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**DEMOCRATIC FEDERALISM AND THE  
SUPREME COURT: KEYNOTE ADDRESS  
AT THE 2023 IRA C. ROTHGERBER JR.  
CONFERENCE**

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It is an honor to be here and to have been invited to give this keynote address. My thanks to Professor Suzette Malveaux and Dean Lolita Buckner Inniss, to Student Fellow Charlotte Goodenow, and to Events Coordinator Lindley Bell, all of whom have been so gracious and helpful, and more broadly to the University of Colorado and the Byron R. White Center for the Study of American Constitutional Law.

My talk today is about the relationship between federalism and democracy. It's also about the Supreme Court and why the Supreme Court's failure to protect democracy may be worse than you think and indeed argues heavily in favor of significant court reform. But I'm not going to get to that part till the very end. Instead, I will focus first on the history and claimed benefits of federalism, explain why those benefits require robust

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democracy, and explore the dangers our democracy currently faces.

In this talk, I bring together ideas from overlapping but different literatures and put them in conversation with each other. I rely on historians of the Founding Era. I rely on scholars of federalism, including not only historians, but also theorists and empiricists, to identify the purposes, benefits, and costs of federalism. I rely on scholars of democracy, including political scientists and historians, for insights into when and how democracies descend into authoritarianism and what it takes to avoid or emerge from that state. Relatedly, I draw on scholars who focus on the role of race in American democracy. Finally, I rely on Supreme Court scholars and observers for critiques of the Supreme Court's institutional role with respect to these issues.

Let's start with a discussion of federalism, or more accurately, "Our Federalism."<sup>1</sup> Part of the founding story that we often hear and that, as constitutional law educators, we may even tell, goes like this: The Framers were political geniuses, and when they wrote and ratified the Constitution, they

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1. In *Younger v. Harris*, Justice Hugo Black explained that "Our Federalism" is:

the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

401 U.S. 37, 44–45 (1971).

carefully created structures that would resist tyranny, prevent factionalism, and preserve liberty.

This story often shows up in discussions of horizontal separation of powers within the federal government.<sup>2</sup> But I'm focusing here on the version of the story that we often hear about federalism, what we might call the "mythos of federalism."<sup>3</sup> Under this mythos, the Framers were fearful of a powerful central government and figured out how to, as Justice Anthony Kennedy famously put it, "split the atom of sovereignty,"<sup>4</sup> preserving state governments that were closer to the people and could be responsive to different conditions and preferences. As Justice Harry Blackmun put it, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."<sup>5</sup>

Now, there are at least two things about this story that are, at best, half-truths. The first is the idea that our federalism was designed carefully by the brilliant political minds of the Framers. That suggests that our federalism was seen as something of a platonic ideal by the Framers. Or, as some people argue, it was the carefully calibrated result of deliberations about what amount of sovereignty the states were willing to cede to the federal government.<sup>6</sup>

Here's what we can say about where federalism came from and about why the story I just described is "a mythological story."<sup>7</sup> And by a story, I don't mean it is false in every respect,

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2. *See, e.g.*, *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) ("[T]he Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides 'a single object for the jealousy and watchfulness of the people.'" (quoting THE FEDERALIST No. 70, at 479 (Alexander Hamilton))).

3. I have adopted this term from JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 18 (2022). Grumbach identifies and explains as a "mythological story" the idea that the "framers . . . supported federalism for ideological rather than pragmatic reasons" and that "the framers' support for a weak national government and strong states was unanimous." *Id.* at 19.

4. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

5. *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). Although the quote comes from a dissent, it has been quoted with approval in majority opinions. *See New York v. United States*, 505 U.S. 144, 181 (1992); *Bond v. United States*, 564 U.S. 211, 221 (2011).

6. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 436 (2012) (Scalia, J., concurring in part and dissenting in part).

7. *Cf.* GRUMBACH, *supra* note 3, at 19.

but rather it is deeply incomplete and misleading. In reality, different people had different views about the relationship and division of power between the federal government and the states. Some people wanted a stronger national government. (If you've seen *Hamilton*,<sup>8</sup> you know who one of those people was.) Confusingly, from our modern perspective, those people were known as the Federalists. Their opponents, known as the Anti-Federalists, wanted more power preserved to the states, although exactly what that meant was not entirely clear.<sup>9</sup> As Professor Craig Green has documented, the actual history of the Founding Era reveals a political society in flux, not least as to people's perceptions of statehood.<sup>10</sup> Indeed, "statehood," Green demonstrates, was a concept that evolved simultaneously and interdependently with the nation itself, and about which there was significant contention from the beginning.<sup>11</sup>

The reality, which we must acknowledge, is that the Constitution was the result of political battle and political compromise, not platonic design. But it is also true that it marked a shift from what came before. Under the Articles of Confederation, which the Constitution replaced, "states could 'act independently of each other' with unworkable frequency,"<sup>12</sup> and the central government lacked basic governing powers like the ability to tax. Under the Constitution, the central government became more powerful in a number of respects. And that was the point. In the words of James Wilson at the Pennsylvania ratifying convention, "By adopting this system, we become a *nation*; at present we are not one."<sup>13</sup>

Now, I would not be doing justice to Professor Green's fascinating and nuanced research if I suggested that everyone

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8. See generally HAMILTON ORIGINAL BROADWAY CAST, *HAMILTON: AN AMERICAN MUSICAL* (Atlantic Records 2015).

9. For a discussion of the significant diversity of views between and within those two groups, see, for example, Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 234–47 (2004).

10. See Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1 (2020).

11. *Id.*

12. *Id.* at 43 (quoting Letter from George Washington to James Madison (Nov. 30, 1785), in 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 419, 420 (W.W. Abbot & Dorothy Twohig eds., 1994)).

13. *Id.* at 54 (quoting Remarks by James Wilson at the Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 11, 1787), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS

involved in the drafting and ratification of the Constitution saw it precisely the way that James Wilson did. To the contrary. That is one of his most important points. But it is clear that the Constitution itself takes nationhood very seriously. It's why the federal government is in charge of defense.<sup>14</sup> It's why the federal government has the power to regulate interstate commerce.<sup>15</sup> After all, a single country should not be having trade wars internally, which was one of the things that was happening under the Articles of Confederation.<sup>16</sup>

It is, of course, true that states had and have significant power in our system, and that, as we understand the Constitution today, there are ways that state power is insulated from federal power.<sup>17</sup> But the Constitution is also concerned with protecting the union itself from the states and the states from each other. For example, Article IV, Section 4 says that the United States shall guarantee to every state a republican form of government.<sup>18</sup> As I've written elsewhere, although there was disagreement about *precisely* what a republican form of government meant, two things were clear at the Founding.<sup>19</sup> First, a republican form of government required some kind of representative democracy, albeit one that excluded all women, enslaved people, Native Americans, most free people of color, and some white men.<sup>20</sup> And second, it could not be a monarchy. Why? Well for one thing, because the Framers believed that monarchies were inherently tyrannical and expansionist, and thus a monarchy in one state would be a threat to other states.<sup>21</sup> In other words, the Guarantee arises in part from a belief that

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RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 494, 526 (Jonathan Elliot ed., Washington, D.C., Taylor & Maury 1836) <https://tile.loc.gov/storage-services/service/l1/l1scd/lled002/lled002.pdf> [<https://perma.cc/N6WN-HXF2>].

14. U.S. CONST. art. I, § 8, cl. 11–15.

15. U.S. CONST. art. I, § 8, cl. 3.

16. See, e.g., LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 713 (3d ed. 2000); Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (“[A]n immediate reason for calling the Constitutional Convention [was] the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”).

17. Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–85 (2012).

18. U.S. CONST. art. IV, § 4.

19. See Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183 (2020).

20. *Id.* at 185, 191–92.

21. *Id.* at 190, 194.

some forms of government are incompatible with republicanism and that such incompatible forms of government could threaten the country as a whole.

So, to summarize, our federalism was, from the beginning, underspecified and subject to contention, and it was as concerned with national cohesion and functionality as it was with states' rights.

This brings me to the second big myth about our federalism—the idea that it is inherently liberty-protecting both because state governments are closer to the people, and so more accountable, and because diffusion of sovereign power is preservative of liberty. But these claims simply do not describe our history. To the contrary, our federalism was preservative of liberty for some at the grindingly brutal expense of others. More specifically, at the Founding, the preservation of slavery was intimately tied to the diffusion of sovereign power.<sup>22</sup> It is not at all clear that the Constitution would have been ratified had it not included protections for slavery—both in the form of express provisions, like the Fugitive Slave Clause and the Three-Fifths Clause, and in structural features, like the Senate and the Electoral College, that were also attractive to some smaller northern states.<sup>23</sup> That history alone undermines the myth that federalism—the vertical separation of powers—is inherently liberty-protecting.

To the contrary, not only did our federalism preserve slavery, but, well into the twentieth century, it enabled and protected what some political scientists call “subnational authoritarianism” throughout the Jim Crow South.<sup>24</sup> Federalism's critical role in maintaining first slavery and then another century of often violent racial subjugation cannot be understated. This is not to say that federalism *can't* be liberty-

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22. See, e.g., Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 263 (2000).

23. U.S. CONST. art. IV, § 2 (Fugitive Slave Clause); art. I, § 2 (Three Fifths Clause); art. I, § 3 (providing that every state has two senators); art. II, § 1, cl. 2 (providing that each state has presidential electors equal to the number of congressional representatives plus senators).

24. See, e.g., EDWARD L. GIBSON, *BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES* (2013); GRUMBACH, *supra* note 3, at 175.

protecting or that it is inherently autocratic. But it is to say that the existence of dual sovereigns is no guarantee of either.

Despite this historical evidence, the claim that federalism is liberty-enhancing is frequently made uncritically, without considering what other conditions might be necessary to achieve that end. And here is where I think the Framers got something right—democratic self-government is essential to liberty. The liberty promised by state governments that are closer to the people requires those state governments to actually be responsive to the people.

Perhaps less obviously, like the liberty-protecting justification of federalism, other purported benefits of federalism also do not flow inherently from the simple existence of the vertical separation of power. Here's how Justice Sandra Day O'Connor, a big believer in federalism, explained its advantages in *Gregory v. Ashcroft*:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>25</sup>

But those benefits require something more than structure. As Professor David Schleicher has argued, they depend on “the quality of state democracy.”<sup>26</sup>

Schleicher's argument looks at the extent to which a state's voters focus enough on state-level elections—particularly legislative elections—for elected officials to be incentivized to deliver the policies that the voters actually want.<sup>27</sup> Too often, he argues, state legislative and other state-level elections are what he calls “second order” elections, in which voters respond not to policy positions or past performance, but rather to partisan identification in the context of our national partisan

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25. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

26. David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 769 (2017).

27. *Id.* at 774–75.

polarization.<sup>28</sup> So Republican voters vote for Republican candidates and Democratic voters vote for Democratic candidates, regardless of past or promised future performance. And, he says, “[w]here state democracy does not produce policies or outcomes that are responsive to preferences of residents of the state, we will see less of the benefits of federalism.”<sup>29</sup>

In other words, without functioning state-level democracy, we will not see a diversity of policies that are responsive to local preferences and conditions. Laboratories of democracy cannot develop effective and popular policies that spread across the country if state-level policymaking is essentially controlled by national partisan polarization. And citizens are less likely to civically engage at the state and local levels if doing so is unlikely to affect the nature of the policies that emerge. It’s not just liberty that relies on functioning and responsive democracy, but also the other claimed benefits of federalism.

What is interesting about Schleicher’s argument is that his concerns about the quality of democracy in the states are largely unrelated to the concerns of most contemporary democracy scholars. That’s not a criticism, by the way. He is very much a federalism scholar. But his key insight—that the benefits of federalism depend on responsive state-level democracies—has even more resonance when understood in the context of the challenges to democracy that we see today.

Before I discuss those challenges alongside what scholars of democracy have taught us in recent years, it’s useful to note that much of the most detailed and informative scholarship in this area comes not from those who primarily study contemporary American politics, but from comparativists and historians. As Professor Jake Grumbach puts it, most contemporary American politics scholars “had considered American democracy to be so robust that the potential for backsliding was unnecessary to study.”<sup>30</sup> This is ironic when you consider how recent real democracy is in this country<sup>31</sup>—but that blind spot infects not

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28. *Id.* at 765.

29. *Id.* at 769.

30. GRUMBACH, *supra* note 3, at 150–51.

31. *Cf.* Gilda Daniels, *Democracy’s Destiny*, 109 CALIF. L. REV. 1067, 1080 (2021) (noting that it required the passage of the Voting Rights Act of 1965 to “give true meaning to democracy and dismantle barriers to the ballot box”).



just politics scholars, but also lawyers, legal scholars, judges, and justices.

What these comparative and historical scholars tell us is that the transition from democracy to authoritarianism comes not through bloody coups, but by using the structures and institutions of democracy against it.<sup>32</sup> Consider Hungarian President Viktor Orbán’s takeover of courts—not to mention other institutions—all done through legal means, but which undermined the independent judiciary and protections for individual rights.<sup>33</sup> The authoritarian playbook is to use the structures and institutions (and I would add the rhetoric) of democracy to entrench one party or faction in power, regardless of the actual preferences of the people.

In America today, we have numerous versions of efforts to use the structures and rules of democracy to entrench one party in power. Large numbers of bills to make voting more difficult have been introduced and some passed in Republican-controlled states, particularly targeting voters like young people and people of color who are more likely to vote for Democrats.<sup>34</sup> Often, these bills are promoted using pro-democracy rhetoric, with promises of protecting against overhyped fraud.<sup>35</sup>

Other entrenchment efforts do not have such fig leaves. Unchecked partisan gerrymandering entrenches the legislative supermajorities of one party in states like Wisconsin and North Carolina, whose voters are actually more or less evenly split.<sup>36</sup>

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32. See, e.g., TOM GINSBURG & AZIZ HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 37–38 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

33. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 550 (2018).

34. *Voting Laws Roundup: February 2023*, BRENNAN CTR. FOR JUST. (Feb. 22, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2023> [https://perma.cc/WLP7-MX8M].

35. Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 282 (2022).

36. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019) (describing North Carolina gerrymander designed to ensure “ten Republicans and three Democrats” because, as one Republican legislator explained, “he did ‘not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats’”) (alteration in original); *Gill v. Whitford*, 138 S. Ct. 1916, 1925 (2018) (describing a Wisconsin gerrymander designed to ensure that “Republicans would maintain a majority under any likely voting scenario”) (internal quotation marks omitted). For evidence of overall voting split in North Carolina and Wisconsin, see *North Carolina*, 270 TO WIN, [https://www.270towin.com/states/North\\_Carolina](https://www.270towin.com/states/North_Carolina) [https://perma.cc/7KEH-4QX8]; *Wisconsin*, 270 TO WIN, <https://www.270towin.com/states/Wisconsin> [https://perma.cc/4FGH-577M].

Extreme partisan gerrymandering can lead to such overwhelming supermajorities in other states that minority voices are effectively—and sometimes literally—silenced. Recent events in Tennessee could not make that clearer.<sup>37</sup>

All of these efforts and more demonstrate that we are experiencing democratic erosion. And democracy scholars tell us that what protects against this erosion is not structure, not federalism, but norms and commitments.<sup>38</sup> Modern democracy scholars specifically highlight that what makes democracy work is the acceptance of losing because the next time around, you have the possibility of winning.<sup>39</sup> Entrenchment eliminates the need to accept losing. And, again, we have a lot of attempted, and sometimes successful, entrenchment. And a lot of refusal to accept losses.<sup>40</sup>

Here is where the Supreme Court comes in. The conservative wing of the Court talks a lot about democracy and political accountability. Just last June, for example, Justice Clarence Thomas, joined by Justices Samuel Alito, Neil Gorsuch, and Amy Coney Barrett, explained that “[p]olitical accountability [is] ‘essential to our liberty and republican form of government . . . .’”<sup>41</sup>

This assertion that political accountability is essential to the preservation of liberty has been at the center of some of the most important—and frankly disruptive—recent decisions of the Court. Consider the recent emergence of the “major questions doctrine.” The so-called major questions doctrine, on which I could give an entire speech, is a newly invented doctrine,

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37. See Adam Edelman, *How Redistricting Brought Tennessee to this Moment*, NBCNEWS (Apr. 11, 2023, 11:49 AM), <https://www.nbcnews.com/politics/politics-news/redistricting-brought-tennessee-moment-rcna78953> [<https://perma.cc/8GEX-8MUZ>] (explaining how extreme partisan gerrymandering in Tennessee contributed to Republican lawmakers’ ability to expel two Democratic legislators from the House of Representatives).

38. See LEVITSKY & ZIBLATT, *supra* note 32, at 8–9, 102–17; GINSBURG & HUQ, *supra* note 32, at 11. I don’t mean to suggest that structure is irrelevant or that some structures aren’t better or worse than others at protecting democracy. An example of a “worse” structural feature of our Constitution is the Senate.

39. See LEVITSKY & ZIBLATT, *supra* note 32, at 8–9, 102–17; GINSBURG & HUQ, *supra* note 32, at 11.

40. See, e.g., David Siders, *Why Many Republicans Believe the Big Lie*, POLITICO (June 9, 2022, 7:00 PM), <https://www.politico.com/newsletters/politico-nightly/2022/06/09/why-many-republicans-believe-the-big-lie-00036384> [<https://perma.cc/6AUT-8MWM>].

41. *Torres v. Texas Dep’t of Pub. Safety*, 142 S. Ct. 2455, 2479 (2022) (Thomas, J., dissenting) (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)).

providing that when a particular law appears to give “extraordinary” power to an executive agency through either ambiguous or vague language, it should not be understood to do so.<sup>42</sup> The justification for the major questions doctrine is political accountability. As Justice Gorsuch put it in a concurrence joined by Justices Thomas and Alito, the doctrine

ensures that the national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.<sup>43</sup>

Likewise, in *Dobbs v. Jackson Women’s Health Organization*, the conservative supermajority embraced the longstanding critique of *Roe v. Wade* as antidemocratic, repeatedly emphasizing that because, in the supermajority’s view, the right to reproductive autonomy is not deeply rooted in our history and traditions, the issue must be returned to the people’s “elected representatives,” a phrase the majority used eight times.<sup>44</sup>

Now, as it happens, I disagree profoundly with the major questions doctrine and with *Dobbs*. But I do agree that there is a basic guarantee of political accountability and self-government embedded in the Constitution, and that those guarantees should be a meaningful part of interpreting and applying the Constitution.<sup>45</sup> And as I’ve already argued, functional democracy is necessary for the benefits of federalism to be realized. Yet when the Court makes decisions about democracy and federalism, it routinely undermines democracy, thus

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42. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); see *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) (claiming that although the appellation “major questions doctrine” may be new, the concept is not). Explaining why I disagree with that assertion is beyond the scope of this piece, but suffice to say that I believe there are significant differences between the statutory interpretation undertaken in the older cases on which the Court relies and its recent aggressive wielding of this “doctrine.”

43. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

44. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 *passim* (2022).

45. Cf. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009) (arguing for a canon of statutory interpretation that favors voter enfranchisement).

allowing and even encouraging entrenchment, in ostensible deference to a rigid adherence to structure, while ignoring the harms that entrenchment does to our core structure of federalism.

Consider *Shelby County v. Holder*, the 2013 case that struck down, five to four, the most potent part of the Voting Rights Act—the preclearance provision that required certain jurisdictions, primarily in the South, to get federal approval before making changes to their voting and elections systems.<sup>46</sup> *Shelby County* has had an enormous and devastating effect on democracy, and in particular on responsive multiracial democracy in the previously covered jurisdictions.<sup>47</sup>

Let’s look for a minute at *Shelby County*’s reasoning. Chief Justice John Roberts’s opinion in *Shelby County* has been widely and justly criticized for relying on a completely new and invented principle of “equal sovereignty” between the states, identifying the selective coverage of the preclearance provision as its fatal flaw.<sup>48</sup> But in defining the scope of that sovereignty, it says, “the allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the states,” quoting *Bond v. United States*, a 2011 statutory interpretation case.<sup>49</sup> And it reiterates Justice Blackmun’s claim that “federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>50</sup>

This kind of language is common in cases involving questions about the scope of congressional regulatory authority in light of the Tenth and Eleventh Amendments.<sup>51</sup> Such

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46. See *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

47. See, e.g., Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2145–46 (2015) (discussing the immediate aftermath of *Shelby County* in previously covered jurisdictions); *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/research-reports/effects-shelby-county-v-holder> [<https://perma.cc/D5X5-4CH9>].

48. 570 U.S. at 544–46. For an example of criticism on this point, see Linda Greenhouse, *Current Conditions*, N.Y. TIMES (June 26, 2013, 6:57 PM), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2013/06/26/current-conditions> [<https://perma.cc/DM6G-ALDZ>].

49. *Shelby Cnty.*, 570 U.S. at 543 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

50. *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting), *modified by Martinez v. Ryan*, 566 U.S. 1 (2012).

51. See, e.g., *United States v. Lopez*, 514 U.S. 549, 576 (1994) (Kennedy, J., concurring) (describing liberty-serving purpose of federalism in the Tenth

language is also often used in explaining the interpretation of federal statutes, as in *Bond* and in the frequently quoted case I mentioned earlier, *Gregory v. Ashcroft*, in which Justice O'Connor laid out the benefits of federalism in construing the scope of the Age Discrimination in Employment Act as applied to state officials—in that case, state judges.<sup>52</sup>

But importing that reasoning wholesale into cases like *Shelby County*, cases that address democracy, is another matter altogether. Among other things, doing so ignores the Constitution's commitment, in the form of the Guarantee Clause, to compatible forms of government among the states—compatible forms of government that must incorporate representative democracy—and the Clause's implicit recognition that incompatible forms of government can undermine national cohesion. The Guarantee Clause itself has long been understood to be nonjusticiable—that is, the courts will not adjudicate claims brought under it.<sup>53</sup> But that does not mean the Guarantee Clause is irrelevant to adjudication. I'm arguing that its promise should inform other things that the Court does. In *Shelby County*, for example, the Clause might have informed the analysis of how to honor the promises of federalism.<sup>54</sup> *Shelby County* discussed federalism largely in terms of states' "equal sovereignty," paying no attention to the federalism-based interests that the federal government and the states have in maintaining meaningful representative democracy nationwide.<sup>55</sup> Or consider *Rucho v. Common Cause*, the 2019 case that held, five to four, that partisan gerrymandering is nonjusticiable. Even the majority in *Rucho* acknowledged that partisan gerrymandering is deeply antidemocratic.<sup>56</sup> Both the Guarantee Clause and broader principles of federalism should

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Amendment); *Alden v. Maine*, 527 U.S. 706, 714–19 (1999) (discussing sovereign dignity of the states in the context of the Eleventh Amendment).

52. *Gregory v. Ashcroft*, 501 U.S. 452, 457–59 (1991).

53. *See, e.g.*, *Luther v. Borden*, 48 U.S. 1, 42–43 (1849).

54. Justice Blackmun's famous quote about "diffusion of sovereign power" is itself made in the context of criticizing the majority for its rigid approach that failed, in Justice Blackmun's view, to take into account federalism's liberty-enhancing purpose. *Coleman*, 501 U.S. at 759–62 (Blackmun, J., dissenting).

55. *See, e.g.*, *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013).

56. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (declining to find partisan gerrymandering justiciable despite it being "incompatible with democratic principles") (citation omitted).

have counseled against ruling it a political question, precisely because gerrymandering so manipulates the political process.

The conservative wing of the Court has embraced the mythos of federalism without considering the way federalism actually works. Indeed, that wing of the Court has also embraced the biggest myth of all—the idea that structure itself can be and is protective of liberty. Or, put in terms of the democracy scholarship, it all too often ignores the norms and commitments that are necessary for the preservation of democracy. Instead, it reinforces rigid structures that provide exactly the kind of route to autocracy that we see in other countries and throughout history.

Now, I suspect that some of you are wondering why I am putting so much emphasis on federalism, and why I am, on some level, crediting aspects of the arguments made by the dominant wing of the Court. Wouldn't it be enough just to talk about how bad the Court has been for democracy? What's all the federalism stuff about?

There are at least three reasons. The first reason is that I don't think that all of the justices are equally dug-in to some of their positions in the area of federalism and democracy. I think they are at least somewhat open to argument, and I think we saw that during the oral argument in *Moore v. Harper*,<sup>57</sup> the case about the independent state legislature theory that was argued in December 2022, which I'm happy to talk about in the Q&A.<sup>58</sup> And reaching those justices requires finding some common ground to start with.

The second reason is that I think there is a role for states here, consistent with the theme of this conference. States that value democracy can and should make the kinds of arguments I've been describing in numerous settings. State attorneys general can make arguments in court. State legislatures can

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57. *Moore v. Harper*, 143 S. Ct. 2065 (2023); *see, e.g.*, Justice Barrett's suggestion that the Elections Clause is not a delegation to the States but is rather an example of the Constitution maintaining federal supremacy. Transcript of Oral Argument at 20, *Moore v. Harper*, 143 S. Ct. 2065 (2023) (No. 21-1271).

58. The Court issued an opinion in *Moore* in June 2023, rejecting the extreme form of the "independent state legislature theory" and holding, six to two, that state legislatures are constrained by their state constitutions and by ordinary judicial oversight when they regulate federal elections. *See Moore*, 143 S. Ct. 2065. This pro-democracy result was not surprising in light of the oral argument. Justices Thomas and Gorsuch dissented on both a jurisdictional issue and on the merits. *See id.* (Thomas, J., dissenting). Justice Alito joined only the jurisdictional portion of the dissent. *See id.* (Alito, J., dissenting as to part one).

pass resolutions. I am sure that there is a lot of creative action that smart leaders and activists can embrace to push the idea that our federalism depends on democracy.

It's not just that we lose the benefits of our modern understanding of federalism, including liberty, when we lose meaningfully responsive representative democracy. We lose the central purpose of the Constitution itself—a durable nation. Indeed, we find ourselves in a time when voices on the right and the left are flirting with secession or, as Marjorie Taylor Greene puts it, “a national divorce.”<sup>59</sup> To my mind, this is unacceptable. And so, it is an all-hands-on-deck moment. Every pressure point must be pursued.<sup>60</sup>

And this brings me to my third and last point—something I promised at the very beginning. One of those pressure points is the make-up of the Court.

The make-up of the current Court is itself a product of antidemocratic entrenchment. I could reiterate the history—then-Senate Majority Leader Mitch McConnell's refusal to consider President Barack Obama's nomination of Merrick Garland compared with the rush to confirm Amy Coney Barrett even as people were already voting in the 2020 election.<sup>61</sup> And some of it is a product of antidemocratic structures that long predate the current era. The three Trump appointees are minoritarian in every sense of the word—appointed by a President who lost the popular vote and confirmed with the votes of Senators who collectively represent millions fewer Americans than the Senators who voted against confirmation.<sup>62</sup>

The antidemocratic composition of the Court combined with its antidemocratic jurisprudence means that Court reform may

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59. See Shannon Pettypiece, *Marjorie Taylor Greene Calls for a 'National Divorce' Between Liberal and Conservative States*, NBCNEWS (Feb. 20, 2023, 10:49 AM), <https://www.nbcnews.com/politics/congress/marjorie-taylor-greene-calls-national-divorce-liberal-conservative-sta-rcna71464> [https://perma.cc/6B7D-JKXG].

60. Cf. Miriam Seifter, *Saving Democracy, State by State?*, 110 CALIF. L. REV. 2069, 2072 (2022) (calling democratic decline a “super wicked problem” and arguing that “reforms must begin wherever they are feasible”).

61. See Patrick Taddonio, *On Night of Ginsburg's Death, McConnell Pushed Trump to Nominate Amy Coney Barrett*, FRONTLINE PBS (Nov. 24, 2020), <https://www.pbs.org/wgbh/frontline/article/on-night-of-ginsburgs-death-mcconnell-pushed-trump-to-nominate-amy-coney-barrett> [https://perma.cc/QV2Z-CXUR].

62. See Joshua P. Zoffer & David Singh Grewel, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437 (2020); see also Kevin J. McMahon, *Will the Supreme Court Still “Seldom Stray Very Far”?: Regime Politics in a Polarized America*, 93 CHI.-KENT L. REV. 343 (2018).

be existential.<sup>63</sup> Meaningful responsive democracy is essential to maintaining our nationhood. As a result, changing the make-up of the Court—perhaps in the short run by adding seats<sup>64</sup>—may ultimately be necessary for the survival of the Union. And if the stakes are that high, it might actually happen.

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63. Since I delivered this address in April 2023, the Supreme Court issued its opinions in both *Moore v. Harper*, in which it rejected the independent state legislature theory, and in *Allen v. Milligan*, in which it reiterated longstanding precedent establishing how plaintiffs can establish vote dilution claims under Section 2 of the Voting Rights Act. *Moore v. Harper*, 143 S. Ct. 2065; *Allen v. Milligan*, 143 S. Ct. 1487 (2023). These opinions are pro-democratic but do no more than maintain the status quo. And the status quo is one in which protections for democracy have been eroded in a number of cases. *See* *Shelby Cnty. v. Holder*, 570 U.S. 529; *Rucho v. Common Cause*, 139 S. Ct. 2484; *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (reading Section 2 of the Voting Rights Act to allow numerous voting and election practices that have a disparate impact on minority voters); *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (holding that courts must presume good faith by legislatures even in the face of evidence of discriminatory intent).

64. I am coming to think that adding seats should receive serious consideration only reluctantly. There are obvious downsides to doing so, not least the potential creation of a tit-for-tat arms race that continually expands the Court depending on which party is in power. A variety of other creative ideas for court reform have been and are being proposed, including ideas that attempt to establish a stable equilibrium that partisans on both sides can accept. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019).