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Farm-Bloc Federalism: The Rise, Fall (and Rise Again?) of a Constitutional Coalition

Roderick M. Hills, Jr.[*]

Abstract

Constitutional doctrines are tools for political parties as well as courts. Courts use such doctrines to guide judicial review by providing stability and predictability in judicial decisions. Political parties use constitutional doctrines in an analogous way to achieve partisan stability by holding together coalitions of interests that might otherwise fall apart. This article explores this use of constitutional doctrine to achieve coalitional stability, by examining how, between 1832 and 1932, politicians repeatedly attempted to use federalism doctrine to bridge divides within their parties, with varying degrees of success. The Democratic Party initially succeeded in uniting a "farm bloc" coalition through federalism that limited federal power over banking and infrastructure. Later attempts to use federalism to resolve conflicts over slavery, cultural issues, and racial violence proved less successful. This history holds relevance today as the Republican Party considers whether constitutional federalism might help resolve internal tensions over issues like abortion and gun rights. The article concludes that federalism's effectiveness as a coalition-management tool depends on finding constitutional principles that are simultaneously clear enough

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to detect violations, legally plausible enough to provide political cover, and sufficiently aligned with coalition members' practical interests and emotional needs to sustain their loyalty over time.

Contents

It is a familiar point that the U.S. Constitution is defined and enforced by the political branches—Congress and the President—as well as the courts.[1] The idea that each constitutional department has some role to play in interpreting the Constitution is a staple of introductory courses in constitutional law, with veto messages, letters, or speeches from presidents ranging from Jefferson to FDR illustrating the point.[2] But there is less clarity in this "departmentalist" scholarship and rhetoric about exactly how and why politicians care about defining and enforcing the Constitution. Even in accounts of how political parties entrench their views about the Constitution, there is little discussion of how and why a party reaches a consensus that some position should be expressed as a constitutionally required rule rather than simply a partisan value.[3]

This article explores the partisan roots of constitutional interpretation by examining the process by which politicians endorsed or rejected various theories of constitutional federalism between 1832 and 1932. By "constitutional federalism," I mean divisions of power between state and federal governments that are alleged to be not merely matters of good policy, or even strongly felt ideology, but also constitutional requirements. By characterizing such divisions

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[1] For a survey of the debate over the role of non-judicial bodies in enforcing the Constitution, see Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487 (2018).

[2] Numerous casebooks quote from and discuss familiar examples of presidents' or executive branch officers' asserting the prerogative to exercise judgment independent from courts or Congress in assessing the constitutionality of statutes, including Thomas Jefferson's letter to Abigail Adams regarding the Alien and Sedition Act, Andrew Jackson's veto message accompanying his veto of the renewal of the charter of the Second Bank of the United States, Lincoln's speeches on *Scott v. Sandford*, FDR's speech anticipating an adverse ruling in the gold clause cases, and Attorney General Edwin Meese's law review article defending the law of the Constitution against judicial precedent.

[3] Jack Balkin has offered a theory of partisan entrenchment of constitutional doctrines in which parties use their influence over judicial appointments to entrench party positions. *See, e.g.,* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1060-80 (2001) (describing theory of partisan entrenchment through judicial appointments); JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 69-80 (Oxford 2000) (describing partisan supports for judicial review). Balkin's book, however, says very little—two pages, summarizing seven reasons—about why parties express their platforms in constitutional terms rather than simply as valued policy positions. *Id.* at 76-77. Balkin also says nothing much about how parties manage to arrive at an intra-party consensus on what the Constitution requires. In Balkin's account, parties' constitutional positions are simply brute facts about party members' unanimous preferences and values, about which nothing much can be said beyond that, except that party members happen to hold them.

as matters of constitutional principle, politicians could avoid coalitional instability resulting from each coalition partner's weighing the demands of party loyalty against the advantages of voting with rival parties. If the party's platform merely served the self-interest of the party's members, then there was no reason why those members should not deliver their votes to the highest bidder. By contrast, if the platform instead represented non-negotiable constitutional principles, then defection amounted to treason to the Constitution.

During this century, politicians from what I call a "farm bloc" of states in the South, Midwest, Prairie, and Mountain West embraced and then rejected the idea that the Constitution limited the federal government's power over a variously defined set of issues. The idea behind these changing readings of the Constitution was that the farm bloc had some distinctive set of interests in particular readings of constitutional federalism. This history of federalism's ups and downs illustrates how political parties generally craft doctrine to achieve stability in the face of disagreement about values and interests. The history might also hold more immediate and specific interest to the extent that it can shed some light on whether and how the Republican Party might unite a new farm bloc around a new form of constitutional federalism to sidestep their own internal partisan divisions.

First, some definitions. By "farm bloc," I mean regions within the United States that were economically dominated by agriculture or mining, lacked any major ports, and suffered from high interest rates associated with scarcity of finance capital. By "constitutional federalism," I mean any theory that the constitution limits the power of the national government by preserving some zone of topics exclusively for state control. "Farm-bloc federalism," therefore, denotes the various arguments in favor of constitutional limits on the national government offered by politicians and polemicists from rural America writ large.

How and why did politicians defend or reject farm-bloc federalism (hereinafter "FBF," for the sake of brevity)? The farm bloc certainly had cultural and economic interests in common that predisposed them to a political alliance. Their residents were, for instance, resentful of the high rates charged by financial and transportation corporations owned overwhelmingly by investors residing in the Northeast and Mid-Atlantic United States for interest, shipping,

and insurance.[4] By the early twentieth century, they also resented what they regarded as urban condescension towards rural folkways and religion.[5]

Despite these shared interests, however, the question arises why any farm-bloc platform needed to be defined in constitutional terms. Ordinary political alliances in Congress, after all, could pass laws just as well as a constitutionally inflected coalition. This article offers an answer to that question. As described in more detail below, politicians between 1832 and 1932 repeatedly attempted to constitutionalize different theories of federalism as part of their party program with varying degrees of success. Andrew Jackson and Martin Van Buren were successful in promoting an anti-corporate brand of FBF during the 1830s and 1840s.[6] By contrast, Illinois Senator Stephen Douglas in the 1850s was unsuccessful in pushing a version of FBF that attempted to delegate issues relating to slavery to the jurisdiction of territorial governments.[7] After the Civil War, Democratic politicians followed in Douglas' footsteps, repeatedly attempting to solidify their partisan coalition with some version of ethnocultural federalism, tying together white supremacists of the South with non-Protestant or non-Anglophone immigrant communities in northern cities. Successful for a couple of decades, they were ultimately frustrated by a new form of farm bloc nationalism created by William Jennings Bryan that swept aside the postbellum coalition.[8]

Why would Andrew Jackson and Martin Van Buren try to solidify an alliance based on cultural or economic interests with constitutional principles? And why, despite his best efforts, did Douglas and his successors fail? This essay uses the example of FBF to answer, or at least illustrate possible answers to, these two questions and more generally speculate about how constitutional doctrines can protect partisan stability. Answering these questions, the essay will argue,

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[4] On the burdens faced by Western and Southern farmers and industry from interest and shipping rates charged by corporations owned primarily by Northeastern and Mid-Atlantic shareholders, see RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900, at 23-52 (Cambridge 2000).

[5] For the classic account of the American cultural rebellion against rural values and folkways in the early twentieth century, see ANTHONY CHANNEL HILFER, THE REVOLT FROM THE VILLAGE, 1915-1930 (UNC 1969).

[6] *Infra* Part I(A).

[7] *Infra* Part II(A).

[8] *Infra* Part II(B).

is helpful not only for understanding American federalism but also for understanding how partisan coalitions contribute to the creation of stable constitutional doctrines more generally.

Part I of this essay outlines a theory connecting interests, principles, and constitutional doctrine to the creation of constitutional coalitions. Using Jackson's and Buren's prohibition on federal aid to banks and transportation companies as illustrative examples, Part I(A) of the essay suggests that interest-based coalitions might use constitutional principles and doctrines to make their coalitions more stable. To the extent that they are based only on material benefits like tax revenue or land that can be divided up in a multitude of ways, coalitions risk instability, because parties outside the coalition can propose counteroffers to coalition members based on one of many different, alternative distributions of political spoils. Adherence to an ideology based on coherent principles can avoid this coalitional instability. Jackson and Van Buren were successful in maintaining a stable Democratic Party in part because they engineered a set of constitutional positions that were loose enough to protect rival factions' conflicting interests while uniting the party around emotionally resonant anti-corporate messages through simple yet legally plausible slogans.

Part I(B) provides a more general theory on how constitutional doctrine succeeds in anchoring a partisan coalition. Borrowing a concept from Barry Weingast, I argue that doctrine can provide a "focal solution" to the problem of coordinating different interests within a coalition around a single compromise that can hold the coalition together while still protecting the interests of each coalition member. Not any doctrine can perform this coalition-stabilizing function. To succeed, a doctrine must be "politically manageable," a concept analogous to the constitutional idea of "judicial manageability." Politically manageable doctrines are so sufficiently simple and crisp that coalition members can detect defections from the doctrine, but they are also emotionally resonant and legally plausible enough to mobilize party rank-and-file. Finally, such doctrines accommodate coalition members' self-interest enough to make staying within the coalition more advantageous than defecting. The Jackson-Van Buren position on corporations satisfied these conditions and so could hold together a coalition for thirty years.

Part II of this essay describes three examples of less politically manageable federalism doctrines, all three of which failed to cement partisan coalitions. Stephen Douglas failed to hold together the Democratic Party in the 1850s with his constitutional concept of popular sovereignty. Following the Civil War, Democrats tried to hold together a coalition of white supremacists in the South

and immigrant non-Protestant groups in northern cities with a concept of ethnocultural federalism that decentralized culturally sensitive issues like education and regulation of alcoholic beverages to the states. Because this version of federalism held little appeal for Westerners, however, William Jennings Bryan eventually swept it aside with farm-bloc *nationalism*—an ideology of combining moralistic, indeed Biblical, rhetoric with federal power to tame corporations and aid farmers and workers. White supremacists in the South responded with yet a third form of constitutional federalism to solidify an alliance with northern reformers, an alliance rooted in the "state action" limit on the Fourteenth Amendment that prohibited the federal government from regulating private violence. Protected by this constitutional barrier, "progressive" Southerners simultaneously decried federal limits on lynching yet endorsed federal laws regulating topics previously foreclosed by ethnocultural federalism like household consumption, prostitution, lotteries, child labor, and, ultimately, alcoholic beverages. "State action" federalism, however, collapsed when northern reformers, repulsed by post-war lynchings in the summer of 1919, rejected the super-strong version of the "state action" limit on federal anti-lynching legislation being demanded by white Southerners. In response, Southerners in the 1920s cast about for Western allies to revive an anti-reform farm bloc in the 1920s. Some Western politicians like William Borah of Idaho were willing to accommodate this Southern demand, but the incoherence of simultaneously insisting on enforcement of the Eighteenth Amendment's ban on alcohol while refusing to enforce the Fifteenth Amendment's ban on racial exclusion from voting, doomed this third and final brand of federalism as a failure of partisan coalition-building.

These three efforts to use federalism to anchor a partisan coalition differed from each other in many respects, but they all illustrate how proposed constitutional doctrines can fail to meet partisan needs through lack of legal plausibility, lack of clarity, misalignment with coalition partners' shared self-interest, or contradiction with an emotionally resonant ideology necessary to mobilize a mass party. These failures can be analogized to failures of judicial doctrine. Judicial doctrine can be judicially unmanageable because it lacks clarity, connection to constitutional text, or constitutional purposes deemed important by the justices. Likewise, partisan doctrines can become politically unmanageable when such doctrines cease to advance partisan allies' shared interests or values, with rules sufficiently plain to allow the allies to detect defections from the doctrine.

Part III offers some more general observations about whether a new brand of FBF might succeed where Douglas and his epigoni failed. In particular, there

is an open question about whether a new farm bloc, mostly governed by the Republican Party, can unite around the idea of devolving culturally divisive questions like control over abortion or firearms to state governments. Can Donald Trump, playing the role of a latter-day Stephen Douglas, engineer a new form of FBF by which to satisfy rural resentment yet prevent defections from factions less devoted to anti-abortion or pro-gun politics? Applying the framework laid out in Part I, the essay suggests that guns are more amenable to a partisan, decentralizing decision than abortion.

Finally, the essay concludes in Part IV with some normative speculation about whether FBF is a good or a bad thing, arguing that one's answer to this question depends on whether one believes that the normatively best position would win in a nationalized showdown over issues that provoke the farm bloc.

I. CONSTITUTIONAL DOCTRINE AND COALITIONAL INSTABILITY

Constitutional doctrines can be enlisted, or indeed created, for partisan purposes. Part I(A) lays out the problem of coalitional instability and the solution of constitutional doctrine using the historical example of Andrew Jackson's and Martin Van Buren's anti-corporate federalism. Part I(B) provides a theory of "political manageability" to explain Jackson's and Van Buren's success.

A. Farm Bloc Federalism as Solution to Coalitional Instability

Legislators form alliances with each other to advance their common goals. Sometimes these alliances transcend narrow issues to pursue integrated programs recognizable by voters as united by some shared principles, in which case the alliances could be denoted "political parties."[9] Those alliances, however, might unravel when opponents offer benefits to some of the alliance's members that exceed the benefits of remaining within the alliance. Imagine, for instance,

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[9] For an account of parties as "procedural cartels" in which politicians delegate agenda control to party leaders to develop and protect a party "brand" that voters can recognize, see GARY W. COX & MATTHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE (Cambridge 1993) and GARY W. COX & MATTHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES (Cambridge 2005). For a theory that political parties provide politicians with the collective good of signaling preferences to the electorate, see RODERICK D. KIEWIT & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 39-42 (U Chicago 1991).

that a farm bloc of Southern and Western members of Congress share a common interest in regulating transportation and banking corporations doing business in their respective states. Those members might form a farm bloc to prevent members of Congress elected by Northeast and Mid-Atlantic voters from conferring immunities from state law on private corporations. The Northeast and Mid-Atlantic members, however, might attempt to break apart the alliance by offering Western members of such a farm bloc more generous federal grants of revenue or land to finance canals or railroads in return for Western support of corporate immunities. If the proffered bribe were large enough to outweigh the burden of corporate immunity, the Westerners might abandon their Southern allies.[10]

This "divide-the-dollar" obstacle to stable coalitions has been the subject of a voluminous literature in game theory.[11] Despite their unfamiliarity with game theory's technicalities, politicians in antebellum United States were familiar with the idea of coalition-splitting through division of political spoils. Federalists of the Northeast and Mid-Atlantic states sought to win Western support by offering Westerners infrastructure like roads and canals. To prevent sectional division from breaking apart a "republican" farm bloc of Southern and Western states, James Madison in his 1792 essay *A Candid State of Parties* had urged that Democratic-Republicans "bury[] all antecedent questions [to] banish[] every other distinction than that between enemies and friends to republican government, and in promoting a general harmony among the [landed interest]." John Taylor, a leading party theoretician of the Democratic-Republicans, likewise urged that avoidance of distributive politics along sectional lines "deprive ambition and avarice of a handle, by which to work up and manage geographical

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[10] This hypothetical follows closely the actual politics of internal improvements in the antebellum period. For an overview of that history, see JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES (UNC 2001).

[11] *See, e.g.*, PETER C. ORDESHOOK, GAME THEORY AND POLITICAL THEORY 349-55 (1986). The transaction costs of forming new coalitions can provide a limit on the number of rounds for coalition formation. See Roger Congleton & Robert Tollison, *The Stability-Inducing Propensities of Very Unstable Coalitions*, 15 EUR. J. POL. ECON. 193, 196-99 (1998). For one of several formal models showing how coalitions based solely on a division of material benefits at one point in time are in danger of unraveling when opponents offer members a larger "bribe" at a later point in time, *see* Jeffrey S. Banks, *Buying Supermajorities in Finite Legislatures,* 94 AM. POL. SCI. REV. 677 (2000).

passion and parties, for their own selfish ends."[12] By contrast, fluid, ever-shifting alliances based on the distribution of pork undermined what Taylor called "the general interest" that "cannot be cemented in the same way with those of a separate [aristocratic] one, as there is none to supply the glue."[13] Put more bluntly, the South had less revenue ("glue") to offer the West than Northeastern capitalists.

Jefferson's and Madison's Democratic-Republican Party was an effort to shore up a common front of agrarian interests against the "aristocratic" East. By the 1820s, however, it was plain that this effort to "banish" log-rolling had failed. "National Republicans" during John Quincy Adams' administration (1824-28) used the promise of roads and canals to create a coalition of New England and Western politicians in favor of Henry Clay's "American System." Thomas Jefferson, near the end of his life, bemoaned the fact that "my favorite Western country was to be made the instrument of change" from austere republican principles, lured by "the bait of local interests, artfully prepared for their palate" which "decoyed them from their kindred attachments to alliances alien to them."[14] Jefferson was not merely mourning the defeat of a particular geographic section (the South) but also the defeat of a political principle that elevated farming over finance: National Republicans, Jefferson complained, "now look to a single and splendid government of an Aristocracy, founded on banking institutions and monied corporations under the guise and cloak of their favored branches of manufactures commerce and navigation, riding and ruling over the plundered ploughman and beggared yeomanry."[15]

Andrew Jackson's and Martin Van Buren's constitutional theories of federalism can be understood as an effort to overcome the threat to coalitional stability posed by such distributional politics. At the core of this program were prohibitions on federal aid for "local" improvements and to private corporations. The former was eventually extended by a series of Democratic presidents' veto

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[12] JOHN TAYLOR, AN ENQUIRY INTO THE PRINCIPLES AND TENDENCY OF CERTAIN PUBLIC MEASURES 87 (1794).

[13] JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICIES OF THE GOVERNMENT OF THE UNITED STATES (1815).

[14] Letter from Thomas Jefferson to Claiborne W. Gooch, January 9, 1826, available at https://founders.archives.gov/documents/Jefferson/98-01-02-5818.

[15] Letter from Thomas Jefferson to William Branch Giles, December 26, 1825, available at https://founders.archives.gov/documents/Jefferson/98-01-02-5771.

messages to prohibit federal subsidies for all but sea-side port improvements.[16] The latter eventually barred not merely federal charters of incorporation for banks but even the deposit of federal revenue in state-chartered banks, such that federal money had to be held by the government itself in an "Independent Treasury."[17]

Both positions were politically costly. James Polk's veto of the 1847 Rivers & Harbors Bill alienated Western voters in need of transportation infrastructure and may have cost the Democrats the 1848 presidential election.[18] Van Buren drove important Democrats like Virginia Senator William Cabell Rives out of the party by rigidly insisting on support for the Independent Treasury.[19]

Democrats nonetheless not only stuck with these two planks despite their political costs but also characterized both limits as constitutional requirements. Wielding the slogan "separation of bank and state," Democratic journalists and politicians argued that only gold coin, not bank notes issued by private banks, constituted constitutional currency.[20] The textual basis for this limit was Article I, section 8's delegation of the power to "coin money," language that was said

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[16] 4 RICHARDSON at 610 (December 15, 1847) (James Polk's message). President Franklin Pierce pushed back against Polk's salt-freshwater line while vetoing improvements to the St. Clair River, 5 RICHARDSON 257, 263 (December 30, 1854) (Pierce's message), but President James Buchanan reinstated it. 5 RICHARDSON ___ (February 1, 1860) (Buchanan's message).

[17] On support for the Independent Treasury System as Van Buren's litmus test for party "regularity," see GERALD LEONARD, THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS at 164-66 (U.N.C. 2003); MAJOR L. WILSON, THE PRESIDENCY OF MARTIN VAN BUREN 61-78 (U Kansas 1984); JAMES ROGERS SHARP, JACKSONIANS AND THE BANKS: POLITICS IN THE STATES AFTER THE PANIC OF 1837, 11-15 (1970).

[18] YONATHAN EYAL, THE YOUNG AMERICA MOVEMENT AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY, 1828-1861, at 62 (2009); Mentor Williams, *The Chicago River and Harbor Convention*, 1847, 35 MISS. VALLEY HIST. REV. 607 (1948).

[19] On Rives' and other "conservative" Virginians' rebellion against Van Buren's Independent Treasury System and abandonment of the Democratic for the Whig Party, see Howard Braverman, *The Economic and Political Background of the Conservative Revolt in Virginia*, 60 VA. MAG. HIST. & BIO. 266 (1952).

[20] William Leggett, *Separation of Bank and State*, Plaindealer, May 27th, 1837, reprinted in DEMOCRATICK EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY BY WILLIAM LEGGETT 142, 146 (Lawrence White ed. 1984).

to allow only the federal government to accept or use metallic coins as a medium of exchange.[21] The ideological basis, however, was the broader nondelegation principle that private banks should not control the money supply of the United States.[22]

Why so rigidly insist that anti-corporate principles are part of the Constitution, even when such a stance carried political costs? One plausible reason is coalitional stability. By grounding party membership in constitutional principle, Jackson and Van Buren avoided the instability of distributive politics.[23] Defectors might adopt a different reading of the Constitution,[24] but the constitutional character of the rules radically cut down on the options over which defectors could bargain. By reducing the domain of issues, Jackson and Van Buren thereby increased the solidity of their farm-bloc coalition, thereby following Madison's 1792 advice to "bury[] all antecedent questions" to focus exclusively on the conflict between the monied and landed interest.

B. The Challenge of Designing Politically Manageable Constitutional Doctrine

Demanding that a political party accept a new principle as a constitutional imperative, however, is easier said than done. Not just any doctrine can hold together a coalition. To explain the success of the Jackson-Van Buren anti-corporate position, I offer the concept of "political manageability." Politically manageable doctrines balance the needs for simplicity and legal plausibility against the rational self-interest of coalition members and the emotional needs

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[21] ERIC LOMAZOFF, RECONSTRUCTING THE NATIONAL BANK CONTROVERSY POLITICS AND LAW IN THE EARLY AMERICAN REPUBLIC (2018); Andrew Jackson, 8th Annual Message, January 6, 1836 ("it was the purpose of the Convention to establish a currency consisting of the precious metals"), available at https://www.presidency.ucsb.edu/documents/eighth-annual-message-2.

[22] *See, e.g.,* Albert Marchand, 8 CONG. GLOBE 450, 26th Cong., 1st Sess. (June 16, 1840) (complaining that directors of depository banks "act legislatively, in the fullest sense of the word"). For an overview of Jacksonian hostility of delegations of federal power to private corporations, *see* Richard Primus & Roderick M. Hills, Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost*, 119 MICH. L. REV. 1431, 1476-81 (2021).

[23] For an analogous argument that coalitions might include an excess number of members (*i.e.*, more than a minimum winning majority) because the members have policy positions that are ideologically close to each other, see ROBERT AXELROD, CONFLICT OF INTEREST: A THEORY OF DIVERGENT GOALS WITH APPLICATIONS TO POLITICS 170 (Markham 1970).

[24] For instance, Stephen Douglas, a member of the "Young American" faction of the Democratic Party, took the view that federal subsidies for railroads and rivers crossing state lines were constitutionally permissible. See Eyal *supra* note 18 at 46.

of rank-and-file voters. These goals are in tension with each other, making political manageability a delicate act of partisan engineering, one that Jackson and Van Buren mastered much better than their successors.

1. Four Criteria for Political Manageability

"Political manageability" is the capacity of a doctrine to hold together a political coalition. Coalitions, by definition, contain members with differing interests and values. Holding them together to pursue their common interests requires attention to each member's narrower self-interest, their emotional commitments, and their suspicions that other members of the coalition might defect from any coalitional compromise. Politically manageable doctrines accommodate these different coalitional interests by simultaneously mobilizing rank-and-file voters with emotional catchphrases, accommodating those voters' diverging self-interested preferences, and providing durable and clear markers of what the Constitution requires so that coalition members can easily detect when their partners are cheating on the partisan bargain.

Four criteria help make a doctrine politically manageable: clarity, legal plausibility, consistency with self-interest, and emotional resonance.

First, clarity helps with both coordination and credibility of commitment. Barry Weingast has most prominently laid out how enforcement of constitutional limits present "coordination dilemmas."[25] The rank-and-file members of a political party might all agree to enforce some constitutional requirement through their votes and protests, but there might be many possible variants of that requirement with differing levels of appeal to different groups within the party. Rank-and-file party members need to coordinate around a common definition of the requirement—what Weingast calls a "focal solution"—to preserve the unified action necessary for effective political action.[26] The inability of the modern Republican Party to coalesce around a single definition of fetal life for

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[25] Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

[26] *Id.* at 251. Similar arguments for focal points around which citizens can rally are made by Peter Ordeshook, *Constitutional Stability*, 3 CONST'L POL. ECON. 137, 148 (1991). The point has been made in the legal literature frequently since the 1990s, especially to justify judicial review. See, e.g., Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L. J. 723 (2009).

the purposes of limiting abortions with a national rule illustrates the problem.[27] Clear, even simplistic, constitutional doctrines or text can provide that focal solution, allowing a mass of people to rally around a unified position rather than be divided into minority factions over what exactly the constitution requires.[28]

Coalitions face not only problems of coordination but also credible commitment.[29] To secure allies, each member of a coalition refrains from insisting on their ideal policies, in return for their allies' making similar sacrifices. Such self-restraint, however, requires each coalition member to trust that their partners will honor the compromise over extended periods of time. Having a clear, simple definition of constitutional requirements helps each coalition member determine whether their ostensible partisan allies are adhering to the partisan bargain.

Imagine, for instance, that a political party is committed to fiscal austerity and therefore demands that its members refrain from voting in favor of federal aid for "local" infrastructure on the theory that such "pork-barrel spending" is wasteful. The decision of the Southerners in that party to vote against federal grants to dredge southern waterways might turn on their trust that Northwesterners will later vote against aid for canals linking the Great Lakes to midwestern rivers.[30] A mushy, all-things-considered definition of "local infrastructure" would raise the costs of determining whether the Midwesterners'

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[27] See, e.g., Abigail Abrams, "Republicans Are Divided Over How Extreme to Make Their New Abortion Bans," TIME MAGAZINE, Nov. 18, 2022. In his first term, President Donald Trump attempted to move the Republican Party to converge on a federalism solution to this coordination problem, with only mixed success. See *infra* at ___.

[28] Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability In America's First Century*, 29 J. L. ECON. & ORG. 278, 291 (2013) (treating original constitutions as a set of "bright-line focal solutions" allowing coordination of citizens in defense of liberty); Tonja Jacobi, Sonia Mittal & Barry Weingast, *Creating a Self-Sustaining Constitution: The Case of the Takings Clause*, 109 NW. U. L. REV. 601, 614-23 (2015) (describing the Takings Clause as a "consensus" position around which citizens could rally despite disagreements about other issues, notably slavery).

[29] On the distinction between commitment problems and coordination problems, see MICHAEL CHWE, RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE 11-13 (Princeton 2001).

[30] For an account of such sectional rivalries and suspicions in debates over road and canal spending in the antebellum Congress, see CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADs 43-48 (1960). On the role of credible commitments to divide up infrastructure spending, see Barry Weingast & Kenneth Shepsle, *Political Preferences for the Pork Barrel: A Generalization*, 25 AM. POL. SCI. REV. 96 (1981).

votes for canals violated the partisan pact to oppose "local" spending. A crystal-clear, albeit somewhat arbitrary definition would lower those costs.

Second, legal plausibility also helps with such monitoring. By "legal plausibility," I mean not a definition that is indisputable but merely one that is regarded by a sufficiently large part of the community as within the ballpark of reasonability. Popular consensus about the meaning of the Constitution, even if it is consensus only within one political party, is sufficiently "common knowledge" in Michael Chwe's sense of the term, to hold together a coalition, because it is knowledge that is not merely shared by everyone but also is known by all to be shared by all, allowing each member of a coalition to feel confident that others share their understanding of their agreement.[31] This mutual knowledge that some constitutional definition is widely shared further reduces the costs of coordination and monitoring needed for credible commitments across time.[32]

Third, a politically manageable doctrine should have enough emotional resonance to mobilize rank-and-file voters. Political parties are not just institutions for coordinating the votes of legislators but also for rallying voters to go to the polls. Voters, however, need incentives beyond rational self-interest to overcome the collective-action problems that would deter a cynically rational actor from wasting time to vote when they are unlikely to cast the decisive ballot.[33] Emotive slogans—"one person, one vote!" or "separation of church and state!" work better to mobilize voters than dry, technical, complex formulae, even assuming that the latter could be understood well enough to aid in coordination and monitoring of commitments.

Finally, the value of belonging to a coalition is not infinite. Constitutions, the saying goes, are not suicide pacts. Simple rules that impose costs on coalition members exceeding the value of the coalition will not be durable. Politically

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[31] CHWE, *supra* note 29 at 13-16.

[32] On the role of "consensus" concepts to anchor coalitions in defense of self-enforcing constitutional limits, see Weingast, *supra* note 25 at 251; Mittal & Weingast, *supra* note 28 at 280.

[33] The classic citation here is ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). The idea that voters rely on emotional attachment rather than rational self-interest to motivate their voting behavior is explored in a vast literature. *See, e.g.*, JOHN R. ZALLER, THE NATURE AND ORIGIN OF MASS OPINION (Cambridge 1992). For a summary of the literature on voters' motivations, see CHRISTOPHER AACHEN & LARRY BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT (Princeton 2016). For evidence that voters cast ballots based on "sociotropic" information (meaning information about society in general) rather than "personal pocketbook" information, *see* Don Kinder & Roderick Kiewit, *Sociotropic Politics: The American Case*, 11 BRIT. J. POL. SCI. 129 (1981).

manageable doctrines, therefore, do not diverge too sharply from the interests of any coalition partners. This is not to say that the rules never pinch: Even costly participation in a coalition can sometimes be better than political isolation.[34] One should, however, expect that coalitions will start to fall apart when they are rooted in demands that are politically suicidal for legislators to obey.

2. The Political Manageability of Jackson's and Van Buren's Anti-Corporate Federalism

Balancing these four requirements of clarity, legal plausibility, consistency with self-interest, and emotional resonance is not easy, because simple and emotionally resonant rules tend to be costly and are often legally implausible. Drawing a bright line against all regulations of firearms, for instance, would allow easy coordination against any gun-control measures, and might resonate with many gun owners, but such a rule would also cut against the self-interest of so many other people that the rule could not anchor a politically effective coalition.

It is all the more impressive then, that Jackson's and Van Buren's anti-corporate principles succeeded so well as politically manageable doctrines that could anchor a relatively durable partisan coalition.

First, these anti-corporate principles did not diverge too dramatically from the self-interest of the Democratic Party's various constituencies. Federalism is by definition an accommodating principle that facilitates compromise between geographically dispersed constituencies. As John McFaul put it, "[i]t is surely one of the luxuries of the federal system that power can be sanctimoniously denied at the same time that it is being energetically pursued."[35] The antebellum Democratic Party needed such a comprising principle, because it was composed of factions divided not only by geographic section but also by attitude towards finance. On one side were the Democrats that Richard Hofstadter called "Democrats by trade" and Bray Hammond called "enterprisers"—*nouveaux riches* businessmen and bankers trying to elbow their way into economic opportunities and social status dominated by old entrenched dynasties.[36] These party

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[34] CHWE, *supra* note 29 at 12-13.

[35] JOHN M. MCFAUL, THE POLITICS OF JACKSONIAN FINANCE 82 (1972).

[36] Richard Hofstadter, *Andrew Jackson and the Rise of Liberal Capitalism* in THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 57-87 (1948); BRAY HAMMOND, BANKS AND POLITICS IN AMERICA 251-52 (1957).

members tended to favor "pet banks"—state-chartered banks used as federal depositories—and subsidies for state-chartered railroads to boost their own wealth as well as the economic development of their states. On the other side were urban artisans and farmers in under-capitalized regions who were just as suspicious of state-chartered railroads and banks as they were of federally backed institutions. The former sought governmental assistance for their economic enterprises, while the latter sought to prohibit even state governments' subsidies to corporations.[37]

By endorsing a form of federalism that allowed different states to adopt different stances towards aid for corporations, Jackson and Van Buren finessed this intra-party disagreement, reducing the degree to which any single faction would have to sacrifice their principles to adhere to the party platform. Thus, Illinois's Stephen Douglas, an enterprising supporter of railroad subsidies, was able to endorse the Democratic Party's constitutional principles and nevertheless push through federal land grants for the Illinois Central Railroad in 1850 through the simple expedient of having the federal government distribute the land to the Illinois state government rather than directly to the railroad company.[38] One of the earliest decisions of the Taney Court was to embrace this program of financial decentralization by upholding the constitutionality of Kentucky's state-owned bank against the challenge that its notes constituted unconstitutional "bills of credit" under Article I, section 10.[39]

Second, Jackson's and Van Buren's form of FBF connected rank and file members to emotionally powerful principles capable of mobilizing farm bloc constituencies. FBF trades on rural resentments of the periphery towards the governmental and financial center. Small-town merchants, indebted farmers, urban blacksmiths, or even wealthy bankers in western states could all bristle at the exclusive privileges bestowed by Nicholas Biddle through the "monster bank"—the Second Bank of the United States that formed Jackson's chief target.

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[37] For an overview of the political divisions at the state level in the 1840s, see SHARP, *supra* note 17.

[38] For an overview of the debate over the federal land grants that ultimately subsidized the Illinois Central corporation, see Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding*, 67 STAN. L. REV. 397, 431-440 (2015). For an account of rival mechanisms proposed by Douglas' rival Sidney Breese (by which to sidestep the constitutional principles impeding subsidies for railroad development in the West), see John W. McNulty, *Sidney Breese: His Early Career in Law and Politics in Illinois*, 61 J. ILL. STATE HIST. SOC'Y 164 (1968).

[39] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

Democrats generally resented the concentration of financial power in Philadelphia, Boston, and New York, and they all believed that the holders of such power had uniquely tight, inside connections to officers of the federal government.[40] Stringently limiting the power of the federal government to deploy financial patronage, therefore, could inspire emotional loyalty from every faction, even as Jackson and Van Buren pulled their anti-corporate punches by allowing state governments to do that which was prohibited to the federal government.[41]

Third, Jackson and Van Buren reduced their constitutional platform to simple rules rather than fuzzy principles, so that compliance with the rules could be easily monitored by rank-and-file party members. "Separation of bank and state!" was a slogan that anyone could master. The independent treasury system, in which coins were stored in boxes held in federal buildings rather than private "pet banks" writing loans secured by such deposits was an obvious way to comply with this slogan.[42] Likewise, the distinction between saltwater and freshwater that eventually became the dividing line between permissible and unconstitutional federal expenditures for improvements avoided what President Franklin Pierce described as the "vagueness of the proposed purpose of the expenditure" that "constitute[d] a perpetual admonition of reserve and caution."[43]

Finally, the anti-corporate brand of FBF pushed by Jackson and Van Buren bore some minimally plausible connection to conventionally legal materials like text and precedent. The reference to "coining money" in Article I, section 8 could be enlisted for the purpose of condemning paper banknotes that did not

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[40] For a short but insightful summary of the populist suspicion of insiders and "monied aristocrats" that drove Andrew Jackson's coalition, see Harry L. Watson, *Andrew Jackson's Populism*, 76 TENN. HIST. Q. 218 (2017).

[41] For the Jackson Administration's defense of state banks, see the message from Treasury Secretary Roger Taney to Congress at Message of the Secretary of the Treasury to Congress, Cong. Register, 23rd Cong., 1st. Sess., App., at 158.

[42] For an illustration of the practical costs of the government's holding its coin in subtreasuries, see JOHN D.R. PLATT, THE UNITED STATES' INDEPENDENT TREASURY SYSTEM: ITS SIGNIFICANCE AND APPLICATION TO FEDERAL HALL 40-45 (Nat'l Park Serv. 1968) (describing the task of storing and keeping track of millions of dollars in gold and silver coin in heavily guarded vaults under Federal Hall in Manhattan).

[43] Veto message, December 30, 1854.

strictly count as metallic "coins."[44] The Necessary & Proper Clause could likewise be invoked to condemn allegedly unnecessary and improper extensions of federal power. The reference to "general welfare" in Article I, section 8 naturally implied a restriction on improvements that were not sufficiently "general." The notion of enumerated powers could be used to justify exclusion of some powers excluded from the enumeration. It might be that none of these sources, strictly speaking, required the specific constitutional limits on which Jackson and Van Buren insisted.[45] The ultimate validity of such arguments, however, is beside the point. The arguments were sufficiently plausible that, combined with their emotional resonance, they could provide political cover to a politician seeking to justify to constituents why he had taken some unpopular action like voting against a locally beneficial federal grant.

The combination of these four characteristics—alignment with self-interest, emotional resonance, simplicity, and legal plausibility—made Jackson's and Van Buren's version of FBF a powerful basis for Democratic unity from 1832 until the Civil War.[46] Only the secession of Southern Democrats from Congress and the resulting dominance of Republicans led to the downfall of FBF as the reigning basis for governing federal land, corporate charters, and grants of revenue.

To be sure, Jackson's and Van Buren's FBF was not a bipartisan theory. The Whigs and, later, Republicans both rejected its basic premises. FBF was, therefore, not ratified by "the people" according to the loose criteria suggested by Bruce Ackerman's theory of constitutional moments informally ratified by a

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[44] For an example of such textual argument defining the power to "coin money" as excluding the power to issue letters of credit or authorize a private bank to do so, *see, e.g.*, Speech of Representative Robert Wright (Maryland), 11th Congress., 1st Session., January 21, 1811, reprinted IN LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 197-98 ((Gale & Seaton 1832) ("When it was intended to give any power, we find the convention had no difficulty in expressing it: as, Congress shall have power 'to coin money and regulate the value thereof, and of foreign coin." And here, let me remark, is an express power 'to coin money,' which, if we were left to legal construction, would be an affirmative pregnant that they should not omit bills of credit"). *See also* LOMAZOFF, *supra* note 21 at 139-55 for a general discussion of the textual debate.

[45] On the incapacity of the enumeration in Article I, section 8 to support any specific theory of limits on the federal government, *see generally* Primus & Hills, *supra* note 22 at 1476-81.

[46] On the partisan mechanisms by which the Democrats enforced adherence to their version of federalism, see Gerald Leonard, *Party as a 'Political Safeguard of Federalism': Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 54 221 (2001).

broad consensus of the politically active part of the nation.[47] But FBF was also much more than merely a failed bid at popular constitutionalism. After all, FBF reigned supreme in Congress and the presidency for three decades, expressed as categorial rejections of federal charters for corporations, federal land for transportation companies, and federal grants for "internal improvements." That is a pretty good track record for durability, roughly comparable to many judicially enforced federalism doctrines.[48]

II. THREE FAILURES OF PARTISAN FEDERALISM, 1854–1932

FBF was not inevitably a success. Engineering a coalition capable of sustaining a constitutional principle of federalism over several decades is a tricky business. To illustrate the pitfalls of translating rural resentments into a constitutional doctrine of federalism, this essay examines three failed efforts by Democratic politicians to unite a partisan coalition with federalism rooted in constitutional concepts. Each story's details differ, but they share a common theme. These attempts to unite the party around constitutional federalism were foiled by tension among the four criteria for political manageability: between the partisan necessities of emotionally resonant popular mobilization, on one hand, and sectional self-interest and the doctrinal necessities of clear rules with plausible connection to legal sources, on the other. The failures, like Tolstoy's unhappy families, were all different in their details. Sometimes the constitutional concepts were insufficiently crisp to prevent opportunistic defections. Sometimes they were insufficiently flexible to accommodate rival interests of coalition partners. Sometimes failure was hastened by factors exogenous to partisan platforms, like *Scott v. Sandford*'s strengthening the hand of Southerners seeking to nationalize slavery in western territories and thereby shove aside Stephen Douglas' federal compromise of popular sovereignty. Whatever the particulars, however, each failure also illustrated how politicians' attempts to

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[47] BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 211 (1993) (noting how successful revolutionary movements obtain "wide acceptance" for their synthesis of innovation and novelty).

[48] Compare, for instance, the distinction drawn in *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) between manufacturing and commerce, which lasted from 1895 until the U.S. Supreme Court's decision in *Nat'l Labor Rel. Bd. v. Jones & Laughlin Steel*, 301 U.S. 1 (1937), a forty-two-year lifespan, or the prohibition on Congress' blocking interstate commerce for the purpose of controlling child labor in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), which was overruled only twenty-three years later by *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

stabilize party alliances with constitutional positions collapsed from pressures of internal contradictions and external events.

A. Failure of Federalism #1: Douglas' Popular Sovereignty as Compromise of Slavery

By 1846, slavery posed a new challenge to the Democratic Party's Jacksonian formula for party unity. Representative David Wilmot's 1846 "proviso" banning slavery entirely from territory seized from Mexico during the Mexican-American War split both the Whig and Democratic Parties along sectional lines. It was in the particular self-interest of the Democratic Party, more dependent than the Whigs on Southern support, to construe narrowly Congress' Article IV powers over the western territories so that they could avoid taking a position on slavery's morality. Such a narrow interpretation, however, ran flatly into the plain language of Article IV, section 3, clause 2, which contained no apparent textual limits on Congress's "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States…."

Stephen Douglas' theory of popular sovereignty was an effort to gloss this language with unwritten limits satisfactory to both Northern and Southern Democrats. By devolving the question of slavery's permissibility in the western territories to the people residing within those territories, popular sovereignty allowed congressional Democrats to avoid taking any stance on the question, thereby preserving partisan unity.

1. Popular Sovereignty's Constitutional and Partisan Basis

In its initial incarnation, Douglas' "popular sovereignty" idea was the relatively uncontroversial idea that Congress could not dictate the content of a prospective state's proposed constitution when admitting a new state into the Union. Trading on the "equal footing" doctrine recognized in 1845 by the U.S. Supreme Court in *Permoli v. Municipality No 1 of the City of New Orleans*,[49] Douglas' theory barred the Congress from requiring territories seeking admission as states to ban slavery in their proposed state constitutions. As then-Representative Stephen Douglas declared in supporting the admission of Iowa

[49] 44 U.S. 589 (1845). For a general discussion of *Permoli*'s relationship to Douglas' doctrine, see Roderick M. Hills, Jr., *The Unwritten Constitution for Admitting States*, 89 FORDHAM L. REV. 1877 (2021).

and Florida as free and slave states respectively, he "had doubts as to the power of Congress to reject a State, being now a part of the territory of the United States, merely on account of her peculiar domestic institutions," because "whenever a new State was admitted into the Union, it came in on an equal footing, in all respects, with the original States; all attempts to deprive her of that equality, by act of Congress, was in derogation of the constitution of the United States, and consequently void."[50] Although it went beyond what the U.S. Supreme Court would ultimately endorse in *Coyle v. Oklahoma*,[51] this "equal footing" version of popular sovereignty was a consensus doctrine in the 1840s and 1850s, endorsed not only by Northern Democrats[52] but also anti-slavery Republicans like Abraham Lincoln and pro-slavery Southerners like Representative Preston Brooks.[53]

By the mid-1850s, however, Douglas pushed a more aggressive form of popular sovereignty as a justification for his introducing the Kansas-Nebraska Act in 1854. In this newly beefed-up form, popular sovereignty barred Congress from overruling prohibitions of slavery contained in territorial regulations enacted by a territorial legislature. Invoking such a theory, Douglas proposed that Congress pass legislation creating a territorial government for the territory of Nebraska (encompassing present-day Kansas, Nebraska, Montana, and the Dakotas) under which the new territorial legislature would be given the option

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[50] 28 CONG. GLOBE 273, 284 (February 13th, 1845).

[51] 221 U.S. 559 (1911).

[52] See, e.g., Speech of John Fairchild, Maine Democrat, acknowledging that Florida's proposed constitution's ban on the entry by free Blacks was unconstitutional but arguing that "[i]f Florida was entitled to be admitted into the Union, she was entitled to admission upon an equal footing with the original, States" such that "Congress, therefore, has nothing further to do with her constitution and form of government than to see that it is 'republican.'" 28 CONG. GLOBE 369, 378 (March 1, 1845); Speech of Senator Levi Woodbury, Maine Democrat, id. at 383 ("it was well known that Congress did not overhaul the constitutions of other States when they were admitted; and certainly they should not overhaul the constitution of Florida").

[53] As Representative Preston Brooks stated, "should the people of Kansas comply with the terms of the Kansas-Nebraska Act as I understand it, and apply for admission as a free State, they will encounter no obstacle in my vote." CONG. GLOBE, 34th Cong., 3d Sess. 108 (1856) (statement of Rep. Preston Brooks). Lincoln endorsed the power of Kansas settlers to adopt a state constitution protective of slavery in the joint debate with Stephen Douglas at Freeport, on August 27, 1858. THE LINCOLN-DOUGLAS DEBATES: THE FIRST COMPLETE UNEXPURGATED TEXT 94 (Harold Holzer ed., 1993) ("[I]f slavery shall be kept out of the Territories during the territorial existence of any one given Territory, and then the people shall, having a fair chance and a clear field, when they come to adopt the constitution, do such an extraordinary thing as to adopt a slave constitution, uninfluenced by the actual presence of the institution among them, I see no alternative, if we own the country, but to admit them into the Union").

of permitting or forbidding slavery. By overruling the so-called "Missouri Compromise" under which slavery was prohibited north of the 36° 30′ line, Douglas' proposal explosively re-opened the controversy over slavery in western territories that had previously been settled by the Compromise of 1850.

2. The Failure of Popular Sovereignty

Douglas' bid to create a new constitutional doctrine to unify the farm-bloc states was a disastrous failure. In particular, it did not heal the schism over slavery within the Democratic Party. Anti-Kansas-and-Nebraska Democrats from the Midwest joined with Republicans in condemning the westward extension of slavery. More surprisingly, Southern pro-slavery Democrats also rejected Douglas' version of popular sovereignty, embracing instead the 1857 holding of *Dred Scott v. Sanford* that neither territorial nor federal governments could interfere with slave owners' Fifth Amendment right to carry their property in enslaved people into federally controlled territories.[54] In the conventional historiography too familiar to require rehearsal here, the path to the Civil War runs from Kansas-Nebraska through *Dred Scott* to Fort Sumter.[55]

Why did Douglas' bid to create a new version of FBF fail so spectacularly? The basis for Douglas' theory in text, principle, and precedent was weak—but not notably weaker than the "equal footing" doctrine that won universal support in the 1840s.[56] For that matter, the purely legal argument for limits on Congress' territorial powers was not notably weaker than Jackson's and Van Buren's argument that Congress' Article I, section 8 powers did not include or imply a power to charter private banking corporations. In particular, Douglas was surely correct that, dating from the creation of Wisconsin's territorial government in 1836, Congress had endorsed the practice of delegating broad

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[54] 60 U.S. 393 (1856).

[55] For classic accounts of the relationship between the constitutional issues surrounding Kansas-Nebraska and the politics of the 1850s, see DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (Oxford 1978); ROY FRANKLIN NICHOLS, THE DISRUPTION OF AMERICAN DEMOCRACY (1948).

[56] On the parallels between Douglas' theory and various other versions of the "equal footing" doctrine, see Hills *supra* note 49 at 1891-92.

"home rule" powers to Western settlers in statutes setting up territorial governments.[57] True, Douglas' proposed limits on Congress' power contradicted the 1787 Northwest Ordinance, which had outlawed slavery in the Ohio River Valley. But Jackson's and Van Buren's anti-corporate theory equally contradicted the 1791 charter legislation setting up the First Bank of the United States. Why could not the continuous practice of devolving legislative power on territorial governments be transformed into a constitutional limit on Congress in much the same way that Jackson's war on the Monster Bank eventually became a constitutional limit?[58]

The better explanation for Douglas' failure is that popular sovereignty of territorial residents matched neither the material nor emotional needs of white Southerners who had the most prominent leadership positions within the Democratic Party. Between 1848 and 1860, a rising tide of publications, from Harriet Beecher Stowe's *Uncle Tom's Cabin* to Theodore Slade's *Slavery As It Is*, had accused slave owners of egregious tyranny in graphic terms. Those accusations had provoked an angry reaction of offended honor that exploded in actual violence by the mid-to late 1850s. In such a fraught atmosphere, white Southern politicians craved some affirmative endorsement of slavery's alleged benefits from their Northern co-partisans, regardless of the political consequences of such a demand. This Southern appetite for moral vindication might

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[57] Douglas set forth the constitutional argument for territorial sovereignty over slavery in STEPHEN DOUGLAS, POPULAR SOVEREIGNTY IN THE TERRITORIES: THE DIVIDING LINE BETWEEN FEDERAL AND LOCAL AUTHORITY (New York, Harper & Bros 1859). On Wisconsin's 1836 territorial government as a new model for local autonomy in the western territories, see ALICE E. SMITH ET AL., THE HISTORY WISCONSIN FROM EXPLORATION TO STATEHOOD 243 (1973) (noting that the act that established the territory of Wisconsin "became the model for future territorial organic acts" characterized by "a relaxation in the rigid control over their government").

[58] The idea that a longstanding political practice widely endorsed by rival parties or factions could by a kind of non-textual prescription become part of the Constitution had been endorsed, in one form or another, by many antebellum writers, from Madison to Lincoln. *See, e.g.,* James Madison to Mr. [Jared] Ingersoll, June 25, 1831 (arguing that an interpretation of the Constitution "which has the uniform sanction of successive legislative bodies through a period of years, and under the varied ascendency of parties" constitutes "evidence of the national judgment and intentions" regarding constitutional meaning); *Prigg v. Pennsylvania*, 41 U.S. 539, 621 (1842) (per Story, J.) ("acquiescence, under such circumstances, of the highest state functionaries [to the constitutionality of the 1793 Fugitive Slave Act] is a most decisive proof of the universality of the opinion that the act is founded in a just construction of the Constitution"); Abraham Lincoln, Speech in Springfield, Illinois, June 26, 1857 (arguing that precedents that "are in accordance with legal public expectation, and with the steady practice of the departments throughout our history" are entitled to respect).

have been whetted by the physical location of the 1860 Democratic Convention in Charleston, South Carolina. In his culminating speech of that convention, speaking to galleries packed with cheering white Southerners, William Lowndes Yancey, Alabama senator and leading Southern "fire-eater," declared to the Douglasites, "[i]f you had taken the position directly that slavery was right, and therefore ought to be … you would have triumphed, and anti-slavery would now have been dead in your midst…. I say it in no disrespect, but it is a logical argument that your admission that slavery is wrong has been the cause of all this discord."[59]

Douglas and other Midwestern politicians tried but failed to satisfy these demands by playing up their shared support for white supremacy.[60] Southerners might have accepted this combination of anti-Black and anti-slavery sentiment as a sufficient basis for alliance in the 1840s.[61] By the 1850s, however, Southern slave owners demanded a profession of support not merely for anti-Black racism but for slavery itself. At the Charleston convention, Douglas and his followers balked at such a profession of fidelity to slavery, knowing that it was political suicide in the North: "Gentlemen of the South…you mistake us—you mistake us—we will not do it," George Ellis Pugh, Senator from Ohio and Douglas' lieutenant at the convention, exclaimed. That protest led to a walk-out of the Southerners, the schism in the Democratic Party, the election of Lincoln, and, ultimately, secession and the Civil War.[62]

Beyond the unmet emotional need for political validation, popular sovereignty also did not address white slave owners' immediate self-interest in limiting the damage done to the institution of slavery from interstate mobility. Southerners wanted Northerners to enforce the Fugitive Slave Act of 1850. Northern states had been persistently resisting such enforcement throughout the 1850s, often with the cooperation of state officials' issuing writs of habeas

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[59] Speech of the Hon. William L. Yancey, of Alabama: delivered in the National Democratic convention, Charleston, April 28th, 1860 (Walker Evans & Co. 1860). The speech was originally reported by the Charleston *Mercury.*

[60] For a general overview of Midwestern racism as a basis for a Southern-Western alliance, *see* NICOLE ETCHESON, THE SOUTHERN INFLUENCE ON MIDWESTERN POLITICAL CULTURE: OHIO, INDIANA, AND ILLINOIS FROM FRONTIER TO DISUNION (1991).

[61] As Arkansas Representative James Belser declared, Southerners "knew that their natural allies were the grain-growing States of the West, to whom they looked for succor in the hour of danger." 28 CONG. GLOBE 269, 284 (February 11, 1845).

[62] MURAT HALSTEAD, CAUCUSES OF 1860: A HISTORY OF THE NATIONAL POLITICAL CONVENTIONS OF THE CURRENT PRESIDENTIAL CAMPAIGN (1860).

corpus to free imprisoned and possibly kidnapped Black residents.[63] This resistance posed a direct threat to slavery in the Upper South, creating the risk that border states would lose interest in defending an institution that they could not practically sustain and thereby further eroding slave states' position in Congress.[64] The decentralizing rhetoric of popular sovereignty, however, actually exacerbated rather than diminished the risk of non-enforcement: Abolitionists who demanded that state governments "interpose" their habeas powers to prevent kidnapping were, after all, invoking precisely the powers of local self-government that Douglas and his followers defended.

Douglas' version of FBF, in sum, failed two of the four criteria satisfied by Jackson's and Van Buren's version: It respected neither the emotional needs nor the practical self-interest of a decisive partisan faction.

The cold neutrality of federalism, in short, did not suffice to satisfy the emotional demands of white Southern slave owners for recognition of their moral equality. By contrast, Jackson's and Van Buren's version of FBF easily met these two demands. "Enterprisers" in the Democratic Party did not need some sort of moral reaffirmation that private banking was a morally uplifting, publicly beneficial enterprise. A compromise under which different states experimented with different varieties of bank regulation, ranging from state ownership to "free banking," was thus acceptable to the most conservative faction of the Democratic Party who were least enamored of anti-corporate rhetoric.[65] Ideally, the anti-banking faction would have preferred a single national rule barring even state governments from creating state-subsidized banks, but they could tolerate the Taney Court's federalism-promoting reading of Article I, section 10's "bills of credit" clause in *Briscoe v. Bank of Kentucky* that let each state go its own way. Likewise, pro-banking and pro-subsidy Democrats could achieve their material ends in states where they held sway even if other states stringently

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[63] For a recent account of such northern resistance to recapture of fugitives from slavery and also the kidnapping of free Black citizens, see Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019).

[64] For a defense of the position that the non-enforcement of the Fugitive Slave Act posed a genuine economic threat to the institution of slavery, see Jeffrey Rogers Hummel & Barry R. Weingast, *The Fugitive Slave Act of 1850: Symbolic Gesture or Rational Guarantee?* (SSRN Paper January 2006), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153528. Conor Lennon, *Slave Escape, Prices, and the Fugitive Slave Act of 1850*, 59 J. L. ECON. 669 (2016) provides data in the form of market prices for enslaved persons suggesting that enforcement of the Act importantly sustained slavery.

[65] For a description of the wide variety of banking regulations in different states, *see* SHARP, *supra* note 17 at 26-49

prohibited aid to private conventions, because neither banking rules nor canal and railroad subsidies crossed state borders. If the infrastructure turned out to be profitable, local landowners would reap the rewards; if it led to fiscal disaster, they would bear the costs. This principle of cost-internalization indeed became a staple of Democratic Party rhetoric.[66]

B. Failure of Federalism #2: Ethnocultural Federalism versus the Farm Bloc, 1865-1896

Following the Civil War, the antebellum version of FBF lost favor with the farm bloc. The reasons were complex, but, reducing the complexity to the bottom line, the benefits of state power and the costs of federal power both seemed smaller in light of the nation's wartime experience.[67] State governments, hampered by the U.S. Supreme Court's newly minted doctrines limiting state power over interstate commerce, were less able to control multi-state corporations.[68] By contrast, the federal government's issuing legal tender paper currency ("greenbacks") showed that federal power over money need not strengthen the power of private banks.[69] Farm-bloc constituencies that had railed against corporate power, therefore, became more invested in strengthening the federal

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[66] See, for instance, Franklin Pierce's veto message of subsidies for river improvements that called for state tonnage duties to finance such infrastructure on the ground that "a voluntary charge on those only who see fit to avail themselves of such facilities … can be justly complained of by none." 5 RICHARDSON 257 (December 30, 1854). For a description of this orthodox Democratic attitude at the city and sublocal level regarding street improvements, see ROBIN EINHORN, PROPERTY RULES: POLITICAL ECONOMY IN CHICAGO, 1833-1872, at 94-95 (1991).

[67] For an explanation for how the Democratic Party abandoned its antebellum focus on banking and related financial issues after the Civil War, see Michael Holt, *From Center to Periphery: The Market Revolution and Major-Party Conflict, 1835-1880* in THE MARKET REVOLUTION IN AMERICA: SOCIAL, POLITICAL, AND RELIGIOUS EXPRESSIONS, 1800-1880 224, 235-40 (Stokes & Conway eds. 1996).

[68] The Patrons of Husbandry, also known as the Grange Movement, led a movement in midwestern states in the 1870s to regulate railroads against resistance from the U.S. Supreme Court's commerce clause doctrine. Both efforts met with mixed success. The Waite Court initially upheld the state Grange laws in *The Granger Cases*, 94 U.S. 155 (1877) and *Munn v. Illinois*, 94 U.S. 113 (1877), but, following changes in the Court's membership, eventually struck them down in *Wabash, St. L. & P. Ry. Co. v. Ham,* 114 U.S. 587 (1885).

[69] Antebellum Jacksonian radicals, who had rejected paper currency prior as a device for private manipulation of the money supply, soon became advocates of various brands of federally issued paper currency, and some "hard money" Jacksonians like George Pendleton of Ohio led the charge for the "Ohio Idea" of a paper currency. GRETCHEN RITTER, GOLDBUGS AND

government's hand to control monopolies, through a variety of movements ranging from the Greenback Party to the Grange. The faded remnant of antebellum FBF was farmers' continued distrust of the federal courts, which used the dormant commerce doctrine and contract clause to protect railroads and bond holders from state law.[70]

Democratic politicians nonetheless stuck with federalism as the best way to hold together a partisan coalition. The type of federalism, however, changed. Rather than unite a farm bloc around the control of federal government's financial power, the Democratic Party emphasized federalism as a constraint on the federal government's power over cultural conflict, a brand of constitutionalized decentralization that I dub "ethnocultural federalism."

1. Ethnocultural Federalism's Constitutional and Partisan Basis

Ethnocultural federalism's initial success and eventual failure were both based on the same foundation of fear. Southern white supremacists and immigrant groups in northern cities both faced a threat to their cultural identity from Yankee evangelical reformers bent on imposing moral norms on non-Anglophone or Catholic immigrants in the North and white supremacists in the South. When Republicans offered white Southerners an alternative theory of federalism by which white supremacy might be safeguarded, those Southerners abandoned their Northern immigrant allies.

GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA, 1865–1896, at 51; CHESTER MCARTHUR DESTLER, AMERICAN RADICALISM, 1865–1901, at 32–49 (1946) (describing the Pendleton Plan). By contrast, the old Whig-Republican coalition of corporate elites and New England Calvinist clergy inveighed against the new currency, demanding redemption of the greenbacks and an end to further issues of paper on the ground that legal tender notes were a breach of faith to the creditor. IRWIN UNGER, THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865–1879, at 120–26 (1964).

[70] The movement in Southern states during the 1870s and 1880s to repudiate Reconstruction Era debt, for instance, linked anti-capitalist rhetoric to a narrow construction of the Eleventh Amendment, thereby warding off mandamus lawsuits by bondholders enforcing the Contract Clause of Article I, §10. *See* DAVID SCHLEICHER, IN A BAD STATE: RESPONDING TO STATE AND LOCAL BUDGET CRISES 56–59 (2023); Sarah Ludington, Mitu Gulati, & Alfred L. Brophy, *Applied Legal History: Demystifying the Doctrine of Odious Debts*, 11 THEORETICAL INQUIRIES IN LAW 247, 275–79 (2010). The U.S. Supreme Court largely approved this exercise of state power, allowing Virginia's adjustment of bondholders' remedies in *Antoni v. Greenhow*, 107 U.S. 769 (1882) and confirmed the states' Eleventh Amendment immunity in *Louisiana v. Jumel*, 107 U.S. 769 (1882) and *Hans v. Louisiana* (1890).

While it lasted, the constitutional basis for the ethnocultural alliance lay in the idea that the federal government lacked jurisdiction over cultural or "moral" matters. Those matters were loosely defined as the traditional concerns of the private household—*e.g.*, the schooling of children, marriage, recreation, and religion. For white supremacists in the South, such a rule of federalism had the attraction of barring federal interference with Jim Crow in schools, public accommodations, or marriage. For Irish Catholics, German Lutherans, and other non-Anglophone or non-Protestant immigrants in the North, this reading of the Constitution had the virtue of prohibiting federal interference with parochial schools, foreign-language education, and saloons (which were not only preferred recreational venues for non-native groups but also sites for their political organization).

Aside from having a basis in mutual self-interest, ethnocultural federalism also had plausible roots in partisan constitutional interpretation. Democratic politicians had long argued that the Establishment clause barred the federal government from religiously motivated action even in the form of policies that were facially neutral with respect to religion. Such a constitutional stance had an early expression in Jefferson's letter to Danbury Baptists, a partisan Democratic-Republican attack on New England Federalists. The Democrats' strong stance on separation of church and state had its broadest circulation in Senator Richard Johnson's *Review of the Committee Report on Mails on the Sabbath* in 1829.[71] Johnson's report not only rocketed Johnson into the vice presidency but also became a campaign document with mass appeal, identifying them either as the godless party (to Whigs) or the party of personal liberty (to Democrats).[72] Following mass immigration of Irish Catholics into the United States during the 1840s, the Democratic opposition to Yankee protestant reforms like temperance and abolition of parochial schools won support of immigrant communities concentrated in northern cities.[73] Slaveowners likewise appreciated the idea of a constitutional limit on interference with "domestic relations"

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[71] RICHARD JOHNSON, REPORT OF THE COMMITTEE ON THE SUBJECT OF MAILS ON THE SABBATH (1829).

[72] On the influence of Johnson's report on the Democratic Party's ideology, *see, e.g.*, RICHARD JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 169-205 (2009); James R. Rohrer, *Sunday Mails and the Church-State Theme in Jacksonian America*, 7 J. OF THE EARLY REPUBLIC 53 (1987).

[73] Throughout the nineteenth century, Democrats in northern states relied on decentralized control of schools to accommodate Catholic educational preferences, solidifying their party's reputation for religious tolerance and pluralism. *See* BENJAMIN JUSTICE, THE WAR THAT

based on what they called Yankee abolitionists' religious "fanaticism," because slave owners subsumed master-slave relations under familial ones.

The idea that "domestic relations" were outside the reach of the federal government was not only a theme of Democratic Party rhetoric but even leaked into judicial doctrine. Justice Peter Vivien Daniel's concurrence in *Barber v. Barber* invented the "domestic relations" exception to diversity jurisdiction on the basis of a supposed unwritten exception to federal power that excluded federal power from "regulating the domestic relations of society." As if to highlight the connection between this version of federalism and insulation of slavery from evangelical reformers' moralism, Daniels emphasized that the exception prohibited the federal courts from "pronounc[ing] upon the morals and habits and affections or antipathies of the members of every household."[74]

With such deep roots in constitutional ideology, therefore, it was easy for postbellum Democrats to invoke constitutional limits on federal power over "morality" to seal an alliance between non-protestant communities in northern cities (chiefly Irish Catholics and German Lutherans) and Southern white supremacists. The alliance faced its earliest test in the Democratic Party's resistance to constitutional amendments proposed by President Ulysses Grant and Republican Representative James Blaine of Maine in 1875, barring public aid to religious schools or societies.[75] With few Catholics in the South, Southern politicians rooted their opposition in a principle broader than support for Catholics' religious liberty, emphasizing instead a tradition of state control over

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WASN'T: RELIGIOUS CONFLICT AND COMPROMISE IN THE COMMON SCHOOLS OF NEW YORK STATE, 1865-1900, at 87 103 (2005); CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860, at 154 (1983).

[74] *Barber v. Barber*, 62 U.S. 21 How. 582, 602 (1858) (Daniel, J., concurring). On the connection of Daniels' doctrinal innovation to the defense of slavery, see Kristin Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005).

[75] President Grant proposed an amendment in his annual message to Congress on December 7, 1875, "prohibiting the granting of any school funds or taxes, or any part thereof, either by the legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever." Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 41 (1992). Blaine's amendment re-worded Grant's proposal to provide that "no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 4 Cong. Rec. 205 (1875).

education.[76] Although the proposed amendment passed the House, it was narrowly defeated in the Senate after the failure of several efforts to strengthen its perhaps deliberately ambiguous language.[77] In opposition, Democrats repeatedly urged a constitutional principle that education ought to remain a subnational concern because citizens did not want "New England and other states to dictate what her schools shall be or what her taxes shall be and least of all what her religion shall be."[78]

In defining itself in opposition to New England religious reformers, postbellum Democrats never developed the crisp legal categories devised by Van Buren and Jackson to cabin federal power over corporations. Instead, Democrats relied on a vague legal slang term: "sumptuary legislation." In opposing a proposed 1872 "special tax" imposed on tobacco leaf, for instance, Representative Richard Duke, a Virginia Democrat, sarcastically asked, "has the Congress of the United States any authority to pass sumptuary laws?" To leave no ambiguity that New England's pietists were the target of his sarcasm, Duke added that he did "not think that the Congress of the United States can resolve itself into 'a Brick Lane branch of the Grand Junction Ebenezer Temperance Society' and enforce its views upon the people by law"; "when they ask Congress to legislate on these subjects," Duke concluded, "I must respectfully refer them to their state legislatures, where the power to do so properly belongs."[79] When James Blaine doubled down on anti-Catholic rhetoric in his 1880 campaign for the presidency, the national Democratic Party elevated their stance against

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[76] The Democratic Party Platform of 1876, June 22, 1876, provided that

> Reform is necessary and can never be effected but by making it the controlling issue of the election and lifting it above the two issues with which the office-holding classes and the party in power seek to smother it:— First—The false issue with which they would enkindle sectarian strife in respect to the public schools, of which the establishment and support belong exclusively to the several States, and which the Democratic party has cherished from their foundation, and is resolved to maintain without partiality or preference for any class, sect or creed, and without contributions from the treasury to any.

[77] Because the amendment passed by the House barred only the use of money "raised by taxation for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto," the question was left open whether it applied to general revenues raised for general purposes. Efforts to close the loophole floundered in the Senate. *See* 4 Cong. Rec. 5245-46 (Aug. 7, 1876).

[78] *See* remarks of Senator Stevenson, 4 Cong. Rec. 5589.

[79] CONG. GLOBE, 42nd Cong., 2nd sess. 3014 (May 2, 1872).

"sumptuary legislation" to a plank in their platform, lumping it in with "opposition to centralization" and "separation of church and state."[80] The Democrats' stance against moralistic federal laws paid off politically in 1884 when they renewed their plank against "sumptuary laws which vex the citizen and interfere with individual liberty." Not only was Grover Cleveland elected to the Presidency but Democrats were also victorious in important races in the Midwest, because Republican attacks on saloons and German and Catholic schools alienated immigrant communities.[81]

The Democratic Party's new brand of federalism had some partisan virtues as a constitutional theory. Like the antebellum FBF of Jackson and Van Buren, ethnocultural federalism's prohibition on federal "sumptuary legislation" had the virtue of side-stepping conflicts between different wings of the Democratic Party. The condemnation of "sumptuary" laws had a comfortingly conservative resonance for pro-business Democrats (sometimes denoted "Bourbons" because of their attachment to old economic and racial hierarchies).[82] It simultaneously appealed to urban immigrants fearful that their schools, religion, language, and recreation were all under assault by New England Protestants. As a principle of federalism, the limit on sumptuary legislation also allowed Southern states to indulge evangelical moralism—bans on lotteries, alcoholic beverages, dueling,

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[80] "Opposition to centralization and to that dangerous spirit of encroachment which tends to consolidate the powers of all the departments in one, and thus to create whatever be the form of government, a real despotism. No sumptuary laws; separation of Church and State, for the good of each; common schools fostered and protected."

[81] RICHARD JENSEN, THE WINNING OF THE MIDWEST: SOCIAL AND POLITICAL CONFLICT, 1888-1896, at 147 (1971) (describing the politics of Midwestern Democrats in appealing to German and Scandinavian Lutherans to resist reformers' efforts to require the teaching of English as a predominant language in all schools during the late 1880s).

[82] Chancellor Kent had used the term in his Commentaries as an epithet for economic radicalism generally, observing that "[c]ivil government is not entitled, in ordinary cases, and as a general rule, to regulate the use of property in the hands of the owners, by sumptuary laws, or any other visionary schemes of frugality and equality." JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW, Lecture 34 (1830). By the late 1880s, attacks on "sumptuary legislation" were sometimes even deployed as a generic sort of conservative protection for property rights from labor legislation. In *State v. Goodwill*, 10 S.E. 285, 288 (1889), for instance, the West Virginia supreme court struck down a state ban on coal companies' requiring miners to use company scrip at company stores as "a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue, and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a tyrant, and the laborer is an imbecile."

etc.—from which the federal government was excluded.[83] Because cultural libertarianism was repeatedly declared to be a matter of constitutional principle, white voters in the South and immigrant communities in the North came to trust that Democrats meant what they said and thereby made what V.O. Key called a "standing decision" to stick with the Democratic Party as a matter of group identity.[84] Finally, the prohibition on federal sumptuary laws had sufficient cross-aisle support to ward off violations of the rule: Republicans who needed political cover from evangelical advocates for prohibition could invoke the distinction as a reason for rejecting federal restrictions on alcoholic beverages pushed by the party's evangelical wing.[85]

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[83] On the growth of evangelical religion in the South after the Civil War, see Blaine A. Brownell, *The Urban South Comes of Age, 1900-1940,* in THE CITY IN SOUTHERN HISTORY: THE GROWTH OF URBAN CIVILIZATION IN THE SOUTH 123-58 (Brownell & David R. Goldfield eds. 1977). On Southern state legislatures' adopting moral legislation banning alcohol, dueling, prize-fighting, and lotteries, see TED OWNBY, SUBDUING SATAN: RELIGION, RECREATION, AND MANHOOD IN THE RURAL SOUTH, 1865-1920, at 167-80 (2014).

[84] V.O. KEY, THE RESPONSIBLE ELECTORATE: RATIONALITY IN PRESIDENTIAL VOTING 1936-1960 (1966). On the Democratic Party's longstanding identity as the "party of personal liberty" resistant to the intrusion of a native Protestant political order into Catholic and non-Anglophone immigrants' way of life, *see* ALAN WARE, THE DEMOCRATIC PARTY HEADS NORTH, 1877-1962, at 52-53 (2006); PAUL KLEPPNER, THE THIRD ELECTORAL SYSTEM, 1853-1892: PARTIES, VOTERS, AND POLITICAL CULTURES 49 (1977); JOEL H. SILBEY, A RESPECTABLE MINORITY: THE DEMOCRATIC PARTY IN THE CIVIL WAR ERA, 1850-1868, at 62-88 (1977).

[85] As early as 1872, for instance, Republicans invoked an unwritten limit on the federal government's power to enact "sumptuary" or "morals" legislation to oppose a petition for federal temperance reform wherever the federal government had jurisdiction (in, for instance, Washington, D.C. and the federal territories). In opposing a committee assignment for the petition, Senator Samuel Pomeroy (Republican, Kansas) sarcastically asked, "[d]oes the Senator think that is a committee on morals?" CONG. GLOBE, 42nd Cong., 3rd sess., 93 (December 10, 1872). Even George Edmunds, the pro-temperance Vermont chair of the Judiciary Committee, conceded that "the Senate perfectly well knows that [the proposal] is totally out of the scope of the United States to do anything of that character." CONG. GLOBE, 42nd Cong., 2nd sess. 3014 (May 2, 1872). Even for Republican politicians who staked their reputation on religious and cultural controversies, prohibition of alcohol was so sensitive that it became politically convenient to use federalism to avoid even commenting on state-level proposals. *See* DAVID L. COLVIN, PROHIBITION IN THE UNITED STATES: A HISTORY OF THE PROHIBITION PARTY AND OF THE PROHIBITION MOVEMENT 223 (1926) (noting that Blaine in 1884 refused to take a position on a proposed amendment to the Maine constitution, stating that the matter was purely a state concern on which federal officials should not express views).

2. The Failure of Ethnocultural Federalism

Although it enjoyed two decades of success between roughly 1875 and 1896, ethnocultural federalism ultimately collapsed when it ceased to match the interests and values of the coalition that it had previously cemented. By 1892, after Cleveland's second election, Democratic politicians had used ethnocultural federalism to engineer an apparently durable alliance between Southern white supremacists and northern immigrant communities. In just four years, however, this system of constitutional federalism would start to crumble, because the costs of the doctrine to Western members of the Democratic Party became too high.

By the 1890s, the costs of ethnocultural federalism were increasing, because the admission of nine new states in the Prairie and Mountain West upset the old calculations for winning presidential elections. Disproportionately settled by Yankees from the Mid-Atlantic and Northeast, these states generally favored a more aggressive use of federal power than the old ethnocultural alliance permitted, and additionally favored an evangelical style of politics.[86] If the Democrats wanted to appeal to these Westerners, then they would need to offer something more than a defensive pact against evangelical reform.

That the Prairie and Mountain West might be up for grabs became obvious with the rise of the People's (or Populist) Party in 1892. Formed from members of the Farmers' Alliance who were worried about the power of transportation and manufacturing corporations, the People's Party demanded the dramatic enlargement of federal power in the form of nationalized telegraphs and railroads, federal "subtreasuries" that would extend credit to farmers at low rates for security interests in crops, and expansion of the money supply through the free coinage of silver.[87] The Populists won over a million popular votes; twenty-

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[86] There is a large historiography on the political culture of "the frontier" between the Civil War and the rise of Populism in the 1890s. The conventional explanation for the divergence between the Mountain and Prairie West from the rest of the nation has focused on economic disappointment of Westerners. *See, e.g.,* Hallie Farmer, *The Economic Background of Frontier Populism*, 10 MISS. VALLEY HIST. REV. 406 (1924). For the contribution of evangelical culture to populism, see Mattias Smångs & Kent Redding, *A Match Made in Heaven? Southern Evangelicalism and the Rise and Fall of Agrarian Populism in the 1890s*, 43 SOC. SCI. HIST. 63 (2019). For an account of Populism's connection to heterodox evangelical religion using a case study of Waco, Texas, in the 1890s, see Charles Postel, *Murder on the Brazos: The Religious Context of the Populist Revolt*, 15 J. GILDED AGE & PROG. ERA 197 (2016).

[87] The Omaha Platform of the People's Party generally declared that "[w]e believe that the power of government—in other words, of the people—should be expanded … as rapidly and as far as the good sense of an intelligent people and the teachings of experience shall justify, to the

two electoral votes; governorships in Colorado, Kansas, and Colorado; and large pluralities of votes in eight Prairie or Mountain West states.[88] When the nation was hit by a massive depression shortly after Grover Cleveland's election, it was obvious that the Democratic Party's old ethnocultural libertarianism would face a major challenge from a farm bloc insistent on enlargement of federal power. William Jennings Bryan's acceptance of a fusion nomination of both the Populist and Democratic Parties in 1896 marked the victory of this farm bloc over Cleveland's faction of Bourbon Democrats and their brand of ethnocultural federalism.

Bryan campaigned on a brand of farm-bloc nationalism that neither Republicans nor Democrats could ignore. Although he lost all three of his nominated elections, Bryan permanently transformed both parties by forcing both to incorporate Bryan's spirit of evangelically inflected social and moral reform. Part of this need to incorporate Bryan's ideas was simple electoral mathematics: Both parties needed Western votes to compete for the presidency.[89] In particular, if the Democrats lost New York, then they could only prevail in a presidential election by combining the old Confederacy with some border and midwestern states and eight western states.[90] To win those Westerners, Democrats endorsed a raft of moralistic reforms between 1895 and 1918, banning interstate sales of lottery tickets and impure food and drugs, stringently taxing oleomargarine, prohibiting the interstate transportation of prostitutes, and ultimately banning the interstate shipment of goods manufactured with child labor.[91] Southerners had resisted bans on lottery tickets back in the 1870s, but they endorsed them

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end that oppression, injustice, and poverty shall eventually cease in the land." ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917 131–32 (1999). On the Populists' endorsing a "broadly democratic rural movement that embraced a vision of business politics that focused on centralized, bureaucratic, and state-centered reform" that self-consciously imitated the large-scale organization of the business corporation, see CHARLES POSTEL, THE POPULIST VISION 137–71 (2007).

[88] JOHN D. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY 267 (1961).

[89] Alan Ware, *supra* note 84 at 92–94.

[90] *Id*. at 88–95.

[91] Southern support for the Owen-Keating Child Labor bill included Representative Joseph Robinson of Arkansas as the bill's floor manager and the "yea" votes of the House delegations from eleven southern states. STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 56 (1968).

in 1895—a tribute to Bryan's effect on the electoral politics of federalism.[92] In 1886, Representative John Randolph Tucker of Virginia had issued a Judiciary Committee report condemning an excessively stringent tax on oleomargarine on the ground that "to strike down a product or an industry is to abuse a constitutional trust," because "the right of Congress to enact anything like sumptuary laws for the States is nowhere granted."[93] By 1902, these constitutional scruples had been thrown away: Southerners voted for a more stringent tax, mocking constitutional theories against regulatory taxes as an outdated idea that "will in due time be relegated to the limbo of forgotten things."[94] Contrary to the argument of Professor Gerald Magliocca, Bryan's campaign had a permanent influence on constitutional politics, by demonstrating the electoral benefits of abandoning ethnocultural federalism in favor of a new farm-bloc nationalism.[95]

Ethnocultural federalism, in other words, failed to accommodate the interests of a decisive farm bloc in much the same way that Douglas' popular sovereignty failed: Neither theory could accommodate the shared interests of

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[92] On Southern support for the 1895 lottery prohibition, see Herbert Margulies, *Pioneering the Federal Police Power:* Champion v. Ames *and the Anti-Lottery Act of 1895*, 4 J. SOUTHERN L. HIST. 45, 51 (1995). On Southerners' earlier opposition to lottery legislation, see JOHN S. EZELL, FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA 239 (1960); GAINES M. FOSTER, MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865-1920, at 121-22 (2002).

[93] 17 Cong. Rec. 4900, 4923, 49th Cong., 1st sess., May 25, 1886.

[94] Cong. Rec., 3503 (April 1, 1902). On the absence of strong Southern objections to the tax, see Thomas A. Bailey, *Congressional Opposition to Pure Food Legislation, 1879-1906*, 36 AM. J. OF SOC. 52 (1930).

[95] Gerald Magliocca has argued that this raft of progressive legislation did not really represent a major concession to Bryan's ideas, because the movement for such national laws "was an elite affair that drew its support from professionals enthusiastic about technocratic solutions to public policy questions." GERALD MAGLIOCCA, THE TRAGEDY OF WILLIAM JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH 134 (2011). This dismissal of Bryan's influence, however, ignores the reality that, far from being anti-capitalist rabble-rousers, the Populists and the Farmer's Alliance strongly endorsed technocracy and disliked mass party-based politics. National laws motivated by hostility to "the trusts" through apolitical expertise, therefore, was precisely what the Populists demanded. *See* Postel, *supra* note 87. Bryan's influence over the Democratic Party was especially pronounced on moral regulations that Cleveland Democrats had assiduously opposed: After 1906, Bryan was the acknowledged leader of Democratic "dries" (supporters of laws banning liquor) and other religiously motivated reforms. MICHAEL KAZIN, A GODLY HERO: A LIFE OF WILLIAM JENNINGS BRYAN 171-73 (2006).

the South and West. Merely appealing to Southern Bourbons with cultural pluralism lost the West in the 1890s, just as appealing to Westerners' interest in territorial governments' autonomy lost the South in the 1850s.

Ethnocultural federalism failed to hold together a constitutional coalition for a second reason related to its incoherence as a legal theory: The definition of what constituted a forbidden federal intrusion into "moral" topics or "domestic relations" with "sumptuary" laws was never defined with precision sufficient enough to ensure consistent enforcement of the theory. Ethnocultural federalism specified only that some ambiguously defined domain of "morals legislation" was beyond federal control without defining exactly which topics fell within this forbidden domain or whether the prohibition applied to all rather than only some federal powers. Such ambiguity allowed Democrats who opposed anti-polygamy measures in the 1870s to accede to them in 1881 when the political costs of standing by Mormons became too high.[96] Even in the 1886 fight over the oleomargarine bill, some Democrats, primarily from dairy districts seeking to disadvantage competition to butter, endorsed what John Randolph Tucker had branded as a "sumptuary law" out of sheer economic self-interest. Such fair-weather ethnocultural federalists provoked mockery from the bill's opponents but also illustrated that the category of "sumptuary laws" was vague enough to accommodate statutes that could serve as precedents for abandoning the principle altogether.[97]

Vagueness had advantages. By invoking such a vague theory to justify opposition to moralistic legislation, Democrats preserved their flexibility: They could vote for federal legislation where the burden on the ethnocultural alliance was low and the political costs of opposing the law were high. Irish Catholic or German Lutheran allies in northern cities had few objections to federal laws banning lotteries, interstate prostitution, impure food, or child labor, while progressive and evangelical reformers would punish congresspersons who opposed such laws. Southerner legislators, therefore, understandably voted repeatedly for moralistic federal legislation between 1895 and 1918, confident that each vote could be justified as a regulation of interstate commerce (often in the form of

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[96] FOSTER *supra* note 92 at 54-61 (2002).

[97] Representative Poindexter Dunn, Democrat from Arkansas, mocked the inconsistency, noting that "[w]hen the debate on this bill shall have been finished we will find … the advocate of the greatest amount of liberty… heretofore supposed the irreconcilable enemy of sumptuary legislation, standing side by side, hugged breast to breast, lying cheek by jowl, with the advocates of the blue laws and sumptuary legislation." 17 CONG. REC. 4917, 49th Cong., 1st sess., May 25, 1886.

an immoral monopoly like the "whiskey trust" or the "brothel trust") that only old fogies devoted to obsolete constitutional abstractions could oppose.[98]

Each such vote, however, undermined the principled constitutional underpinnings of an objection to federal laws that ethnocultural allies might disfavor. In particular, each such vote lay a stone in the foundation for the 1918 vote in favor of the Volstead Act, the national statutory prohibition of liquor. That a federal statute banning liquor was flatly inconsistent with the ethnocultural alliance that formed the foundation of the Democratic Party was self-evident: That is why President Woodrow Wilson vetoed it.[99] But opposing such laws in the name of some constitutional abstraction favoring cultural pluralism became increasingly untenable as the Democratic Party embraced federal moralistic laws in every other area of life, from the kitchen (the 1906 Pure Food & Drug Act) to the bedroom (the 1910 Mann Act).

The collapse of the old ethnocultural alliance between Southern white supremacists and northern immigrant communities became plain when Southern "dries" succeeded in pushing through a national prohibition of alcoholic beverages in 1918. By the early 1920s, that push created a paralyzing schism between the northern and the southern wings of the Democratic Party, not unlike the division between Stephen Douglas' Westerners and the pro-slavery South in 1861. Delegates at the 1924 Democratic Convention in New York City cast 103 ballots—the most ever in any political convention—without being able to choose between Alfred Smith, the New York Governor and candidate of the Catholic "wet" North, and William McAdoo, Woodrow Wilson's son-

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[98] For an account of the anti-prostitution movement as a Progressive attack on an alleged cartel of businesses denoted "the Vice Trust," see MARA L. KEIRE, FOR BUSINESS AND PLEASURE: RED-LIGHT DISTRICTS AND THE REGULATION OF VICE IN THE UNITED STATES, 1890-1933 (Johns Hopkins 2010). For an account of the anti-liquor movement that stresses its connection to antitrust Progressive politics, see MARK LAWRENCE SCHRAD, SMASHING THE LIQUOR MACHINE: A GLOBAL HISTORY OF PROHIBITION (Oxford 2021).

[99] Woodrow Wilson, Message to the House of Representatives, October 27, 1919. Wilson justified his veto simply as a rejection of the wartime necessity for the Volstead Act. The veto was, however, interpreted by the urban immigrant wing of the Democratic Party as a vindication for the old 1880s Democratic Platform against "sumptuary laws." See, e.g., Alfred Smith, *Address of Acceptance of Presidential Nomination at the State Capitol*, Albany, New York (August 22, 1928) ("It was for this reason [of decentralized resolution of moral issues] that the Democratic platform in 1884 announced, 'We oppose sumptuary laws which vex the citizens and interfere with individual liberty,' and it was for this reason that Woodrow Wilson vetoed the Volstead Act").

in-law and candidate of the "dry" South.[100] Compromising on a non-entity, the corporate lawyer John W. Davis, the Democrats practically guaranteed their defeat in the general election.

C. Failure of Federalism #3: the Rise and Fall of "State Action" Federalism, 1901-1932

The gradual abandonment of their Northern immigrant allies by white Southerners invited a new theory of federalism to ground a new coalition. The new theory was a new version of the "state action" limit on the Fourteenth Amendment. The principle that the Congress lacked power over private action and, in particular, private violence was, abstractly viewed, hardly novel. Some version of that limited power dated back at least to *The Civil Rights Cases* (1883)[101] or even *United States v. Cruikshank* (1875).[102] The early twentieth century, however, saw the Republican Party embrace a super-strong version of this limit, barring federal intervention to stop racist violence even when state officials' inability to intervene seemed incompetent or willful. This new super-strong version of the "state action" limit helped cement a new political alliance: Northern protestant reformers, who were fearful of Catholic and non-Anglophone immigrants, joining with Southern white supremacists who were intent on preventing Black citizens from voting. "State action" federalism won endorsements from every influential political and judicial figure, North and South, before World War I. Northerners became so appalled by the wave of racist mob attacks that swept the nation in the summer of 1919, however, that they abandoned "state action" federalism by endorsing Representative Leonidas Dyre's anti-lynching bill. The final failure of farm-bloc federalism was the inability of Westerners and white Southerners to save "state action" federalism with a new alliance between South and West. This failure was not merely or even primarily a matter of divergent political interests but rather of conceptual constitutional incoherence.

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[100] DAVID BURNER, THE POLITICS OF PROVINCIALISM: THE DEMOCRATIC PARTY IN TRANSITION, 1918-1932, at 113-25 (1967).

[101] 109 U.S. 3 (1883).

[102] 92 U.S. 542 (1875).

1. State Action Federalism's Constitutional and Partisan Basis

The partisan basis for state action federalism was Northern Republicans' need for congressional support from representatives elected by white supremacists in the South. That need, like the collapse of ethnocultural federalism, arose from those Mountain and Prairie States that disrupted the old party system. Pro-business Republicans could not count on Western Republicans to support high tariffs and deflationary currency policy. To make up for those lost votes, Republicans sought white Southerners' support in the solidly Democratic South. One way to win that support was to reassure white Southerners that the Republican Party would no longer seek to protect Black citizens' right to vote. "State action" federalism gave Republicans the political cover to provide this reassurance.

An early sign of a modus vivendi in 1890 between Northern Republicans and Southern white supremacists was the failure of an election law introduced by Massachusetts' Henry Cabot Lodge and George Frisbie Hoar. Derided by Southerners as coercive sectional legislation—a "force act," in their phrase—the measure was defeated when pro-business Republicans gave priority to the tariff issue by seeking Democratic votes to make up for lost pro-silver Western Republicans dissatisfied with the Sherman Silver Purchase Act.[103] This specific northern abandonment of Black civil rights was part of a larger movement towards reconciliation with white supremacy, initially championed by northern business interests and intellectuals but increasingly embraced even by former abolitionists.[104] Fearing the political and cultural influence of recent immigrants from Southern and Eastern Europe, Northern reformers were attracted by the

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[103] Richard Welch, *The Federal Elections Bill of 1890: Postscripts and Prelude*, 52 J. AM. HIST. 511, 517-21(1965).

[104] On the general hostility of the Mid-Atlantic "national bourgeoisie" towards civil rights law, see SVEN BECKERT, THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850-1896 (2001). For intellectual support for disenfranchisement, see DAVID BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 123-28 (2001) (on liberal republicans' call for rule by a natural aristocracy and Southern support for northern liberals like Carl Schurz); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 496-99. As an illustration of how dramatically the Blue & Gray reconciliation undermined the white constituency for civil rights, consider that Thomas Wentworth Higginson, a Unitarian supporter of John Brown and commander of a Black regiment during the Civil War, joined the call against "sectional" legislation in 1890. MARK SCHNEIDER, BOSTON CONFRONTS JIM CROW, 1890-1920, at 46-47 (1997).

idea of combining disenfranchisement of such immigrants with disenfranchisement of Black votes in the South, a project that was urged by Southerners eager for a reconciliation of Blue and Gray.[105]

As with past alliances, this new alliance between Northern and Southern Protestant whites rested on a new constitutional theory. This latest version rested on a theory of "state action" federalism. As an abstract proposition, the requirement that federal laws address some form of state action was not controversial: such a general idea had been announced by the U.S. Supreme Court in the 1870s and 1880s.[106] This generality, however, did not resolve the question of how directly and specifically such state action had to be proven. In 1902, Senator George Frisbie Hoar endorsed a super-strong version of the "state action" limit, thereby barring Congress from intervening to stop disenfranchisement of Southern Black voters. Hoar took this stance when reporting to the Senate that the Judiciary Committee (of which he was the chair) unanimously regarded a proposed anti-lynching bill as outside of Congress' power to enact.[107] That bill had been drafted by Albert Pillsbury, the former Attorney General of Massachusetts, who argued that his measure contained direct restrictions on racist state inaction, insofar as federal intervention required proof that a state's officers had reasonably failed to prevent a lynching or bring lynchers to justice.[108] It was hardly self-evident from the judicial precedents that the Fourteenth Amendment did not authorize a federal judicial remedy for such specific and culpable official inaction: Three lower federal court judges had,

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[105] Charles Francis Adams expressed this project of disenfranchisement as a struggle against a "Celtic proletariat" in the North and an "African Proletariat on the shores of the Gulf." MICHAEL MCGERR, THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH, 1865-1928, at 46 (1985). *See generally* NINA SILBER, THE ROMANCE OF REUNION: NORTHERNERS AND THE SOUTH, 1865-1900, at 124-29 (1993) (noting how minstrel shows and other displays of Southern Blacks portrayed them as a "strange and foreign population" akin to immigrant groups); STANLEY HIRSHON, FAREWELL TO THE BLOODY SHIRT: NORTHERN REPUBLICANS AND THE SOUTHERN NEGRO, 1877-1893 (1962). Henry W. Grady, the Georgia publisher and booster of the "New South," urged such an alliance in 1889 in a speech to the Boston Merchant's Association, calling for both North and South to disenfranchise a "vast, ignorant, and purchasable vote—clannish, credulous, impulsive, and passionate—tempting every act of the demagogue, but insensible to the appeal of the statesman." JOEL CHANDLER HARRIS, LIFE OF HENRY W. GRADY, INCLUDING HIS WRITINGS AND SPEECHES 180, 190 (1890).

[106] United States v. Cruikshank, 92 U.S. 542 (1875); Civil Rights Cases, 109 U.S. 3 (1883).

[107] Adam Burns, *Without Due Process: Albert E. Pillsbury and the Hoar Anti-Lynching Bill*, 11 AM. NINETEENTH CENTURY HIST. 233, 241 (2010).

[108] Albert E. Pillsbury, *A Brief Inquiry into a Federal Remedy for Lynching*, 15 HARV. L. REV. 707 (1902).

between 1900 and 1910, held that such deliberate official inaction violated the Fourteenth Amendment.[109] That Senator Hoar, grandson of a famous abolitionist and former champion of Black civil rights, refused to report such an interpretation out of committee for a floor debate suggests the degree to which the Republican leadership had given up on protecting Blacks' civil rights. This narrow view of federal remedial powers to combat Southern governments' inaction in the face of private violence was later affirmed in 1905 by the United States Supreme Court over a dissent by Justices John Marshall Harlan and William Day.[110] "State action" federalism also became the Taft Administration's official response to Black demands for federal investigations of massacres and lynchings.[111] Republicans' endorsing "state action" federalism thus removed the fear of national power, which in turn motivated white Southerners' support for ethnocultural federalism.

The constitutional basis for "state action federalism," in short, was a super-strong reading of the accepted "state action" limit on the Congress' Fourteenth Amendment's enforcement power. Behind this reading lay a larger theory of sectional reconciliation in which the white leaders of each geographic section deferred to their counterparts to manage politics in their respective regions. Such a principle of mutual deference encompassed not only a super-strong state action theory but also an abandonment of any effort to reduce Southern representation under section 2 of the Fourteenth Amendment. Sectional reconciliation also extended to the federal courts, inspiring *Giles v. Harris*'s 1903 declaration that devices for disenfranchising Black voters were beyond the power of the federal courts to remedy.[112]

Behind this general abandonment of Black rights in the South was a kind of prudential self-restraint. While the formal law might require some sort of limit on how white Southerners governed their states, the limits of the national

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[109] BRENT J. AUCOIN, A RIFT IN THE CLOUDS: RACE AND THE SOUTHERN FEDERAL JUDICIARY, 1900–1910 (2007).

[110] Hodges v. United States, 203 U.S. 1 (1905).

[111] Perfunctorily citing the principle that private violence did not violate the Fourteenth Amendment, George Wickersham, President Taft's Attorney General, refused in 1910 to take any action to investigate a massacre of Black citizens in East Texas. E.R. BILL, THE 1910 SLOCUM MASSACRE: AN ACT OF GENOCIDE IN EAST TEXAS (2014).

[112] 189 U.S. 475 (1903). For an account of the importance of *Giles* as a benchmark for judicial attitudes towards race, equality, and democracy despite its neglect in conventional accounts of constitutional history, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONSTITUTION. COMM. 892, 897 (2000) ("one of the most momentous decisions in United States Supreme Court history and one of the most revealing").

government's practical capacity to overcome racial sensibilities required a kind of diplomatic ignoring of blatant Fourteenth and Fifteenth Amendment violations. Northern Republicans would accept white Southerners' assurances that irresistible local mores required private enforcement of racial hierarchy so long as the laws themselves were race neutral.

2. The Failure of State Action Federalism

With the rise in racial violence following World War I, the consensus in favor of a super-strong state action requirement broke down. The wave of anti-Black violence that engulfed the nation as Black war veterans returned from Europe in the summer of 1919 shocked Northern politicians who had formerly endorsed the exclusion of Congress from the control of private violence. That violence was not remarkable only for its ferocity and ubiquity but also the willingness of Black victims to fight back. Black resistance suggested that private violence presaged not only injustice but also disorder, as pitched battles between racial groups engulfed major cities like Chicago and Washington, D.C.[113] Black citizens were also fighting back organizationally, joining and forming new chapters of the NAACP in unprecedented numbers and wielding electoral clout in northern cities—especially Chicago, where Republicans were electorally competitive.[114]

Taking advantage of the growing mass movement against extrajudicial violence, Representative Leonidas Dyer, Republican from East Saint Louis, in 1921 re-introduced an anti-lynching bill that penalized both inaction by state and local officials as well as private violence that took advantage of such inaction. The bill plainly failed the super-strong state action doctrine that had been the foundation of state action federalism, but the elite response to Dyer's bill showed that times had changed: The South had lost its northern coalition partners. Provoked by the prospect of violent chaos, Northern leaders who had formerly endorsed state action federalism now argued in favor of federal legislation to control lynching. Former President but not yet Chief Justice Taft, in particular, reversed his 1910 endorsement of state action federalism, opining

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[113] CAMERON MCWHIRTER, RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA (2012).

[114] On the meteoric growth of the NAACP following World War I, see MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE (2014).

instead that Congress had the power to prohibit lynching where state authorities failed to maintain order.[115] The Dyer bill accordingly passed the House by more than a hundred votes, forcing Southern leaders to rely on the filibuster to beat it back in the Senate.

White supremacists' newfound political vulnerability led Southern politicians to cast about for new allies by reviving the farm bloc.[116] The raw materials for some sort of alliance rooted in shared racism were near at hand: Western whites were fearful of Japanese immigration and sought votes to limit Asian migration into the United States. The South was happy to oblige in return for votes to help defeat anti-lynching and other civil rights legislation. The result was Southern Democratic votes for the Johnson-Reed anti-immigration bill.[117] As W. E. B. Du Bois noted, the Southerners' otherwise perplexing abandonment of their traditional Northern immigrant allies could be explained as a simple quid pro quo—"a bargain "between South and West under which lynching was let to go on uncurbed by federal law on condition that the Japanese be excluded from the United States."[118]

Could such a farm-bloc alliance, however, survive without any constitutional foundation to stabilize it over time? The West and South confronted a problem of credible commitment: After the Japanese were incorporated into the national quota system, Westerners had no further need for Southern votes. By contrast, the defeat of a single civil rights bill would not permanently forestall the white Southerners' vulnerability to future civil rights legislation. Solidifying the alliance by inducing Western politicians to endorse a super-strong state action doctrine could ensure that Westerners stuck with their Southern allies after the latter delivered votes on immigration exclusion to the former.

Senator William Borah of Idaho, the self-styled constitutional scholar and leader of the Westerners, stood ready to supply the needed endorsement of the white Southerners' constitutional theory. Despite being assiduously courted by the NAACP, Borah voted against the Dyer bill and, more troubling, offered an elaborate opinion that the bill fell outside Congress' powers because it regulated

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[115] JESSE TARBERT, WHEN GOOD GOVERNMENT MEANT BIG GOVERNMENT: THE QUEST TO EXPAND FEDERAL POWER, 1913–1933, at 92.

[116] *Id*. at 157-58 (on rival efforts by Southern politicians to ally with Western Republicans like Herbert Hoover or Northeastern Democrats like Alfred Smith).

[117] For a general account of the politics of the Johnson-Reed Act, see MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 18–55 (Princeton 2004).

[118] Quoted by Jesse Tarbert, *supra* note 115 at 134.

private conduct.[119] A champion of various progressive and anti-corporate causes, Borah was widely regarded as a leader of the "farm bloc," even on the vice-presidential short list. His endorsement of the white Southerners' state action theory signaled a possible revival of the farm bloc on a more permanent basis than bill-by-bill alliances.

Borah's effort at partisan constitutional interpretation, however, floundered, because the theory was too legally incoherent to provide the political cover necessary to draw along Western politicians' votes. In part, Borah's difficulty was a lack of shared coalitional self-interest: Western voters were not invested in protection of private violence from federal control, because lynching was far more important as a method of racist intimidation in the South than the West.[120]

Underscoring this absence of common interest lay the absence of any coherent constitutional theory that could unite South and West. Southerners were invested in the idea of sectional reconciliation through under-enforcement of sectionally controversial constitutional provisions like the Fifteenth Amendment. Westerners, however, rejected this general principle, because they favored the vigorous and centralized enforcement of the Eighteenth Amendment's ban on alcoholic beverages, despite that ban's geographically discriminatory burdens on Northern immigrants whose political lives were closely connected to drinking and saloons. Borah was a committed "dry" and rebuffed efforts by Catholic Democrats to commit enforcement and interpretation of Prohibition to the states, thereby giving New York City and Chicago leeway to under-enforce the Eighteenth Amendment just as Southern states under-enforced the Fifteenth Amendment. Westerners' rejection of ethnocultural federalism, on which rested such delegation of cultural matters to the states, was indeed a cornerstone of western populist and progressive politics. That rejection, however, made a mockery of Borah's effort to revive a canon of constitutional construction rooted in respect for each geographic section's distinctive social mores. The blatant inconsistency of insisting on strict national enforcement of the Eighteenth Amendment, while leaving the Fourteenth and

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[119] *Id.* at 99.

[120] Lynching, especially against Latinos in California but also against Asians, was a significant but under-publicized source of white power in the West. *See* KEN GONZALES-DAY, LYNCHING IN THE WEST, 1850–1935 (Duke U. 2006). Precisely because such lynching was under-publicized, however, it did not become an issue capable of mobilizing Western voters to nearly the same extent that lynching in the American South mobilized Southerners.

Fifteenth Amendments to the discretion of white Southern politicians, did not pass unobserved.[121]

The problem was a matter of coalitional rather than logical coherence: Borah simply had not devised a principle of decentralization capable of attracting a sufficiently broad coalition. In particular, the nationalization of the liquor question alienated the northern immigrant communities who had previously been reliable supporters on limiting national power. As late as 1924, there was still the possibility for recreating the old Democratic Party coalition for ethnocultural federalism. Catholic leaders like Cardinal William O'Connell had, for instance, opposed the constitutional amendment authorizing Congress to ban child labor on the ground that such intrusion into family matters would open the way to federalization of parochial schools.[122] Catholics were also suspicious for similar reasons about the Sheppard-Towner Act authorizing grants to states for maternal health.[123] A general stance against federal power's being extended into some range of "domestic" matters involving morality and family might have won both Southern and northern immigrant support. Any such stance, however, was undercut by farm-bloc support (*i.e.*, from primarily Southern and Western voters in smaller towns) for Prohibition and hostility towards Catholic immigrants. The opposition of northern immigrant communities to Prohibition, therefore, did not anchor any more general support for federalism but instead became a stance against Protestant moral reform that united non-Protestant communities behind the New Deal.[124]

The "state action" coalition failed as a source of constitutional federalism, in short, because it did not muster coherent principles that could serve coalitional self-interest. This is not to say that the state -action obstacle to federal legislation did not persist for decades: The theory mobilized Southern unity against anti-

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[121] Darrell LeRoy Ashby, *William E. Borah and the Politics of Constitutionalism*, 58 PAC. NW. Q. 119, 122, 128 (1967) (noting the "number of people in the 1920s [who] found the Senator's position on liquor inconsistent with his attitude toward the rights of Negroes").

[122] Julia Bowes, *"Every Citizen a Sentinel! Every Home a Sentry Box!" The Sentinels of the Republic and the Gendered Origins of Free-Market Conservatism*, 2 MOD. AM. HIST. 269, 284-85 (2019) (describing amendment opponents' recruiting of Boston Catholic leaders against child labor amendments); Grace Abbott, *Federal Regulation of Child Labor, 1906-38,* ___ SOC. SERV. REV. 409, 424 (1939).

[123] KIRSTEN MARIE DELEGARD, BATTLING MISS BOLSHEVIKI: THE ORIGINS OF FEMALE CONSERVATISM IN THE UNITED STATES 149 (U. Penn 2012).

[124] For a discussion of the importance of the repeal of Prohibition to the creation of a new urban, ethnic working-class constituency, SEE LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE 191-226 (Norton 2016).

lynching legislation. That defense, however, turned less on the coalition-building capacities of constitutional theory and more on the filibuster in the U.S. Senate, for which the constitutional interpretation served as a fig leaf.

III. REBIRTH OF FBF IN THE MODERN GOP? THE CASE OF ABORTION AND GUNS

With uncanny precision, the modern Republican Party draws its support from the old farm bloc that sustained the antebellum Democrats.[125] Like the old farm-bloc coalition, the GOP's new coalition is united by the periphery's resentment towards the perceived cultural, academic, business, and bureaucratic dominance of the nation's wealthiest cities.[126] This new farm bloc dominates states where rural and exurban voters outnumber voters in dense metropolitan areas, with suburbs casting the deciding ballots.[127]

Does the history of American federalism provide any lessons for the modern Republican Party? Jackson and Van Buren finessed coalitional disagreement with constitutional federalism. Could Republican politicians manage a similar feat?

I argue below that there are, if not lessons, at least powerful analogies between the situations of the modern Republican Party and the Democratic Party between 1832 and 1932. In both cases, constitutional federalism seems plausible as a tool for stabilizing a partisan coalition. The value of that tool, however, varies with the emotional intensity and cultural homogeneity of the parties. In particular, the odds of a rebirth of antebellum FBF are greater for guns than abortions. The partisan dynamics of abortion mimic antebellum Southerners' incentives to demand a single and politically suicidal, centralized response to

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[125] Compare any map of presidential elections between 1832 and 1860 with analogous maps between 2008 and 2020.

[126] On the educational and religious factors that promote cultural division in American politics, see Shadi Hamid, "How education and religion have redrawn America's political map," WASH. POST, October 28, 2024. For a public opinion survey-based examination of the realignment of Democratic and Republican Parties along educational lines and its likely durability, see William Marble, *What Explains Educational Realignment? An Issue Voting Framework for Analyzing Electoral Coalitions*, Working Paper September 2024, https://osf.io/preprints/socarxiv/2e3jp.

[127] On population density's power to predict partisan voting in the 2020 elections, see David A. Hopkins, *The Suburbanization of the Democratic Party, 1992–2018*, Paper presented at the Annual Meetings of the American Political Science Association, Washington, DC, August 29, 2019; Richard Florida, Marie Patino & Rachael Dottle, *How Suburbs Swung the 2020 Election*, BLOOMBERG, November 17, 2020.

the extension of slavery in the western territories. By contrast, the partisan dynamics of guns naturally suggest a decentralized response akin to the version of FBF engineered by Jackson and Van Buren for banks and railroads. With both guns and abortions, however, the modern GOP lacks the power of nineteenth-century political parties to force their members to adhere to a coalitional compromise. Instead, the modern Republican Party has been able to achieve some equivocal but electorally effective, federalism-based compromise on abortion only through the influence of a charismatic leader, Donald Trump, whose endorsements provide political cover to Republican candidates for relative moderation on the abortion issue. Whether such federalism coalitions are sustainable without the atypically powerful hold of Trump over the Republican Party remains an open question.

A. The Partisan Benefits of FBF for the Republican Party

That the Republicans would benefit politically from a revival of FBF seems so obvious as to require little citation.[128] So-called "battleground states" were closely divided in 2024 between rural and exurban voters, on one hand, and urban and suburban voters on the other. To win elections in these states, therefore, Republicans must persuade a critical mass of suburban voters to vote for them.[129] Like Cleveland's "Gold Democrats" of old, these suburbanites tend to be more culturally pluralistic than the rural and exurban parts of the GOP's coalition. They are, therefore, less enamored of the GOP's hard-line stance on culturally divisive issues than the GOP's rural voters.[130] Caring more about protection of their middle-class prerogatives than preservation of a Christian, Anglophone, or "white" nation, they can flip to the Democrats if the GOP does not offer them a cultural compromise on guns, abortion, or other issues that mobilize exurban and rural voters. The "diploma divide" between college-educated and working-class voters in the twenty-first century has replaced the old

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[128] But I am happy to insert a long string cite here to various news items describing GOP panic over how their positions on abortion and guns will play with the median voter in 2024.

[129] For data on how close the balance is in even very "Red" states, see DAVID A. HOPKINS, RED FIGHTING BLUE: HOW GEOGRAPHY AND ELECTORAL RULES POLARIZE (2017) (Cambridge 2017). For the decisive role of suburban voters in battleground states, see William H. Frey, *Flipping the script, swing states' rural, suburban, and white voters could power key Biden victories*, BROOKINGS, October 31, 2020, https://www.brookings.edu/articles/flipping-the-script-swing-states-rural-suburban-and-white-voters-could-power-key-biden-victories/.

[130] Geoffrey Skelley et al., *Why The Suburbs Have Shifted Blue*, FiveThirtyEights, December 16, 2020, https://fivethirtyeight.com/features/why-the-suburbs-have-shifted-blue/.

ethnic and religious divisions among white voters in the nineteenth century, but the partisan challenge of bridging that divide remains fundamentally similar.[131]

In theory, some version of FBF might provide the compromise that could hold together such an otherwise tenuous coalition. FBF would allow state Republican parties to tailor their positions on guns or abortion restrictions to win support from the particular mix of rural, exurban, and suburban constituencies in their respective states. Public opinion varies widely on what length of time should pass after pregnancy before a ban on abortion is imposed, with close divisions on fifteen-week prohibitions and substantial majorities opposed to six-week bans.[132] It is no surprise, therefore, that Republican presidential hopefuls spent their brief primary campaigns waffling on what position to endorse, fearful of breaking apart the coalition on which any nominee will depend to be elected.[133] Analogous diversity of opinion exists on the right level of gun regulation, with significant differences between states regarding who should be restricted from buying weapons, what kind of weapons should be permitted, and where they can be carried.

FBF would seem to be a natural way to finesse these disagreements. So why cannot some latter-day Van Buren or Stephen Douglas engineer a version of FBF that could hold together the FBF coalition on either or both of these issues?

Justice Brett Kavanaugh has stepped into Stephen Douglas' role. In his concurrence in *Dobbs v. Jackson Women's Health Organization*, he strained to bridge divided public opinion with decentralized decision-making with a two-part formula. First, Kavanaugh broadly hinted that the Fourteenth Amendment does not, in his view, protect a fetal right to life, asserting that "[t]oday's decision

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[131] On the end of ethnic divisions among whites, see RICHARD D. ALBA, ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA (1990). Those divisions may still manifest themselves in modes of thought, habits, and educational or consumption choices. Ronald H. Bayor, *Another Look at "Whiteness": The Persistence of Ethnicity in American Life*, 29 J. ETHNIC HIST. 13 (2009). On the end of partisan loyalty of Catholics to a single party, see Pew Research Center, *Party Affiliation among Catholics*, https://www.pewresearch.org/religion/religious-landscape-study/religious-tradition/catholic/party-affiliation/.

[132] Jean Yi & Amelia Thomson-DeVeaux, *Where Americans Stand On Abortion, In 5 Charts,* FiveThirtyEight, May 6, 2022, available at https://fivethirtyeight.com/features/where-americans-stand-on-abortion-in-5-charts/.

[133] Amelia Thomson-DeVeaux, *Abortion Is Already Tripping Up The 2024 Republican Candidates*, FiveThirtyEight, June 5, 2023 (describing meta-review of public opinion surveys), available at https://fivethirtyeight.com/features/abortion-2024-republican-candidates/.

does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion" and that "all of the States may evaluate the competing interests and decide how to address this consequential issue." Second, Kavanaugh urged that interstate mobility might allow citizens to vote with their feet, because, in his view, "the constitutional right to interstate travel" prohibited "a State [from] bar[ring] a resident of that State from traveling to another State to obtain an abortion."

There are, in sum, both good-enough constitutional theories and apparently powerful political incentives for the Republican Party to embrace some sort of FBF to sustain an election-winning combination of suburban and rural-exurban voters. Have the Republicans taken advantage of this opportunity to use federalism to bridge intra-party disagreement?

In asking this question, I do not intend to address the strict legal merits of such a federal compromise. There are numerous articles analyzing the finer doctrinal points of each of these two positions, especially in the context of abortion,[134] but I take each of these positions to be at least legally *plausible*.[135] I assume, therefore, that, if the Republican Party wanted to embrace Kavanaugh's formula by abstaining from enacting either a national ban on abortion or a federal law extra-territorially extending state bans on the basis of domicile, they could do so with the U.S. Supreme Court's blessing or, at least, silent acquiescence. I am asking a different question. Given that the Republican Party might likely avoid loss of coalition partners by embracing the version of FBF endorsed by Kavanaugh, will they take the hint? Or will they reject the better part of valor and instead double-down on a national ban and limits on interstate mobility that will likely lead to national electoral defeat?

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[134] For a recent analysis of the power of each state to impose its rules concerning abortion on either the basis of territorial nexus or domicile, *see* Paul S. Berman, Roey Goldstein & Sophie Leff, *Conflicts of Laws and the Abortion Wars Between the States*, 172 U. PA. L. REV. 399 (forthcoming 2024). For earlier analysis of similar issues, *see, e.g.*, Richard H. Fallon Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L. J. (2007); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism,* 67 N.Y.U. L. REV. 451 (1992).

[135] For my own brief defense of the idea that power to enforce abortion restrictions could be based on either territorial contacts or domicile, see Rick Hills, *Will Federalism (and Conflicts of Law Doctrine) Deregulate Abortion?* Prawfsblawg, December 5, 2021, at https://prawfsblawg.blogs.com/prawfsblawg/2021/12/will-federalism-and-conflicts-of-law-doctrine-deregulate-abortion.html.

The signs so far are mixed. The Republican Party in 2024 apparently embraced some form of federalism on abortion and guns, but it did so in a half-hearted way.

On one hand, Donald Trump has strong-armed the GOP's anti-abortion faction into accepting a modification of the Republican Party's 2016 Platform demanding national anti-abortion legislation.[136] The 2024 Platform instead declared that "Republicans Will Protect and Defend a Vote of the People, from within the States, on the Issue of Life," declaring that Republicans "proudly stand for families and Life" and that "the 14th Amendment … guarantees that no person can be denied Life or Liberty without Due Process, and that the States are, therefore, free to pass Laws protecting those Rights."[137] Trump went so far as to tweet that he would veto "a federal abortion ban."[138] Likewise, the 2024 Republican Platform dropped the 2016 Platform's call for "firearm reciprocity legislation" allowing residents from pro-gun states to carry those states' permissive licensing rules into anti-gun states along with their firearms.[139] The 2024 Platform's preamble instead vaguely demands that the government "DEFEND OUR CONSTITUTION … INCLUDING … THE RIGHT TO KEEP AND BEAR ARMS."[140]

On the other hand, the Republican Party's embrace of federalism, in sharp contrast to nineteenth-century versions of FBF, has been devoid of any claim that the Constitution limits Congress' power over divisive issues. The 2024 Platform, to the contrary, reiterates the 2016 Platform's claim that the Fourteenth Amendment protects fetal right to life, suggesting that Congress is fully empowered to ban abortion if it so decided. Moreover, even as a matter of non-constitutional federalism policy, neither Donald Trump nor the Republican

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[136] The Republican's 2016 Platform "support[s] a human life amendment to the Constitution and legislation to make clear that the Fourteenth Amendment's protections apply to children before birth." 2016 Platform at page 13.

[137] 2024 GOP Platform: Make America Great Again! Chapter 9, ¶4, available at https://www.presidency.ucsb.edu/documents/2024-republican-party-platform.

[138] Lisa Kashinsky & Megan Messerly, *Trump vows to veto any federal abortion ban—after previously refusing to commit*, POLITICO, October 1, 2024, https://www.politico.com/news/2024/10/01/trump-abortion-veto-national-ban-00182091. Trump's tweet is available at https://x.com/realdonaldtrump/status/1841295548109955091?s=61&t=sGMpjEBuMdMbZvZAYDOc-A. For reasons of intelligibility, I refer to "tweets" even though Elon Musk has changed Twitter's name to "x.com," because "x" cannot be converted easily into a verb.

[139] *Id*. at 15.

[140] 2024 GOP Platform, *supra* note 137, Preamble (All Caps in the original).

Platform have suggested that the GOP ought to be neutral on the question of how abortion should be regulated. The 2024 Platform denounces "Late Term Abortion," while Trump tweeted out support for exceptions for "rape, incest, and the life of the mother." This willingness of the national party and presidential candidate to weigh in on a divisive issue that federalism allows them to sidestep suggests the gulf separating the modern version of partisan federalism from the nineteenth-century brand of ethnocultural federalism that both the Republican and Democratic Party endorsed to evade endorsing a national prohibition on alcoholic beverages. James Blaine, the Republican candidate in 1884, went so far as to refuse to say how he would vote on Maine's state referendum banning liquor, on the ground that it would be inappropriate for a candidate for national office to take a position on an issue reserved for the states.[141] Likewise, even the Republican platform of 1884 acknowledged that "the States have reserved rights which should be faithfully maintained" and that "[e]ach [federal and state sphere] should be guarded with jealous care, so that the harmony of our system of government may be preserved and the Union kept inviolate."[142] There is no remotely similar language in the 2024 Republican Platform.

B. Coalitional Logic and the Limits of FBF

Why do the Republican Party and Donald Trump not declare more full-throated support for federal neutrality on abortion? I suggest below that (1) coalitional logic indicates that some FBF-type correction is more likely for guns than for abortion, for reasons of both factional self-interest and emotional resonance but (2) any predictions about partisan behavior are complicated by the transformation of state and national parties and presidential politics since 1932.

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[141] *Blaine on the Liquor Question*, TRUE REPUBLICAN, Wednesday, Sept. 17, 1884, https://idnc.library.illinois.edu/?a=d&d=STR18840917.2.2&e=-------en-20--1--txt-txIN----------. Blaine's refusal to take a stand on the liquor question came at some political cost: He was ridiculed for being a "dodger" of a controversial issue, and the supporters of prohibition created a third party that likely took votes away from the GOP. Rick Hills, *Trump's and Blaine's Use of Federalism as an Artful Dodge on Abortion (2024) and Booze (1884),* PRAWFSBLAWG, Friday, October 25, 2024, https://prawfsblawg.blogs.com/prawfsblawg/2024/10/trumps-and-blaines-use-of-federalism-as-an-artful-dodgie-on-abortion-2024-and-booze-1884.html.

[142] Republican Party Platform of 1884, July 3, 1884, https://www.presidency.ucsb.edu/documents/republican-party-platform-1884.

1. The Obstacles to FBF for Abortion

First, with respect to partisan emotion, opponents of abortion in the modern-day Republican Party are in much the same position as the slave-owning faction of the antebellum Democratic Party. Both have been accused repeatedly of seeking to exercise patriarchal tyranny over other people's bodies. In response, both have designed their public-relations campaigns around the idea that they are actually protecting the alleged victims from exploitation. Anti-abortion activists have repeatedly emphasized, sometimes in the names of their organization (*e.g.*, "Susan B. Anthony List" or "Women Exploited By Abortion"), that they seek to protect women from being exploited by unscrupulous medical providers, with some organizations emphatically (albeit often contradictorily) denying that they advocate any sort of criminal punishment for women who obtain abortions.[143] Likewise, throughout the 1850s and with increasing hysteria, slave owners argued that their enslaved labor force was better off than exploited Northern workers who lacked the alleged cradle-to-grave paternalistic care of an owner. The antebellum rhetoric from writers in *DeBow's Review* like George Fitzhugh, regarding the satanic mills of New England, runs parallel to anti-abortion rhetoric about satanic abortion mills.[144] In both cases, free labor (or lack thereof) was derided as the true private tyranny, exploiting hapless victims incapable of protecting their interest through freedom of contract.

Such a framing resists any decentralizing compromise. Feeling that their honor has been impugned, the opponents of abortion within the GOP are likely to seek assurance from their co-partisans that those erstwhile allies do not share their enemies' belief that abortion opponents are tyrants. This need for assurance naturally impels such abortion opponents to respond to fellow Republicans' pleas for FBF in much the same way that William Yancey responded to the

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[143] For a history of anti-abortion groups' contradictory attitudes towards the punishment of women who receive abortions, see Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735 (2018). As Ziegler notes, the anti-abortion movement split over whether to support penalties against women for seeking abortions, with Americans United for Life (AUL) simultaneously taking a stance by the late 1980s against punishing women, *id.* at 750, 753, 765-66, but also advocating prosecution of women for prenatal harms to fetuses during pregnancy. In 2016, Donald Trump provoked vociferous objections when he conceded in an interview that there would have to be "some sort of punishment" for women who obtained abortions. Brian Naylor, *Trump Backtracks On Comments About Abortion And "Punishment" For Women,* NAT'L PUB. RADIO, March 30, 2016.

[144] The canonical citation is GEORGE FITZHUGH, CANNIBALS ALL! OR SLAVES WITHOUT MASTERS (1857).

Douglasites: "it is a logical argument that your admission that [abortion restrictions are] wrong has been the cause of all this discord." If women really are being exploited by abortion mills, then should not the GOP leap to their defense? Mere FBF is too cold an answer for such a heated question.

Quite apart from emotional stakes, sheer practical self-interest suggests that opponents of abortion will not be willing to endorse the robust freedom of movement suggested by Justice Kavanaugh. Just as the power of slave owners to control enslaved labor was significantly curbed by the flight of enslaved persons, so too, the capacity of states to enforce draconian restrictions on abortion are likely to be severely burdened by the right of women to cross state lines. This is especially true if states' criminal laws cannot be extended on the basis of domicile to out-of-state abortion providers. The costs of interstate migration may ensure that restrictions on abortion are enforced against a subset of indigent women who cannot obtain financial assistance for interstate travel. The very spectacle of such discrimination between different classes of people seeking abortion, however, is likely to bring a state's anti-abortion regime into disrepute. Bus convoys for people of means versus criminal penalties for the indigent is not likely the preferred stance of abortion opponents.

2. *The Promise of FBF for Guns*

By contrast, gun control presents an issue much more closely analogous to antebellum bank regulation and infrastructure subsidies insofar as FBF is concerned. Although emotions run high around the question of access to firearms, the campaign against such access does not revolve around the moral culpability of gun owners. The question instead turns more on consequences than character, with rhetoric that has an epidemiological rather than moralistic tone. To the extent that moral culpability is at issue, supporters of gun control level accusations not against individuals but against the corporations like Remington or Smith & Wesson that sell weapons too freely. The campaign against firearms has the acoustics, therefore, of an anti-corporate campaign—the targets of which bear a resemblance to the banks, insurance companies, and railroads that were the targets of antebellum Democrats. This is not to say that the antebellum Whigs did not, or modern-day Republicans will not, rally to the defense of corporations: Both did or do. But "condemn[ing] frivolous lawsuits against gun manufacturers," as the 2016 Republican Platform did, naturally implies a tolerance for non-frivolous lawsuits. It is a matter of degree, not moral bright lines. Such matters lend themselves to state-by-state resolution. Just as the Whigs gradually abandoned support for a nationally chartered bank by the 1840s, so

too, the NRA and their followers might reasonably be expected to yield a bit on a single national system of gun regulation for the sake of their co-partisans' electoral survival.[145]

Likewise, interdiction of guns across state lines does not raise the same problems of freedom of travel posed by a migration of women seeking out-of-state abortions. By long legal tradition, states can forbid the possession or manufacture of dangerous goods within their borders. The old "original package" doctrine that allowed the importation of that which states can forbid has long been discredited by modern dormant-commerce doctrine.[146] Moreover, the tradition of the national government's assisting states in policing their borders to interdict illegal imports dates to the 1890 Wilson Act (federally prohibiting importation of alcohol prohibited by the destination state). Such a regime already exists on paper for firearms. The FBF needed by the Republican Party would merely require that this regime be effectively enforced. It does not seem to be beyond the pale of political imagination to contemplate a grand bargain under which the Republican Party agrees to fund such enforcement of interstate interdiction in return for guarantees against federal regulation of guns within states that favor free access to them.

3. Three Wild Cards: Hollow National Parties, Second-Order State Parties, and Personalistic Presidential Campaigns

Political parties just are not what they used to be. Since 1932, party loyalties and internal governance have fundamentally changed, weakening the capacity of any partisan organization to force single-issue interest groups into compromising their commitments for the sake of some federalist compromise. In particular, (1) national political parties are much weaker today in their capacity to control candidates than they were between 1832 and 1932 while (2) state-party labels convey information primarily about positions taken by national politicians at the national level of government, making state elections "second-

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[145] On Zachary Taylor's abandoning the bank issue at the outset of his administration as a vestige of "old Hunker Whig politicians" and "ultra Whiggery," *see* MICHAEL HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 415 (U. Michigan 1999). After Taylor's death, Whigs neverthl;ess made efforts to re-enact a charter for a national bank, only to have President Tyler veto the measures, causing a rebellion against the Tyler Administration in the Whig Party.

[146] The latest blow to such a robust concept of free interstate commerce is *Nat'l Pork Producers Council v Ross*, 598 U.S. 356 (2023).

order" elections in which state politicians have incentives to echo national politicians' talking points. Both factors press against credibly enforcing any federal compromise on issues like abortion or guns when interest groups seek some national legislation on these topics. Donald Trump's forcing the GOP to adhere to a quasi-federal compromise on abortion in 2024, however, suggests another possibility: A sufficiently charismatic presidential candidate with complete domination over a political party can enforce federalism-based compromises, a role that the parties themselves no longer are able to perform.

Consider, first, the inability of national political parties to crack the whip of party loyalty to force politicians into obeying a federal compromise that conflicts with the politicians' ideal priorities. Party-based compromise lay at the root of Van Buren's success in enforcing Democrats' adherence to the Independent Treasury System between 1836 and 1841. As described in Part I(A), Van Buren ruthlessly cut dissidents off from the patronage and solidaristic support that the party endorsement provided, even at the expense of losing defectors to Whigs. Political parties lack that sort of clout today: As Daniel Schlozman and Sam Rosenfeld have recently argued, the Republican and Democratic Parties today are "hollow" in the sense that party institutions, rules, and officials lack power to define the issues or control the candidacies over which electoral campaigns are fought.[147] Candidates derive funding with personal appeals to donors large and small and their nominations from personal campaigns in direct primaries.[148] Voters no longer feel the personal attachment to parties to accept partisan compromises merely because they are endorsed by party leaders, especially on high-salience issues about which voters feel strongly.[149]

Consider, second, the position of state politicians and state-party organizations in enforcing federal compromises. The old conventional wisdom is that

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[147] DANIEL SCHLOZMAN & SAM ROSENFELD, THE HOLLOW PARTIES: THE MANY PASTS AND DISORDERED PRESENT OF AMERICAN PARTY POLITICS (Princeton 2019).

[148] On the direct party primary's weakening of parties' influence, see ____. On how changes in election finance have weakened parties, see RAYMOND J. LA RAJA AND BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL (U. Michigan 2015).

[149] For a summary of evidence that parties have lost credibility with voters, see DIDI KUO, THE GREAT RETREAT: HOW POLITICAL PARTIES SHOULD BEHAVE AND WHY THEY DON'T (Oxford 2025). On voters' reluctance to accept departures from their preferred partisan positions regarding highly salient issues, see Jonathan Mummolo, Erik Peterson & Sean Westwood, *The Limits of Partisan Loyalty*, 43 POLITICAL BEHAVIOR 949 (2021).

national politicians will protect the authority of state elected officials out of respect for their shared partisan ties.[150] State officials like governors and mayors, on this theory, have clout within the national political parties, because "officials at different levels were dependent upon each other to get, and stay, elected."[151] Whatever the merits of this description of state parties for the pre-New Deal party system (or even in 2000 when Professor Kramer published the statement), the theory holds little force today. The evidence is strong that voters increasingly pay little attention to the state-specific positions of state elected officials, instead judging those politicians by the voters' views of the positions taken by the national party that appears next to the state officials' names on the ballot.[152] As Dan Hopkins argues, "today's state parties increasingly follow their national patrons by offering voters clear ideological choices…. Like McDonald's, today's major parties are thoroughly nationalized brands."[153] State politicians whose electoral fates are determined by their constituents' assessments of national parties are unlikely to fight for state autonomy merely because they happen to hold state office.[154] Instead, one would expect them to fight for whatever their national party supports—a national guarantee of fetal life, for instance, if they are Republican governors, or a nationally guaranteed right to obtain an abortion, if they are Democratic governors.

Donald Trump's 2024 presidential campaign, however, has suggested another, non-party-based mechanism to enforce federalism-based compromises: the endorsement of charismatic party leaders with extraordinary influence over a party's constituents. As noted in Part III(A) above, Trump persuaded the Republican Party to jettison the 2016 platform plank endorsing national legislation to protect a fetal right to life, even declaring that he would veto any such legislation. Conventional wisdom ascribes Trump's power to control the GOP to the influence of his endorsement over Republican rank-and-file members.[155]

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[150] For a summary of this position, see Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

[151] *Id.* at 282.

[152] DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 142 (U. Chicago 2018).

[153] *Id.* at 142.

[154] For an assessment, mostly negative, for what second-order state and local elections means for the conventional partisan argument that federalism is safeguarded by partisan politics, see David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 803-09 (2017).

[155] See, e.g., Sarah Fortinsky, *Trump-endorsed candidates pull through against primary challengers*, THE HILL, Jun 12, 2024, https://thehill.com/homenews/campaign/4717488-trump-endorsed-candidates-pull-through-against-primary-challengers/.

There is some evidence from a survey experiment to support that conventional wisdom: Blatte, Piccoli, and Zachem found that survey respondents of both parties weighted Trump's endorsement of a fictional candidate more heavily than the candidate's policy stances, with Democrats' opposing, and Republicans' supporting, the candidate more because of the endorsement regardless of the candidate's policy stances.[156] In effect, Trump played the role of an "elite signal" similar to a party label, providing political cover for candidates to take policies at odds with their constituents' ideal preferences.[157]

The idea that a charismatic party leader could win votes based on purely personalistic appeal rather than policy stances is not new. William Jennings Bryan pioneered the idea of a personalistic rather than party-based candidacy, using a novel whistle-stop campaign through hundreds of towns to build a personal brand, a style of campaigning that he felt forced to defend against attacks on its novelty.[158] Despite its departure from previous norms, his campaign style became the gold standard (I couldn't resist) for presidential politics, with Theodore Roosevelt's paying Bryan the compliment of imitation with his own whistle-stop campaign in 1900.[159] The microphone, radio, TV, and Twitter have since reduced the costs but not the importance of candidate-centered personal appeals in presidential politics.

To the extent that a presidential candidate can build a personal brand with rank-and-file voters that transcends their policy stances, they can deploy that brand on behalf of federalism as well as any other policy stance. The advantage of a federalism-based approach to policy is that it can smooth over disagreements that might otherwise sink a coalition. Although any definitive conclusion will have to await sophisticated analysis of survey and electoral data, there are anecdotal indications that Trump's using federalism to avoid endorsing a national abortion ban helped him reduce the loss of female voters.[160] Of course,

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[156] Scott Blatte, Danielle Piccoli & Matthew Zachem, *The Causal Effects of a Trump Endorsement on Voter Preferences in a General Election Scenario*, 57 PS: POL. SCI. & POL. 340 (2024).

[157] Id. at 345 (a Trump endorsement "could counteract the effect of unorthodox policies, demonstrating that although the role of policy is nontrivial, it is not immune to elite signals").

[158] Speech by William Jennings Bryan, City Party, Escanoba, MI, October 14, 1896, The [Lincoln NE] Evening News, Thursday, October 15, 1896 ("I have been criticized so many times for traveling around among the people, but, my friends, I do not know where a candidate is going to go if you do not allow him to go among the people who are to vote for him").

[159] *See, generally* JOHN M. HILPERT, AMERICAN CYCLONE: THEODORE ROOSEVELT AND HIS 1900 WHISTLE-STOP CAMPAIGN (2015).

[160] Elaine Godfrey, *How Trump Neutralized His Abortion Problem*, THE ATLANTIC MONTHLY, Nov. 7, 2024.

whether the Trump Administration will actually follow its campaign promise to decentralize abortion disputes on issues like the interstate shipment or FDA approval of mifepristone remains to be seen. To the extent, however, that such a stance holds together a suburban and rural constituency for midterm elections, Trump has electoral incentives to deploy his charisma on federalism's behalf.

IV. CONCLUDING THOUGHTS ON THE COSTS AND BENEFITS OF FBF

In light of the partisan logic of guns and abortion described above, the U.S. Supreme Court has played a curious role in foiling an FBF compromise on guns but promoting one on abortion. On abortion, Kavanaugh's concurrence suggests that it is unlikely that the Court will nationalize abortion regulation by recognizing a fundamental Fourteenth Amendment right of fetuses (or, if you like, prenatal children) to life. On guns, however, the Court has aggressively defended a national right to bear arms in *New York State Rifle & Pistol Ass'n v. Bruen*,[161] by allowing only state regulations of firearms that are "relevantly similar" to laws existing at or near to the ratification of either the Second or Fourteenth Amendments.

Far from removing the issue of firearms regulation from the national political agenda, *Bruen*'s "relevantly similar" test invites repeated federal litigation to define which state laws satisfy the doctrine. *United States v. Rahimi*, for instance, upheld a federal statute barring persons subject to a domestic-violence restraining order containing a finding that the person presented a "credible threat" to the "physical safety" of the domestic partner.[162] The *Rahimi* Court reasoned that this statute, at least as applied to Rahimi, was sufficiently "similar" to surety and "going armed" laws, because all such laws allowed people who "pose[] a clear threat of physical violence to another" to "be disarmed."[163] Chief Justice John Roberts airily dismissed Justice Clarence Thomas' dissenting complaint (in that the federal domestic violence statute was more restrictive than the majority's historical analogues) by repeating *Bruen*'s assurance that the historical analogue need not be a "historical twin."[164] As to what degree of family resemblance short of twin-status was required, *Rahimi* had little to say, inviting a flood of litigation

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[161] 597 U.S. 1 (2022).

[162] 144 S. Ct. 1889 (2024) (upholding 42 U.S.C. 922(g)(8) as applied to Rahimi's repeated threats and impulsive violent actions, often against girlfriends).

[163] *Id.* at 1901.

[164] Id. at 1903.

in the lower courts.[165] Whatever the legal merits of the *Bruen-Rahimi* "relevantly similar" doctrine, that doctrine tends to cut against the partisan logic of FBF, because, far from decentralizing disputes about firearms, the doctrine repeatedly forces the issue onto the federal courts' agenda and, from there, on to the agenda of the U.S. Senate's judicial confirmation process. *Dobbs* criticized the "undue burden" test of *Planned Parenthood of Southeast Pennsylvania v. Casey* for being "unworkable," on the ground that *Casey* "'seems calculated to perpetuate give-it-a-try litigation.'"[166] The "relevantly similar" test of *Bruen-Rahimi* seems just as "unworkable" in this sense.

Should the Court help rather than frustrate FBF compromises by avoiding doctrines like *Bruen-Rahimi* and instead developing "hard" and "soft" limits on Congress' power to pick such culture-war fights? This essay has so far avoided any normative commitments in favor of predictive speculation. In the spirit of provoking rather than answering questions, however, here are some normative speculations about the benefits and costs of FBF.

One arguably useful function performed by judicial review is to help political actors make credible their commitments to abstain from pursuing mutually self-destructive policies. Political parties pose collective-action problems for politicians that seek to create and maintain them. Although it might be in the collective interests of all party members not to open a Pandora's Box of issues that risk dividing the political party, individual politicians might still have an individual self-interest in gaining prominence for themselves by raising the divisive issue. By taking such issues off the agenda, courts can provide political

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[165] On the flood of litigation provoked by *Bruen*, see Rebecca L. Brown, Lee Epstein & Mitu Gulati, *Guns, Judges, and Trump*, forthcoming DUKE L. J. ONLINE (2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4873330. On the perception that *Rahimi* has not made *Bruen*'s test any clearer, see Ian Millhiser, *A Trump judge ruled there's a Second Amendment right to own machine guns: The Supreme Court's* Bruen *decision will keep on creating chaos until it is overruled*, VOX, Aug. 23, 2024, https://www.vox.com/scotus/368616/supreme-court-second-amendment-machine-guns-bruen-broomes. For the suggestion that the protracted litigation would be worth it for those who regard gun rights as fundamental , see Jacob Sollum, *Has SCOTUS Replaced One Kind of Unbridled Discretion With Another in Second Amendment Cases?* REASON, June 26, 2024, https://reason.com/2024/06/26/has-scotus-replaced-one-kind-of-unbridled-discretion-with-another-in-second-amendment-cases/.

[166] See *Dobbs v. Jackson Women's Health Center*, 142 S. Ct. 2228, 2275 (2022) (quoting Rehnquist J., in *Casey v. Planned Parenthood of SE PA*, 505 U.S. 833 (1992).

cover for politicians seeking to maintain partisan unity against such partisan dissidents.[167]

Such judicial protection of political parties' credible commitments to take issues off the national agenda is only arguably, not necessarily, useful. Partisan unity sealed by judicially supplied political cover is not necessarily beneficial for the nation. The Buchanan Administration's, Taney Court's, and Charleston Convention's rejection of Stephen Douglas' "popular sovereignty" compromise destroyed the Democratic Party by helping to ensure that Douglas would not get the Democratic nomination. That might have been a good thing: Had Douglas won that nomination, he might well have unified the Democratic Party, defeated Lincoln, and averted the Civil War. Avoiding the Civil War that ended slavery would not have been a good thing. Sometimes a fight is worth the bloodshed—if the right side wins.

Trump's ability to sustain FBF with his federalism-based compromise on abortion might likewise possibly have helped the Republican Party win the presidency and Congress in 2024. To the extent that one regards the Republican program as unjust or harmful to the national interest, then judicial assistance to FBF might, like Douglas' popular sovereignty, be beneficial to the party but harmful to the nation.

The question of *realpolitik* remains: Would the "right" party prevail if FBF (or some other conflict-ameliorating brand of federalism) were denied judicial assistance? If one is not confident about the answer to this question, then FBF might make sense as a second-best *modus vivendi* to a war that cannot be won. Stephen Douglas was a vicious racist, and his brand of FBF would have sustained vicious racism. But one's assessment of the objective costs and benefits of Douglas' FBF depends critically on Appomattox Courthouse. President Douglas presiding over a politically united nation, divided over slavery but possibly headed for eventual emancipation, might yet seem preferable to a Confederate victory in which the South was perpetually independent and unfree.

I have elsewhere defended the idea that the courts can play a beneficial role in using federalism to lower the temperature of otherwise intractable political

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[167] For an argument along these lines, see Keith Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 283 (2005).

conflict.[168] On guns, at least, the benefits of FBF seem higher than the costs simply because, for the foreseeable future, there does not seem any way forward on national gun legislation.[169] In this sense, *Bruen* has a second-time-as-farce flavor of *Dred Scott*. *Dred Scott* nationalized an issue that plausibly could have been decentralized, thereby (albeit unintentionally) promoting a Civil War that, in turn, led to beneficial centralization. *Bruen*, by contrast, merely provoked endless and fruitless conflict by unnecessarily centralizing the issue of guns.

Likewise, Justice Kavanaugh's invitation to the U.S. Supreme Court to decentralize the issue of abortion will seem more attractive if one is less confident that a national fight over abortion will eventually be resolved in the right way. Now that the Republicans have won control over the presidency and both houses of Congress, it might be that many legal academics will find the FBF promoted by President Donald Trump more appealing than they did before the election. Whatever the legal merits of such judicial limits on Congress' powers, those limits would give political cover to Republican inaction on abortion with an FBF compromise offensive to the anti-abortion faction of the GOP. That judicial help might be welcome relief to both sides of the congressional aisle—and maybe it should be welcomed by the rest of us as well.

[168] *See* Hills & Primus, *supra* note 22 at 1460-64; Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913 (2018); Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769 (2006).

[169] On the practical obstacles to a national system of gun regulation that will reduce gun deaths, see JAMES B. JACOBS, CAN GUN CONTROL WORK? (Oxford 2004).