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The Loyal Opposition

ABSTRACT. The term *loyal opposition* is not often used in American debates because (we think) we lack an institutional structure for allowing minorities to take part in governance. On this view, we've found our own way to build loyalty while licensing opposition, but it's been a rights-based strategy, not an institutional one. Rights are the means we use to build a loyal opposition, and diversity is the measure for our success.

The story isn't just wrong. It's also not nearly as attractive a tale as we make it out to be. An unduly narrow focus on rights, combined with some genuinely ugly history, has also led us to endorse thin, even anemic visions of integration. And it's led us to adopt a measure of democratic legitimacy that involves relatively little power for those it's supposed to empower.

None of this should be news to the academics, particular those in the nationalist camp. Nationalists know we owe our loyal opposition something more. They just can't tell us what that "something more" is. Worse, they denigrate the "something more" we *do* offer democracy's outliers -- federalism. Federalism and rights have served as interlocking gears, moving our democracy forward. Yet it's been all too easy for nationalists to play the role of the critic, simultaneously complaining about national rights and national politics while trotting out outdated complaints about federalism. Those who think that decentralization should be understood as a distinctively American vision of the loyal opposition can fairly ask the nationalists to put something better on the table. To use the unduly blunt vernacular of the playground, the question is whether it's time for the nationalists to put up or shut up.

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INTRODUCTION

Loyal opposition is one of democracy's grandest terms. Once used to shield the party out of power from accusations of treason,[1] it now describes the institutionalization of opposition, most famously Great Britain's elevation of the minority party leadership to a shadow cabinet.[2] Termed the "greatest contribution of the nineteenth century to the art of government,"[3] it is a stand-in for some of the best practices in democracy: making space for dissent, knitting outsiders into democracy's fabric, attending to the institutional dimensions of integration. It perfectly captures one of the basic aims of democracy: maintaining an opposition that is loyal.

The term is not often used in American debates because (we think) we lack an institutional structure for allowing minorities to take part in governance.[4] On this view, we've found our own way to build loyalty while licensing opposition, but it's been a rights-based strategy, not an institutional one. We don't give democracy's outliers a formal role in the government, so the story goes, but we ensure that they can influence the debate and take part in the decision through the First Amendment and the Fifteenth.[5] In the United States, rights are cast as the means for achieving racial and political integration, and diversity has become its measure.

The story isn't just wrong. It's also not nearly as attractive a tale as we make it out to be. An unduly narrow focus on rights, combined with some genuinely ugly history, has led us to endorse a thin, even anemic vision of integration. And it's led us to adopt a measure of democratic legitimacy that involves relatively little power for those it's supposed to empower.

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1. Nevil Johnson, *Opposition in the British Political System*, 32 GOV'T & OPPOSITION 487, 489 & n.4 (1997).

2. For an overview of the idea's development, see generally *id.* For broad-gauged disquisitions on the topic, see IAN SHAPIRO, DEMOCRATIC JUSTICE 39-45 (1999); David Fontana, *Government in Opposition*, 119 YALE L.J. 548 (2009); and Jeremy Waldron, *The Principle of Loyal Opposition* (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-22, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045647.

3. 1 A. LAWRENCE LOWELL, THE GOVERNMENT OF ENGLAND 451 (1924).

4. We do, of course, have supermajority rules and the like. But those provisions cast minorities either in the role of junior partners to the decision or as perpetual veto gates. What these rules do not do is allow dissenters to put their own ideas into place. As I discuss *infra* Section III.A, federalism does just that.

5. And the Fourteenth Amendment, of course. In order to keep the focus on the right to vote, I use the Fifteenth Amendment as my reference point.

There were times when tolerance of dissent was sufficient and guaranteeing the right to vote was enough. Indeed, there were times when protecting the opposition's right to speak was an act of statesmanship, and the mere existence of a diverse decisionmaking body was a small miracle. Today, however, these concessions to democracy's outliers have become too easy for those in the majority. Perhaps *easy* isn't the right word. Maybe the problem is that they've become too convenient. A cynic might even worry that these concessions do as much to legitimize power as to share it.

Fortunately, we do, in fact, offer more to racial minorities and dissenters than the right to speak and vote. We do, in fact, have a strategy for institutionalizing opposition. We do, in fact, have a form of loyal opposition in this country, one that is distinctively American and arguably more robust than its counterparts elsewhere. It's called federalism.[6]

The trouble is nationalists don't recognize federalism (or its homely cousin, localism) as a form of loyal opposition. They don't recognize decentralization to be either a means of integrating or a measure of integration. They don't understand devolution to be a gesture of loyalty toward the opposition whose loyalty we in turn demand. Instead, nationalists view federalism with suspicion at best, largely because they pride themselves on showing the greatest loyalty to democracy's outliers. The nationalists' case against decentralization, after all, rests largely on the shameful role federalism has played in legitimating the oppression of racial minorities and dissenters. Nationalists grasp federalism's ability to facilitate certain forms of opposition. But they have grave doubts as to whether those forms of opposition are loyal. As a result, when nationalists think about the grand constitutional project of integration, they privilege rights over governance, courts over politics, participation over power, outsiders over insiders, and minority rights over minority rule.

That is a mistake. Proof of that mistake cannot be fully canvassed in a short essay, although I have sought to do so elsewhere.[7] An essay, at best, can raise

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6. Two exceptions to the literature's failure to regard federalism as a form of loyal opposition are David Fontana, who briefly discusses federalism in his comparative overview of "government in opposition," Fontana, *supra* note 2, at 560, and Jeremy Waldron, who argues that the separation of powers and federalism, among other institutions, foster a "loyal opposition" in the United States, Waldron, *supra* note 2, at 22-26.

7. *See, e.g.*, Heather K. Gerken, *The Federalis(m) Society*, 36 HARV. J.L. & PUB. POL'Y 941 (2013) [hereinafter Gerken, *The Federalis(m) Society*]; Heather K. Gerken, Lecture, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012); Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44-73 (2010) [hereinafter Gerken, *Foreword*]; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE

questions. In keeping with this Feature's theme of "federalism as the new nationalism,"[8] this one raises two. First, is it time for nationalists to reassess what we owe democracy's outliers? Views on what the "loyal opposition" is owed have evolved over time in Great Britain. The question is whether our thinking ought to change as well. The battles to make the First and Fifteenth Amendments meaningful were hard fought and important. They are not the end of our democratic journey, however.

In the abstract, the opportunity for dissenters to voice their concerns and vote their consciences seems like it ought to be enough. The moment power enters the equation, however, these democratic gestures seem less grand. The iconoclastic dissenter is an archetype in constitutional theory. But he exercises his First Amendment rights as an outsider, not an insider. He is licensed to speak truth to power, not with it. He may object to power's exercise, but he's rarely able to influence it. We've been told that our willingness to recognize the opposition's speech rights is a sign of our tolerance, and so it is. But a cynic might also point out that the main theories undergirding the First Amendment largely reflect the majority's interests and often legitimate the majority's power.

So, too, the right to vote—while profound and important—loses some of its normative oomph when one starts to do the math. The right gives democracy's outliers a chance to exercise a proportionate share of power in governance. That is why diversity—the notion that decisionmaking bodies should mirror the polity from which they are drawn—has become the touchstone for democratic legitimacy, the measure of integration, the sign that democracy's outliers have been treated fairly. But that benchmark is also a statistical guarantee of the majority's power. The nationalists' strategy for minority "empowerment" thus relentlessly reproduces the same inequalities in governance that minorities experience everywhere else. On the issues that divide us, it consigns minorities to the status of perpetual losers. That's a tempting option for those in the majority. It ought to be less appealing to those who aren't.

None of this should be news to the nationalists. After all, rights talk has been shelled by academics of every stripe. But most of those challenges have

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L.J. 1256 (2009); Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006) [hereinafter Gerken, *Of Sovereigns and Servants*]; Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) [hereinafter Gerken, *Second-Order Diversity*]; Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) [hereinafter Gerken, *Dissenting by Deciding*].

8. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014).

been all in the kill. Scholars have offered a number of telling criticisms, but few have put forward readily discernible (or, at least, remotely plausible) solutions. So, too, the idea of diversity has been dented here and there. But it reigns supreme for the simple reason that nationalists haven't offered a viable alternative to this deeply intuitive vision of democratic fairness. *Nationalists, in short, know that we owe our loyal opposition something more. They just can't tell us what that "something more" is.*

It's worse than that, though, because nationalists consistently devalue the "something more" we do offer our loyal opposition: federalism and localism. Minority rule can be as important as minority rights to the project of integration. To be sure, most nationalists are happy to favor federalism for this or that pet issue, and some subscribe to muddle-headed and deeply naïve accounts of local democracy. But that just means they are localists for the wrong reasons, and inconstant localists at that. Nationalists will not, however, acknowledge that federalism *is* a robust institutional complement to rights as a means of achieving integration, and diversity *isn't* the only touchstone for measuring it.

That would be fine, of course, if the nationalists had a better alternative. But they don't. It's all too easy to play the critic's role, simultaneously complaining about rights and diversity while trotting out outdated complaints about federalism. But if decentralization represents a distinctively American vision of the loyal opposition, can we fairly ask the nationalists to put something better on the table? This is the second question this essay addresses. To use the unduly blunt vernacular of the playground, the question is whether it's time for the nationalists to put up or shut up.

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Part I defines terms, explains why both racial minorities and dissenters are properly characterized as part of the loyal opposition, and provides the set-up for the rest of the essay by loosely tracing the connection between nationalism, on the one hand, and rights and diversity, on the other. Part II discusses the first question posed by this essay: do we owe democracy's outliers something more than constitutional rights and diverse decisionmaking bodies? In doing so, it offers a deeply cynical, deliberately provocative account of the rights conferred by the First and Fifteenth Amendments. Part III asks the second question: what is that "something more"? It argues that federalism can serve as a robust, distinctively American strategy for institutionalizing opposition and ensuring our democracy thrives. Better yet, it is both a workable solution and a working solution—a decidedly imperfect but reasonably perfectible complement to our rights-based scheme. The essay concludes with a simple question for the nationalists: can they offer something better?

Before turning to the argument, let me offer one caveat. Nationalists sleep easily at night because they think that the First and Fifteenth Amendments are sufficient to protect and empower racial minorities and dissenters. Why bother with decentralization—which obviously involves real costs—if the current system is working just fine? I hope to unsettle that easy assumption and suggest that we owe more to our loyal opposition. Questioning the sufficiency of rights is, of course, quite different than questioning their necessity. Nothing in this essay is intended to diminish the luster of our democracy's crown jewels. To the contrary, this essay is premised on the notion that rights have laid a strong foundation for political and racial integration. It questions only what we should build on that foundation going forward.

I. AN (ALL TOO BRIEF) ACCOUNT OF AN (ALL TOO CONVENTIONAL) WISDOM

To understand why rights and diversity have become nationalism's intellectual traveling companions, it's useful to trace the odd, even perverse relationship between them. Before turning to that argument, a few definitional points are in order.

A. Terms Defined

Our Federalism. Nationalists have a bad habit of conflating "Our Federalism" with your father's federalism. State sovereignty looms large whenever nationalists discuss federalism, with many viewing federalism as a code word for letting racists be racists. But federalism today is largely sheared of its traditional trappings. The sovereignty trump card wielded during the days of slavery and Jim Crow cannot be played anymore. If the national government wants to find a way to regulate states, it can. The national government can police federalism's worst excesses, then, while taking advantage of its best features, including the benefits it offers our loyal opposition. That fact ought to change nationalists' calculation as to whether the decentralization game is worth the candle. As I note at the end of this essay, federalism may not be perfect, but it is far more perfectible than it once was.

Our Federalism should not be conflated with your father's federalism in a second important respect. The system I describe is not one confined to states, but "federalism all the way down," which includes substate, local, and sublocal

institutions.[9] Imagine a majority-black city council, a town that favors same-sex marriage, a zoning commission dominated by Greens, a jury that contains nine Latinos instead of two, or a school board controlled by Darwin skeptics. States, after all, are often too large to serve as sites of empowerment for racial and political minorities. But Our Federalism, properly defined, includes countless sites for minority rule. Political and racial minorities exercise majority power in governing bodies that lack sovereignty, that may even lack a robust form of autonomy. The power that minorities wield in these institutions is often the power of the servant, the power of the agent, the power of the bureaucrat. It is, in other words, a form of power that we often treat as if it were not power at all. Entire legal fields—administrative law, corporate law—are all but devoted to taming the power of the agent, but constitutional law often overlooks how powerful the servant can be.[10] A highly decentralized, partially politicized bureaucracy like our own is all but built for a loyal opposition to thrive. Yet nationalists consistently overlook the power democracy's outliers wield in our Tocquevillian bureaucracy.

The Loyal Opposition. "Loyal opposition" is a term of art used to describe how Great Britain and some of its former colonies institutionalize opposition. This essay adverts to that notion here and there. For the most part, however, I use the term loosely as an interpretive frame, one that captures the importance of building loyalty by making space for opposition and showing loyalty to the opposition whose loyalty we in turn demand.

One might, of course, bristle at the use of this frame to think about race as well as dissent. To be sure, both racial minorities and dissenters can properly be termed democracy's outliers, which means that we should try to earn their loyalty and show them loyalty in return. Nonetheless, there are obviously substantial differences between the two groups. While the notion of a "loyal opposition" works naturally for dissenters, it seems an odd term for racial minorities.

It's worth remembering a simple fact, however. Whites and racial minorities often divide in politics for reasons that have much to do with past and present discrimination. I refer not just to racially polarized voting, which exists in many places and is pronounced in some. The term "opposition" offers

9. For a full description, see Gerken, *Foreword*, *supra* note 7. For ease of exposition, then, I will use several terms interchangeably in describing these institutional arrangements: federalism-all-the-way-down, federalism and localism, decentralization, and "Our Federalism."

10. For a description of the power of the servant, see Gerken, *Of Sovereigns and Servants*, *supra* note 7; and Gerken, *Foreword*, *supra* note 7.

a useful reminder that there is genuine disagreement between whites and racial minorities on a variety of issues, including how much race discrimination exists in the first place.[11] That fact matters for structuring a fair democratic process. Moreover, it's worth remembering that racial minorities may well feel *opposed* even when they aren't actually in the opposition. That's one definition of discrimination, after all.

Pressing harder on the metaphor, we might even think that the pairing of "loyalty" and "opposition" is useful for both political and racial minorities. With dissenters, we know that they are in the opposition, but we sometimes doubt their loyalty. With racial minorities, we do not doubt their loyalty, but we sometimes forget that they are capable of vibrant oppositional politics. On this view, the term *opposition* is something of an honorific—a reminder that racial minorities are not victims, but capable political actors.

B. Rights, Diversity, and Nationalism as Intellectual Traveling Companions

The academy is largely nationalist in its orientation. It's not just that legal academics mostly study federal law and national institutions. Many also believe that, *ceteris paribus*, national institutions are superior to state and local ones. No one thinks that everything should be centralized. But when the inevitable contests over devolution arise, academics generally suit up with the National[ist]s.

Nationalists also subscribe to a common set of tropes when it comes to the project of integration. They focus on rights, not institutions, in thinking about what we owe democracy's outliers. That's largely due to the ugliness of our history and the attractiveness of the diversity paradigm. It may also stem from

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11. Perhaps the most important divide between whites, on the one hand, and African Americans and Latinos, on the other, is their perception of how much racial discrimination exists. *See After Boston, Little Change in Views of Islam and Violence*, PEW RES. CENTER 4 (May 7, 2013), http://www.people-press.org/files/legacy-pdf/5-7-13%20Islam%20Release.pdf (38% of Hispanics believe there is "a lot" of discrimination against Hispanics compared to 20% of whites); Carroll Doherty, *For African Americans, Discrimination Is Not Dead*, PEW RES. CENTER (June 28, 2013), http://www.pewresearch.org/fact-tank/2013/06/28/for-african-americans-discrimination-is-not-dead (46% of African American respondents felt there is "a lot" of discrimination against African Americans, compared to 16% of whites). But these groups also divide along a variety of policy dimensions. *See Black, White and Latino Political Attitudes*, NEWS21, http://www.thenewvoters.com/database/race (last visited Dec. 4, 2013) (45% of whites favor universal healthcare whereas roughly 65% of African Americans and Hispanics do; 48% of whites favor smaller government whereas 14% and 19%, respectively, of African Americans and Hispanics do).

the fact that the institutions we use to accommodate our loyal opposition don't fit neatly into doctrinal silos, they don't emerge seamlessly from our constitutional text, and they bear little connection to our original history.

Or perhaps these institutions simply fall within academics' blind spots. Dissenters and racial minorities, after all, are the darlings of most intellectuals. They are also the objects of constitutional solicitude, with amendments devoted to the fate of each. That confluence has led academics to treat rights as natural tools for promoting racial and political integration, and it's ensured that diversity has emerged as our yardstick for measuring whether integration has been achieved. And by *diversity*, I'm referring not to the irritatingly shallow notion linking viewpoint and race that once dominated debates over affirmative action thanks to Justice Powell.[12] I refer instead to the deeply intuitive notion that decisionmaking bodies should mirror the polity from which they are drawn.[13] It's a simple equation for the nationalists, then. Rights are the *means* we use to create a loyal opposition, and diversity is the *measure* of our success.

The consensus isn't clean, needless to say, but it's robust. While nationalists may gripe about the courts' failure to fulfill the promise of the civil rights amendments, they still believe in rights. They'd just prefer the Warren Court vindicating them to the Roberts Court watering them down. Similarly, nationalists routinely complain about the Supreme Court's emphasis on viewpoint diversity in higher education, but they do not question the more fundamental ideal that diversity is a touchstone for democratic legitimacy—that democratic bodies ought to mirror the polity from which they are drawn.

It's not clear whether constitutional theory is the source of these academic tropes or merely mirrors and reinforces them (the latter, I assume). But you'll notice that even something as basic as the scholarly division of labor buttresses these notions while leaving our normative blind spots in place.

The worker bees of the academy have long divvied up the three great projects of American constitutionalism. The first is governance—allocating power among institutions so that policymaking flourishes and a Leviathan does not emerge. These questions have been taken up by those focused on constitutional structure—federalism, the separation of powers, and the like. The other two projects fall to those who labor on the rights side of the Constitution. Devotees of the First Amendment have done yeoman's work on

12. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (opinion of Powell, J.).

13. Elsewhere I have called this notion of statistical mirroring "first-order diversity." Gerken, *Second-Order Diversity*, *supra* note 7, at 1106-08.

how to guarantee a healthy amount of debate in the democratic sphere. Similarly, Fourteenth and Fifteenth Amendment gurus have done most of the thinking on the project of integration, with their First Amendment brethren putting in a laboring oar.

This division of labor seems intuitive and obvious. It is also a mistake. It ensures that we focus on rights, not governance, when we think about what a democracy owes its minorities. It ensures that the conventional wisdom about diversity's preeminence remains conventional.

There are critics, of course. Tropes rarely emerge unscathed in the academy, and the nationalists' tropes about rights and diversity are no exception. But the critics lack much by way of an affirmative agenda. That may not matter in some fields, but it can be a death knell in a relentlessly pragmatic, problem-oriented field like law. The critique of rights and diversity may have taken the sheen off of these democratic icons, but it hasn't knocked them off their pedestals.

Federalism, of course, is the main competitor to nationalism, but federalism scholars haven't managed to undermine the nationalists' sense that the conventional wisdom is conventional with good reason. It's not that either side disagrees much about the anodyne, quasi-bureaucratic justifications for centralization or devolution. Those who favor federalism plainly understand economies of scale and the value of uniformity, both of which favor moving issues up the decisionmaking ladder. Nationalists similarly recognize the reasons for local tailoring and democratic experimentation. And scholars of both stripes seem equally susceptible to the amorphous calls for local participation that make sensible people break out in hives.

The reason that there are intellectual camps, then, isn't that we all balance the same costs and benefits and emerge with slightly different results. We'd all be quibbling if that were the case, and our views would fall along a continuum instead of sorting themselves into intellectual camps. No, the reason that nationalists are nationalists is that they think that the costs of devolution will almost always be too high. And most of the costs have to do with the treatment of political and racial minorities, particularly the latter. William Riker wrote that if "one disapproves of racism, one should disapprove of federalism."[14] Others are more polite, but the worry is the same.

To be fair to the nationalists, this objection has not been met by federalism's proponents. The nationalists' invocation of slavery or Jim Crow has become something of a trump card, eliciting little more than an apologetic

14. WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 155 (1964).

sidebar from the other side. Similarly, in addressing nationalists' worries about dissenters, most federalism proponents have found no middle ground between the anodyne idea of states as laboratories and the alarming notion of armed state rebellion. Little wonder, then, that those who pride themselves on their loyalty to democracy's outliers are confident in nationalism's tropes.

History has reinforced the nationalists' blind spots or, more accurately, created them in the first place. For many, the story of racial progress is the story of *Brown*. For the more discerning, the story of racial progress is the story of social movements and the civil rights acts. In either case, the means for achieving integration and its appropriate measure are clear. Nationally enforced rights are what mattered for racial progress. And the touchstone for measuring success is diversity.

Jim Crow's despicable legacy runs so deep that it is inscribed in our vocabulary. We classify institutions as *diverse* or *segregated*. "Diverse" institutions mirror the polity. "Segregated" institutions are those where racial minorities dominate. We have no laudatory term for heterogeneous institutions where racial minorities are in the majority and whites are in the minority; those get lumped together with "segregated" institutions.[15] As a result, we have no means of distinguishing between the racially homogenous enclaves of Jim Crow and heterogeneous institutions where racial minorities wield majority power.

Perhaps it would be more accurate to say that we *do* have terms for the structures that give racial minorities a chance to rule: *federalism* and *localism*. The problem is that nationalists equate those terms with racial oppression, not racial empowerment.

The story of dissent is more variegated, but the bottom-line is roughly the same. We are familiar with the role that states and local institutions have played in facilitating dissent. Kentucky and Virginia's responses to the Alien and Sedition Acts are prominent examples, as is the storied role juries played early in our history. But the history of dissent and decentralization has hardly been heroic given the tendency of local majorities to persecute dissenters within their own ranks, to oppress minorities within a minority. Here again, Jim Crow supplies the ugliest example, but examples abound, particularly with regard to the treatment of religious and sexual minorities. Here again, national rights enforced by national actors protected dissenters. And here again, that history has deprived us of a vocabulary to describe the good that can come from majority-minority institutions. We typically don't associate state and

15. For examples, see Gerken, *Foreword*, *supra* note 7, at 49-50.

local institutions that oppose national views with our storied tradition of dissent, nor do we have a laudatory term to describe them. Instead, we call them *lawless* or *parochial* and condemn them as such.

Federalism's ugly history is the obvious reason for the nationalists' confidence in rights and diversity, but it's not the only one. Once one focuses on rights, rather than structure, as the means for securing a loyal opposition, diversity emerges as the natural measure of our success.

It's easy to see the intuitive case for using statistical mirroring as the baseline for measuring fairness. Most think that a "fair" election system gives everyone a proportionate share of power. That's why the right to vote has never been conflated with the right to win. Racial minorities, in the words of the Supreme Court, should not be subject to a "political famine," but neither are they entitled to a "political feast."[16] So, too, we expect dissenters to be one lone juror among twelve angry men, to speak truth to power not with it. The Constitution guarantees rights to participation, not power.

If participatory rights are what we owe democracy's outliers, diversity isn't just an intuitive measure of progress; it's also a workable one. We have a crude sense of how democracy works—the group with the most votes wins. But once one moves past this easy toggle, it is difficult to explain what share of power this or that minority group should wield. We can identify signs of unfairness, to be sure,[17] but minorities are supposed to lose in a majoritarian system.[18]

While we can't measure political power, we can measure political presence. And statistical mirroring is as intuitive a measure of presence as one could devise. What better sign that we have done right by our loyal opposition than decisionmaking bodies that look like the polity from which they are drawn—that "look like America,"[19] to use Bill Clinton's favorite phrase?

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16. Johnson v. De Grandy, 512 U.S. 997, 1017 (1994) (discussing the notion of proportionality in the context of voting power).

17. In the context of voting, the courts have often looked to what are commonly referred to as the "Senate factors" (because they are derived from a 1982 Senate report accompanying the renewal of the Voting Rights Act). These include racially polarized voting, the use of voting rules that burden minority voters, the exclusion of racial minorities from the slating process, overt racial appeals during campaigns, and the like. *See* Thornburg v. Gingles, 478 U.S. 30, 44-45 (1986).

18. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971) (rejecting the notion that a minority's failure to win even a proportional share of seats is proof of discrimination lest the evidence of discrimination amount to little more than a "euphemism for political defeat at the polls").

19. *See, e.g.*, Dan Balz & Ruth Marcus, *Clinton Said to Fill Last 4 Cabinet Jobs; Baird, Babbitt, Espy, Peña Chosen*, WASH. POST, Dec. 24, 1992, at A1.

Unsurprisingly, academics have built entire theories around the assumption that diversity is the touchstone for democratic fairness.[20]

Note, however, that our institutional impulses don't go much beyond nose-counting. We think a lot about membership on decisionmaking bodies, but we eschew crass notions like "winners" and "losers." The work on group empowerment has focused on private associations, not state actors. While we have a vocabulary and grammar for lauding the benefits of diversity, we lack such an account for the benefits decentralization affords to democracy's outliers. Instead, we more commonly associate federalism and localism with those dreaded -isms – racism, parochialism, cronyism.

II. ARE RIGHTS AND DIVERSITY ENOUGH OR DO WE OWE OUR LOYAL OPPOSITION SOMETHING MORE?

The question we must ask is whether the rights guaranteed by the First and Fifteenth Amendments are enough. To be sure, without these foundational rights, decentralization wouldn't matter nearly as much as it does to those groups. It might not matter at all. But, taking a lesson from the Brits, whose views on what the majority owes its loyal opposition have evolved over time,[21] I mean to ask whether today we owe our opposition something more.

A. Dissent and the First Amendment

Start with the First Amendment. Here I will offer a deeply cynical account of the right. Not because it's entirely true. But because it ought to make us wonder a little, even worry a little. At the very least, it ought to make us less

20. Political theorists who write about "the politics of recognition," for instance, have insisted on the presence of racial minorities on decisionmaking bodies in rough proportion to their share of the population. For an excellent overview of the theory, see generally Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994). Similarly, academics like Cass Sunstein have insisted on the presence of at least one dissenter on every decisionmaking body in explaining "why societies need dissent." CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 164-65 (2003).

21. The term was first used simply to acknowledge that a party in opposition could legitimately be termed loyal. Johnson, *supra* note 1, at 489 & n.4. Over time it evolved into an institutionalized system that grants the leader of the opposition party a cabinet position and creates a shadow cabinet. *Id.* at 492.

dismissive of institutions that complement the work the First Amendment does.

The First Amendment guarantees the right to speak and associate, both core requirements for a well-functioning democracy. But you don't have to be a cynic to recognize that protest and debate are not always enough. Although one can make this point by drawing on the long-standing political science literature on agenda setting,[22] a crude example will do here. Think about the iconic image of the First Amendment: someone standing on a soapbox. A moment's thought should remind us that the soapbox is the least powerful perch in politics. We all know what those in the majority do when they see someone standing on a soapbox. They walk right on by. The right to speak freely is widely accepted nowadays. The most difficult problem for political outliers isn't getting their message out; it's getting their message across.

It's not a coincidence, then, that our dominant model of dissent is the iconoclastic outsider. Free speech is a private right. The moment a citizen ceases to speak for himself and begins to speak for the state, his First Amendment rights all but disappear.[23] The right to free speech is the right of the outsider. Even when dissenters are on the inside, we assume they lack the power to decide. They are *dissenters*, after all.[24]

The First Amendment, then, isn't always that hard for those in power. Certainly, there are times when it is deeply challenging at the human level. Allowing despicable groups like the Nazis to march in Skokie[25] or the Westboro Baptist Church to protest at a veteran's funeral[26] is difficult for everyone, most especially for those being pilloried. But in our stable and tolerant society, these groups are not going to upend the status quo. And given the challenges associated with effecting change, neither will most of the people who exercise the speech rights the Constitution confers upon them.

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22. *See, e.g.*, FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (2d ed. 2009); ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (2d ed. 1983); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 2010); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (reprint ed. 1988).

23. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006).

24. For a more in-depth exploration of these ideas, see Gerken, *Dissenting by Deciding*, *supra* note 7.

25. *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977) (per curiam).

26. *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

This is not surprising. It is hard for those in power to cede others power. It is easier to allow them to speak against power's exercise. The First Amendment confers a right to speak against a decision. Not to change it. Not even to influence it. Of course that is the case, you might think. There can be no right to influence or change the majority's mind. Participation, not power, is all political outliers can demand.

A cynic might well both concede the basic truth of those claims and yet wonder whether the right to speak is a bit too convenient for those in power. What better way to maintain one's power than to let people speak against the status quo while depriving them of the ability to change it? I'm not suggesting some conspiracy-fueled fantasy that those in power have maintained First Amendment rights for these purposes. But a cynic, upon hearing that free speech confers legitimacy on our political system, will naturally wonder whether that legitimacy is deserved.[27]

A cynic might even think that the mainstream theories undergirding the First Amendment largely reflect the majority's interest. Perhaps that's not surprising given that the task of the early case law and scholarship was to persuade those in power to accept a robust right in the first place. Nonetheless, it's hard not to notice how appealing our justifications for free speech are to a complacent majority.

The First Amendment, for instance, is supposed to create a robust marketplace of ideas,[28] something any decisionmaker would desire. Dissenters play a role, to be sure. If their ideas are good, they may eventually win a majority to their side. But proponents of the theory are just as happy having wrongheaded dissenters around so "we" can test our arguments and figure out precisely how right "we" are.[29]

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27. The formulation was inspired by a conversation with Zephyr Teachout. Waldron poses the issue sharply: "[I]t is hard to avoid the impression that rights of free expression are just freedoms to let our words go out into the air, where by and large and for most of us they dissipate without any discernable effect on the government that is being conducted by others in our name . . . ." Waldron, *supra* note 2, at 6.

28. The touchstone for this argument is JOHN STUART MILL, ON LIBERTY 37-40 (The Legal Classics Library 1992) (1859). For work developing these arguments, see generally ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 559-66 (7th prtg. 1967); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (Vintage Books ed. 1967); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995); and R. George Wright, *A Rationale from J. S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149.

29. For the early and seminal example, see MILL, *supra* note 28, at 37-40.

So, too, the First Amendment is thought to ensure we have the information we need to govern ourselves.[30] It's another idea that ought to be deeply appealing to the majority. And it's another that places dissenters in a supporting role; our focus is the majority receiving the information rather than the minority conveying it.

Even when the First Amendment is a difficult pill to swallow, scholars have tempted the majority with claims that it demonstrates its tolerance toward those who dare question it by allowing them to speak.[31] Tolerance, of course, is a lovely idea. But it also suggests a set of power relations that are agreeable to a complacent majority, maybe even to a self-satisfied one.

Those First Amendment theories that place the interests of dissenters front and center generally emphasize the right's expressive dimensions.[32] But these arguments tend to be highly individualistic, often romantic. They are not the stuff of power politics. They are not what matter to cynical political actors trying to get something done.

When one views the First Amendment through the lens of power relations, other worries emerge. Associational rights are understudied. The role of groups is underplayed. And precious little attention is paid to what takes place *inside* political structures. Which means precious little attention is paid to what takes place inside the institutions where power lies. The First Amendment is all

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30. Alexander Meiklejohn has led here. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960). Contemporary scholars of many stripes have also written in this vein. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300-01 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1971); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) [hereinafter Fiss, *Why the State?*]; Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 316 (1992).

31. *See* LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

32. Steven Shiffrin writes some of the most evocative work in this area, *see* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 93 (1990), but he writes in good company, *see, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 165-78 (1986); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-96 (1978); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 232-37 (1992).

about the road to the statehouse. But our interest in the fate of dissenters seems to end at the statehouse door.

Scholars of dissent, conscious of the First Amendment's shortcomings, have offered a variety of proposals about the "something more" we owe our loyal opposition. Some of those proposals are so politically implausible that I won't canvass them here. Most of the politically viable proposals have emphasized doctrinal changes that would, in turn, generate more opportunities for speech. Some, for instance, have called for a more "institutional" First Amendment that lends greater protections to speech-facilitating institutions like universities, the media, and the like.[33] Others have insisted we need more public spaces for dissent.[34] Still others have urged the government to create more platforms for debate or more space for expression.[35]

There are two things to note. First, most of these proposals rest on the assumption that we owe our loyal opposition more speech and more platforms for speech. These proposals are not aimed at facilitating different forms of advocacy, offering different platforms for mobilizing, or supplying different levers of change. Second, scholars of dissent have not argued that decentralization is the solution we need, let alone that it's the solution we already have.

B. Race, Diversity, and the Right to Vote

If we turn to the question of racial minorities and the right to vote, a similar story emerges. It's not hard to see the shortcomings of the Fifteenth Amendment, at least when diversity is the touchstone for democratic fairness. Vindicating the right to vote may have been the hardest fight. But if all it guarantees is statistical mirroring, it may not provide racial minorities enough democratic power.

As noted above, diversity is often depicted as the measure of successful racial integration. Peer through the lens of power relations, and you'll quickly notice that diversity ensures that racial minorities experience the same numeric inequalities in governance that they experience everywhere else. It's a statistical

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33. *See, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN L. REV. 1256 (2005).

34. *See, e.g.*, Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587 (2007).

35. *See, e.g.*, Fiss, *Why the State?*, *supra* note 30; Larry W. Yackle, *Confessions of a Horizontalist: A Dialogue on the First Amendment*, 27 U. KAN. L. REV. 541 (1979).

guarantee that racial minorities will lose on any issue that divides us along racial lines, that they will never wield the power that whites unthinkingly wield. You don't have to be a cynic to think that it's an odd theory of empowerment.[36]

Diversity, in short, is a measure of racial integration that involves a relatively anemic vision of racial power. It's one where racial minorities never get to stand in the shoes of the majority. It's one where the tables are never turned on those in power, where whites never risk defeat for issues where we divide along racial lines.[37]

Nor does a Dahlian account alleviate these concerns. Dahl famously argued that "minorities rule" in a democracy, with shifting coalitions of minorities wielding majority power over time.[38] But, of course, the nationalists worry about racial minorities precisely because they aren't full partners in Dahlian coalitions.[39]

Unsurprisingly, scholars of equality have long worried about the danger of submergence. As with scholars of dissent, they've also suggested that we owe democracy's outliers "something more." Some have emphasized the notion of "critical mass."[40] Thus far, however, that idea hasn't pushed us past statistical mirroring.[41] Some have proposed "taking turns" deciding, or unanimity rules that would force members of the majority to pay attention to the views of racial minorities.[42] The uptake has been slow, to say the least. Other scholars have gone further, urging the creation of "safe spaces" or private associations for

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36. The vote obviously matters to dissenters as well and, unsurprisingly, the diversity model dominates here as well, albeit in a less explicit form. We typically assume that dissenters should be represented in rough proportion to their share of the population. Here again, it's a convenient notion for members of the majority. To be sure, they will be forced to deal with challengers. But dissenters can only succeed through argument; the majority always retains its ability to outvote them.

37. For a more in-depth exploration of these themes, see Gerken, *Second-Order Diversity*, *supra* note 7.

38. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 133 (1956).

39. Thomas Christiano terms this "the problem of persistent minorities." THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS 288 (2008); *see also id.* at 226-28, 288-99; Gerken, *Second-Order Diversity*, *supra* note 7, at 1110.

40. The validity of this approach was famously litigated in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

41. A point made by the *Grutter* dissenters. *Id.* at 378-87 (Rehnquist, C.J., dissenting).

42. LANI GUINIER, THE TYRANNY OF THE MAJORITY 5, 73, 107 (1994).

racial minorities.[43] That's all well and good. But safe spaces are also separate spaces, which means they are not a solution for the problem of race and politics. Outside the United States, still others have favored territorially defined enclaves protected by sovereignty, guaranteed representation, and the like.[44] In casting about for solutions, however, scholars of equality have not looked to Our Federalism—the substate, local, and sublocal institutions where racial minorities are in the majority—as sites of racial empowerment.

C. Do We Owe Our Loyal Opposition Something More?

None of this should be news to the nationalists.[45] Even if academics weren't all but allergic to being in favor of anything, the defects of the rights paradigm are well known. So, too, most nationalists would readily concede that diversity is at best an imperfect touchstone for democratic fairness given how power works. Nationalists, in short, are aware of the inadequacy of the means by which we build a loyal opposition and the measure by which we judge our success.

But if we owe our loyal opposition something more, it's fair to ask the nationalists what that "something more" is. Academics always love to play Mary Hume, showing their sophistication by finding fault in all things.[46] But while it's logically tenable to reject the only options on the table, it's intellectually cowardly, at least when you have nothing better to offer up. Why, then, do nationalists not only ignore the possibility that federalism provides "something more" for our loyal opposition but reject that possibility outright? And why do they reject it on the very grounds that ought to make them appreciate it—the role it plays in ensuring that our loyal opposition remains loyal?

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43. For a thoughtful assessment of the relationship between safe spaces, opinion formation, and politics, see CASS R. SUNSTEIN, GOING TO EXTREMES 151-54 (2009).

44. *See generally* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 108-15 (1995).

45. At least if they've been reading their Barron or their Fiss or their Guinier. *See generally* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Fiss, *Why the State?*, *supra* note 30; GUINIER, *supra* note 42; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991).

46. SHEL SILVERSTEIN, *Almost Perfect*, *in* A LIGHT IN THE ATTIC (1981) ("'Almost perfect . . . but not quite' / Those were the words of Mary Hume / At her seventh birthday party, / Looking 'round the ribboned room. / 'This tablecloth is pink and white— / Almost perfect . . . but not quite.'").

III. PUTTING UP OR SHUTTING UP: IS FEDERALISM OUR BEST SHOT AT GIVING THE LOYAL OPPOSITION "SOMETHING MORE"?

During the last few years, a great deal of work—including much of my own—has been devoted to identifying what federalism offers our loyal opposition.[47] If anything, the theoretical work has lagged behind what's taking place on the ground. Social movements routinely move their causes through local sites in order to tee up national debates. The majority of work on both conservative and progressive causes is being done at the state level, be it climate change or gay rights or abortion or guns. Racial minorities wield considerable power at the local level and have used that power to remedy inequality and promote civil rights. Members of our loyal opposition, in other words, have not overlooked the opportunities Our Federalism offers them.

Both theory and practice suggest that federalism *is* a robust complement to rights as a means to integration, and diversity *isn't* integration's only measure. Better yet, this alternative vision of both means and ends has been part of our constitutional fabric since the Founding. Nationalists pride themselves on their loyalty to democracy's outliers. That's why they're nationalists in the first place. The question in this day and age is whether they have it backwards.

Instead of rehashing the extant work, I'll briefly examine Our Federalism through the lens of loyalty in an attempt to show how it compensates for the

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47. In addition to my own work, *supra* note 7, this includes Ernie Young's work describing the role states play in empowering the party out of power at the national level, Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1285-87 (2004); *see also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 7 (1988); Akhil Amar's discussion of the role states play in monitoring federal officials and training the loyal opposition, Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 499-505 (1991); *see also* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 137-38 (2001); Andrzej Rapaczynski's depiction of local power as a "counterbalance" to federal lock-up, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 386-88; Judith Resnik's work on localism's role in promoting international rights, Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE. L.J. 1564 (2006); Cristina Rodríguez's work on the role federalism plays in mediating immigration battles, Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Jessica Bulman-Pozen's work on the role that states play in facilitating partisan competition, Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); and the work of Richard Schragger on the role of the local in the same-sex marriage debate, Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2573 (2006).

shortcomings of the First and Fifteenth Amendments. I'll even argue that federalism might one day compete with diversity as the measure of our success.[48]

I don't mean to convince you that federalism is perfect or even perfectible. I simply aim to show that it is the best candidate we have for the "something more" we owe our loyal opposition. And by "best," I mean that it comes closest to hitting the sweet spot where normative attractiveness and practical seriousness meet. I want to place special emphasis on practicality here. If you think that the solution to what ails our democracy is for the country to wake up tomorrow and start radically redistributing wealth or politicking in a genuinely deliberative fashion, you can stop reading now.

Because loyalty is a two-way street, we must focus on at least two closely related tasks if we want to secure a loyal opposition: First, how do we create sufficient space for oppositional politics to earn the opposition's loyalty? Second, how do we show our respect for the opposition whose loyalty we in turn demand? The first has largely to do with instrumental concerns, the second with expressive ones.

A. What Do We Owe Dissenters?

Creating space for oppositional politics is, needless to say, something the First Amendment does. It allows dissenters to speak and organize. And it signals respect for our loyal opposition by cloaking those activities in the revered, even the romantic, mantle of dissent. Federalism-all-the-way-down also helps achieve those goals. Here's how.

1. Building a Loyal Opposition by Making Space for Oppositional Politics

If making space for oppositional politics helps earn the loyalty of the opposition, federalism matters. At the very least, decentralization lends greater visibility to dissenters' views because it allows them to offer real-life instantiations of their ideas.[49] The First Amendment allows dissenters to publicize their views, to be sure. Many think that the proliferation of media

48. For those who immediately want to object on the grounds that something can't be both a means of achieving something and a measure of achievement, please just hang on until Section III.C.

49. For an in-depth analysis of this argument, see Gerken, *Dissenting by Deciding*, *supra* note 7, at 1759-74.

forms has only made dissenters' efforts easier in that regard, and surely that is sometimes true. But the vast array of information sources also creates the risk that dissent will be swamped by the many other media sites competing for our attention.[50] For every Wendy Davis,[51] there are thousands of protestors who can't find their way onto our screens. For this reason, the "more of the same" remedy to the First Amendment's shortcomings may not be the "something more" our loyal opposition needs. Generating more platforms for dissent—more blogs, more editorials, more YouTube videos—might not make a difference. It might even make things worse.

When democracy's outliers can "dissent by deciding"—when they can embed their views into a governance decision—advocacy takes a quite different form. The platform alone matters. Decisions made by state and local governments, on average, get more publicity than protests or blogs or editorials. Journalists report on them, for one thing. The decisions matter, for another. Think, for instance, about the sea change that occurred in the marriage debate when Massachusetts and San Francisco began issuing marriage licenses to same-sex couples. Supporters of marriage equality spent years writing editorials, marching in parades, and arguing with their neighbors. The movement received a much-needed boost when state and local governments put those ideas into practice. Or consider immigration reform, another perennial subject of debate. What has moved that debate from the editorial page to the front page in recent years? Arizona's anti-immigrant initiatives. You can play this parlor game with almost any topic. Disputes over vote fraud garnered a lot more attention once state legislatures started passing voter ID laws. The movement for universal healthcare was given a lift when Massachusetts put Obamacare's predecessor into place. Marijuana policy now dominates the airwaves in the wake of the Colorado and Washington initiatives. These shifts did not come about because advocates had more opportunities to speak. They came about because advocacy was run through a different platform and took a different form.

Even when reporters aren't paying attention to what states and localities are doing, political elites often are. That's why decentralization complements

50. One might be especially worried given that search engines function by pushing people to already popular sites. As one academic observed, "obscurity hurts." Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL F. 263, 264-65.

51. Luisita Lopez Torregrosa, *After Filibuster, a Star Rises in Texas*, N.Y. TIMES, July 23, 2013, http://www.nytimes.com/2013/07/24/us/24iht-letter24.html.

the First Amendment in a second important way: it facilitates agenda setting.[52] When one group or another "dissents by deciding," the majority can't just ignore dissenters, as majorities are wont to do. Instead, that majority must *do* something to get the policy overturned. Decentralization thus gives dissenters the chance to shift the burden of inertia and force the majority to engage.[53]

The advantages of decentralization go beyond making dissent visible or setting the agenda. "Dissenting by deciding" also gives dissenters a chance to move from the abstract to the concrete. They don't have to talk about how a policy would work in theory. They can show how it does work in practice. They can show it *will* work in practice. That matters in policymaking. Ask yourself, for instance, if healthcare advocates could have persuaded Congress to pass Obamacare without Massachusetts doing it first. Ask yourself whether we would have ever gotten "Welfare to Work" without Michigan and Wisconsin showing us what it looked like in practice.

Decentralization also allows dissenters to build their case for change one step at a time. It is hard to build a national movement. That's why virtually every national movement began as a local one.[54] Gay rights, civil rights, gun rights—they all began small and grew into something bigger. Social movements have long used state and local policymaking as an organizing tool, a rallying cry, a testing ground for their ideas. Moreover, these state and local platforms aren't just sites for early mobilization efforts; they also connect dissenters to the large and powerful networks that fuel policymaking in the United States.[55]

Decentralization also dramatically expands the sites of resistance and the leverage points for change. In our highly decentralized and partially politicized bureaucracy, dissenters help *make* national policy. They do so directly when they serve on juries, sit on locally oriented school boards and zoning commissions, or function as street-level bureaucrats. And they do so indirectly

52. Agenda setting may be the most powerful tool minorities wield in a majoritarian system. *See* Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74, 80-83 (2005).

53. For a fuller account, see Gerken, *Dissenting by Deciding*, *supra* note 7, at 1763-65.

54. This idea may even undergird *Romer v. Evans*, 517 U.S. 620 (1996), the first gay rights victory at the Supreme Court. *See, e.g.*, Nicholas S. Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445, 452-55 (1997).

55. For a description of these networks, see Bulman-Pozen, *supra* note 47, at 1085-87; Resnik, *supra* note 47; and Heather K. Gerken & Charles Tyler, The Myth of the Laboratories of Democracy (2013) (unpublished manuscript) (on file with author).

by electing state and local politicians who serve a nominally bureaucratic role and thus can staff more (or less) cooperative agencies to carry out federal policy. Federalism thus gives dissenters another perch from which to criticize, and a powerful one at that.

Consider one of the most important institutions in the United States: the behemoth we call the Fourth Branch. The First Amendment gives dissenters an opportunity to influence federal regulation from the outside. They can lobby Congress when legislation is passed. They can lobby agencies when a regulation is issued. They can challenge both in court.

Federalism, in contrast, puts skeptics inside the Fourth Branch.[56] When states and localities administer federal law, dissenters are decisionmakers, not just lobbyists or supplicants. They can help set policy rather than merely complain about it. They can control federal law from within rather than challenging it from without. Cooperative federalism is paired with uncooperative federalism.[57] Cooperative localism[58] is paired with local resistance. Even in highly centralized, highly technocratic federal bureaucracies, we see state and local variation in carrying out routinized policy jobs.[59] The rebellion of the street-level bureaucrat is hardly confined to the street.

Insider status gives dissenters advantages that the First Amendment cannot.[60] For instance, they have standing—in the colloquial sense—to challenge the center. Dissenters have always understood that those in power pay more attention to a loyal opposition than to a disloyal one. That's why the dissenters' trope is to affirm their membership in the community by waving a flag or invoking the Constitution or affirming their citizenship. Decentralization provides a crucial means for the loyal opposition to signal its loyalty. The people who dissent from the inside have demonstrated their

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56. For an exploration of these ideas, see Bulman-Pozen & Gerken, *supra* note 7, at 1285-87; and Gerken, *The Federalis(m) Society*, *supra* note 7, at 944-47.

57. Bulman-Pozen & Gerken, *supra* note 7.

58. Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007).

59. *See, e.g.*, Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 142-44 (Michael W. Dowdle ed., 2006); John T. Scholz et al., *Street-Level Political Controls over Federal Bureaucracy*, 85 AM. POL. SCI. REV. 829 (1991). *See generally* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY (1980).

60. For additional analysis, see Bulman-Pozen & Gerken, *supra* note 7, at 1268-70, 1288-89; and Gerken, *Of Sovereigns and Servants*, *supra* note 7.

willingness to suit up and get in the game rather than jeer from the sidelines. Better yet, dissenters' arguments will be based on detailed knowledge of on-the-ground facts and will be cast in the vernacular of shared expertise and experience. Our Federalism, in short, creates dissenters who resemble Michael Walzer's "connected critics"[61]: they are "[a] little to the side, but not outside" of the community they are challenging.[62]

The point goes deeper. As I noted in the Introduction to this Feature,[63] there is a burgeoning body of work on what I call the "discursive benefits of structure." Jessica Bulman-Pozen insists that federalism provides a "robust scaffolding" for partisan battles.[64] Cristina Rodríguez suggests that we often can't have a national conversation until we've had a variety of local ones.[65] Indeed, she suggests that the endless contestation at the local level is the only conversation we'll ever have for some highly contested issues. And, to make the point yet again, none of this has been lost on the leaders of social movements.

In sum, for those worried about the First Amendment's shortcomings, it's not clear that our loyal opposition needs the "more speech/more platforms for speech" solutions that seem to dominate the work on dissent. We may need different forms of advocacy, different platforms for mobilizing, different levers of change. That's precisely what federalism and localism provide.

2. Showing Loyalty to Those Whose Loyalty We in Turn Demand

Theory and practice don't just point out federalism's utility to democracy's outliers, but confirm its expressive significance. Our Federalism doesn't just build loyalty by creating space for opposition. It also gives those in power an opportunity to affirm their loyalty to those whose loyalty they in turn demand.

The First Amendment, of course, expresses respect for democracy's outliers by cloaking them in the grand tradition of dissent. But that tradition leaves plenty of room for the self-satisfied aside. We tend to follow the aphorism often attributed to Voltaire when speaking of dissenters—"I disapprove of what you say, but I will defend to the death your right to say it."[66] But

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61. MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 39 (1987).

62. *Id.* at 61.

63. Gerken, *supra* note 8.

64. Bulman-Pozen, *supra* note 47, at 1081.

65. Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014).

66. According to the *Yale Book of Quotations*, this is S.G. Tallenytyre's paraphrase of Voltaire,

underlying that phrase can be a sentiment closer to a catchphrase (mis)attributed to Oscar Wilde: "I may not agree with you, but I'll defend to the death your right to make an ass of yourself."[67] At the very least, our fondness for Voltaire's formulation bears the whiff of another sentiment directed at outliers: "hate the sin, love the sinner."[68]

Decentralization allows those in power to express their loyalty to the opposition in a quite different fashion. Most obviously, it accords dissenters the dignity associated with choosing their own fate, which is why "choice" has long been a celebrated feature of federalism. But federalism and localism do a good deal more than give democracy's outliers a chance to live under law of their own choosing.

If the First Amendment shows dissenters respect by letting them speak *against* the polity, federalism shows them respect by letting them speak *for* it.[69] California implemented federal law when it heavily regulated carbon emissions; Michigan and Wisconsin did the same when they enacted "Welfare to Work."[70] Arizona may have been engaging in "overcooperative federalism"[71] when it passed its controversial immigration laws, but federal law was its touchstone. So, too, Massachusetts's transformative health-care program was carried out under Medicaid.

Decentralization allows us to demonstrate our loyalty toward political outliers in other ways. If the First Amendment allows dissenters to criticize power, federalism allows them to exercise it. It turns the tables,[72] giving political minorities the chance to do what members of the majority routinely do: Win. Make policy. Forge coalitions. Spearhead compromises. Deal with

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which *Bartlett's Familiar Quotations* incorrectly attributes to one of Voltaire's letters. FRED R. SHAPIRO, THE YALE BOOK OF QUOTATIONS 744 (2006).

67. The legendary Fred Shapiro insists that Wilde could not have said this, which ought to be sufficient authority for anyone. *See* E-mail from Fred R. Shapiro to author (Nov. 17, 2013) (on file with author).

68. This appears to be a corruption of a letter from St. Augustine: "With love for mankind and hatred of sins." SHAPIRO, *supra* note 66, at 34.

69. For further exploration of this idea, see Gerken, *Dissenting by Deciding*, *supra* note 7, at 1776-78.

70. Bulman-Pozen & Gerken, *supra* note 7, at 1274-78.

71. Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 445 n.118 (2013).

72. For further exploration of this idea, see Gerken, *Second-Order Diversity*, *supra* note 7, at 1142-60.

dissenters. Enjoy the sense of efficacy—and discomfort—associated with governance.

Federalism isn't the perfect solution for dissenters. Far from it. I won't canvass all of those tradeoffs here, although I've examined them elsewhere.[73] But where decentralization fails dissenters, the First Amendment often succeeds. The opportunities for "dissenting by deciding" are catch-as-catch-can. They emerge only when the right decisionmakers control the right decisions at the right time. The First Amendment, in contrast, is a constant. It allows dissenters to speak and organize whenever they like.

So, too, the First Amendment allows dissenters to speak *however* they like. Federalism requires dissenters to pour their lofty ideals into the narrow policymaking space available. It risks taming dissent, draining abstract commitments of their purity, perhaps even their fire. The First Amendment allows dissenters the luxury of ideological purity, which can only be had outside the policymaking process.

Little wonder, then, that the First Amendment and federalism so often work in tandem. Debate leads to policy, which in turn provides a rallying point for still more debate. Social movements include pragmatic insiders, forging bargains from within, and principled outsiders, demanding more and better from without. Perhaps we can attribute all of this to the genius of the Founders. Or perhaps it was a happy accident that federalism and the First Amendment fit hand in glove. In either case, federalism offers dissenters "something more" than the First Amendment provides.

B. What Do We Owe Racial Minorities?

The Fifteenth Amendment also matters for maintaining a loyal opposition. It guarantees the right of racial minorities to take part in politicking. So, too, the right to vote is a recognition of equality, a sign of full membership, proof of the loyalty the majority extends to a minority.[74] Federalism does the same. Indeed, just as decentralization mitigates the weaknesses of the First Amendment, it compensates for the shortcomings of the Fifteenth.

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73. *See, e.g.*, Gerken, *Second-Order Diversity*, *supra* note 7, 1132-42, 1152-60, 1165-71, 1176-84; Gerken, *Dissenting by Deciding*, *supra* note 7, at 1769-74, 1782-91, 1794-1804.

74. *See* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991); *see also* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 152-55 (1984); ANNE PHILLIPS, THE POLITICS OF PRESENCE 39-40 (1995); Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628, 628 (1999).

1. Building a Loyal Opposition by Making Space for Race-Related Politics

To the extent that racial minorities are part of a social movement or hold outlier political views, federalism obviously confers on them the benefits it confers on all of democracy's outliers. I won't rehash the arguments I made in the preceding Section but will simply incorporate them by reference. But Our Federalism does more to mitigate the shortcomings of the right to vote because it creates space for the right kinds of racial politicking.

Think first about the many issues on which whites and racial minorities divide. Diversity ensures that racial minorities are perpetual losers whenever those issues arise. Federalism, in sharp contrast, ensures that the usual winners sometimes lose and the usual losers sometimes win. That should matter if we seek to earn the loyalty of racial minorities. Political theorists have long argued that participation helps constitute one's civic identity.[75] But those arguments are almost always cast in anodyne, individualistic terms. Little attention is paid to context, let alone crass categories like winners and losers. If we pay attention to power dynamics, however, diversity means that racial minorities will be the perpetual losers on any issue where people divide along racial lines. The only political "script"[76] available to racial minorities is to be the junior partner or dissenting gadfly, something that might affect how racial minorities understand their civic identity. Federalism-all-the-way-down, in sharp contrast, builds loyalty by turning the tables, allowing racial minorities to exercise the same power that the majority unthinkingly wields.[77]

Federalism-all-the-way-down creates space for a second form of racial politicking. It allows racial minorities to protect themselves instead of looking to the courts or Congress for solace. For instance, it enabled a black-majority city council to take steps to combat racism in the contracting industry instead

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75. *See, e.g.*, BARBER, *supra* note 74, at 119-20, 152; CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 23-33 (1970); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 92 (1990); Ellen D. Katz, *Race and the Right to Vote After* Rice v. Cayetano, 99 MICH. L. REV. 491, 512-14 (2000); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 478-79 (1989).

76. I borrow the term from K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, *in* K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 30, 97 (1996).

77. For a deeper examination of these ideas, see Gerken, *Second-Order Diversity*, *supra* note 7, at 1156-58.

of relying on federal law.[78] National rights enforced by national actors build loyalty, of course. But so does granting racial minorities the same power that whites enjoy—the power to look out for their own interests. Federalism reduces the chance that we will treat racial minorities as what Pam Karlan calls "objects of judicial solicitude," rather than as "efficacious political actors in their own right."[79]

Decentralization creates space for a third form of politicking, one that academics rarely praise; it creates opportunities for pork and patronage. Both, of course, are phenomena that routinely lead nationalists to condemn federalism and localism, and fairly so. But we often forget that pork and patronage are means of building loyalty.[80] That's at least one account of how white ethnics were integrated into places like Chicago, Boston, and New York. In these machine-dominated cities, the economic advantages associated with political power exerted a gravitational pull on outsiders, bringing them into the system and giving them a stake in its success. Some even believe that this form of empowerment helped "cool[]" ethnicity's "talismanic force."[81] Perhaps the same is true for racial minorities. Pam Karlan and Sam Issacharoff, for instance, argue that economic progress for African Americans has depended not on rights enforcement, but on business set-asides, affirmative action, and government employment.[82] Note, for instance, that black employment rates go up in cities with black mayors, an effect that is particularly pronounced for municipal jobs.[83] Whether you think this involves eliminating discrimination or equalizing chances to feed at the public trough, "the creation of a black middle class has depended on the vigilance of a black political class."[84]

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78. At least until the Supreme Court deemed the program unconstitutional, giving the program extra scrutiny because it was enacted by a black-majority city council rather than a white one. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

79. Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1332 (2005).

80. For a fuller account, see Gerken, *Foreword*, *supra* note 7, at 52-55.

81. Bush v. Vera, 517 U.S. 952, 1060-76 (1996) (Souter, J., dissenting).

82. Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 47-50 (2003).

83. John V.C. Nye et al., *Do Black Mayors Improve Black Employment Outcomes? Evidence from Large U.S. Cities* (George Mason Univ. Working Paper in Econ., Paper No. 10-11, 2010), http://ssrn.com/abstract=1589138.

84. Issacharoff & Karlan, *supra* note 82, at 49.

2. *Showing Loyalty to Those Whose Loyalty We in Turn Demand*

Federalism also complements the expressive dimensions of the right to vote. Decentralization turns the tables, allowing racial minorities to stand in the shoes of the majority. It confirms not only the majority's willingness to allow racial minorities to win, but its willingness to allow its own members to lose. Turning the tables doesn't just help us shed crude (but important) political scripts like winner and loser; it also gives racial minorities a chance to take their turn "stand[ing] for the whole," which George Kateb has argued is a key feature of representative democracy.[85]

Politics of recognition theorists have argued that diversity is a symbol of equal status because it recognizes minorities' right to participate. This "politics of presence,"[86] some believe, offers racial minorities the dignity of "voice."[87] Federalism-all-the-way-down is also an acknowledgement of equal status. In place of the right to participate, decentralization gives racial minorities the right to rule. In place of the politics of presence, we have the politics of power. Diversity offers racial minorities the dignity of voice. Our Federalism offers them the dignity of deciding.

As with the First Amendment, the Fifteenth Amendment and federalism work in tandem. That's obviously true in the crude sense: the right to vote ensures that racial minorities exercise power at the local level. But majority-minority institutions at the state and local level pair nicely with diversity at the national level. Taken together, they generate overlapping political systems that simultaneously push toward the project of integration while compensating for each other's weaknesses. Some democracies try to earn the loyalty of their ethnically or racially defined minorities by creating separate fiefdoms, which are protected by sovereignty, veto rules, and the like. There are obviously advantages associated with homogenous enclaves, especially where cleavages are deep, politics are divisive, and violence is a lingering threat.

But sovereignty and separation carry with them the risk of isolation and distance. Our Federalism, in contrast, allows racial minorities to exercise control *without* shielding them from the constraints of everyday politics. Racial minorities wield control in many places, but they do so within heterogeneous polities and inside a party system that is linked top to bottom. They must

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85. George Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 ETHICS 357, 360 (1981).

86. PHILLIPS, *supra* note 74.

87. *See, e.g.*, Mansbridge, *supra* note 74, at 651; Taylor, *supra* note 20, at 100.

"pull, haul, and trade"[88] inside their polity and inside their party, at the local level and at the national level, just as would any other group. Our system thus creates opportunities for racial empowerment while allowing cross-cutting cleavages to develop.

C. *Building a Loyal Opposition: Federalism as the Means and Measure of Integration*

I began this essay by observing that the nationalists have a neat plan for building and maintaining a loyal opposition. The First and Fifteenth Amendments are the means by which we build a loyal opposition, and diversity is the measure of our success.[89] What about federalism? Throughout this essay, I've argued that federalism is a complementary means of securing a loyal opposition. But what is the measure of success?

Federalism itself may well be a (partial) measure of success. I don't mean "federalism" in the sense I've discussed above—a set of institutional arrangements that facilitate minority-dominated governance. I mean the *normalization* of those arrangements in the eyes of the body politic.

At the most abstract level, normalizing federalism would mean thinking of decentralization as we do rights—as part of the warp and woof of any well-functioning democracy. We would understand structure to be every bit as important as rights for generating discourse and furthering integration. If federalism-all-the-way-down were normalized in this fashion, we'd cloak state and local politicking in our grand tradition of dissent instead of worrying about lawless localities or parochialism. If federalism were normalized, we wouldn't unthinkingly equate integration with statistical mirroring. We wouldn't affix the dread term "segregation" to heterogeneous bodies simply because minorities are in the majority. The Dahlian phrase "minorities rule" wouldn't just describe a well-functioning national system dominated by ever-changing, multi-group coalitions. It would also describe a well-functioning federal system in which different groups rule in different places.

It's hard to wrap our heads around these ideas because diversity has been the touchstone of democratic legitimacy for so long. It has crowded out other, equally attractive visions of integration. It has prevented us from considering whether *genuine* integration means that democracy's outliers take their turn

88. I borrow the phrase from Justice Souter. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

89. *See supra* Part I.

standing in for the whole. It has prevented us from imagining a world in which political and racial minorities have a chance both to govern and to be governed, a chance both to wield power and stand against it.

At a more granular level, what it means to "normalize" federalism will differ, depending on the group. For racial minorities, we'll have succeeded when decisionmaking bodies dominated by racial minorities are no longer subject to what Lani Guinier calls race's "neon light." On Guinier's view, race causes us to focus on practices that are in fact commonplace;[90] we see gerrymandering when bizarrely shaped districts are dominated by blacks or Latinos but often overlook it when they are dominated by whites.[91] We worry about government contracting or Title VII compliance when racial minorities have exercised power during the policymaking process,[92] but we unthinkingly rubber-stamp other interest-based bargaining under the rational basis test.[93] We call heterogeneous school districts segregated when racial minorities are in the majority but not when whites are in the majority.[94]

Contrast these examples to those instances where we have successfully normalized federalism's arrangements, converting groups that were once democracy's outliers into democracy's insiders. Ethnic and religious minorities of all sorts—Italians and Irish, Catholics and Jews, Polish and Lithuanians—rule at the state and local level. We don't worry about this representational kaleidoscope, let alone condemn it as "segregated," merely because one group or another is taking its turn standing in for the whole. We'll have achieved real integration when the same is true for decisionmaking bodies where racial minorities are in the majority. When news that an important decisionmaking body is dominated by blacks or Latinos is greeted in the same fashion we've greeted the news that the Supreme Court has a Catholic majority—with a collective shrug. When the Supreme Court doesn't impose higher scrutiny on a business set-aside simply because the city council was dominated by African Americans.[95] When Justices no longer feel the need to write about the presence

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90. Lani Guinier, *The Supreme Court 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 189-90 (2003).

91. *E.g.*, Shaw v. Reno, 509 U.S. 630 (1993).

92. *E.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Ricci v. DeStefano, 557 U.S. 557, 596 (2009) (Alito, J., concurring).

93. *E.g.*, Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955).

94. *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

95. *Croson*, 488 U.S. 469.

of black urban power in an employment discrimination case.[96] Or, at least, when Justices exercised about the problem of patronage write just as often about the egregious interest-based bargains struck by dairy farmers in Vermont or ophthalmologists in Oklahoma.[97] When even the supporters of the Voting Rights Act no longer feel the need to defend majority-minority districts as products of the "politics of the second best"[98] but can simply refer to them as products of politics. When judges write about heterogeneous schools where racial minorities are in the majority using some term other than "segregation."[99]

The end game—the normalization of federalism-all-the-way-down—will look different for dissenters than for racial minorities. There will presumably always be some forms of dissent that we will (properly) view as disloyal. We will, however, be able to recognize when particular groups of dissenters have been successfully folded into our loyal opposition. It will be when we no longer look askance at their exercise of power. When we stop using terms like "runaway" or "lawless" localities solely because the group in question converts its dissenting vision into a policymaking reality. When we cease condemning decisions that depart from national preferences as "parochial." When we acknowledge that those who use the levers of local power to promote their outlier views can be termed dissenters, and loyal ones at that.

Though we haven't normalized federalism as a *measure* of integration, we've at least begun to normalize it as a *means* of achieving integration. As noted above, political and racial minorities have long used state and local sites to pursue their agendas. And the significance of that fact has finally dawned on even the most isolated of elite decisionmakers: the Justices of the Supreme Court. One of them, at least. Justice Kennedy's opinion in *Windsor* is close to a textbook description of the role federalism plays in promoting integration.[100] Kennedy plainly understood that states and localities—not Congress, not the federal courts—changed the debate over marriage equality. Note, for instance, Kennedy's ringing endorsement of the instrumental and expressive benefits federalism has conferred on supporters of same-sex marriage. State decisions

96. *Ricci*, 557 U.S. at 598-605 (Alito, J., concurring).

97. *Williamson*, 348 U.S. 483; United States v. Carolene Products Co., 304 U.S. 144 (1938).

98. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

99. *Parents Involved*, 551 U.S. at 736; *id.* at 764 (Thomas, J., concurring); *id.* at 794 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 806 (Breyer, J., dissenting).

100. United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (quoting Bond v. United States, 131 S. Ct. 2355, 2359 (2011)).

to legalize same-sex marriage, he writes, were "responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.'" So, too, the opinion acknowledges that states have influenced our "evolving understanding of the meaning of equality."[101] Kennedy even goes so far as to equate federal interference with state marriage laws (nominally, a federalism question) with discrimination against gays and lesbians (nominally, an equality question), all the while leaving open the possibility that the national government could override state marriage laws that discriminate against same-sex couples. The move irritated academics, with their penchant for clear categories and their stubborn insistence on equating federalism with state autonomy. Predictably, commentators immediately condemned Kennedy as a muddle-head and started squabbling over whether *Windsor* was "really" an equality opinion or a federalism opinion.

This rigid insistence on an either/or approach, however, misses the crucial truth undergirding *Windsor*. The ends of equality are served by both rights *and* structure. In the marriage equality debate—as with so many others—federalism and rights have served as interlocking gears moving us forward. Kennedy's opinion might not have been a model of clarity, but at least it recognized that important fact. *Windsor* is neither an equality opinion nor a federalism opinion. It is both. And that is precisely as it should be.

D. Our Federalism: Imperfect but More Perfectible than Your Father's Federalism

I'll close my plea for the nationalists to recognize federalism as their own by noting another interpretive move that the notion of the "loyal opposition" makes available. Earlier in this essay, I asked, tongue firmly in cheek, whether it's time for the nationalists to put up or shut up when it comes to federalism. One can, however, fairly replace the playground taunt with the policymaker's taunt: *as opposed to what?* If nationalists agree, as I think they should, that we owe democracy's outliers something more than rights and diversity, what "something more" do they have in mind?

As I noted above,[102] proposals have not been particularly forthcoming, and those that have emerged are unlikely to compensate for the shortcomings of the rights and diversity paradigms. Federalism, in sharp contrast, nicely

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101. *Id.* at 2693.
102. *See supra* Section I.B.

complements the First and Fifteenth Amendments when it comes to building a loyal opposition.

Federalism also represents a *viable* solution to the "something more" problem. It's up and running, for one thing. Imperfectly, to be sure. But it's a large-scale solution, and it's already in place. That fact cannot be underestimated if we are hunting for the sweet spot where normative attractiveness and practical seriousness meet. Indeed, while nationalists have always imagined federalism working against the First and Fifteenth Amendments, it's worth remembering that they've also been working in tandem for a good long while. Even if you think the First and Fifteenth Amendments are working just fine, thank you very much, you should at least ask yourself whether federalism has had something to do with that fact.

More importantly, because Our Federalism is so different from your father's federalism, this imperfect system is more perfectible than it once was. Decentralization involves risks, particularly when it comes to political and racial minorities. But those risks are more easily managed in today's world, where federalism is all but sheared of sovereignty. The national government is enormously powerful and involved in virtually every dimension of state and local policy. It is more than capable of protecting the members of our loyal opposition from members of our disloyal opposition.

When sovereignty protected democracy's outliers, we could not easily choose among the groups that federalism empowered. We could not easily distinguish sites that protected democracy's outliers from sites that protected their tormentors. It was difficult, in other words, to distinguish between empowering a loyal opposition and empowering a disloyal one.

Our Federalism is different today. If the national government is willing to spend its political capital, it can either play the national supremacy trump card or bid under the Spending Clause. That means that federalism sheared of sovereignty doesn't just allow us to show loyalty to the opposition. It allows us to demand loyalty in return.[103] A structural solution does not require us to empower an opposition that is disloyal to our fundamental ideals. Perhaps that is what prompted Justice Kennedy to take the position in *Windsor* that has so irked the academy. He insisted that states must have discretion to promote marriage equality while refusing to say that they have just as much discretion to deny it. Whether that position makes sense as a doctrinal matter given the Court's attachment to outdated notions of sovereignty, it is certainly a principled position for Our Federalism writ large.

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103. For a skeptical view of such attempts, see Waldron, *supra* note 2.

Some might worry, of course, about picking and choosing among political outliers, deploying structural arrangements to empower our loyal opposition but not our disloyal one. But as Bruce Ackerman and so many others have warned us whenever we think that procedural neutrality will excuse us from making such choices, at the end of the day we have to have the moral fight.[104]

The notion of the loyal opposition, in sum, reminds us not just that federalism offers the "something more" we owe democracy's outliers, but that the "something more" need not be a trump card in the game of politics. We can preserve appropriately majoritarian practices while still giving political and racial minorities a better shot at democratic success. We can give democracy's outliers a better chance of influencing our views without giving them a right to do so. We can signal our respect for the loyal opposition without licensing a disloyal one.

CONCLUSION

Loyal opposition is a term of art. But it also provides a loose, interpretive frame for thinking about core questions of democratic design. How do we secure a loyal opposition? How do we build loyalty by creating space for oppositional politics? How do we show loyalty to those whose loyalty we demand? Viewed through this lens, the nationalist standbys for protecting and empowering democracy's outliers—rights and diversity—seem inadequate for reasons with which the nationalists are familiar. That, in turn, suggests we owe our loyal opposition something more.

Federalism provides that "something more." Nationalists have long thought that federalism works against the First and Fifteenth Amendments. Today, the opposite is often true. Federalism offers racial and political minorities advantages that cannot be had from rights and diversity alone. Better yet, it isn't just a workable solution; it's a working one.

At bottom, the affirmative case for decentralization pivots off of a simple idea: While it is a commonplace that the United States lacks a loyal opposition—an institutionalized structure that allows democracy's outliers to help govern—in fact we have always had one. Decentralization has woven a loyal opposition into the fabric of our democracy. We have long been aware of the costs associated with federalism. What is missing from our lexicon of localism is a vocabulary for acknowledging that our opposition can be loyal, that minority rule can be a source of racial empowerment not just racial spoils,

104. Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 740 (1985).

that local resistance can be part of the grand tradition of dissent, that it is reasonable—honorable, even—to laud states and localities as staging grounds for national politics rather than offering yet another hazy ode to local participation. Our Federalism furthers what are deeply nationalist, deeply American ideals. Perhaps it's time for the nationalists to devote their considerable energies to improving federalism rather than impugning it. It is *Our* Federalism, after all.

