimentation, innovation, and a healthy competition for educational excellence."²¹⁹ Similarly, in much the same way the Supreme Court talks about sanctity of state boundaries, the *Milliken* Court added that the "notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country," especially given that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."²²⁰ From this perspective, what the Court seemed intent on protecting through federalism was not necessarily the right of the state to structure its public schools free of federal interference. Rather, it seemed to be limiting the scope of equal protection precisely to defend the very specific choice of these states to fragment public education into a number of distinct and independent school districts.

Why this specific focus on the local? Part of the reason is that pursuing this route allowed the Court to navigate around earlier precedents that firmly subject *states* and *state* policies to the equal protection clause and other constitutional rights.²²¹ But it is also important to recognize that for all the discussion of federalism and local autonomy, *Rodriguez* and *Milliken* were largely intrastate disputes. The structure of constitutional civil rights litigation required the plaintiffs to state their claims in terms of individual rights. But the alleged harm was the product of local government structures that pitted communities against communities—Detroit against its suburbs in *Milliken*, poor against wealthy communities in *Rodriguez*. This is why the alignment of the parties in these cases shifted so dramatically. While plaintiffs originally sued the San Antonio School District in *Rodriguez*, the district petitioned to be removed as a defendant and eventually joined the plaintiffs as amici in challenging the state and

218 *Rodriguez*, 411 U.S. at 50.

219 *Id.*

220 *Milliken*, 418 U.S. at 741.

221 Williams, *supra* note 161, at 108–09.

other school districts.²²² Similarly, while the interdistrict remedy crafted in *Milliken* was based in part on past racial discrimination by the Detroit School Board, the school board also changed sides by aligning with the plaintiffs in favoring the metropolitan remedy on appeal and before the Supreme Court.²²³ As the dissents in both these cases point out, the “local autonomy” that concerned the Court was not local autonomy in the general sense. Rather, it was the autonomy of certain localities to be free from the claims and demands of others in an intrastate fight.²²⁴

From this perspective, local autonomy was not a way for the Court to invoke federalism to insulate states from constitutional challenges. Rather, federalism was invoked as a way of insulating certain communities from claims made by others. In other words, the Supreme Court did not “confuse[] localism with federalism.”²²⁵ Federalism was being used specifically to address localism. At the risk of sounding crass, what the Court was interested in protecting in *Rodriguez* and *Milliken* was the wealthy and white suburban communities that were insulating themselves from the central city and other poor suburbs. Texas and Michigan, from this perspective, were the proxies through which the Court was able to do so.

3. Contemporary Local-Federal Relations

Vestiges of the local-federal alignment of the twentieth century still remain. Yet many of the programs, funding streams, and relationships have either withered away or been redirected through states. By the 1980s, the Democratic urban coalition had largely col-

222 Brief for Amici Curiae, San Antonio Independent School District, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972) (No. 71-1332), 1972 WL 136437.

223 See JOYCE BAUGH, *THE DETROIT SCHOOL BUSING CASE: MILLIKEN V. BRADLEY AND THE CONTROVERSY OVER DESEGREGATION*, 134, 138-139 (2011) (“George Roumell, attorney for the Detroit board, announced that he would not argue against Judge Roth’s finding of segregation but would recommend a metropolitan remedy.”).

224 See *Rodriguez*, 411 U.S. at 64-70 (White, J., dissenting) (“[T]he State must fashion a financing scheme which provides a rational basis for the maximization of local control, if local control is to remain a goal of the system”); *id.* at 126-29 (Marshall, J., dissenting) (“[I]t is apparent that the State’s purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.”); *Milliken*, 717 U.S. at 800-08 (Marshall, J., dissenting) (“Ironically, by ruling out an interdistrict remedy . . . the majority flouts the very principle on which it purports to rely.”).

225 Mark C Rahdert, *Obstacles and Wrong Turns on the Road from Brown: Milliken v. Bradley and the Quest for Racial Diversity in Education*, 13 TEMP. POL. & CIV. RTS. L. REV. 785, 798 (2003).

lapsed.²²⁶ By the 1990s, federal grant-in-aid programs to cities and other localities had been dramatically reduced.²²⁷ Moreover, with the move towards Community Block Grants, states became the intermediary through which federal funds meant for localities were channeled.²²⁸ The “New Federalism” of the 1980s did not eliminate federal involvement in local affairs. What it did, however, was sever the direct relationships that many cities enjoyed with the federal government while strengthening the role of states.

But the relationships that were forged between localities and the federal government continue to play a role in defining how localities respond to contemporary issues. As noted earlier, when Internet providers succeeded in convincing states to block municipal Internet services, localities turned to lobbying the Federal Communications Commission to reinterpret federal law to preempt the state bans.²²⁹ More recently, when a number of states sued to block an executive order issued by President Barack Obama excluding certain undocumented immigrants from deportation, a coalition of localities, including many in states that were suing, independently filed an amicus brief backing the President, touting the local benefits his executive order would provide.²³⁰ Even the relationships that were forged between local police and federal law enforcement during the War on Drugs and various firearm task forces proved useful when localities sought to circumvent state laws legalizing marijuana or expanding gun rights.²³¹ As a matter of law, localities remain creatures of the

226 See MOLLENKOPF, *supra* note 139, at 255–56 (“Especially during the mid-1970s, the politicized, older, Democratic central cities found themselves in considerable distress, as did the Democratic coalition.”).

227 See CARL GRODACH & RENIA EHRENFEUCHT, *URBAN REVITALIZATION: REMAKING CITIES IN A CHANGING WORLD* 51–52 (2015).

228 See, e.g., Richard P. Nathan & John R. Lago, *Intergovernmental Fiscal Roles and Relations*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 43 (1990) (“States, for example, became the intermediaries for small cities and towns under the Community Development Block Grant program.”).

229 See *supra* note 74 and accompanying text.

230 Brief for Amici Curiae Mayors of New York & Los Angeles, et al. in Support of Appellants, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238), 2015 WL 1777787 (touting the public safety and economic benefits of the Executive Action). A separate brief was filed by a coalition of police chiefs in support of the President, which, again, includes many serving in states that were suing. *Amicus Curiae* Brief of Major Cities Chiefs Ass’n, et al. in Support of Petitioners, *United States v. Texas*, 809 F.3d 134 (5th Cir. 2015), 2015 WL 7774512 (touting the public safety benefits of the Executive Action).

231 See sources cited *supra* note 112 (discussing California localities’ treatment of marijuana companies); cf. Darryl Forte & Sly James, Opinion, *We Need Laws to Stop Gun Violence in Kansas City*, (Mar. 23, 2014), <http://www.kansascity.com/opinion/readers-opinion/as-i-see-it/article342979/We-need-new-laws-to-stop-gun-violence-in-Kansas-City.html> (refer-

state. But the local-federal realignment that took place in the federal expansion of the twentieth century also continues to influence the behavior of localities.

In addition, local lobbying at the national level remains strong. Both the U.S. Conference of Mayors and the National League of Cities continue to advocate for the interests of their members, and largely focus on the reform or enactment of federal policies.²³² Issue-specific organizations, like Mayors Against Illegal Guns and Cities United for Immigration Action also seek federal action even if (or especially because) many of the obstacles they face are at the state level.²³³ This is not to say that state politics are no longer important. Rather it is to show that the close and independent relationships that localities have forged with the federal government and the states over the years have expanded the field where local issues and intrastate conflicts are fought. Given this, it is no wonder that federal-state conflict in the federalism arena is increasingly concerned about local policies and the political divide within states.

III. INTRASTATE FEDERALISM AND FEDERALISM THEORIES

Intrastate federalism outlines an alternative account of why federalism disputes occur. This Part suggests that it also offers a new way of thinking about federalism theories. Most theories of federalism assume that federalism is important because states are important. They further assume that this importance is based on the distinctiveness of states and their ability to inspire loyalty and affection in the American people.²³⁴ But in recent years, many federalism scholars have become skeptical that states continue to be important in these ways. Even among those who defend the distinctiveness and identi-

ring to gun legislation as “beyond [the] power” of Kansas City government and “something that must be done in the Missouri [State] legislature.”).

232 See CAMMISA, *supra* note 129, at 22 (examining the tactics of state and local lobbying groups).

233 See ROBERT J. SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS 169 (2015) (describing Mayors Against Illegal Guns’ advocacy for changes in federal law); Kirk Semple, *De Blasio to Host Mayors at Immigration Forum*, N.Y. TIMES (Dec. 6, 2014), <http://www.nytimes.com/2014/12/07/nyregion/de-blasio-to-host-mayors-at-immigration-forum.html> (describing Mayor Bill de Blasio’s efforts to support federal gun control laws).

234 See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 905-07 (1994) (“‘Federalism,’ Justice O’Connor states, ‘increases opportunity for citizen involvement in democratic processes’”); WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 136 (1964) (“It is true that federalism is maintained by the existence of dual citizen loyalties to the two levels of government.”).

ties of states, there is considerable disagreement over how they are distinctive and the basis of their identity. Are states socio-cultural communities? Are they sites of partisan affiliation? Are they simply outlets for divergent policy preferences?

Federalism scholars are right in thinking that geographic distinctiveness and subnational identities are important for understanding federalism. Where they are mistaken is in assuming that distinctiveness and identity must be based on states as states. States may not be cohesive communities. They may not have coherent identities. Intra-state federalism suggests, however, that a different kind of distinctiveness or identity may be at play. In other words, federalism's enduring significance may not necessarily be tied to protecting states as such. Rather, in many instances, federalism is the forum through which distinctive communities within states negotiate their relative political standing, and the means by which the contested identities of states are worked out.

A. *State- and National-based Theories of Federalism*

Two bodies of theory dominate the federalism literature. And like the federal system that they describe, these theories are aligned along the federal-state divide. On the one hand, state-based theories of federalism emphasize the legal and political role of states.²³⁵ Under this view, the willingness of states to check the federal government, and their ability to do so under federalism doctrines, explains the prevalence of federalism disputes in American politics. On the other hand, national-based theories see federalism disputes as an extension of national politics.²³⁶ The partisan split between the national political parties, and the way states are used to advance the parties' respective political agendas, is why federal-state contestations exist today. The central divide between state- and national-based theories of federalism is largely descriptive; both offer a different account of why federalism disputes arise. Yet they also lead to different normative outlooks, especially with respect to the purpose of the federal system and how federalism should be structured to meet those goals. This is not to say that disagreements do not exist within the camps them-

²³⁵ See, e.g., ELAZAR, *supra* note 13, at 2 ("This volume is devoted to an exploration of the way in which the states function as political keystones, serving their local subdivisions and supporting the overall structure of the national government."); Young, *supra* note 13 (examining the role of states in our federal system).

²³⁶ See, e.g., SCHAPIRO, *supra* note 24, at 11 ("Federalism has strong support in national politics."); Gardner, *supra* note 14 (discussing the decrease in the power of states under our federal system).

selves. Nevertheless, the most contentious battles in the federalism literature tend to take place across this divide.

State-based theories draw upon federalism's historic origins. Their central claim is that the basic conditions that gave rise to the federal system persist today.²³⁷ States, they argue, continue to be distinctive communities, each with particular needs and divergent interests. The political identities of Americans, they assert, also remain split between the nation and the state. As a result, federal-state contests can often be understood as a competition for their affection.²³⁸ From this perspective, federalism is the means by which our political system accommodates the geographic divides that fracture American society, and the contested loyalties that fragment the American polity. And federalism serves this role by preserving the ability of states to check federal power, enact policies tailored to their specific contexts, and compete with one another through policy experiments and innovations. To be sure, we may no longer believe that federalism arguments justify state-by-state divergences on such issues as slavery or Jim Crow.²³⁹ Yet state-based theories maintain that allowing policy patchworks on a number of other policy controversies is nevertheless worthwhile, if not outright desirable. In short, state-based theories see the salience of states as the primary reason for adhering to a federal system. The fact that federalism disputes continue to dominate American politics, they maintain, supports their claim about the continued relevance of states.

In contrast, national-based theories believe that a new era of federalism is upon us. Federalism's historic roots may be grounded in the need to accommodate the distinctive culture and divergent interests of different states. But states today, proponents of national-based theories point out, are simply too alike: they are integrated into a national economy; their residents are beholden to a national culture; and if political divides exist, they tend to be slight variations of the one that divides the nation as a whole.²⁴⁰ In place of geographic dis-

²³⁷ See Young, *supra* note 13, at 44–45 (arguing that cultural differences among the states persist).

²³⁸ See generally Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 332 (2003) ("The *Federalist Papers* clearly suggest that the Framers believed federalism would foster a vertical competition between the states and the federal government for the people's 'affection.'").

²³⁹ See RIKER, *supra* note 234, at 155.

²⁴⁰ See, e.g., JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 69–72 (2005) (arguing that the interconnectivity of modern society renders state-based political identity unproductive); Bulman-Pozen, *supra* note

tinctiveness and subnational identity, national-based theories posit that the role of federalism today is tied primarily to national politics.²⁴¹ Partisan competition explains why federal-state contestation persists. State politics are now largely extensions of national political agendas.²⁴² To the extent that states continue to challenge the federal government, it is because national political parties use them as staging grounds to challenge the party in control.²⁴³ To the extent that states pursue policies different from those of the national government, they do so largely in order to advance political agendas that aspire to become national policies. What we are left with is often a picture that focuses on differences at the individual level—better reflected by ideology and partisan affiliations than geographic communities.

But if federalism is no longer about knitting together the variegated communities and fractured identities in American society, then is it still “federalism?” It is on precisely these grounds that Malcolm Feeley and Edward Rubin argue that federalism no longer exists in the United States.²⁴⁴ And while their own theory of federalism may be critiqued for being too narrowly drawn, it does raise the question of whether national-based theories of federalism truly capture why federalism matters—and seems to matter so much—to most Americans. People seem drawn to federalism arguments in ways that are not fully captured by partisan politics. People seem attached to our federal system in more expansive ways than simply as a mechanism for maintaining a separation of powers or a system of checks and balances. Indeed, federalism arguments seem to retain a normative appeal closer to its historical purpose: as a means of negotiating geographic divides and subnational identities. In this respect, modern theories of federalism trade the descriptive problem for a normative one. They explain why federal-state contestation occurs. But they offer an

14, at 1110–12 (“[M]ost recent federalism scholarship has rejected the notion of state identity altogether, at least for the majority of states.”).

241 See Bulman-Pozen, *supra* note 14, at 1090–91 (“Instead of representing distinctively state interests against the distinctively national interests of the federal government, states may participate in substantive controversies that are national in scope.”).

242 See Gardner, *supra* note 14, at 17 (arguing that national politics has “colonized” state politics).

243 Bulman-Pozen, *supra* note 14, at 1119 (“Given the role of the states in staging partisan competition, individuals may reasonably regard state elections as outlets for their national political preferences.”).

244 See Rubin & Feeley, *supra* note 234, at 908 (“We have a federal system because we began with a federal system . . .”).

unsatisfactory account of why it often incites such strong passions and continues to hold such a privileged position in American politics.

In recent years, some federalism scholars have tried to bridge this divide. Yet efforts to do so seem increasingly divorced from reality on the ground. Jessica Bulman-Pozen, for example, argues that partisanship can explain why state identities might still matter; people identify with states that share their partisan affiliations.²⁴⁵ Thus, Republicans feel an affinity to Texas because it is controlled by their political party. Democrats in Texas may not feel the same, but the federal system provides them with an opportunity to form political identities with other states. Similarly, Jacob Levy offers a model of state identity that is independent of state distinctiveness.²⁴⁶ The key, he suggests, is to see state political identities as ascriptive rather than elective. In other words, Americans identify with their state not because they choose to; rather, they do so simply because many never leave the state in which they are born or spend most of their lives, and that “stickiness” serves as a basis for attachment and loyalties. But are Americans really forming cross-state identities as Bulman-Pozen’s theory would suggest? Do people feel attached to their states simply because it is so hard to leave, as Levy argues? Democrats in Texas may look fondly upon policies in New York. But I doubt that many identify in any meaningful way as New Yorkers, no matter how strong the partisan connection might be. At the same time, while it is true that most people do not frequently move from state to state, it is not clear that such ascriptive identities truly spur the kind of loyalties and affection that motivate people to stand behind their state in opposition to their country.

Maybe the need to locate federalism in the territorial distinctiveness and political identity of states is simply outdated or mistaken. Many proponents of national-based theories of federalism seem to think so. States may simply be a historic remnant. The invocation of federalism in American politics may be a national neurosis.²⁴⁷ Or maybe all the purported commitment to geographic distinctiveness and subnational identities is merely political cover—a disingenuous commitment used to mask our instrumental support of certain policy outcomes over others. If any or all of these are true, then it certainly

²⁴⁵ See Bulman-Pozen, *supra* note 14, at 1117 (describing states as “sites of partisan identification”).

²⁴⁶ Levy, *supra* note 64, at 469.

²⁴⁷ See Rubin & Feeley, *supra* note 234, at 908 (“We carry this system with us, like any neurosis, because it is part of our collective psychology, and we proclaim its virtues out of the universal desire for self-justification.”).

lends support to Feeley and Rubin's argument that the federal system in America is, at heart, no longer "federalism" at all. Or maybe the problem stems from the fact that federalism scholars assume that a theory of federalism based on distinctiveness must revolve around the distinctiveness of states.

B. The Local as the Site of Distinctiveness and Identity

Intrastate federalism does not resolve the underlying tension between state- and national-based theories of federalism. Nevertheless, it does offer a different way to think about the terms of the debate. Geographic distinctiveness and subnational identities may still be playing a role in federalism controversies. But it may be that the distinctiveness and identity that people care about in many federalism disputes are not those of states at all. The locality is increasingly the scale at which geographic distinctiveness is most pronounced, and where claims about the need for tailoring and experimentation can be most strongly made. Localities are also important sources of political identification, especially when people feel disconnected from state and national politics. Federalism, from this perspective, is useful not only because localities sometimes find themselves in federalism disputes when they seek state or federal support for local policies. Its appeal may also lie in the fact that federalism arguments are so closely aligned with the competing localism claims that underlie most intrastate conflicts.

Both state- and national-based theories of federalism assume that the distinctiveness that matters is that associated with states. But the kind of distinctiveness that federalism scholars often look for fits much better at the local scale. Localities today often represent socio-cultural communities in ways that states do not. They map America's partisan cleavages more accurately than the red-state, blue-state divide. More importantly, the characteristics that divide localities tend to be those that people care most about. Ernest Young is right to point out that states still vary in a number of ways: territorial size, population count, and population density.²⁴⁸ Yet all of this pales in comparison to the racial, class, and cultural cleavages that so often describe intrastate divides at the local level.²⁴⁹ None of this is to say that localities perfectly track the heterogeneity of American society.

²⁴⁸ See Young, *supra* note 13, at 47–49.

²⁴⁹ See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 85 (1993) (describing intrastate disparities among races and classes).

Indeed, divides within localities—between boroughs, wards, and neighborhoods—can sometimes be just as pronounced as those that separate one locality from the next. But if federalism is a political strategy for reconciling geographic divides, no level of government in our federal system comes closer to approximating its finer grains than those at the local level.

Just as geographic distinctiveness is tied to the fragmentation of localities at the local level, localities are also a potent source of political identification. Federalism scholars fixate on the identity of states because it is imagined that the political salience of states, and thus the need for a federalist arrangement, is tied in large part to the loyalties and affection that states generate among their residents. But for most Americans, state and national affiliations also compete with those at the local level. People “♥” New York;²⁵⁰ they “love L.A.”²⁵¹ And local attachments are not just associated with major cities; researchers find equally strong attachments in both suburban and rural towns.²⁵² This should not be surprising. More so than either the states or the nation, localities reflect the face-to-face communities in which people live, the economies in which they work, and the communal values that define them. Moreover, local attachments tend to grow when national- and state-based identities give way. Globalization may be undermining the salience of nation-states. At the same time, intrastate divides may be undermining the extent to which a single state identity can capture the hearts and minds of all state residents. But localities are fast taking their place in the construction of social identities.²⁵³ Rather than looking out and towards other states, as Bulman-Pozen suggests, it seems that Americans are looking inwards for a more local sense of belonging. Austin may be the state capital of Texas. But its residents foster a political and cultural iden-

250 See MIRIAM GREENBERG, *BRANDING NEW YORK: HOW A CITY IN CRISIS WAS SOLD TO THE WORLD* 193–95 (2009) (describing the development of the “I ♥ NY” brand).

251 See KEVIN COURRIER, RANDY NEWMAN’S *AMERICAN DREAMS* 247 (2005) (describing the development of the “I Love L.A.” brand).

252 See generally Roberta M. Feldman, *Constancy and Change in Attachments to Types of Settlements*, 28 ENV’T. & BEHAV. 419, 421 (1996) (“Place attachments are developed through an individual’s habitual and satisfying everyday experiences of the tangible surroundings of home place.”); David M. Hummon, *City Mouse, Country Mouse: The Persistence of Community Identity*, 9 QUALITATIVE SOC. 3, 3 (1986) (“The home . . . often serves as a significant locus of self and a sign of biographical, social, and temporal identities.”).

253 See, e.g., Roland Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity*, in *GLOBAL MODERNITIES* 25, 35 (Mike Featherstone et al. eds., 1995) (describing how localities absorb global “cultural messages” in different ways).

tity that is specifically distinguished from, if not outright in opposition to, that of the state.²⁵⁴

Indeed, local attachments may not just be supplanting our identification with the nation or the states. They may also be the lenses through which our sense of the nation and the state are constructed. In discussing the emergence of the nation-state as a conceptual framework, Benedict Anderson famously described them as “*imagined* [political communities] because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”²⁵⁵ Given the size of the states in America, state identities are likely no less “imagined” in Anderson’s formulation. From this perspective, the identity of states seems to be a function of the local perspective from which we are looking.²⁵⁶ For those living in Hollywood and West Los Angeles, California is the entertainment capital of the world, where everyone is writing a script and auditioning on the side.²⁵⁷ From the perspective of the Silicon Valley and San Francisco, it is the center of the nation’s Internet economy, where startups and tech giants compete. From the Central Valley, however, California is America’s agricultural breadbasket. And from East Los Angeles and the San Gabriel Valley, one might see California as “a capital of the third world,” where the promise and perils of immigration are playing out.²⁵⁸ Of course, California is all of these things. If California’s political identity is confused and contested, it is because it is based on myriad local identities, each of which lay claim to being the real California.

From this perspective, it may not be surprising that the Supreme Court’s first “federalism revival” in the 1970s coincided with the rise of “local autonomy” in constitutional jurisprudence.²⁵⁹ Indeed, at the

254 See generally JOSHUA LONG, WEIRD CITY: SENSE OF PLACE AND CREATIVE RESISTANCE IN AUSTIN, TEXAS (2010) (describing the “Keep Austin Weird” movement and Austin’s unique character among Texas municipalities).

255 BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (2006).

256 Cf. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 35 (1983) (arguing that larger political communities are best understood through comparisons to smaller associations).

257 See DAVID RIEFF, LOS ANGELES: CAPITAL OF THE THIRD WORLD 171 (1991) (describing the perception in the Westside of Los Angeles that “[e]veryone in L.A. is writing a script”).

258 See generally *id.* (discussing the large concentration of various ethnic communities present in Los Angeles).

259 See Williams, *supra* note 214, at 118–20 (discussing the influence of the principle of local sovereignty on Supreme Court cases alleging discrimination in housing and schools in the 1970s).

same time it was dismantling barriers to interstate mobility by expanding the constitutional “right to travel,”²⁶⁰ the Court was bolstering municipal boundaries as a barrier to intrastate mobility.²⁶¹ Nor should it be surprising that when the Supreme Court refocused its efforts on reaffirming federalism as a restraint on federal power during this time, its efforts were so closely tied to a defense of *local* autonomy. As we saw earlier, the invocation of federalism principles in cases like *San Antonio School District v. Rodriguez* and *Milliken v. Bradley* was primarily in the service of protecting specific local communities—namely, middle- and upper-class white suburbs—from constitutional claims made by Blacks and others living in other communities.²⁶² Taken together, it is telling that federalism was used to protect the boundaries of localities at the same time the Court was willing to emphasize national cohesion in undermining the ability of states to restrict interstate mobility. Federalism may continue to be tied to the perceived need in our nation to accommodate and reconcile geographic differences and subnational identities. It is just that, as distinctiveness and identities are increasingly associated with intrastate divides, the focus of federalism turns local as well.

Federalism scholars have struggled to reconcile intrastate distinctiveness and local political identities with theories that revolve around the distinctiveness and identities of states. But intrastate federalism suggests that the relation between the two may not necessarily be oppositional, as many federalism scholars seem to assume. In many instances, federalism fights *are* about the geographic divides that fragment American society. Demands for tailored policymaking, local autonomy, and the ability to experiment and innovate may be seriously made, and not simply a cover for the substantive policy at hand. But the stakes of the debate may not be about the distinctiveness or identities of states *per se*. Rather, they may have much more to do with people’s attachments to the policies and interests of their local

²⁶⁰ See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974) (noting the recognition of interstate travel as a fundamental constitutional right); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969) (holding that a law intended to inhibit the migration of poor people into a state was unconstitutional because it violated the constitutionally guaranteed right to travel). But see *Sosna v. Iowa*, 419 U.S. 393, 404–06 (1975) (upholding a durational residency requirement justified under Iowa’s “comprehensive statutory regulation of domestic relations”).

²⁶¹ See, e.g., *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (upholding the denial of rezoning land to federally subsidized housing); *Warth v. Seldin*, 422 U.S. 490 (1975); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding an ordinance prohibiting unmarried couples from living together).

²⁶² See *supra* notes 211–26 and accompanying text.

communities. For some, these align with the state. For others, their interests align with the federal government. Different communities may find themselves in disagreement over which of their policies should prevail. But both sides may be in agreement over federalism as a framework because it gives voice to arguments grounded in territorial distinctiveness and subnational identity.

C. Federalism and the Contested State

I have suggested that local distinctiveness and local identities may play a more significant role in federalism disputes than prevailing federalism theories acknowledge. Another way of looking at distinctiveness and identity through an intrastate lens is to expand the manner in which they are used to describe states. Federalism scholars may be right to believe that what matters is how states continue to be differentiated from one another. Yet they too readily assume that this differentiation must be based on something that unites a state together. A state may be internally divided. Its identity may be fiercely contested. Yet the particular manner in which it is political divided, and the specific ways in which its identity is contested, may be what truly defines the social and political distinctiveness of a particular state. To be sure, describing states in this manner does not lend easily to the traditional argument that federalism serves to knit together variegated, but otherwise internally homogenous, communities into a political union. But, as I suggest here, it may help to explain why federalism disputes often involve states that are internally divided and undergoing tremendous demographic change.

In talking about a state's social and political culture, jurists and legal commentators tend to focus on broad generalizations of what makes a state unique. In defining the source of this uniqueness, however, there is surprisingly little effort to probe into the internal dynamics that truly define the politics and culture of a particular state. States may be internally divided, but they are nevertheless divided in different ways. It is impossible to describe politics in a state like New Jersey without accounting for the divide between its two major metropolitan areas—those associated with New York City in the north and Philadelphia in the south—and the stark racial divide between cities like Camden and Newark and the white suburbs that surround them.²⁶³ Similarly, one cannot fully understand Florida politics

²⁶³ See DENNIS E. GALE, GREATER NEW JERSEY: LIVING IN THE SHADOW OF GOTHAM 82–85 (2006) (noting that the news broadcast networks and newspapers in New Jersey are predominantly from either New York City or Philadelphia).

without recognizing the impact of immigration—both foreign and domestic—on the state’s demographic transformation, and the split it has created between communities in the southern and northern parts of the state.²⁶⁴ Few would mistake New Jersey for Florida, or assume that the politics or culture in either state is the same. But what sets them apart is in many ways a reflection of the particular manner in which they are divided.

What makes states unique may also lie in the specific ways that state identities are contested. In debates about whether people meaningfully identify with their state, federalism scholars often clash over what the identity of a state might be. The fact that a state may foster competing identities is usually taken to be evidence that people do not, perhaps cannot, meaningfully identify with their state. But it may be precisely when state identities are in flux that the very idea of a unique state identity becomes the most salient in state and national politics. Some have argued that it is often when national identities are contested that efforts to define such an identity are the most intense.²⁶⁵ It may be that the salience of state identities follows a similar logic. Efforts to construct a “southern identity” peaked precisely when economic development, rapid urbanization, and the civil rights movement began to offer alternative visions in the southern states.²⁶⁶ Several generations earlier, leaders in northern states like New York and Massachusetts similarly struggled to locate an intrinsic state identity when massive immigration was making it more difficult to pin down what that identity might be.²⁶⁷

There is no reason to assume that divided states with contested identities lack distinctiveness or are incapable of generating loyalty and affection among their residents. Indeed, if the purpose of drawing out the distinctiveness and identity of states is to explain why federal-state contestation occurs, a theory of states that focuses on internal divisions and contested identities may ultimately be more useful. Federalism battles are not limited to states like Wyoming, Idaho, or

264 See GIMPEL & SCHUKNECHT, *supra* note 25, at 86–93 (comparing the political divide in Florida counties with the ethnic populations in those counties).

265 See PAUL ROE, *ETHNIC VIOLENCE AND THE SOCIETAL SECURITY DILEMMA* 59–60 (2005).

266 See JAMES C. COBB, *AWAY DOWN SOUTH: A HISTORY OF SOUTHERN IDENTITY* 231 (2005) (noting the effort to maintain a “permanent and immutable” Southern culture as society and the region changed).

267 See PAUL M. SEARLS, *TWO VERMONT: GEOGRAPHY AND IDENTITY, 1865–1910* 60, 136 (2006) (discussing the evolving role of immigrants and the issues of prohibition in the late nineteenth and early twentieth centuries in Vermont); Bluford Adams, *New Ireland: The Place of Immigrants in American Regionalism*, 24 J. AM. ETHN. HIST. 3, 3–4 (2005) (noting the impact of immigrants on regionalism).

North Dakota where internal divisions are less pronounced, as traditional federalism theories might predict. Rather, they are often more likely to involve diverse and divided states like New York, California, Texas, and increasingly Colorado, Arizona, and Virginia. Moreover, the timing of these disputes also seems to correspond with when these states are undergoing the most dramatic demographic change, and state identities are contested and in flux. California challenged federal immigration laws with its enactment of Proposition 187 in 1994, precisely the time when the state tipped from being a white and Republican-controlled state to one in which minorities are in the majority and Democrats solidly in control.²⁶⁸ Arizona did the same with S.B. 1070 in 2010, also a time when demographic shifts were marking a transition from an “old” Arizona to a “new.”²⁶⁹ And just as California withdrew its support for Proposition 187 in the years following its enactment, Arizona appears to be distancing itself as well. Russell Pierce, the state senator who introduced S.B. 1070, was successfully recalled a year after the law was enacted, and the current governor seems distinctly uninterested in associating himself with the state’s controversial law.²⁷⁰

Given the costs and benefits of federalism disputes, it may not be surprising that contested states so often find themselves at the forefront of federalism controversies. Federalism depends on states being willing to stand up to check the federal government. But doing so is costly. Federalism challenges drain state coffers; they expend political capital. State-based theories of federalism assume that the states willing to pay these costs are those with distinct cultures and cohesive identities mounting a defense against external forces. Intra-state federalism suggests, however, that the states may also be willing to pay this price when political control is most contested. Virginia was nominally controlled by Republicans when it sued the federal government in an effort to gut President Obama’s Affordable Care Act in 2010. Yet the Republican grip on the state was tenuous, and many saw this as an effort by the party to mobilize its voters in the face of the state’s political change. Indeed, the lawsuit was perceived

268 See LISA BEDOLLA, *FLUID BORDERS: LATINO POWER, IDENTITY, AND POLITICS IN LOS ANGELES* 29–30 (2005).

269 See Eric Jay Toll, *Old, New Arizona in Crossfire on Fifth Anniversary of SB 1070*, PHX. BUS. J. (Apr. 24, 2015), <http://www.bizjournals.com/phoenix/blog/business/2015/04/old-new-arizona-in-crossfire-on-fifth-anniversary.html> (describing the public perception of the major players five years after the controversial immigration bill S.B. 1070 in Arizona).

270 See Howard Fischer, *Ducey Leaves Any Appeal on “Dreamers” Up to the New AG*, ARIZ. DAILY STAR, Jan. 31, 2015, at C1 (showing how the new Arizona governor has attempted to distance himself from the controversial immigration law).

by many political veterans in Virginia as the latest in a string of developments reshaping a state political culture that was once known for its civility and conciliation. And the impetus for these actions was tied to the fact that Virginia now finds itself more evenly divided than ever on a political level.²⁷¹

Just as federalism depends on states' willingness to challenge the federal government, it is also contingent on the federal government's willingness to assert authority against a state. This side of the federalism equation is often overlooked. But the fiscal and political costs borne by states in federalism disputes weigh on the federal government as well. State-based theories of federalism assume that the federal government is most likely to confront states whose political and cultural norms are the most out-of-step with the nation as a whole. Intrastate federalism suggests, however, that the federal government might be equally, if not more, willing to intervene in states where internal discord is the most pronounced. Federal intervention during the civil rights era targeted those states in which local tensions were high and especially volatile. The federal government sued Arizona over its immigration law in 2010 after fierce protests against the law had broken out all across the state, but largely ignored Missouri and Oklahoma, which had passed similar laws earlier but without the same degree of intrastate tensions. In choosing which state the federal government should expend its resources and political capital to challenge, federal actors seem just as motivated by intrastate divisions as the states themselves.

In short, looking at distinctiveness and identity through this perspective not only accounts for the types of states that tend to get embroiled in federalism disputes. It also offers a way of reconciling the divide in the federalism literature between state- and national-based theories of federalism. On the one hand, intrastate federalism suggests that state-based theories are right to emphasize the distinctiveness and identity of states in explaining federal-state contestation. The fact that political divides exists within states, or that a state's political identity may appear contested, explains why both the federal government and the states find themselves locked in a federalism

²⁷¹ See Trip Gabriel, *In Politics, the "Virginia Way" No Longer Reflects Its Genial Southern Roots*, N.Y. TIMES (July 27, 2014), <http://www.nytimes.com/2014/07/28/us/politics/in-virginia-bob-mcdonnells-corruption-trial-symbolizes-growing-political-partisanship.html> ("The more closely divided a political environment, the nastier the disputes are. Because [Virginia] is basically 50-50, all parties are engaged in the kind of trench warfare that really is a very, very distinct departure from the dynamic that previously marked state government here.").

dispute. On the other hand, intrastate federalism also supports national-based theories of federalism and their focus on national politics. The states that tend to get embroiled in federalism disputes also tend to be those that are internally divided in much the same way as the nation as a whole. Federalism disputes are framed around federal-state contestation. But the substantive issues at stake in many federalism disputes are those that divide both the nation and the states involved.

IV. INTRASTATE FEDERALISM AND THE DIVIDE WITHIN STATES

It is easy from the foregoing analysis to assume that the most significant implication of intrastate federalism is with respect to federalism. But equally important is what it tells us about how federalism disputes are being used to shape the nature and consequences of America's intrastate divides. In other words, how has intrastate federalism shaped our national response to local problems stemming from the divide within states and between localities?

This is not an insignificant issue. Many of the problems that America faces today—from race relations to economic inequality—are rooted in the fragmentation of our local communities. At the same time, few solutions to these problems seem possible without addressing how local boundaries fracture American society and delimit the bounds of our communal obligations. The organization of our local communities, and the impact of this organization on American society, is seldom mentioned in debates about federalism and the federal-state relationship upon which it is traditionally based. Yet in making federalism decisions, we are often making important decisions on how our local communities are organized, and the impact of this organization on American society. Intrastate conflicts may be reshaping the role of federalism in American politics. But the corollary is that federalism is also shaping the role of intrastate fragmentation in American society.

Yet despite the importance of intrastate conflicts, the rise of intrastate federalism may hamper our efforts to address them. To be sure, reframing an interlocal conflict as a federal-state dispute allows local political actors to raise issues that may otherwise be ignored. But this reframing often conceals and distorts the nature of the intrastate conflicts at stake. Concealment and distortion is not just a problem for courts and policymakers who eventually confront interlocal conflicts as federalism controversies. It may also alter how local political actors themselves see these problems, and the way they go about addressing them. Negotiating intrastate divides may not be purpose

for which our federal system was designed. But if that is the way it is now commonly used, it is worth asking whether it can serve this role in a more meaningful capacity.

A. *The Significance of Intrastate Fragmentation*

National and state politics dominate discussions about federalism. Yet the issues that shape national and state politics are also increasingly the result of how intrastate divisions are geographically organized. Racial and economic inequality is a product of the spatially segregated communities that determine access to good jobs, safe neighborhoods, and meaningful educational opportunities.²⁷² America's social and cultural rifts are exacerbated by local geographic boundaries that limit the everyday interactions that we might otherwise have with people who think differently than ourselves.²⁷³ Skepticism about the role of government today is also shaped by the responsiveness of our local governments and their ability to address local concerns.²⁷⁴ In short, the crisis in American politics today is not simply a product of ideology or partisanship. It is also a result of deepening interlocal divides, and the dire consequences of organizing American society in this manner.

It is here that we have to recognize that the intrastate fragmentation that I have described is not just a social or economic phenomenon. It is also the product of laws and policies that have contributed to, and incentivized, the sorting of Americans into discrete legal jurisdictions. And the consequences of this fragmentation is profound. It is part of the reason why more than half a century after racial segregation was declared unconstitutional, America remains as segregated as ever. The fragmentation of local land use powers, along with the ability to use local boundaries to insulate services and tax bases from outsiders, have concerted to sort Americans into localities on the basis of race and class.²⁷⁵ It also helps explain the low level of economic mobility that new generations of Americans face, as wealth

272 See PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 60–62 (2013) (noting that economic segregation through local zoning ordinances leads to racially segregated neighborhoods).

273 See BISHOP & CUSHING, *supra* note 30, at 287 (noting the difference in political views between two counties in Colorado).

274 Cf. ELAINE B. SHARP, *DOES LOCAL GOVERNMENT MATTER? HOW URBAN POLICIES SHAPE CIVIC ENGAGEMENT* 19 (2012) (examining policy-centered theory in the context of local and urban government).

275 See GORDON, *supra* note 192, at 9–10 (noting the shift of resources and political power from cities to suburbs through the segregating effects of local land use controls).

and income disparities are replicated across different communities in the quality of schools, safety of neighborhoods, and the availability of jobs.²⁷⁶ The manner in which inequality is spatially organized in American society means that many people are foreclosed from acquiring the kind of human, social, and economic capital to move from one socioeconomic stratum to the next.²⁷⁷ Indeed, from housing to education to healthcare, there are few issues facing America today that are not due in part—and often a substantial part—to the high degree of segregation and fragmentation at the local level.

It might strike some as trivial to think about federalism through such an overtly local lens. When we talk about federalism, we tend to think big. Federalism, after all, is the political structure around which the United States is organized. Its design preoccupied our nation's founders, and fiercely divided them in the early years of the republic.²⁷⁸ And since then, it has continuously been invoked in some of the most contentious battles in American life, including those that have threatened the integrity and viability of the union that it was created to maintain.²⁷⁹ From this perspective, the most striking aspect of the rise of intrastate federalism is the extent to which federalism is increasingly being used to negotiate interlocal conflicts, which appears to be far from its original purpose.

But if we foreground intrastate fragmentation as a meaningful problem—both from a local and national perspective—then the most important lesson of intrastate federalism may be that the cause and consequences of interlocal divisions are increasingly resolved through debates about federalism and the federal-state relationship. We saw this with respect to immigration in Arizona; by soliciting the aid of both the federal government and the state, competing localities engineered a federalism controversy that ultimately decided which local policies would prevail and which would be overturned. This was also the case in Massachusetts, where Boston's efforts to shore up its employment prospects in the face of suburban flight rested on the pe-

276 See Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* (May 2015) (unpublished manuscript) (on file with Harvard University) (studying the negative effects of low-income and segregated neighborhoods on children).

277 See Ford, *supra* note 209, at 1851–52 (noting that much of the racial segregation in cities and suburban life is correlated to economic segregation of the races).

278 See generally STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800* 22–29 (1994) (discussing the different beliefs held by the Founding Fathers about the role of the federal government).

279 See RYAN, *supra* note 11, at 75–76 (noting the challenge to federalism brought on by the Civil War).

ripheral impact that the policy had on out-of-state workers and interstate relations. Even political movements based on federalism have shaped the relationship between different localities in profound ways. As we saw, the “New Federalism” revolution in the latter half of the twentieth century did as much to shape urban-suburban relations as those involving the federal government and the states. Time and time again, federalism has been at the forefront of how interlocal conflicts have been resolved.

But federalism has done more than simply determine winners and losers at the local level. In many cases, it has also shaped the very structure of intrastate fragmentation that gives rise to intrastate federalism disputes in the first place. Federalism was not only invoked by the Supreme Court in *Rodriguez* and *Milliken* to insulate privileged suburban school districts against equal protection claims made by its less fortunate neighbors. It also contributed to holdings that reinforced the significance of municipal boundaries, making it all the more likely that those wishing to avoid racial integration or wealth redistribution would seek the protection that those boundaries could now provide.²⁸⁰ The federalism battles over the role of the federal government in local affairs, and whether federal funds should be distributed directly through localities or through the state, have also changed how we think about local finances. As a result, federalism became a more convenient framework for working out interlocal inequities than regional solutions involving direct negotiations between localities. In other words, the way by which federalism has been deployed to resolve intrastate conflicts has also contributed to the local divides that have made intrastate federalism more common.

Indeed, foregrounding federalism in this manner is all the more necessary as traditional forums for resolving interlocal disputes are waning. While states today are more inclined than ever to exert power and control over their localities, state politics itself is increasingly less focused on shrinking interlocal divisions or negotiating interlocal tensions. Rather than a forum in which localities can represent and reconcile their differences, states tend to treat localities as isolated units without much regard for the relations between them. State courts in the late twentieth century briefly emerged as a useful venue for addressing interlocal disparities, especially with respect to racial and economic segregation in housing and schools.²⁸¹ But without the

280 See Ford, *supra* note 209, at 1875–77 (discussing the impacts of the *Milliken* and *Rodriguez* cases).

281 See, e.g., *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1354 (N.H. 1997) (holding that New Hampshire’s system for financing elementary and secondary public education was

support of governors or state legislators, their efforts have produced soaring rhetoric but limited results. And while the federal government still occasionally turns its attention towards local matters like policing and education, recent efforts have largely abandoned the regional outlook that guided federal policies in the past.²⁸² In modern political times, it would seem, local political actors have no choice but to navigate interlocal disputes around the federal system in search of supporters. And interlocal conflicts are successfully framed as such only when competing local actors are able to recruit allies at different governmental levels to fight on their behalf.

The hidden role that federalism has played in shaping the nature and consequences of America's intrastate divides is not just something that federalism scholars have largely overlooked. It is also a point that local government scholars do not seem to fully appreciate. This is not to say that local government scholars have not at times considered how federalism affects a locality's power and authority, especially vis-à-vis their states.²⁸³ Rather, it is that they often overlook how the very structure of federalism disputes itself replicates the local-local and state-local battles that local government research is so focused on.

B. Federalism as a Forum for Interlocal Negotiations

But if federalism is now an important forum for interlocal negotiations, how well does it actually serve in this capacity? In my view, federalism's prospects in this regard are mixed. On the one hand, federalism provides a much needed forum for competing localities to voice and resolve their grievances. On the other hand, federalism often conceals the underlying nature of the problems involved, especially the intrastate dimensions that define these disputes. The nature and consequence of intrastate fragmentation may be shaped by how federalism decisions are made. Yet, because of the manner in

unconstitutional); *So. Burlington Cty. NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (concerning a requirement that municipalities in New Jersey "provide a realistic opportunity for low and moderate income housing"); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (challenging the constitutionality of Texas's system for financing public schools).

282 See GERALD BENJAMIN & RICHARD P NATHAN, *REGIONALISM AND REALISM: A STUDY OF GOVERNMENTS IN THE NEW YORK METROPOLITAN AREA* 267 (2001) (noting that while states principally make regional decisions, the national government may still offer financial aid to enforce regionalism).

283 See generally Davidson, *supra* note 78; Hills, *supra* note 78.

which federalism is addressed, we often do so without a clear understanding of the local stakes involved.

To be sure, intrastate federalism is an adaptation that has helped elevate many local concerns onto the national stage. Localities may have lost much in terms of their formal role in American politics. Yet intrastate federalism suggests that they have found ways to exert influence indirectly by recruiting proxies at the state and federal level. This is made possible by the flexibility of our federal system, and the fact that federalism arguments about centralization and decentralization apply just as well to local efforts to resist state authority as they do to state efforts to resist federal control. It is also a testament to the persistence and ingenuity of local political actors, and their ability to foster relationships and navigate the federal system. This is all the more important because federalism draws attention in ways that localism does not. For example, not much attention was given to the opposition of rural counties in western Colorado to the state's legalization of marijuana when it was framed as an intrastate dispute. That changed, however, when local sheriffs joined their counterparts in Oklahoma and Nebraska in filing a suit against Colorado alleging that the legalization forces them to violate their allegiance to federal law and also imposes costs on neighboring states.²⁸⁴ As David Barron has argued, there is no reason to believe that local governments are necessarily tied to any particular side of the federal-state divide.²⁸⁵ Given the inferior status of localities vis-à-vis both the federal government and the state, local interests are often as well served by an expansive construction of federal power as they are by a broad recognition of state rights. What intrastate federalism demonstrates is that this logic is already well recognized in the politics of federalism, and has already shaped the purpose to which federalism disputes are used.

But even if federalism brings the relevance and significance of many intrastate conflicts to light, there are limits to its role as a forum for negotiating intrastate conflict. The first problem is concealment. Local political actors may look to federalism as a means of advancing local interests and negotiating intrastate divides. Yet successfully re-

²⁸⁴ See Kirk Mitchell and John Ingold, *Recreational Marijuana: Colorado Sheriffs Challenge Amendment 64*, DENV. POST (June 8, 2016) <http://www.denverpost.com/2015/03/05/recreational-marijuana-colorado-sheriffs-challenge-amendment-64/> (discussing the lawsuit filed by Sheriffs against their governor in response to the legalization of marijuana in Colorado).

²⁸⁵ See David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE LAW J. 377, 379–80 (2001) (noting the paradox that the central government both protects and limits local autonomy).

framing an intrastate conflict as a federalism dispute often obscures the local interests involved. This concealment affects how intrastate federal disputes are resolved. It shapes how court decisions and political resolutions are reported. Moreover, it affects how intrastate federalism disputes are remembered. The intrastate conflicts that prompted the federalism battle over Arizona's controversial immigration law in 2010, for example, were well documented in court filings, open letters, and local media accounts. Yet few people at the time or today saw this as anything other than a classic federal-state fight. Similarly, when New York joined Cortland and Alleghany Counties in their suit against the federal scheme for disposing of low-level radioactive waste, it was widely acknowledged that New York was doing an about-face and that the local plaintiffs in the suit were part of the reason. Yet few remember these details today in talking about the landmark federalism decision that this challenge produced. As a means of resolving intrastate conflicts, federalism may indeed be a useful framework. But as a forum for gauging the competing local interests that lead to intrastate conflicts, federalism seems to conceal more than it exposes.

Another problem with intrastate federalism is distortion. Indeed, even when local interests are raised in the federalism context, they tend to be framed in such a way so that the interlocal nature of the dispute, and the complex relationship between states and localities, are taken out of the analysis. Traditional federalism doctrine does not formally account for the local sphere. But when it does, it tends to treat local interests as synonymous with that of the state, even when competing local interests are at play. When federalism concerns were raised in educational equality cases like *San Antonio Independent School District v. Rodriguez* and *Milliken v. Bradley*, the Supreme Court tied federalism to the local autonomy of prosperous suburban communities and the interests of the state, while entirely ignoring the interests and autonomy of disadvantaged communities. Similarly, when the Supreme Court confronted city efforts to privilege its residents at the expense of suburban workers in *White v. Massachusetts Council of Construction Employers, Inc.*, the question of local autonomy and city-suburb relations was subsumed entirely into a discussion about the ability of states to discriminate against out-of-state workers and what this meant for interstate relations. All three of these cases raised important questions about the spatial organization of American society. In none of them could it be said that elevating state control or federal power would advance a definitive local interest. The Court could hardly be faulted for overlooking this in resolving these disputes; federalism doctrine operates through a federal-state lens.

But in privileging one set of local interests over another, the resolution of these cases is often premised on a distorted view of the interlocal tensions at stake.

Third, and even more troubling, however, is the effect that it has on how localities and their residents come to understand the nature of the intrastate fights that they are embroiled in. All too often, local political actors seek state and federal intervention to achieve policy outcomes that might not otherwise be possible. But coming to rely on state and federal intervention also changes the local perception of the underlying issue. When local factions saw their policies overturned by state laws in the early twentieth century, it was easy to blame the states for intervening in local affairs while papering over the fact that the intervention often came at the behest of local forces who appealed to the state.²⁸⁶ When federal intervention became necessary to advance the civil rights movement, it became possible for local segregationists to cast the intrastate clashes over Jim Crow as a contest between locals and outsiders, the states against the federal government.²⁸⁷ The fact that much of the push for civil rights came from within the contested states themselves was wiped from the conventional accounts. In an era of intrastate federalism, it becomes easier for local political actors to cast blame for the plight of their communities on state and federal policymakers. What becomes lost is any sense that local policies themselves are part of the problem, and may be central to finding an enduring solution.

In short, federalism is a necessary yet imperfect forum for addressing interlocal tensions. It offers a framework for negotiating intrastate conflicts. Yet by directing the attention to the federal-state divide, it can obscure the interlocal dynamics at stake.

C. *Negotiating Intrastate Conflicts*

How might the promise of intrastate federalism be realized? This is not an easy endeavor given the constitutional structure of our federal system and the incentives that it creates for political actors. But for those concerned about the nature and consequences of growing intrastate fragmentation at the local level, this is an issue that de-

286 See Scott Allard, Nancy Burns & Gerald Gamm, *Representing Urban Interests: The Local Politics of State Legislatures*, 12 *STUD. AM. POLIT. DEV.* 267, 288 (1998) (noting state legislation assigning appointments to a city governing board to the city council members and the mayor).

287 See JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975*, at 69–83 (2008) (discussing the segregationist belief that the push for civil rights was devised by outsiders) .

mands attention. What intrastate federalism teaches us is that in order to balance the relationship between competing localities in an America fractured along municipal boundaries requires us to reexamine how federalism is deployed in American law and politics.

We can begin by reassessing the legal doctrines and political arguments that we use to resolve federalism disputes. If federal-state conflicts are increasingly proxies for interlocal disputes, then our view of federalism should be expanded to account for this reality. As a matter of law, we should reexamine doctrines that automatically assume that federal power is tied to centralization and uniformity, or that the states serve the interest of tailored policymaking and experimentation. We should question the common assumption that states are synonymous with localities or that local interests are always best served by their states. In an era of intrastate fragmentation, there is no singular local interest. The goals of one locality is often at odds with others in the state. None of this should be taken as an attack on our federal system or its role in contemporary American society. None of this suggests that federal-state conflicts are unimportant or fail to capture the realities of American politics. Rather, these proposals simply recognize that the policy positions of the federal government and the states are not generated in a vacuum. In an era of interlocal fragmentation, they are necessarily informed by the experiences and interests of competing localities. Just as the balance of federal and state powers has historically been mediated through their relationship with America's myriad localities, federal and state politics today is also increasingly an extension of the differences that divide our local communities.

It is also important that we understand the interlocal nature of intrastate federalism disputes. Federalism is structured around the vertical competition between different levels of government. Yet solutions to interlocal conflicts ultimately require the horizontal negotiations between competing localities.²⁸⁸ Addressing the consequences of America's deepening interlocal divides, then, may lie less in developing forums in which competing localities can do battle. More important may be developing forums that can foster cooperation and coordination between localities themselves. How can we encourage local communities to find common interests? How can we cast light on the fact that the fates of local communities are often tied to the policies of their neighbors? From this perspective, federalism itself may be as much a problem as a solution. It is not just that the

288 See Frug, *supra* note 54, at 557.

current federalism framework obscures the horizontal relationships between localities, and the spillover effects that local policies have on one another. It also prompts local political actors to look up rather than out towards one another in search of common ground and negotiated solutions. This is not to say that reframing interlocal conflicts as federalism disputes does not produce results. After all, certain localities are likely to be pleased by the outcome of intrastate federalism disputes, whether they are resolved in court or in the world of legislative politics. Yet these victories tend to be fleeting. They do not address the underlying structure that gives rise to these conflicts. Nor do they promote the kind of environment that makes interlocal negotiations possible.

In addition to reforming how federalism battles are waged, then, it might also be necessary to explore whether other forums for intrastate negotiations can be opened up. Would local political actors be as inclined to navigate interlocal disputes into the federalism arena if other avenues are available? Would federalism disputes be more narrowly reserved for true federal-state conflicts if interlocal resolutions can be reached through other means? Local government scholars have proposed various ways through which localities might better address the spillover effects that they have on one another.²⁸⁹ Many of these proposals hold not only a better way of resolving interlocal disputes, but also the possibility of forestalling the growth of intrastate fragmentation in a way that makes these disputes less likely. What intrastate federalism suggests is that these efforts are not only relevant to those interested in the plight of local communities. It is also central to those interested in reforming how we address federalism controversies in American law and politics.

But maybe even more important than doctrinal or institutional reforms may simply be the need to recognize that place still matters in American society. It is easy to forget this in an era dominated by discussions about globalization and the networked society.²⁹⁰ It is easy to assume, as many federalism scholars now do, that American politics operates in some grand forum in which partisanship, ideology, and individual preferences delineate the battle lines in federalism dis-

289 See, e.g., Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (1999); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. LAW REV. 253–338 (1993); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93 (2003).

290 See ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 3, 21–22 (2012) (noting that the focus on globalization detracts from discussions about local issues and inequalities).

putes. But Americans still live in particular places. These places still determine to a great extent who we are and the lives that we can lead. Laws continue to demarcate these places as specific legal jurisdictions. And these jurisdictions, and the relationships between them, frame much of the problems that confront American society today. The federalism literature may be right that states may no longer be the geographic or legal institutions that best represent the significance of place for most Americans. But that hardly means that place and space no longer matters; it just lies within the state boundaries and below the state governments that preoccupies much of our attention. From this perspective, intrastate federalism is not all that different from federalism generally understood. Federalism continues to be the mechanism by which we bind a fractured and diverse society into a more perfect union. Intrastate federalism simply recognizes that the fault lines that we need to address today are increasingly at the local level and within states.

CONCLUSION

The divide between states is fading. The distinctions between national and state politics are eroding. Why then do federalism disputes—structured as they are around federal-state conflict—still predominate in American politics? In this Article, I have argued that the answer lies in the growing divide within states. More than ever, Americans are being sorted into local communities on the basis of personal characteristics and shared interests. As a result, the boundaries between localities increasingly represent the fault lines in American society. Rather than undermining the role of federalism in American politics, however, I have argued that intrastate divides are increasingly at the root of federalism controversies. Consequently, federalism is increasingly being used to negotiate intrastate conflicts.

The rise of intrastate federalism—as I have called this development—has many sources. As my examination of federal-state battles over immigration and civil rights revealed, it is sometimes the result of local political actors who recruit the federal government and the states to do battle on their behalf. As the discussion of marijuana policy and resident worker preferences suggested, it is also spurred by localities invoking or contesting federalism arguments to defend local policies from countervailing laws at the state and federal level. Moreover, as the political battles over “New Federalism” and efforts to regulate the disposal of low-level radioactive waste showed, federalism battles often serves as the means by which competing localities seek to alter the design and local impact of state and federal programs.

The fact that localities are increasingly turning to federalism, however, is not merely a product of contemporary developments. This path was laid in the development of federalism more generally, particularly the way that the balance of federal and state power had historically been mediated through the localities themselves.

There is every reason to believe that intrastate federalism will continue to play an important role in federalism disputes in the foreseeable future. Indeed, all of the forces that have remade federalism into a forum for intrastate conflicts are likely to persist, if not intensify. Even as states are becoming more alike, social and economic segregation at the local level continues to grow. Representing increasingly insular enclaves, localities are likely to continue their competition at the forefront of controversial policy disputes. All the while, the basic structure of our federal system creates strong incentives for political actors to navigate intrastate conflicts into the federalism arena. Intrastate federalism may not be the purpose for which federalism is designed. Yet it will likely continue to be a central part of federalism disputes for years to come.

All of this has consequences for how we understand both the role of federalism in American politics and the significance of intrastate divisions on American society. It is time that we broadened the federalism debate beyond its traditional focus on states as states. It is also time that we recognize that, in an era of intrastate federalism, how federalism controversies are resolved has consequences for more than federal-state relations. Federalism is already being used to negotiate America's growing intrastate divides. We just have to recognize this new role in accounting for federalism's continued significance in American politics.