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## Volume 101 Lead Piece

# Federalism and Moral Disagreement

Guido Calabresi<sup>†</sup> and Eric S. Fish<sup>\*</sup>

### INTRODUCTION

Americans disagree profoundly on questions of moral principle. A policy that is morally necessary to some may be abhorrent to others. Examples abound: capital punishment, abortion, racial segregation, same-sex marriage, slavery, and alcohol prohibition have all at one point or another divided the moral convictions of different citizens of the United States. Moral disagreements of this kind can make it difficult for people of differing views to coexist in the same nation. If one group of people considers a policy morally required, and another group considers it abominable, then by unifying into one nation each group risks being forced to violate its deep moral commitments. Those holding opposing views might gain control of the government, and use that power to enact laws that are abhorrent to the minority.

Federalist government structures present a partial solution to this problem. If the peoples of different states wish to unify into a single government without sacrificing their deeply held beliefs, they can do so through a structure that leaves certain moral questions to local control. This allows them to hold distinctive moral views that define their local communities and local cultures, while at the same time coexisting in a larger national polity alongside those with whom they disagree. Thus the Constitution of the United States created a strong central government, but left issues like the legality of slavery to state-

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by-state determination. This permitted the American colonies to unify for economic and military reasons while limiting conflict over moral issues that divided them as states. Localizing, “centrifugal” political forces kept such issues squarely in the jurisdiction of local decisionmakers.<sup>1</sup>

But, as the example of slavery suggests, such a decentralized structure is potentially unstable. People do not merely wish to be able to live according to their own deeply felt moral principles; they often also wish to impose those principles *upon others*. Thus federalist systems also exhibit “centripetal” forces—forces that push moral issues towards the central government and away from local control, thereby placing deep moral conflicts like slavery onto the national agenda. Such moral conflicts can sometimes cause the breakup of federalist systems, if state majorities decide that they value their own local principles over the survival of the national union.

The push and pull between centripetal and centrifugal forces helps to explain the dynamics of moral conflict in contemporary American politics. Time and again, one group will seek to nationalize its beliefs on an issue—abortion, same-sex marriage, or alcohol prohibition, for example. This attempt at nationalization may take place through the courts, the legislature, executive branch policymaking, or even constitutional amendment. And those holding the opposite view will object strenuously to nationalization, invoking the principle of states’ rights and the power of local majorities to legislate according to their own, different moral principles. But if the pendulum swings in national politics, and the opponents see an opportunity to impose their own beliefs nationwide, they jump at the opportunity. Localism is wonderful when it lets one live by one’s own (correct) beliefs, but not when it lets others live by their own (wrongheaded) ones.

Here we explore the logic of such moral conflicts, showing how they help explain the creation, the collapse, and the ordinary politics of federalist systems. Part I argues that one major

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1. See JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783-1789* (2015). Ellis describes a number of different economic and military rationales for the adoption of the Constitution, including that it would be crucial to maintaining the Continental Army, expanding into the West, protecting against the schemes of European powers, and establishing good credit with European financiers. We also note that Ellis frequently uses the terms “centripetal” and “centrifugal” to describe the movement of policymaking between the center and the periphery, and that we are independently devoted to those terms.

cause of federalist unions is the unionizers' desire to create a permanent political alliance while limiting conflict over morally inflected policy questions. Part II discusses situations where moral disagreements threaten to destroy a federalist union, focusing on the conflict over slavery in the United States and recent instability over moralized economic and immigration issues in the European Union. Part III examines centripetal and centrifugal forces in the normal politics of a federalist union, shedding light on how federalist dynamics play out in policy conflicts in the United States over moral matters like same-sex marriage, abortion, segregation, prohibition, and capital punishment. Part IV suggests that viewing federalism as a method for dealing with moral conflicts between states helps to frame, but by no means solves, the difficult legal and political problem of defining the proper boundary between the national and the local.

#### I. FEDERALISM AS A STRATEGY FOR LIMITING MORAL CONFLICT

People unite into one country for various reasons. Among these are mutual defense against a common enemy, the benefits of larger economic units and bigger markets, and because they believe that they are “one people.” If, like Italy in the nineteenth century, they unite for this last reason, they tend to establish a unitary rather than a federal governmental system.<sup>2</sup> They do this even if for centuries—as in Italy<sup>3</sup>—they were separate polities. They do it—again as in Italy<sup>4</sup>—even if they spoke significantly different languages. By creating a unitary state they affirm their common culture, common history, and common values. And they tend, then too, to claim and develop a common language—yet again as in Italy<sup>5</sup>—which they then assert they have all “historically” shared.<sup>6</sup> The fact that, later on,

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2. See generally THE RISORGIMENTO REVISITED: NATIONALISM AND CULTURE IN NINETEENTH-CENTURY ITALY (Silvana Patriarca & Lucy Riall eds., 2012) (discussing cultural trends in Italy during the country's founding).

3. See ARTURO TOSI, LANGUAGE AND SOCIETY IN A CHANGING ITALY 4 (2001) (discussing Italy's polycentric structure before unification).

4. See *id.* at 1–3.

5. See *id.* at 4–10.

6. See *id.* at 23–24 (noting that after unification, Italian became the national language while other languages were demoted to “dialects”). Similarly, the revival of Hebrew in the late nineteenth and early twentieth century helped to unify the Zionist movement. See Anat Helman, “*Even the Dogs in the*

underlying differences in different parts of the unitary state become evident, and that some degree of recognition of these becomes appropriate, which may even lead to some degree of federalism or regionalism,<sup>7</sup> does not alter the underlying reason for unification, nor does it fundamentally undercut the role of the central government as manifestor of the overwhelmingly common values and common cultural heritage.<sup>8</sup>

If instead separate polities—whether previously colonies of another nation or already sovereign states—unite for reasons of defense or economic advantage, but think of themselves as “different” from each other in fundamental values or cultural heritage, they tend to join together through a federal structure. This is because, however strong the reasons for uniting may be, the different “states” want to remain different, and to assert their differences in values, morals, and culture.<sup>9</sup> This is, of course, the story of the United States after 1776 and ultimately (after one form of weak federalism failed) in 1789.<sup>10</sup> It is also the story of Europe today.

The differences in morals, culture, and values among the several colonies in the 18th Century—which, by the way, profoundly affect America still—were enormous.<sup>11</sup> Slavery is, of course, the moral issue that one immediately thinks of. And it

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*Street Bark in Hebrew*: *National Ideology and Everyday Culture in Tel-Aviv*, 92 JEWISH Q. REV. 359, 359 (2002).

7. Modern Italy, for instance, is currently moving towards a more federalist system. See Christophe Roux, *Italy's Path to Federalism. Origins and Paradoxes*, 13 J. MOD. ITALIAN STUD. 325, 325–29 (2008).

8. For example, Rome today remains the political and, to some degree, the cultural capital of Italy, and Italy has an overwhelmingly common religion—Roman Catholicism, more or less observed—and a sense of Italian nationhood perdures despite the recent trend towards more decentralized power. See, for example, the words of Italy's national anthem. *Inno Nazionale*, OFFICE OF STATE PROTOCOL, [http://presidenza.governo.it/ufficio\\_cerimoniale/cerimoniale/inno.html](http://presidenza.governo.it/ufficio_cerimoniale/cerimoniale/inno.html) (last visited Oct. 12, 2016).

9. See Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769, 769–70 (2006) (identifying federalism as a strategy for managing strong religious and ideological differences within a nation by letting local subunits govern themselves). Hills' basic position has significant similarities to ours. His discussion of these issues in philosophical terms is particularly interesting.

10. See ELLIS, *supra* note 1.

11. See Daniel Elazar, *Foreword: The Moral Compass of State Constitutionalism*, 30 RUTGERS L.J. 849, 853–60 (1999) (describing how the American constitutional system evolved from one where moral questions were mostly decided by states, into one where the national Constitution decided important moral questions, largely because of the Civil War and the conflict over slavery).

certainly was a dominant difference as the many debates and compromises of 1789 (and after) demonstrate.<sup>12</sup> But it was just one of many. For example, though the colonies spoke a common language, their views of fundamental religious truths were profoundly different. Calvinist New England and Anglican Virginia reflected transcendental beliefs sufficiently different to have brought England to civil war well in the memory of all the colonies.<sup>13</sup> And these transcendental differences did not reckon with the yet more problematic views of Catholic Maryland, Quaker Pennsylvania, and—what can one call it but deeply radical—Rhode Island.<sup>14</sup> Moreover, these were not the trivial doctrinal or liturgical differences that they might seem to us today to have been. The insults—and wars—of all-too-recent memory were on the order of those between Sunnis and Shiites in our times! And, peculiarly, some economic differences among the colonies took on moral attributes as well. Should wealth be financial, bank and trade-based, or land-centered? Hamilton, Jefferson, and Jackson viewed that as a deep moral issue!<sup>15</sup>

Yet, for political-defense reasons, and economic ones as well, joining together as a nation—and, after the failure of the Articles of Confederation, as one nation with a well-defined central government—was a necessity. The solution proved to be a truly federal polity, uniting “we the people” and “the sovereign states” into the United States of America. The point, and it is this that we wish to emphasize, was to join together, as needed, but to allow the unified-but-still-separate parts to remain different with respect to fundamental values and morals. It meant—and still means, but query to what degree, today—each unit, each sovereign state being willing to accept what

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12. See generally MATTHEW MASON, *SLAVERY AND POLITICS IN THE EARLY AMERICAN REPUBLIC* 9–41 (2006) (discussing the North and South’s conflicting views regarding slavery).

13. Cf. ALAN HEIMERT, *RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION* 2–4 (2006) (discussing the religious divisions within the colonies).

14. See Bruce C. Daniels, *Dissent and Disorder: The Radical Impulse and Early Government in the Founding of Rhode Island*, 24 *J. CHURCH & ST.* 357, 376–78 (1982); Maria Mazzenga, *John Churchman and Quaker Reform in Colonial Pennsylvania: A Search for Spiritual Purity*, 83 *QUAKER HIST.* 71, 71 (1994); Tricia T. Pyne, *The Politics of Identity in Eighteenth-Century British America: Catholic Perceptions of Their Role in Colonial Society*, 15 *CATH. HISTORIAN* 1, 2–3 (1997).

15. See JOHN FERLING, *JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION* 224–42 (2013); ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR* (1967).

seemed to it and its citizens to be *immoral behavior* on the part of citizens of other states, in exchange for those other states and their citizens letting that state and its citizens do things that to them seemed immoral!<sup>16</sup>

Thus citizens' disagreements on matters of moral principle, which are deeply intertwined with their cultural identities and religious convictions, give the members of a newly formed union powerful motivation for retaining decentralized sovereignty. It is this reason, this grounding, which seems to us to explain the existence of a federalist structure in the United States.<sup>17</sup> We will, soon enough, discuss the consequences of this fundamental basis for federalism, in the face of the centripetal and centrifugal forces that inhere in federalist polities that united in this way. Since, however, other explanations are sometimes given for federalist structures, and especially for American federalism, a few words on these seem appropriate. Here we discuss in particular two theories from legal scholarship that (much like our account) focus on federalism's functional value within the American political system.<sup>18</sup>

It is sometimes said that American federalism was created to divide power and thereby to lessen the danger of tyranny.<sup>19</sup> And it is certainly true that divisions of authority make an ef-

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16. Again we do not mean only the conflict over slavery, but also moralized disagreements over issues like the proper forms of Christian worship and the structure of the American economy.

17. Cf. MALCOLM FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 38–68 (2008) (arguing that states form federalist systems because of conflicts between citizens' identification with their local political unit and the larger national political unit). Our argument here is analogous to Feeley and Rubin's, but unlike them we emphasize the role that moral disagreements play in this division of political loyalty.

18. Our theory of federalism is also, we believe, broadly consistent with many of the explanatory theories found in the history and political science literatures. It is, however, a different kind of explanation, one that looks at the use-value of federalism rather than at federalism's historical antecedents or deeper structural causes. For discussion of major historical and political science theories on the origins of American federalism, see, for example, FEELEY & RUBIN, *supra* note 17, at 69–95; ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 3–10 (2010).

19. See, e.g., Candace H. Beckett, *Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government*, 29 WM. & MARY L. REV. 635, 645–46 (1988); Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459, 465 (2007); see also THE FEDERALIST NO. 28 (Alexander Hamilton) (arguing that state governments will secure the public's liberty against threats by the national government); THE FEDERALIST NO. 46 (James Madison) (arguing that state governments can check the power of the central government).

fective dictatorship more difficult to achieve. The more independent sources of power need to be brought under control, the harder it is to achieve single-minded authority. But geographical separation of authority is at best only a weak check against an undemocratic central government.<sup>20</sup> The separation of powers within the central government—for example in the United States among executive, legislative, and judicial branches—is far more important. And the intellectual influence of Montesquieu at the time of our Constitution’s framing suggests that it was through those divisions that our framers sought protection from tyranny, rather than by the “federalist” structure that they adopted.<sup>21</sup> Indeed, beyond the three divisions of Montesquieu, the added Senate and House Congressional divisions suggest that the importance of divided authority as a safeguard against tyranny was a serious concern. But it was not a concern that federalism was principally designed to address, nor one that federalism was deemed capable of achieving on its own.

Rather, the primary reason for establishing a federalist system in the United States was that the people of the independent states would not fully cede their sovereignty, because they thought of themselves as separate peoples with separate cultures and beliefs.<sup>22</sup> We do not for a moment mean to suggest that the existence of a federalist structure is not both useful for diminishing the risk of tyranny and employed for that purpose. We are claiming only that American federalism was primarily created for a different reason—to preserve the separate morals, values, and cultures of the individual states—and that countering the danger of tyrannic rule was an ancillary benefit.

Similarly, a common attribute of federalism, its capacity to experiment, though a quite wonderful advantage, seems historically an unlikely reason for choosing such a structure. Experimentation, as Brandeis classically pointed out, is something that can be done much more easily in a federalist system.<sup>23</sup> On-

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20. Indeed, as Professor Steven Calabresi has suggested, a proliferation of many national subunits can even strengthen the central government. See Steven G. Calabresi, *Does Institutional Design Make a Difference?*, 109 NW. U. L. REV. 577, 585–87 (2015).

21. See THE FEDERALIST NO. 47 (James Madison).

22. See ELLIS, *supra* note 1, at xii, 8–11.

23. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).



ly one part of the whole takes the risk of failure, and many different ways of addressing a problem can be attempted with some hope that the most successful approach will ultimately win out and become broadly adopted throughout the federalist polity. One need only think of what might have happened if our central government had chosen to address universal medical care in this way. Require nationally (and subsidize nationally, to the degree needed) that *all* be covered by medical insurance to some minimum degree by some future date. But let each state pick whatever structure it wishes to meet that requirement—whether through single-payer systems, employment-based systems, totally private insurance systems, mixed-Obamacare-type systems, individual health savings accounts, or what have you.<sup>24</sup> The opposition to each approach would be divided, and in time—one might hope—those methods that worked best would survive. And citizens could even vote with their feet, moving to the states that provided the best health care systems.<sup>25</sup>

And yet, much as with the tyranny-prevention theory, it is hard to imagine that nations have ever opted for a federal structure with such arcane, albeit very real, benefits in mind. Rather, the opposite seems likely. Experimentation becomes possible and occurs *because* the separate-unified parts of a federal system have different values and morals. On the basis of such differences, some states opt for—and thus experiment with—different approaches. And, in time, other states may (or may not) accept what the experimenters have done, because of its effectiveness and its conformity, from the start or over time, with the underlying moral values of those who—later—decide to adopt one or another “experimental” approach. Think about today’s experiments with legalized marijuana, or assisted suicide, as possible examples, or even Massachusetts’ early experiment with same-sex marriage. These were only made possible by the underlying differences in values, morals, beliefs, and deep attitudes among the citizens of our nation’s various sovereign parts.

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24. Such a requirement could be enforced with a federal fallback: if a state fails to establish universal access to health insurance for its own citizens, then the federal government will step in and impose its own policy.

25. Cf. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–20 (1956) (discussing how public expenditures influence where citizens choose to live). *But see* Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. (forthcoming 2017) (arguing that the information generated through such experiments can cause harm).

## II. MORAL DISAGREEMENTS THAT BREAK FEDERALIST SYSTEMS

When different peoples unite in a federalist structure for defense or economic reasons, while retaining basic differences in fundamental moral and cultural worldviews, then such a structure is subject to immense centripetal forces that seek to nationalize moral conflicts. Moreover, the greater the moral differences, the stronger these forces are. It is *hard* to accept another's immoral behavior. And the more immoral that behavior seems, the harder it is to accept it. And the fact that the others may be required to accept *your* (in turn) immoral behavior doesn't help too much because, of course, you think that your behavior is precisely what all should adhere to. Indeed, if the "wrong" behavior of totally separate nations often gives us more than pause, and leads us from time to time to interfere in their internal affairs,<sup>26</sup> it is far harder to accept that kind of behavior by those who are, in a very real sense, *part of our own nation*. There is, after all—by definition—a central government that deals with issues of defense and economy in the federalist state. Why should it not centralize those things that *truly* matter, issues of morality, whether these concern slavery, religion, or life and death?

But if that central government tries to compel me, and those likeminded to me, in my sovereign state, to adhere to behavior that *we* deem to be fundamentally wrong, why should we not have the right to pull away and—as a totally separate nation—continue to do what we believe is right? And, having done so, why should we not deny our previous "partner" states the right to interfere in our internal affairs? The desire to make others behave morally, according to our vision of morality, and the countervailing desire to continue the behavior we deem moral in the face of those who would prohibit it, account for the enormous centrifugal and centripetal forces that characterize federalist systems. And, as we shall soon see, the ultimate results of these forces are determined by the presence of strong or weak central governments in federalist systems, as well as the decisions of courts and elected officials concerning which issues are properly national and which are properly local.

Examples in United States history are all too easy to come by. Slavery and racial segregation are, of course, the easiest

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26. And rightly so in some cases, such as interventions to prevent ethnic cleansing and genocide.

and most dramatic ones. While the religious differences, which may have been an important original reason for our federalist structure, attenuated in the nineteenth century, those deriving from slavery dramatically exacerbated. State after state gave up its established religion.<sup>27</sup> This did not happen quickly everywhere—Connecticut disestablished Congregationalism only in 1818,<sup>28</sup> and every president of Yale (the only Connecticut college until 1823) was an ordained Congregationalist minister until 1899.<sup>29</sup> And deep religious divisions remain to this day and affect our present federalist problems. But still, religious differences exerted relatively little pressure on our federalism in the nineteenth century compared to those resulting from the existence of race-based human bondage.

At the framing slavery existed all over the United States. But it was increasingly disapproved and abolished in the North. And this development was pretty clearly presaged in the debates and structures regarding slavery that characterized the Constitution of 1789.<sup>30</sup> Yet despite the deep and increasing moral differences slavery remained largely an issue for local, state determination for nearly one hundred years.<sup>31</sup> Was Lincoln right when he said that a nation cannot remain half-slave and half-free?<sup>32</sup> In retrospect so it turned out (though the perdurance of segregation and institutionalized racism makes even that retrospective view anything but pellucid). But for more than a third of our existence as a nation we were just that—half-slave, half-free. And during much of that time, the

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27. See STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* 9 (2010).

28. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2126 (2003). Massachusetts, for its part, did not disestablish until 1833. *Id.*

29. Arthur Twining Hadley, economist and president of Yale from 1899 to 1921, was the first non-minister to lead the institution. BROOKS MATHER KELLEY, *YALE: A HISTORY* 315 (1999).

30. See GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 187–223* (2010).

31. Some attributes of slavery were centrally decided from the start: the limitation on abolishing the slave trade before 1808 and the counting of slaves for voting purposes. See U.S. CONST. art. I, § 9, cl. 1; *id.* art. I, § 2, cl. 3. The former was even made an “unamendable” part of the national Constitution. See *id.* art. V. But the question of whether to allow slavery in the first place was still left for state-by-state determination.

32. See 2 ABRAHAM LINCOLN, “*A House Divided*”: *Speech at Springfield, Illinois*, in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 461, 461 (Roy P. Basler ed., 1953).

abolitionists, those dedicated to declaring the profound immorality of slavery were, for the most part, viewed *in the North* as right but also bothersome.<sup>33</sup> “Oh yes slavery is wrong; but we are a federalism and we should not impose *our* views on the South,” was a prevailing view in much of the North for longer than we now perhaps would like to remember.

But in time the centripetal forces—followed by centrifugal secession, followed by war and centripetal results—overwhelmed that uneasy federalist accommodation. Slavery was pushed onto the national political agenda by, among other factors, policies that forced Northern states to protect slavery even within their own territory. The Fugitive Slave Act of 1850 required Northern states to arrest escaped slaves and return them to their former masters.<sup>34</sup> The Supreme Court’s *Dred Scott* decision established that slave owners retained their right to own other humans even while traveling in the free territories.<sup>35</sup> These decisions went a long way towards nationalizing slavery. The consequence, as so often happens when deep moral divisions are no longer treated as acceptable, was that the losers—the North—reacted and, in effect, declared: if it is to be *all one way*, it will be *our* morals, not yours! The fight between North and South over control of national slavery policy thereby proceeded through a long series of conflicts, and attempted compromises, over whether territories and new states would establish slavery (and by extension how much representation pro-slavery forces would have in the national government). Ultimately the Republican Party was formed as a national anti-slavery party, Abraham Lincoln was elected President, and the South seceded. Both sides in this conflict feared that the other would win out, and impose *its* morality nationwide. And this fear sparked the ultimate centrifugal response—civil war.

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33. See, e.g., Ryan Jordan, *Quakers, “Comeouters,” and the Meaning of Abolitionism in the Antebellum Free States*, 24 J. EARLY REPUBLIC 587, 588–89 (2004) (noting that many in the North who opposed slavery viewed the abolitionists as a threat to religious liberty).

34. Fugitive Slave Act of 1850, 9 STAT. 462 (repealed 1864).

35. See *Dred Scott v. Sandford*, 60 U.S. 393, 464–65 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; see also *Prigg v. Pennsylvania*, 41 U.S. 539, 625–26 (1842) (holding that the Fugitive Slave Act of 1793 preempted a Pennsylvania state law protecting slaves from being taken out of the state into slavery).

Significantly, Lincoln, however anti-slavery he may have been, until 1863 focused primarily on preserving the Union.<sup>36</sup> What was most unacceptable to him was not slavery in a limited part of the land—it was the break up of the federalist system. Centrifugalism had to be put down. For the moment, the cause had to be “Union Forever!” The United States had to be preserved, even if on *this* moral issue its compact seemed to have failed. And if the result was that the Northern, anti-slavery morality ruled universally—or instead that on this issue now and thereafter we accepted the South’s immorality—that was of secondary concern. Indeed, in 1861 Congress even passed, and sent to the states for ratification, a constitutional amendment that would have made states’ power to maintain slavery an unamendable feature of the Constitution.<sup>37</sup> But this compromise was rejected by the states.

And so the war came, with an immense amount of bloodshed, and the moral justness of the cause—by the end of the war no longer just “the Union” but also the total abolition of slavery—asserted. The irony of this assertion, given the all-too-soon reestablishment of overt racial oppression and the hundred-year federalist compromise on that issue, is but another insight into the problematic nature of moral federalism, of which more later. What matters now is that our federalist Union survived because, and only because, we had and have a very powerful central government which could martial force—economic and military—to keep the Union together. And, in keeping it together, the central government decided both which moral values would thereafter be *national* and which, instead, could continue to be different, and *local*.

The lesson of this story is that when a localized, decentralized solution of a morally deeply divided issue is abandoned, through the actions of a national institution capable of centralizing the issue, it is very unlikely that a decentralized—compromise—solution can be made acceptable and reestab-

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36. See, e.g., 5 ABRAHAM LINCOLN, *To Horace Greeley*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN 388, 388 (Roy P. Basler ed., 1953) (“My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.”).

37. See J. Res. 13, 36th Cong. (1861). Lincoln stated that he had no objection to this amendment. See 4 ABRAHAM LINCOLN, *First Inaugural Address—Final Text*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 270 (Roy P. Basler ed., 1953).

lished. Once slavery was nationalized by Congress and the Supreme Court, it became a significant part of the anti-slavery agenda to abolish it throughout the land. And though it soon became apparent that a national pro-slavery solution was doomed, the South's retreat to a localized, states' rights solution was also doomed. Centripetalism had won, and the question became: Whose moral views would dominate and be imposed nationally? And this remained so even in the face of attempts by a not insignificant number of slave states, which rejected secession and stayed in the federal union, and many distinguished contemporary statesmen, to search for such a localized, "federalist" solution. Lincoln could say he was fighting for the Union and not over slavery, but what he had also said, that a nation cannot be half-slave and half-free, had come to pass.<sup>38</sup>

If the American system of federalism survived only because we had a central government strong enough to dominate, by force even, the moral and cultural commitment of white southerners to slavery, the history of the post-World War II European Union is quite different. The "central government," such as it is, of the European Union is extraordinarily weak—as weak as or weaker than our own, quickly failing, Articles of Confederation. Yet, until just now, "Europe" has survived. Why? And what does the reason for its past survival tell us about Europe's current problems?

The reason for the European Union's survival at least until now stems, we would assert, from the fact that within the core of "old Europe"—Italy, Germany, France, the Low Countries

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38. One other matter regarding slavery deserves attention. And this, pointed out to us by Professor Steven Calabresi, has to do with the significance of multi-unit federal unions versus few-unit federalisms. See Calabresi, *supra* note 20. When a federalist polity is made up of many "sovereign" units, with very different moral values, which themselves differ among those who, on the whole, take the same side, the union is more likely to survive than when the sovereign states are few and the opposing moral values are not attenuated over many different units. That America has fifty states, and even at the start of the Civil War had thirty-four states is, and was, very important. In a way, the Civil War and secession became likely because, on slavery, the issue almost divided the Union in two. But in another sense, secession may have failed because, even as to that issue, there were an important number of sovereign units which, though pro-slavery, were more nuanced than, say, South Carolina, and so did not secede. What would have happened in the Civil War if the four non-seceding slave states had joined the South is hard to say. See *id.* at 586 ("Had the slave states of Maryland, Delaware, Kentucky, and Missouri seceded, forcing the relocation of the capitol to New York or Philadelphia, the North would probably have lost the Civil War.").

(but query, England)—the value differences are remarkably limited. Despite different languages, histories of war, and some religious variations, these countries think pretty much alike—morally—on the crucial issues of the day. Religious differences exist, but they are nowhere near as widely held and fierce as the opposing worldviews of secularists and born-again Christians in the United States.<sup>39</sup> On topics like the death penalty there is inter-state unanimity: the practice of capital punishment precludes membership in the European Union.<sup>40</sup> At a trivial—but revealing—level, Europe can even contemplate a uniform law of torts, or of contracts, something almost unthinkable here.<sup>41</sup> Cultural differences exist, of course, and are cherished. Germans vacation in Italy, and Italians work in Germany, for good reasons. And this helps explain the perdurance of a *federalist* structure. But the differences, since the Second World War, and until recently, have not risen to a level of moral intensity that would require strong central authority to mediate and control.

Recent developments suggest possible changes in this dynamic, with concomitant pressure on the current European “Constitution.” Europe, at times, has considered expanding and, for good economic and defense reasons, bringing in nations whose cultural and moral values are different from those of “old Europe,” from those that Europe’s founders—Adenauer, Monet, De Gasperi—took for granted.<sup>42</sup> If Middle Eastern countries ever became part of Europe, for example, moral disagreements, accompanied by centrifugal and centripetal forces, would increase substantially. To a lesser degree, the admission of Turkey into the European Union would likely cause a similar dynamic.<sup>43</sup> In some ways Turkey is “European,” but in other ways

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39. See *The American-Western European Values Gap*, PEW RES. CTR. (Nov. 17, 2011), <http://www.pewglobal.org/2011/11/17/the-american-western-european-values-gap> (“Americans also distinguish themselves from Western Europeans on views about the importance of religion. Half of Americans deem religion *very* important in their lives; fewer than a quarter in Spain (22%), Germany (21%), Britain (17%) and France (13%) share this view.”).

40. See Council Guideline (EC) No. 8416/13 of 12 Apr. 2013 (stating guidelines on death penalty positions for member states).

41. See, e.g., Arthur Hartkamp, *Principles of Contract Law*, in *TOWARDS A EUROPEAN CIVIL CODE* 107–09 (Arthur Hartkamp et al. eds., 2d ed. 1998).

42. See Ernesto J. Vidal Gil, *The Social State Based on the Rule of Law in the Europe of Rights*, in *GLOBALIZATION AND HUMAN RIGHTS: CHALLENGES AND ANSWERS FROM A EUROPEAN PERSPECTIVE* 179–89 (Jesús Ballesteros et al. eds., 2012).

43. See Paul Kubicek, *Turkish Accession to the European Union: Chal-*

it is not. Turkey joining Europe may for many reasons be a very wise idea. But if it does, those disagreements that we in America take for granted, given *our* deep and geographically linked differences, will likely arise in this broader Europe. And a strong central government, far stronger than the extant one, will be needed to mediate and control them if that broader Europe is to survive.

But if the expansion of Europe invites only a speculative consideration of value differences and the strength of the central authority, very recent events in old Europe give a more direct, concrete illustration.

Until a few years ago, the important economic differences within old Europe did not take on moral connotations. As such, they could be dealt with even by a weak central government. The events of the last few years came close to changing all that. Germany, and many of its citizens, came to view Greece and its government's economic behavior—high public sector spending, low tax collection, large debt—as not just economically flawed, but as truly immoral.<sup>44</sup> And the Greeks made quite clear that they considered Germany's reaction and its economic policies to be morally despicable.<sup>45</sup> All of a sudden, previously manageable differences came to bear the kinds of value connotations that we know all too well in the United (but morally divided) States. The proposed solutions to the 2015 Greek economic crisis seem to us good illustrations of what we have been saying about federalist structures.

During this crisis there were two approaches suggested, and a third implicitly countenanced. The first approach was to make the central European government stronger. This was early, and repeatedly, advocated as a solution to the crisis.<sup>46</sup> If economic differences between the European countries are to take on deep moral connotations, then it is essential for the survival of the European Union that it have a powerful central govern-

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*lenges and Opportunities*, 168 *WORLD AFFAIRS* 67, 73–74 (2005).

44. See, e.g., Bertrand Benoit, *German Public Stands Behind Angela Merkel's Tough Stance on Greece*, *WALL ST. J.* (June 30, 2015), <http://www.wsj.com/articles/german-public-stands-behind-angela-merkels-tough-stance-on-greece-1435673522>.

45. See Dan Bloom, *Angry Greeks Compare Germans to Nazis After They Are Forced into Austerity-Laden £60bn Bailout*, *MIRROR* (July 13, 2015), <http://www.mirror.co.uk/news/uk-news/angry-greeks-compare-germans-nazis-6059006>.

46. See, e.g., JEAN-CLAUDE JUNCKER, *EUROPEAN COMM'N, COMPLETING EUROPE'S ECONOMIC AND MONETARY UNION* 4–5 (2015).



ment. Such a government would be able to dictate what will be decided uniformly by all the different states, and what instead can be decided locally by an individual state regardless of how immoral its decision may seem to the other states.

The second solution, suggested with equal frequency, was centrifugal. Break up the Union, at least in part.<sup>47</sup> If the rest of Europe views the Greeks' economic behavior as immoral, and Greece in turn views Europe's reactions as foul, then Greece should pull out (or be pushed out). Secession, or "excommunitification," solves the problem. Lincoln would wince, and America fought the Civil War to avoid this outcome, ending up with an even stronger central government. But separation is a real possibility when the values of different parts of a federalism are too much at odds, and the central government is not strong enough to control and mediate the differences.

The third approach, which has been less openly discussed but nonetheless seems to be the one that Europe has chosen, is to compromise and deescalate.<sup>48</sup> To the extent that the differences between the countries can return to being merely financial, and not also deeply moral, perhaps Germany and Greece can make do. Whether this toning down will actually work in the long term remains to be seen. But if it does, then Europe may be able to stay united even without a strong central government. The moral and cultural differences among its parts, though strong enough and important enough to preclude a unitary structure, are also attenuated enough that creating a powerful central government to control them is not essential. The various parts accept their reciprocal moral and cultural differences without having to deal with destructive centrifugal and centripetal forces, because their moral conflicts are usually not that great. Some moral issues are, of course, decided centrally and uniformly—as we have said, prohibition of capital punishment is a uniform rule in Europe.<sup>49</sup> But it can be so decided because there is a degree of uniformity across old Europe with respect to that moral issue which permits a single, uniform

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47. See, e.g., Allister Heath, *The Game Is up. It's Time for Greece To Leave the Eurozone and Move on*, TELEGRAPH (Jan. 29, 2015), <http://www.telegraph.co.uk/finance/economics/11378396/The-game-is-up.-Its-time-for-Greece-to-leave-the-eurozone-and-move-on.html>.

48. See *Explaining Greece's Debt Crisis*, N.Y. TIMES (June 17, 2016), <http://www.nytimes.com/interactive/2016/business/international/greece-debt-crisis-euro.html>.

49. See *supra* note 40 and accompanying text.

resolution even without a strong central government to enforce it. If the economic differences between old Europe can be demoralized, and returned to ordinary questions of public policy, perhaps a weak central government can handle these as well. Such non-conflictual resolutions are essential to maintaining the status quo in Europe.

The relationship between England and the rest of Europe has always been more problematic. But it too reflects just what we have been saying. The moral and cultural differences between England and the core of Europe are small relative to those within the United States.<sup>50</sup> But they are, and have long been, greater than those among those countries that are the core of Europe. And this explains how England could remain, sort of, a part of Europe for some sixty years, despite the weakness of the “European” government, and then—perhaps, because the tale of Brexit is not yet fully over<sup>51</sup>—vote to pull out when a couple of moral issues (primarily immigration) heated up a bit.

Who can doubt that, were the European central government just a little stronger, Brexit would have failed? And even so weak a government as that in Brussels may still have enough clout ultimately to make the cost of Brexit too great, but perhaps not. In the end the factors at play remain the same: how great are the economic and defense considerations that argue for a federalist union despite moral differences; how deeply felt *are* those moral differences in fact; and how capable is the central government to require its component parts to accept both what is to be national and what will stay local. How Brexit will end up depends on these factors, and remains to be seen. What cannot be doubted, though, is that the stronger the central government, the more moral differences can be countenanced within a federal union, and the weaker the central government, the more even minor differences can lead to its breakup despite economic and defense reasons for its survival.

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50. Leaving aside the question of Scotland and its moral differences with England.

51. While the referendum to leave the European Union did pass, it is not necessarily binding on the government. See John Cassidy, *Why Brexit Might Not Happen at All*, NEW YORKER (June 27, 2016), <http://www.newyorker.com/news/john-cassidy/why-brexit-might-not-happen-at-all>.

## III. CENTRIPETAL AND CENTRIFUGAL FORCES IN ORDINARY POLITICS

In the United States there is no longer a serious threat that moral conflicts will cause states to secede from the union. The history of the Civil War and the very strong central government that resulted from it guarantee that. As a result, today we are “one nation.” Nonetheless, the different states are still deeply divided on moral questions. These differences are even today greater than those in old Europe. Some may doubt this claim. And there certainly are things as to which we have been more united than old Europe. Language, for many years, was one. Whether it continues to be, as English becomes the *Lingua Franca* (pun intended) of Europe, and Spanish grows in significance in the United States, remains to be seen.<sup>52</sup> But those things that distinguish the European countries from one another, though deeply cultural, rarely generate—today—the moral outrage that characterizes Americans’ differences. Who can doubt the deep geographic divide, in America, of moral attitudes with respect to guns, abortion, capital punishment, gay marriage, religious fundamentalism, assisted suicide, and more?<sup>53</sup> Maine and Texas *are* very, very different from each other, however much each might deem its own values to be America’s values.<sup>54</sup> In the nineteenth century, when a magnetic

52. See Steve Doughty, *English Is the Lingua Franca of Europeans as Two Thirds Speak the Language Which Has Squeezed out All Its Rivals*, DAILY MAIL (Sept. 27, 2013), <http://www.dailymail.co.uk/news/article-2436051/English-lingua-franca-Europeans-thirds-speak-language-squeezed-rivals.html>.

53. See, e.g., Michael Lipka, *Gay Marriage Arrives in the South, Where the Public Is Less Enthused*, PEW RES. CTR. (Oct. 15, 2014), <http://www.pewresearch.org/fact-tank/2014/10/15/gay-marriage-arrives-in-the-south-where-the-public-is-less-enthused>; *Widening Regional Divide over Abortion Laws*, PEW RES. CTR. (July 29, 2013), <http://www.people-press.org/2013/07/29/widening-regional-divide-over-abortion-laws>.

54. On this point we disagree with the work of scholars who view Americans’ moral and cultural attachments to their particular states as unimportant. See, e.g., FEELEY & RUBIN, *supra* note 17, at 96–123; ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 7 (2009); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1109–13 (2014); Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. SOC. SCI. 37, 45–46 (2001). For a fascinating discussion of the moral and cultural differences between the states, and the extent to which people still identify with their home states in our federalist system, see Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture* (Duke Law Sch. Pub. Law & Legal Theory Series No. 2015-11, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2552866](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552866). See also Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. 1133, 1150–53 (2014).

telegraph was being run from Maine to Texas, Henry David Thoreau wrote that “Maine and Texas, it may be, have nothing important to communicate.”<sup>55</sup> That may well have been an exaggeration then, and is perhaps more so now. But, all too often, what they do have to say to each other is disapproving! And yet, with an occasional secessionist twinge,<sup>56</sup> they both want and need to be part of a truly United (and genuinely federalist) States.

Because of these moral differences, centrifugalism and centripetalism are still defining features of American politics.<sup>57</sup> On a multiplicity of issues, groups try to establish their moral beliefs as national policy. They do so by appealing to Congress, the President, and the federal courts. At the same time, those holding opposing views seek to protect their own moral positions by arguing for states’ rights (or, if the opportunity arises, by seeking in turn to impose *their* morality nationwide). These fights over the nationalization of moral issues involve a wide variety of different institutional moves—national legislation, presidential enforcement decisions, judicial rulings, even constitutional amendments. And once a single moral position is clearly established as national policy, those holding the opposite position must either acquiesce or adopt strategies of persistent resistance, such as attempting to gain control of the national government through elections, or using their control over

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55. HENRY DAVID THOREAU, *WALDEN* (1854), *reprinted in WALDEN, CIVIL DISOBEDIENCE, AND OTHER WRITINGS* 39 (William Rossi ed., 3d ed. 2008).

56. *See, e.g.*, James C. McKinley Jr., *Texas Governor’s Secession Talk Stirs Furor*, N.Y. TIMES, Apr. 18, 2009, at A15.

57. Our observations here about American federalist politics are related to an idea that Professor Heather Gerken has labeled the “discursive benefits of structure.” *See* Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1894–97 (2014) (“One of the nationalist school’s distinctive contributions is showing how structural arrangements help tee up national debates, accommodate political competition, and work through normative conflict. . . . [T]his work considers how national debates and national identity are forged against the background of these structural arrangements.”); *see also* Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014) (arguing that federalism provides a framework for national integration by allowing for ongoing negotiation of disagreements through decentralized law-making institutions). One important difference between our argument and the type of argument Professor Gerken identifies is that we see federalist contestation not just as an opportunity for transformative democratic discourse, but also, and often, as a source of divisive political struggle over who will get to impose their moral views nationwide.

state governments to undermine the national policy.<sup>58</sup> Only rarely (but not quite never) is the issue later returned to state control. This basic pattern defines the modern politics of federalism in the United States.<sup>59</sup> But, given the multiplicity of different institutional moves available in national politics, the details vary widely from conflict to conflict. Here some historical examples may prove illuminating.

The sequelae to the end of slavery provide a classic story of a moral issue—racial equality—being denationalized, given over to state control, and then renationalized nearly a century later. For a time after the Civil War and the passage of the great egalitarian amendments, XIII, XIV, and XV, the end of slavery seemed to presage a national moral imperative of equal rights regardless of race.<sup>60</sup> But it was not to be. If a return to a local compromise on slavery was doomed by nationalization of the issue through *Dred Scott* and the Fugitive Slave Act, subjugation of African Americans on a local, state-determined level soon enough took its place. The political events that brought it about seem almost arbitrary. Reconstruction was destroyed by the Rutherford B. Hayes mis-election of 1876, and probably even more so by the seemingly random assassination of James Garfield, a devout, fiercely abolitionist Ohioan who had pledged to send the Northern troops back South.<sup>61</sup> But whatever the chance events, North and South all too soon were ready to compromise on a new local “solution.” Segregation, and virtually total subjugation of the nominally equal African American citizens, became an accepted matter of states’ rights, and remained so for just about as long as slavery itself had been a local matter! This did not truly begin to change until the middle part of the 20th Century, when the great centripetalizing

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58. As Professors Heather Gerken and Jessica Bulman-Pozen have shown, state (and even local) majorities can resist policies they find immoral in a variety of different ways, even after having lost at the national level. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271–84 (2009); Heather K. Gerken, *Foreword: Federalism All the Way down*, 124 HARV. L. REV. 4, 60–71 (2009).

59. See Bulman-Pozen, *supra* note 54, at 1092–1108 (describing how American federalism allows parties that are in the minority nationally, but that hold a majority in some states, to contest the policies of the national majority party through states’ rights litigation and local policymaking).

60. W.E.B. Du Bois’s classic article on the Freedmen’s Bureau is but one illustration of Reconstruction’s lost promise. W.E. Burghardt Du Bois, *The Freedmen’s Bureau*, ATLANTIC MONTHLY, Mar. 1901, at 354.

61. See Vincent P. De Santis, *President Garfield and the Solid South*, 36 N.C. HIST. REV. 442, 465 (1959).

force of the civil rights movement pushed the issue of racial equality onto the national agenda. The NAACP's legal strategy revived the Reconstruction Amendments by convincing the federal courts to outlaw racial segregation.<sup>62</sup> The executive branch ultimately (and grudgingly) enforced these rulings, and Congress eventually enacted the Civil Rights Act and the Voting Rights Act. All of this happened, of course, in the face of massive state resistance at every stage. This story is familiar to any student of recent history. And that state resistance does seem to have ultimately subsided now, many decades later, at least in the narrow sense that no political figure could today openly advocate for racial segregation without facing severe consequences.<sup>63</sup> Desegregation is thus a dramatic example of a moral viewpoint that becomes imposed nationwide, one to which even the resisting states eventually acquiesce, even if parts of their citizenry remain, to some considerable degree, nostalgic for its opposite.

A similar cycle of localization and nationalization can be seen in America's experiment with alcohol prohibition, though with a radically different outcome. The successes of the American temperance movement began at the local level, with a series of state laws prohibiting alcohol that were enacted in the 1850s.<sup>64</sup> After the Supreme Court held in 1888 that these prohibitions violated the Interstate Commerce Clause, Congress enacted a centrifugal solution—the Wilson Act—empowering states to control transported liquor, but bringing the issue of prohibition into national politics.<sup>65</sup> Eventually the advocates of

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62. The NAACP developed its legal argument carefully over many cases spanning a number of decades. *See generally* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975).

63. Though, as we have noted, one result of nationalizing a moral issue like racial justice is that those holding countervailing views can, once they gain control of a national governing institution, later impose their own moral vision nationwide. Note, for example, that the legal victories of the civil rights movement are today cited as support for reading the Fourteenth Amendment to restrict affirmative action.

64. *See* KYLE G. VOLK, *MORAL MINORITIES AND THE MAKING OF AMERICAN DEMOCRACY* 168–71 (2014).

65. *See* *Leisy v. Hardin*, 135 U.S. 100, 125 (1890); *Bowman v. Chicago & Nw. Ry. Co.*, 125 U.S. 465, 499–500 (1888); *see also* RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920*, at 57 (1995) (“No act was more important to the course of the temperance movement than the Wilson Act . . . . For the next thirty years dries would follow the course . . . laid down in [the Wilson Act]. From it a trail of failed bills and occasionally successful measures would lead

temperance sought to impose their morality nationwide through a constitutional amendment, which was ultimately ratified in 1917.<sup>66</sup> Opposition to prohibition, however, grew over the subsequent years, especially in urban areas, as new immigrant communities with cultural attachments to alcohol gained political power, and as it became clear that prohibition had made law breaking “normal” and had hastened the spread of organized crime. This caused years of political conflict between the “wets” and the “drys,” with prohibition’s legislative supporters even going so far as to refuse to reapportion Congress after the 1920 census, since the growth in urban areas had eroded support for the policy!<sup>67</sup> The 1928 presidential election between the “wet” Al Smith and the “dry” Herbert Hoover was a major turning point in this conflict.<sup>68</sup> And while Hoover won that race, the policy of prohibition did not long outlive his presidency.<sup>69</sup> The “wet” forces prevailed, the Eighteenth Amendment was repealed by the Twenty-First, and the question of whether to permit alcohol was returned to state control.<sup>70</sup> This seems like a classic centrifugal solution, in that power was returned to the states. If a state wishes to ban alcohol today, it still can. But, in another sense, the position of the “wets” won out entirely. After all, how effective is it for a state to prohibit alcohol in a country where it is freely available in other states, and can be easily transported?<sup>71</sup>

Indeed, a similar federalism dynamic is arising today with the decisions of various states to decriminalize marijuana. While there is a federal law prohibiting the sale of marijuana, the United States Department of Justice has created its own centrifugal solution, declining to enforce that federal law in

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ultimately to passage of the Eighteenth Amendment and the Volstead Act.”).

66. See U.S. CONST. amend. XVIII (repealed 1933).

67. This was the only time in American history that Congress refused to fulfill its constitutional mandate to reapportion. See DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 239–41 (2010).

68. See *id.* at 302–03.

69. See *id.* at 306–09.

70. See U.S. CONST. amend. XXI.

71. The point is generalizable. If the people of Maine are able to go to Vermont to purchase an item that Maine has prohibited, and bring it back to Maine, then Maine’s prohibition is largely meaningless, and there is a de facto national policy of toleration for that activity even if the states are formally given control. *But see* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 858–59 (2002) (arguing that states have the power to regulate the activities of their citizens when they travel out of state).

states (like Colorado, Oregon, and Washington) that decriminalize and regulate the drug.<sup>72</sup> And much like the legalization of alcohol on a state-by-state basis, this policy seems likely to lead to nationwide availability (if not actual legalization) of marijuana.<sup>73</sup>

Abortion provides another example of a national struggle between different moral viewpoints that has been subject to centripetal forces and a states' rights backlash. Prior to the Supreme Court's *Roe v. Wade* decision, states had a variety of different approaches to regulating abortion, with most states heavily restricting abortion but some others liberalizing it.<sup>74</sup> When the Court created a nationwide right to abortion in *Roe*, it sparked a decades-long conservative backlash. Opponents of abortion have argued that the states should decide abortion policy, and so they have sought to ensure the nomination of Supreme Court Justices who would reverse *Roe*. And they have also put in place innumerable state laws that restrict access to abortion. At the same time, abortion opponents have also enacted national legislation restricting abortion, like the Partial-Birth Abortion Act of 2003,<sup>75</sup> and have advanced arguments that the Constitution actually prohibits abortion. Similarly, supporters of abortion rights have both opposed all national partial anti-abortion laws, and looked to the Supreme Court to strike down local restrictions on abortion.<sup>76</sup> One can see here

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72. See Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (outlining Department of Justice policy for enforcement of federal marijuana law in states with conflicting regimes); see also Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 979–82 (2016) (describing how executive branch policy on issues like marijuana criminalization can facilitate state differentiation). An analogous form of executive branch centrifugalism can be seen in the failure of the federal government to enforce national civil rights laws in the period between Reconstruction and the civil rights movement.

73. Indeed, Nebraska and Oklahoma have even brought a lawsuit against Colorado in the Supreme Court, arguing that Colorado's decriminalization of marijuana makes it impossible to enforce their own drug laws effectively. See Jack Healy, *2 Neighbors of Colorado Sue over Marijuana Law*, N.Y. TIMES, Dec. 19, 2014, at A21.

74. See Sarah Kliff, *CHARTS: How Roe v. Wade Changed Abortion Rights*, WASH. POST: WONKBLOG (Jan. 22, 2013), <http://www.washingtonpost.com/news/wonk/wp/2013/01/22/charts-how-roe-v-wade-changed-abortion-rights>.

75. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2012).

76. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2301 (2016).



the strategic element of federalism claims—holders of a certain moral viewpoint run to federalism when they are losing nationally, but they happily abandon “states’ rights” if they sense the possibility of nationwide victory.

Capital punishment also helps to illustrate the strategic use of federalism. In Europe, capital punishment is manifestly a *European* issue, and its abolition a core part of Europe’s self-definition. In America it is largely local, even in the face of a part of our national Constitution, the Eighth Amendment, which would make its nationalization relatively easy.<sup>77</sup> The Supreme Court did briefly strike down the death penalty on due process grounds in the 1972 case *Furman v. Georgia*,<sup>78</sup> but quickly reversed course when a large number of states enacted new death penalty statutes in response.<sup>79</sup> And so, after this dramatically failed attempt at centripetalism, capital punishment is today mostly a state matter, though with important federal, Constitution-based restrictions.<sup>80</sup> Yet, conversely, proponents of the death penalty have achieved a form of nationalization by establishing its use in federal prosecutions in states that prohibit capital punishment. Prior to the 2000s, the Department of Justice virtually never sought the death penalty in a state where it was prohibited. But Attorney General John Ashcroft reversed that policy, reasoning that geographic disuniformity in the death penalty was unfair, and so expanded its use.<sup>81</sup> The result is that today states like Massachusetts and

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77. See U.S. CONST. amend. VIII; see also *Glossip v. Gross*, 135 S. Ct. 2726, 2776–77 (2015) (Breyer, J., dissenting) (“I believe it highly likely that the death penalty violates the Eighth Amendment.”).

78. 408 U.S. 238 (1972).

79. See *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976). As one of us has previously noted, some of the state politicians who voted for these new death penalty statutes did so under the assumption that the statutes would then be struck down by the Supreme Court (rendering the vote costless for those who opposed capital punishment but did not wish to take a stand against it). Thus the Supreme Court may, ironically, have helped to strengthen the pro-death penalty backlash with its strong rhetoric in *Furman*. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 26–27 (1982).

80. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (prohibiting capital punishment for the crime of raping a child “where the crime did not result, and was not intended to result, in death of the victim”); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (prohibiting capital punishment for non-adult offenders); *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (prohibiting capital punishment for offenders with intellectual disabilities).

81. See Richard B. Schmitt, *Ashcroft Is Undeterred in Push for Capital Cases*, L.A. TIMES (Sept. 29, 2004), <http://articles.latimes.com/2004/sep/29/nation/na-death29>.

Vermont, which prohibit capital punishment, nonetheless have seen criminal defendants sentenced to death within their territory.<sup>82</sup> Thus executive discretion can be a centripetal force as well.

Finally, the recent conflict over same-sex marriage provides an excellent illustration of how competing moral claimants bring centripetal and centrifugal forces to bear in their struggle for supremacy. The first salvo in this fight was the Supreme Court of Hawaii's 1993 decision in *Baehr v. Lewin*, which held that refusing to marry same-sex couples was potentially unconstitutional sex discrimination.<sup>83</sup> Following this decision, more than forty states (including Hawaii) adopted laws and constitutional amendments prohibiting same-sex marriage.<sup>84</sup> Congress also enacted the Defense of Marriage Act, which withheld federal benefits from those in same-sex marriages and permitted states to refuse to recognize same-sex marriages performed in other states (an interesting instance of centripetalism hiding behind a veneer of centrifugalism).<sup>85</sup> Then, a decade after *Baehr*, the Massachusetts Supreme Court held in *Goodridge v. Department of Public Health* that denial of same-sex marriage violated the Massachusetts Constitution,<sup>86</sup> and the City of San Francisco began issuing marriage licenses to same-sex couples without state authorization.<sup>87</sup> These decisions sparked a powerful nationwide backlash, including the proposal in Congress, and widespread support by conservatives, of a constitutional amendment that would have defined marriage in the United States as only heterosexual.<sup>88</sup> This amend-

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82. For an argument in favor of more local control over the federal use of the death penalty, see *United States v. Fell*, 571 F.3d 264, 289–90 (2d Cir. 2009) (Calabresi, J., dissenting from denial of rehearing en banc).

83. See *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

84. See Barbara J. Cox, *From One Town's "Alternative Families" Ordinance to Marriage Equality Nationwide*, 52 CAL. W.L. REV. 65, 73 (2015).

85. See Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2012), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013); DOMA, 28 U.S.C. § 1738C (2012).

86. See *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

87. See David Stout, *San Francisco City Officials Perform Gay Marriages*, N.Y. TIMES (Feb. 12, 2004), <http://www.nytimes.com/2004/02/12/national/san-francisco-city-officials-perform-gay-marriages.html>.

88. See H.R.J. Res. 106, 108th Cong. (2004) (proposing an amendment to the Constitution of the United States defining marriage as between a man and a woman).

ment was opposed on states' rights grounds by same-sex marriage supporters, who sought to preserve the right of states to expand marriage. Then, a few years later, the tide began to turn and, as public approval of it steadily grew, state after state began adopting same-sex marriage through both court decisions and legislation. Ultimately the supporters of same-sex marriage turned to their own centripetal solution, appealing to the Supreme Court not only to strike down the Defense of Marriage Act,<sup>89</sup> but soon after to declare that there is a constitutional right to same-sex marriage.<sup>90</sup> And today, quite ironically, opponents of same-sex marriage have proposed a different constitutional amendment—one that would allow states to define marriage for themselves!<sup>91</sup>

All of these historical examples serve to show that moral conflicts in a healthy federalism involve a complex, multi-stage game. One side seeks to nationalize its moral position through some federal institution, be it the courts, legislation, executive action, or a constitutional amendment. Then the other side invokes the principle of states' rights to argue against this nationalization. But these appeals to federalism are usually merely strategic, and accompanied by counter-moves in the national political game. If the national balance of power later becomes reversed, and the initial nationalizers find themselves on the losing end, then their opponents usually impose their own morality nationwide. The game becomes all or nothing.

#### IV. WHAT SHOULD BE NATIONAL? WHAT SHOULD BE LOCAL?

This analysis of federalism may lead to cynical conclusions. It may be taken to suggest that federalism is not a political value in itself, but instead merely a tactic used by the supporters of different moral positions seeking to advance their preferred policies. But this does not necessarily follow. One can advocate federalism as a political value in itself, to be weighed against others, and not merely reducible to the policies one invokes federalism to preserve. Embracing moral federalism might entail a kind of epistemic humility, recognizing that

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89. See *Windsor*, 133 S. Ct. at 2682.

90. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

91. See, e.g., Alan Rappoport, *Scott Walker Calls for Amendment Allowing States To Define Marriage*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/live/supreme-court-rulings/scott-walker-calls-for-amendment-allowing-states-to-define-marriage>.

one's own moral view may not be the correct one, or perhaps adopting a principle that even correct moral views should not be imposed on the unwilling. Or one could argue that federalism is valuable precisely because it allows people with profoundly different moral views to stay peacefully united in one country.

But nevertheless, at least for elected officials like presidents and legislators, other values will often trump the value of federalism. How, after all, can a politician advocate letting other states maintain racial segregation, or the death penalty, or access to abortion, or alcohol consumption, if they and their supporters find these deeply immoral?

The question is different for judges, however. Federalism is not merely a political value; it is also a constitutional principle that must be interpreted and applied in a self-consistent way. It may be fine for politicians to switch positions on "states' rights" depending on the policy outcomes they produce. But for judges and lawyers, federalism must have a legal meaning that does not depend on the vagaries of politics. And here is where it gets supremely tricky.

At one time, one of us thought that constitutional federalism principles required local determination of moral questions, *except* when those questions involved discrimination. Following the post-Civil War Amendments, according to this line of thought, discrimination was banned at the state level, and this ban became a fundamental structural principle of American constitutional law. But this is not how the Supreme Court's rights doctrine has actually developed. For example, the very recent decision nationalizing the right to gay marriage quite self-consciously went beyond a relatively simple antidiscrimination basis to a broader—and much attacked in Chief Justice Roberts's dissent—substantive due process grounding.<sup>92</sup> Abortion rights too were originally judicially nationalized not on the basis of discrimination against women, as then-Professor Ruth Bader Ginsburg and some scholars had urged,<sup>93</sup> but, in Justice

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92. See *Obergefell*, 135 S. Ct. at 2597–2605; *id.* at 2616–23 (Roberts, C.J., dissenting).

93. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 381, 382–83 (1985); see also GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW* 98–114 (1985) (describing the constitutional argument for abortion rights as about equality rather than due process).

Blackmun's opinion, for substantive due process reasons.<sup>94</sup> And on the flip side, the Supreme Court has invoked constitutional federalism principles to reverse and curtail a number of federal antidiscrimination laws that were enacted by Congress pursuant to its own Fourteenth Amendment powers.<sup>95</sup> Antidiscrimination, it can be plausibly argued, is thus not *the* guiding principle of judicial federalism, at least in the modern Supreme Court. And whatever theory could describe the line between the national and the local in contemporary American law is far from clear.

What is clear, however, is that at different times and as to different issues all three of our main national legal institutions—the legislature, executive, and judiciary—have played a crucial role in defining, for *our* federalism, what is to be uniform and national in the face of great moral differences, and what is instead to be subject to local control despite strong disapprobation in parts of our somewhat United States. A lot more work is needed, both to describe when different moral issues are to be decided nationally and when locally, and also what institutions should take the lead either in localizing or in centralizing the result. This Article is not the place to undertake that work.

And so we end with a different question—how should a moral partisan deal with diverse moral values in a unified, but federal, state? Surely today no one can accept the notion that slavery can tolerably be a local issue. It is wrong and not to be countenanced—now or ever! And most would say the same as to segregation—we certainly would! But how far can one, should one, go in imposing one's moral values on “unbelievers”? And should one be influenced in making that decision by the historical knowledge that once one successfully claims national status for a moral position, national determination usually be-

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94. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973).

95. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding unconstitutional the coverage formula for pre-clearance found in § 4(b) of the Voting Rights Act of 1965); *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (holding that Congress's findings did not justify abrogation of states' Eleventh Amendment immunity from suits for money damages under Title 1 of the Americans with Disabilities Act); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5 (2012) (holding that the Religious Freedom Restoration Act unconstitutionally exceeded Congress's enforcement powers under Section 5 of the Fourteenth Amendment).

comes unshakably established? The national result, however, may well ultimately be the opposite of that believed in by the original nationalizers.<sup>96</sup> It would thus seem prudent to nationalize your values only if you are quite sure you will win out, and prevail not just in the short run but in the long run as well.

But can it be acceptable, in the face of uncertainty as to ultimate result, to allow things like slavery and segregation to perdure nationally without fierce opposition? The abolitionists were troublesome, surely, but in their desire to do away with human bondage nationally they were also profoundly right! Still, as to the issue of slavery, and as to the many moral issues dividing our federalism today, one cannot help but ask: When is nationalizing them worth the risk? And when is not taking the risk itself immoral?

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96. Witness the examples of slavery and same-sex marriage.