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ARTICLE

PREFERENCE-BASED FEDERALISM

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I. INTRODUCTION

During an eight-year run as mayor of South Bend, Indiana, Pete Buttigieg stated, "A Midwestern municipal government isn't the first thing that leaps

to mind when you think of innovation, but it ought to be."[1] Buttigieg explained, "In local government, it's very clear to your customers—*your citizens*—whether or not you're delivering. Either that pothole gets filled in or it doesn't. The results are very much on display, and that creates a very healthy pressure to innovate."[2] In other words, local governments exercise direct authority over the lives of those in their municipalities, more so than state or federal governments. As a result of this relationship, citizens enjoy greater reciprocity in political bonds with local representatives versus state or national representatives.[3] Given the unique connection local governments share with their citizenry, this Article argues that federal and state authorities use local governments to implement laws and policy directives for their citizens.

This is not the first article to argue that states underuse localities.[4] That said, much of localization scholarship focuses on *why* local governments deserve a seat at the table instead of *how* their involvement would work. In particular, the scholarship fails to address the overall impact the usage of localities would have on the Constitution's federalism framework as it is understood today. Understanding why local governments must be involved is necessary in order to find ways to involve them. This Article argues that federalism requires significant contributions from cities to realize their many values.

Part II surveys the history of municipalities in the nation-state dynamic. It compares the diminished state in which most cities found themselves in

1. Pete Buttigieg, *How South Bend, Indiana Saved $100 Million By Tracking Its Sewers*, FAST CO. (Aug. 5, 2013), https://www.fastcompany.com/3014805/how-south-bend-indiana-saved-100-million-by-tracking-its-sewers [https://perma.cc/9RDZ-4KWA] (offering his account of attempts to revive the city of South Bend with the help of local governments).

2. *Id.* (emphasis added).

3. *See generally* Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 297 (2007) (highlighting the benefits of suburban living, Garnett also highlights the benefits many citizens have in choosing "[s]maller local governments [that] also may be more responsive to constituent preferences").

4. *See* Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J.133, 163–174 (2017) (exploring the "[f]ailed [p]romise [o]f [i]nstrastate [f]ederalism" through the lens of bipartisan legislative districts and state preemption); *see also* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1122 (2007) ("[L]ocal units of government were mere administrative conveniences of the state with no inherent lawmaking authority."); David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 392 (2001) ("There are few, if any, matters of concern to state residents . . . the state legislature would be barred from addressing because of the need to respect the rights to self-government of local communities."); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1096–97 (1980) (discussing the early American cities and the hierarchical relationships that existed).

the wake of the Dillon Rule to the recent spark in the power of localities through the Home Rule doctrine. Part III explores how state and federal governments can use localities based on the values scholars and courts claim federalism provides. In exploring these values, this Article highlights the increased importance of preferences and experimentation in contemporary times. This section argues that society has outgrown some values that were once the nation's primary concern. Part IV details the proposed framework, cementing local governments in the contemporary federalism framework. The proposed framework calls for federal and state governments to maximize preference satisfaction by capitalizing on localities' relationships with their citizens. Part V establishes the framework's function in an actual scenario using qualified immunity as a hypothetical experiment. The section details each layer of the government's role in the preference-based framework. Part VI then examines some challenges the framework would face if implemented. While many problems highlighted in this part have workable solutions, others have no clear answer other than a good-faith approach by localities, states, and the federal government.

The reasons to maintain a form of government based on federalism are continuously evolving. Today, the strongest argument in support of this structure is to maximize preference satisfaction. The only way federal and state governments can increase preference satisfaction is to foster policy experimentation at the local level. The preference-based federalism framework provides an ideal mechanism for state and federal governments seeking to maximize preference satisfaction while contemporizing policy experimentation.

II. HOW THE FRAMERS UNDERSTOOD LOCAL POWER AND WHETHER STATES WORK AGAINST THESE ORIGINAL UNDERSTANDINGS TODAY

The story of local government autonomy is vital to the framework proposed later. History reveals a growing understanding among states that cities require power. Furthermore, affording more power to localities allows all levels of government to ensure they are faithfully serving their citizens. Before reaching contemporary times, it makes sense to start with the Framers of the U.S. Constitution and the state constitutions. It is no secret that the Framers neglected to deliver any power to local governments through the text of the Constitution.[5] Understanding this decision should

5. James Herget, a professor of law at the University of Houston, explains:

illuminate how the Framers understood local governments' role and how society should understand it today. This section compares the founding era's understanding of local government with present-day conditions through a brief exploration of different state Dillon and Home Rule regimes.

A. *The Framers*

Many problems ran through the Framers' minds as they created the federal structure. Considering the recent split from the Crown, no issue was more significant than avoiding tyrannical rule. One effort the Framers took to avoid tyranny was the separation of powers. Today, separations of power exist in two forms: horizontal and vertical. The Framers crafted horizontal separation by creating the Executive, Legislative, and Judicial Branches. However, the Framers chose not to articulate three levels of vertical separations in the Constitution, drawing the line at nation-state powers instead of nation-state-local. Why would the Framers leave municipalities out of the equation? More importantly, how much does that decision bind states from affording greater autonomy to their localities?

There are two potential explanations as to why the Framers did not include local governments in the Constitution. The first is that the Framers never understood municipalities to have the same governmental functions as federal or state governments. While this explanation provides an easy answer, it rests on shaky foundations and is quickly dispelled. In *Federalist No. 45*, James Madison brushes over the wide breadth of powers a government entity possesses, noting that "the powers reserved to the several states [] extend to all the objects, which . . . concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state."[6] Accordingly, Madison considered powers like taxing and spending, regulating and enforcing rules of conduct, taking

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> At the time of the Revolution the framers of our state constitutions failed to allocate a basic power in fact acknowledged and practiced, the power of local government. In 1776 the United States enjoyed three levels of successful governmental operation—national, state, and local. Only the first two were given constitutional legitimacy.

James E. Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in Our Early State Constitutions*, 62 VA. L. REV. 999, 1001 (1976).

6. THE FEDERALIST No. 45 (James Madison).

property for public usage, and providing public services and facilities as traditional government functions.[7]

Before and after the Constitution's ratification, local entities served these functions. For example, many New England colonies afforded local entities broad powers to enforce ordinances related to public welfare.[8] Some localities even adjudicate executed orders.[9] Additionally, New Jersey included localities in their state constitution, providing that: "Townships, at their annual Town Meetings . . . shall choose . . . Freeholders of good Character to hear and finally determine all Appeals relative to unjust Assessments in Cases of public[] Taxation."[10] Although many states did not go as far as New Jersey in figuring out a role for localities in their constitutions, states did entrust municipalities with all of the same functions the Framers considered traditional government functions.

The second explanation for the local government dynamic is that the Framers intentionally constructed it. Judge Barron has been at the fore of this argument, noting that "[a]s a formal legal matter, the federal Constitution does not treat local governments as anything approximating coequal sovereigns."[11] In this view, cities and towns have no explicit Constitutional authority to exercise powers other than those granted by the state.[12] Judge Barron's logic implies that the Framers created a system, which encouraged local self-determination[13] absent clear textual mandates. Judge Barron would likely agree that localities impose their will through political force rather than constitutional influence.[14] At best, this line of thinking in the scholarship suggests that the Framers were either apathetic or overly cautious about the role of local governments. Did the Framers

7. Herget, *supra* note 5, at 1001.

8. *See e.g.*, 1 JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 50 (Harvard Univ. Press 1917) (examining the diffusion of power among local entities by the New England colonies).

9. *Id.*

10. N.J. CONST. art. XIV (1776).

11. Barron, *supra* note 4, at 390.

12. *Id.* at 390–91.

13. Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935, 1936 (2003) (defining local self-determination as "the right of citizens to organize local government as they see fit").

14. As one scholar explains:

> While there is no [C]onstitutional mandate for local self-determination . . . political realities are such that any effort by the state to limit [local powers] is understood as a direct threat to local autonomy. [And] [o]nce certain powers have been committed to local control, state governments find it difficult to reassert their authority. *Id.* (emphasis added) (internal quotations omitted).

intend to disenfranchise the local governments that were the glue for states before the Constitution? Legal minds like Judge Barron argue yes, although practical realities point to the contrary.

The Framers' treatment of local governments is one of their only shortcomings. The deliberate silence on local autonomy leaves society to fill the gaps. At one extreme, the silence could constitute an intentional decision by the Framers to provide no Constitutional power to local municipalities. On the other more likely end of the spectrum, the silence suggests the desire to leave the question open and allow states to decide how much power each locality would get. The latter option is the path most states have taken.

This Article argues a third understanding of the Framers' silence on local government in the text of the Constitution. At the very least, the Framers sought to maintain the status quo of local power dynamics at the time of the Constitution's ratification. This conclusion is not at odds with the notion that states solely determine the scope of power for their cities. Instead, it is in recognition that a society with little to no power for municipalities goes against the Framers' intention. Put another way, states that provide no authority or *de minimis* authority to their cities operate against conventional understandings of what power cities could and would have had at the founding. A look at *Federalist No. 32* supports this conclusion.[15] Alexander Hamilton's vision of how states and local governments would work to keep national power at bay necessarily implies that the Framers counted on local governments, to some degree, to be a factor in the federalism scheme of the country.[16]

Alternatively, states that broaden local power are working within a reasonable expectation of how the Framers intended state and local relationships to function. Operating under these assumptions, one can conclude that the Framers understood that states would take some liberties to ensure local governments have the necessary power. That said, what that power would look like seems subjective. This Article recommends that authority begins with the people and what they want from the city they

15. *See generally* THE FEDERALIST NO. 32, at 157 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (describing the division of power and the "necessity of a concurrent jurisdiction").

16. *Id.* at 154 ("[The] necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power . . . ."); *see also* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525–26 (1995) ("If the powers of the federal government are limited, most governing, of necessity, must be done at the state and *local* levels." (emphasis added)).

inhabit. Given the constitutional silence and resulting ambiguity, states should unleash cities to experiment with various policy directives. This conclusion may not be precisely what the Framers intended, but it does not contradict their intentions as much as state regimes that leave localities with no power to experiment.

B. *The Dillon Rule*

The judiciary dealt a titanic blow to local autonomy in the nineteenth and early twentieth centuries. Courts targeted municipal authority in response to a different crisis: monopolies and organization. In the Republic's early days, states gave autonomy to businesses mainly through charters, "which conceived of organizations as largely independent political, social[,] and economic associations exercising coercive powers and enjoying private rights."[17] These charters did not constitute a delegation of power from the states—given that corporations were not in the lawmaking business—but they did imply certain economic privileges and monopolies that the states sanctioned.[18] The nation outgrew corporate charters and recognized the dangers monopolies posed to diverse economic growth and state sovereignty. In response to the threat of monopolies, Congress passed hallmark legislation, such as the Sherman Act and Clayton Act. Courts began an assault on corporate entities using the newly enacted Sherman and Clayton Acts, and many municipal charters did not survive the onslaught.[19]

Like corporate charters, municipal charters functioned in the same way. Essentially, "cities received their lawmaking authority from state statutes—typically, a combination of statutes, each conferring on cities authority to engage in a particular activity."[20] The defining blow to municipalities came from Judge Dillon's 1868 decision in *City of Clinton v. Cedar Rapids & Missouri River Railroad Co.*[21] In *Cedar Rapids*, the city sought to enjoin the

17. Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1204 (2008).

18. *Id.* ("A corporate charter was the conferral by the sovereign of an exclusive and irrevocable privilege, not an acceptance of sovereign legal constraints—a property right, not a delegation of power.").

19. *Id.* at 1206 ("[T]he distinction between municipal and business corporations, between corporations and unions, meant very little; all were equally threatening to individual freedom and state authority. The courts freely used the Sherman Antitrust Act and its successor, the Clayton Act, against unions as well as corporations.").

20. Gary T. Schwartz, *Reviewing and Revising Dillon's Rule*, 67 CHI. KENT L. REV. 1025, 1025 (1991).

21. City of Clinton v. Cedar Rapids & Mo. River R.R. Co., 24 Iowa 455 (1868).

Cedar Rapids and Missouri Railroad Company (CRMRC) from building railroad tracks through the streets of Clinton without the city's consent.[22] CRMRC maintained that the city lacked the authority to prevent the construction because the Iowa legislature sanctioned the project, and state authority superseded local desires.[23] Judge Dillon found CRMRC's argument more convincing, finding that the locality had no power to impose its will where the Iowa legislature provided otherwise. Judge Dillon explained:

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the *corporation* could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature.[24]

And with the stroke of the pen, Judge Dillon eradicated any sense of autonomy Iowa cities possessed. In the wake of *Cedar Rapids*, cities were no more than an extension of the state, and courts would not read in power where state constitutions did not explicitly provide it. Courts have interpreted *Cedar Rapids* to limit city powers to three narrow categories: (1) powers expressly granted by the state; (2) powers necessarily and fairly implied from the grant of power; and (3) powers crucial to the existence of local government.[25] Any ambiguity in state statutes or constitutions is

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22. *Id.* at 464.

> The city of Clinton asks for the injunction upon substantially two main grounds: 1. That the defendant, by its articles of incorporation, is not authorized to build the proposed road from Lyons city to Clinton city; but only to build a road from Cedar Rapids westward to the Missouri river. 2. The common council of the city of Clinton having refused to give its consent to allow any of the streets of the city, or any portion of such streets, to be used by the defendant for the purpose of building its road thereon, the railroad company has no right thus to use the streets, and the city has the right to enjoin it from so doing.

Id.

23. *Id.* at 466 (including the specific language of the Act).

24. *Id.* at 475.

25. *See, e.g.*, Morgan v. Salt Lake City, 3 P.2d 510, 511–12 (Utah 1931) ("[T]he powers of the city are strictly limited to those *expressly granted*, to those *necessarily or fairly implied* in or incident to the powers expressly granted, and to those *essential to the declared objects and purposes of the corporation*, is settled

construed against local lawmaking authority and in favor of state sovereignty.[26]

The Supreme Court of the United States delivered another blow to local governments in *Merrill v. Town of Monticello*.[27] In *Merrill*, the Court held that municipalities did not possess the legal authority to sell bonds.[28] The Court also relied on Judge Dillon's previous holding that "whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter, and the legislation of the state applicable to it."[29] The Dillon Rule remains the majority rule in the United States, with thirty-nine states employing it against their localities.[30] This Article explores whether the Dillon Rule is a problem for the overall framework in Part VI.

C. *Home-Rule Doctrine*

Some states saw the restrictive nature of the Dillon Rule as an opportunity to grant greater express authority to their cities. From that desire came the Home Rule doctrine.[31] In these states' eyes, "[s]tate

law in this state." (emphasis added)) (quoting American Fork City v. Robinson, 292 P. 249, 250 (Utah 1930) (internal quotation marks omitted)).

26. Schwartz, *supra* note 20, at 1025 ("The message of Dillon's Rule—formulated in the late nineteenth century—was that each of these statutory grants of authority should be narrowly construed: if the grant contains an ambiguity, that ambiguity should be resolved against a finding of local government lawmaking authority.").

27. Merrill v. Town of Monticello, 138 U.S. 673 (1891).

28. *Id.* at 673 (articulating the issue as whether "the town of Monticello ha[d] authority, under the laws of Indiana, to issue for sale in open market negotiable securities in the forms of the bonds and coupons on which recovery is here sought"). The Court doubled down on its decision in *Merrill* in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). It held:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.

Id. at 178.

29. *Merrill*, 138 U.S. at 682; *see also* City of Newark v. New Jersey, 262 U.S. 192, 196 (1923) (noting "[t]he regulation of municipalities is a matter peculiarly within the domain of the State").

30. *Local Government Authority*, NAT'L LEAGUE OF CITIES, https://web.archive.org/web/20160804131854/http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority [https://perma.cc/XJU2-B98R].

31. *See* Leslie Bender, Note, *Home Rule, Revisited*, 10 J. LEGIS. 231, 231 (1983) (defining the Home Rule doctrine as a mechanism for "providing cities, towns, and counties with self-governing powers").

legislature's absolute power over municipalities . . . did not prove to vitiate local autonomy."[32] Home Rule found little legitimacy through the courts early on, notwithstanding solid legal legitimacy from Judge Cooley in Michigan and courts in Indiana. Judge Cooley grounded the Home Rule doctrine in the notion that there was an inherent right of self-government to support claims of autonomy made by municipal corporations that lacked political clout.[33] Despite some judicial backing, the doctrine did not catch fire at first among the many states because it proved difficult to square with the language of the Tenth Amendment.[34] Even then, time proved Judge Cooley's theory correct. As legislative burdens grew, states began recognizing structural defects and decided cities could help them fix the problem.[35]

Missouri was the first state to implement the Home Rule doctrine in its constitution in 1875.[36] The criteria proscribed in Missouri's state constitution granted home rule powers only to St. Louis.[37] The primary purpose for installing Home Rule was to alleviate limitations on the municipality most affected by implementing the Dillon Rule.[38] Shortly after Missouri, California became the second state to implement Home Rule.[39] Today, forty states have some degree of the Home Rule doctrine in their

32. *Id.* at 232.

33. *See generally* Howard Lee McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 299, 300–03 (1916) ("It would be folly to deny that in a general way the principle of local self-government is one of those principles that lie at the foundation of American political institutions.").

34. City of Logansport v. Pub. Serv. Comm'n, 177 N.E. 249, 251 (Ind. 1931) (explaining the right of self-government granted the people "an inherent right, which antedates the Constitution, to govern themselves locally, that the Constitution is a grant of power, and that all power not delegated by it remains in the local communities, rather than in the state, exempt from legislative interference").

35. Gerald L. Sharp, *Home Rule in Alaska: A Clash Between the Constitution and the Court*, 3 U.C.L.A.—ALASKA L. REV. 1, 2 (1973) ("[A]s state legislative burdens increased, cities received less attention and began to feel the pinch of Judge Dillon's legacy to local government.").

36. MO. CONST. of 1875, art. IX, §§ 16–25.

37. *Id.*

38. *See also* Bender, *supra* note 31, at 235 ("The Missouri legislature assumed that if it gave cities exclusive powers by constitutional provision(s), the state legislature would refrain from enacting laws which interfered with local powers of self-government."). *See generally* Henry J. Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385, 385 ("The Missouri plan, for the first time in American political history, established municipal home rule by constitutional grant, so that theoretically at least the device was placed beyond the pale of legislative encroachment or annulment.").

39. CAL. CONST., art. XI, § 6 (1879).

statutes and constitutions.[40] However, only ten states have gone as far as removing the Dillon Rule altogether.[41]

The Home Rule doctrine has evolved from a purely structural point of emphasis—making sure cities can make laws in general—to an integral means of satisfying the needs of citizens in cities adequately.[42] Large cities, like New York City, have been at the fore of the Home Rule debate.[43] These highly-populated cities have argued that "municipal governments are better attuned to public sentiment and better acquainted with the particular needs and affairs of the community. The state legislature . . . is unfamiliar with disparate municipal needs and unequipped to deal with the existing multitude of local problems."[44] Smaller cities and states also discovered the benefits of diffusing lawmaking power to their municipalities.[45] Still, states continue to resist the greater incorporation of the Home Rule doctrine into their state-local dynamic—understandably so, as power is likely tricky to reobtain once a state has relinquished it. The solution to the state-locality power dynamic is in the grey area between absolute power in municipalities versus the same in states.

III. THE VALUES OF FEDERALISM: EMPHASIZING PREFERENCES THROUGH LOCAL LABORATORIES AND EXPERIMENTATION

A. *Why Preference-Based Federalism?*

Before diving into the values of federalism, it makes sense to break down preference-based federalism conceptually. Preference-based federalism is a federalist structure focused on discerning what citizens want at the most specific level possible and prioritizing these wants through positive law and

40. Bender, *supra* note 31, at 236, 244–45 (cataloging the different states that have adopted some level of Home Rule for their municipalities).

41. *Id.* at 244–45.

42. *See* Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 280 (1968) ("A recent definition of home rule as 'the autonomy of local government in the sovereign state over all purely local matters' appears to express correctly the legal position of the home rule city.").

43. *See generally Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1145 (1966) ("In New York State, a concerted effort has been made—through constitutional revision—to provide local autonomy and freedom from legislative interference. This effort, initiated in 1894 and most recently renewed in 1963, has enjoyed only limited success.").

44. *Id.* at 1145–46.

45. *See, e.g.,* Vanlandingham, *supra* note 42, at 270 ("Following World War II, Maryland adopted home rule because local requests for legislation placed too great a burden on its state legislature.").

other affirmative measures. The best way to bring the concept of preference-based federalism to life is to entrench the political process at the lowest possible level. This means national and state governments should rely on local governments to be accurate assessors of policy desires for the national citizenry. Depending on the type and degree of experimentation, states, the federal government, or both, should act as managers.[46]

Envision the fundamental components of a sports team: head coach, assistant coaches, and players. Each part of the team has a different role to play but is working to accomplish the same goal. The sports team structure parallels society's system of federalism. The national government is at the helm as the head coach, tasked with making the overall game plan to defeat their opponent. State governments are the assistant coaches or coordinators, communicating the strengths of their players to the head coach. The assistant coaches are also responsible for explaining how the head coach can best use their players to win. Lastly, the players are local governments, tasked with bringing the coaches' game plan to life. Players also call audibles when their judgment of a situation permits an informed pivot from the original game plan. Like any great sports team, input from the players increases the likelihood of success and ensures players maximize effort.[47] In preference-based federalism, the federal and state governments

46. Wiseman & Owen explore what a managerial role might look like through the dynamic of federal and state relationships, concluding with how this dynamic can translate to state and local government relations:

> While the political and, sometimes, judicial and academic rhetoric of federalism often fixates solely on state empowerment, a strong, if also limited, centralized government is an essential element of the United States' federalist system. That centralized government could play the part of manager. Indeed, this is close to the democratic experimentalism scholars' vision: in their proposed system, federal coordination helps state and local experimental governance succeed. And in state-local relationships, the states could play that same centralized coordinating role.

Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119, 1145 (2018).

47. *See* Richard Rapaport, *To Build a Winning Team: An Interview with Head Coach Bill Walsh*, HARVARD BUS. REV. (Jan.–Feb. 1993) https://hbr.org/1993/01/to-build-a-winning-team-an-interview-with-head-coach-bill-walsh [https://perma.cc/Z686-ZJW6] (noting the reliance legendary football coach Bill Walsh had on his players, and the trust he put in them to suggest and remind him of what the players wanted to do: "During 49ers games, my coaches and I always tried to respond to what the players said. *We knew that we needed their input. And it often made a difference.*" (emphasis added)); *see also* Scott Ericson, *'Ownership of the Plays': Teams Encouraging Player Input on Play Calling*, CT INSIDER (Sep. 21, 2021, 10:59 AM) https://www.ctinsider.com/gametimect/football/article/Ownership-of-the-plays-Teams-encouraging-16474520.php [https://perma.cc/9RD8-9558] ("[G]etting players to

(the coaches) harness the power of local governments (the players) to meet their objectives. In this way, preference-based federalism derives from a traditional federalist localization theory.[48] At the same time, this Article strengthens localization theory's normative hook by proving how localities can harmonize with states and the federal government without acquiring additional power.

It is similarly essential to note what preference-based federalism is not. Preference-based federalism complements traditional understandings of dynamic, cooperative, and even dual federalism.[49] The framework is best understood as complementary because it cannot exist without some overarching federalism theory holding it up. For instance, in a cooperative federalist regime, citizens' preferences would be the primary informant and catalyst of state and federal action. Implementing local governments is crucial because they are closer to citizens than states or federal representatives. Preference-based federalism merely adds a small, though vital, cog in the wheel of federalism in recognition of the magnificently diverse community the United States has evolved into since the framing of the Constitution. Furthermore, this cog fits into any version of federalism that has existed so far—dual, cooperative, and dynamic—and is flexible enough to remain useful under any subsequent significant evolutions of federalism.

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learn the signs or words is made easier by many teams involving the players in the process, and in some cases drawing them up themselves.").

48. Stahl, *supra* note 4, at 135.

49. *See* J. B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CAL. L. REV. 59, 103 (2010) ("Under Dynamic Federalism, 'federal and state governments function as alternative centers of power and any matter is presumptively within the authority of both the federal and state governments.'") (quoting Kristen H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176 (2006)); *see also* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815 (1998) ("[S]tate and local officials do not enforce merely their own laws in their distinct policymaking sphere. Rather, as analyzed in a voluminous literature, state and local governments also cooperate with the federal government in many policymaking areas, ranging from unemployment insurance to historic preservation."). One scholar defined the four characteristics of dual federalism as:

> 1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are "sovereign" and hence "equal"; 4 The relation of the two centers with each other is one of tension rather than collaboration.

Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

The next section explores why preferences are ripe for prioritization in society's federalist structure by examining the competing values courts and scholars typically identify as stemming from federalism. The goal is to develop a deeper understanding of the different values in federalism. Fleshing out federalism's values will provide a clearer picture of how the nation-state dynamic benefits from the increased implementation of localities.

B. *Traditional Values of Federalism and Making a Case for Greater Legislative and Executive Action*

1. Identifying and Consolidating the Values of Federalism

Dean Chemerinsky asserts that too "[m]any Supreme Court decisions protecting federalism say relatively little about the underlying values that are being served."[50] Justice O'Connor's opinion in *Gregory v. Ashcroft*[51] serves as the most precise guidance on the values that federalism protects. She notes the following:

> 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.[52]

From Justice O'Connor's opinion, legal scholars have extracted and consolidated these values: (1) "decreasing the likelihood of federal tyranny," (2) enriching democracy by ensuring the government remains close to the people, and (3) increasing policy innovation through experimentation among the states.[53] Traditionally, courts prioritized these values in the order in which Justice O'Connor articulated them, with the order changing when circumstances exclude consideration of one of the values.[54]

To keep up with a constantly evolving world, society must continuously evaluate the need for these values. Principles like preventing tyranny should

50. Chemerinsky, *supra* note 16, at 525.
51. Gregory v. Ashcroft, 501 U.S. 452 (1991).
52. *Id.* at 458 (emphasis added).
53. Chemerinsky, *supra* note 16, at 525.
54. *Id.*

give way to experimentation and policy innovation today. Experimentation and policy innovation best serve the diverse needs of the national citizenry because they focus on preference satisfaction at the lowest level.[55] In recognition of such a diverse citizenry, preference satisfaction should be the main consideration of policy directives today. Municipalities ensure that preferences are materialized most efficiently while also accounting for the most significant number of citizens meaningfully. This section identifies the values of federalism and argues that society has outgrown some of them. To better emphasize these values, society must remain fluid in adopting new values or reduce the prioritization of older ones. After constructing a new hierarchy for the values of federalism, this Article explores the ideal vehicle for states to realize these values.

2. Preventing Tyranny

Professor Rapaczynski points out that "the most frequently mentioned function of the federal system is . . . the protection of the citizen against governmental oppression—the tyranny that the Framers were so concerned about."[56] But exactly how does federalism prevent tyranny? One answer is that federalism provides a structural safeguard through the vertical separation of powers.[57] States act as deterrents of unenumerated encroachments by the national government, while the federal government does the same to the states[58] Additionally, states, and their citizens, call on the courts to define the boundaries of federalism. These suits have protected the states from overbearing national gun regulation,[59] articulated and defined their sovereign immunity,[60] and prevented federal commandeering of state legislative processes and police forces.[61] Limiting federal power guarantees that the nation never becomes purely executive or

55. *Ashcroft*, 501 U.S. at 458.

56. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 380 (1985) (internal quotations omitted).

57. *Id.* at 381.

58. *Id.* at 390.

59. *See generally* United States v. Lopez, 514 U.S. 549 (1995) (declaring portions of the Gun-Free School Zones Act of 1990 as unconstitutional and beyond the traditional understandings of the Commerce Clause).

60. *See generally* Chisholm v. Georgia, 2 U.S. 419 (1793) (holding Article 3 Section 2 of the Constitution abrogated the states' sovereign immunity and granted federal courts the affirmative power to hear disputes between private citizens and states).

61. *See generally* New York v. United States, 505 U.S. 144, 145 (1992) (holding Congress cannot "commandeer" state legislative processes to regulate hazardous waste disposal and instead requiring Congress to regulate that activity directly).

legislative.[62] This limitation is irrespective of whether states have too much or too little power and is more concerned with preventing one branch from becoming the only—in actuality or de facto—ruler of the rest of the country.

The prevention of tyranny is essential; no reasonable person can deny that. That said, at some point, the question becomes: what does tyranny look like today? What does it mean to fear tyranny today? As Professor Weinberg suggests, "The question, then, is what Our Federalism ought to require? What is it that we are afraid of? If Congress finds it necessary to act in some way touching the interests of the states, why should it matter?"[63] At the founding, the Framers had sincere concerns that ambitious elites might thwart their attempt at creating a thriving Republic.[64] Those concerns seem frivolous today. The government has increased to such a scale that any Branch can prevent a political coup. Courts have become so ingrained in society's decision-making—for better or worse—that neither Congress nor the President could dangerously exercise the powers of the other Branches. And if one of those Branches attempted to, the other Branches have matured enough to rebuff the effort. As Professor Weinberg correctly surmises, federalism issues today are almost always narrow determinations of the scope of some state or congressional action.[65] It seems safe to say that tyranny, as the Framers understood it, is far from the chief concern of federalism today.

That is not to say that the fear of tyranny is meritless. Instead, the question is whether society should fear tyranny just like the Framers. The U.S. has matured in its safeguards of the federalist structure, and this is especially true for mechanisms like judicial review. The Branches trust—even if begrudgingly at times—and respect the interpretation of their powers by the courts and behave accordingly. Today, tyranny is a tertiary concern of federalism. And citizens should celebrate this accomplishment as it shows tremendous institutional growth. National and state governments must benefit from the escape of tyrannical apprehension by relying on localities' more concentrated understanding of governance.

62. Rapaczynski, *supra* note 56, at 401–08.

63. Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1296 (1997) (internal quotations omitted).

64. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 326–28 (1997).

65. Weinberg, *supra* note 63, at 1337–42 (1997).

3. Enriching Democracy by Ensuring the Government Remains Close to the People

Representative democracies depend on citizens to legitimize their very existence. After all, without citizens, what is there to represent? At any given moment, the people have a will, and it is the task of the many representatives to bring that will to fruition. Representatives who fail to answer citizens' calls—whether intentionally or because of some other defect—are voted out for those who can get the job done. Citizens having this type of control ensures a close relationship between the government and people. The first value is that the empowerment of citizens creates competition between the states for a "mobile citizenry."[66] Secondly, it guarantees ample opportunity for involvement in the democratic process.[67] And finally, it empowers diverse viewpoints by making the government privy to changing diverse societal needs.[68] The government must remain close to the people to hold it accountable and shape it to best suit citizens. So how do citizens keep the government close?

Federalism is one of the most valuable tools in ensuring people are never too untethered from the government; it turns a tall task, materializing competing goals of a diverse citizenry into an accomplishable one. At their cores, democracies bring citizen policy concerns to the fore and aim to resolve them efficiently.[69] Federalism catalyzes citizens as their policy concerns flow through local policymakers to state and federal policymakers. Federalism enables citizens to force their public policy concerns into the minds of their representatives. Not only are citizens expected to track what the government does, but they are also responsible for bringing about change when they believe the government operates contrary to their desires.

66. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); *see also* MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 2 (AEI Press 1999) ("Federalism is about *competition* among the states."); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 918 (1985) (highlighting "[p]olitical competition among jurisdictions—vertically between national and state governments and horizontally among state and local governments—is often a healthy antidote to monopoly").

67. *See*, *e.g.*, Pietro S. Nivola, *Why Federalism Matters*, BROOKINGS (Oct. 1, 2005) https://www.brookings.edu/research/why-federalism-matters/ [https://perma.cc/82KS-D3QU] (examining how "[i]n principle, empowering citizens to manage their own community's affairs is supposed to *enhance civic engagement* in a democracy" (emphasis added)).

68. Stewart, *supra* note 66, at 918. In mapping out four goals of federalism, Stewart notes, "[t]he fourth [goal] is structural: the promotion of diverse physical and social environments and community cultures is an important objective in an increasingly homogenized world. Decentralized self-government promotes that diversity." *Id.*

69. *Id.*

As Wlezien and Soroka note, "Effective policy representation presupposes public responsiveness to policy as well, however; it presupposes that the public's preferences are reasonably well-informed about what policymakers actually do."[70] By remaining responsive and involved in critical policy issues, citizens expect to motivate politicians "to represent public preferences" and impose meaningful "public inputs" to resulting laws.[71]

Unlike tyranny, the threat of a far-removed government seems more concrete. Debates over power often feature the federal government versus the state government, to the detriment of the average citizen; this is especially true at the Executive level.[72] Although the unitary executive theory has been waning in the academy recently, the idea that the Executive Branch tends to operate in a manner that transcends traditional understandings of separations of power is problematic for the nation's citizens.[73] For example, the Reagan, H.W. Bush, Clinton, and W. Bush administrations started the modern practice of "signing statements."[74] As Ku explains, executive signing statements "served to instruct subsequent executive branch officials charged with executing the new law with the President's preferred interpretation."[75] Ku also notes that, "Presidents have used signing statements to signal that they believe certain provisions of [] statutes are unconstitutional and that they will adopt interpretations that avoid such unconstitutional results or even refuse to enforce certain statutory provisions."[76] While the effect or purpose of signing statements exceeds the scope of this paper, the overall takeaway is that the potential for the Executive Branch to disenfranchise Congress—and effectively the citizens in the process—remains a valid concern.

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70. Christopher Wlezien & Stuart N. Soroka, *Federalism and Public Responsiveness to Policy*, 41 PUBLIUS: THE J. OF FEDERALISM 1, 3 (2010).

71. *Id.*

72. John Yoo, *Unitary, Executive, or Both*, 76 U. CHI. L. REV. 1935, 1935 (2009).

73. *See* Arthur M. Schlesinger, Jr, THE IMPERIAL PRESIDENCY viii–ix (Houghton Mifflin Company 1973) (describing the Executive branch as an "imperial [p]residency," in acknowledgement of the vanishing boundaries of the President's power). *See generally* John Yoo, *Unitary, Executive, or Both*, 76 U. CHI. L. REV. 1935 (2009) (grappling with unitary executive theory and the notion that the President's removal power has the potential to be segregated from their substantive constitutional power).

74. Julian G. Ku, *Unitary Executive Theory and Exclusive Presidential Powers*, 12 U. PA. J. CONST. L. 615, 618 (2010) ("Signing statements are presidential statements attached to legislation upon the signature of such legislation into law. . . . Such statements generally offered presidential interpretations of the laws they were signing.").

75. *Id.*

76. *Id.*

4. Increasing Policy Innovation Through Experimentation Among the States

Historically, policy innovation entailed states functioning as "laboratories of democracy" and "places where governmental innovations [could] begin and spread."[77] Scholars and the Supreme Court have promulgated this understanding of federalism for decades.[78] As early as 1932, Justice Brandeis noted that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[79] And more recently, Justice Ginsburg reiterated that "[the Supreme] Court has long recognized the role of the States as laboratories for devising solutions to difficult legal problems."[80] Justice Kennedy has similarly noted that "the States [] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[81] Justice Kennedy's observation is especially relevant as it points out the most significant benefit of having states try different policies in response to a novel issue. Sometimes the nation cannot immediately discern the *best* solution to a problem, and experimentation allows the country to explore many possible resolutions simultaneously to land on the best one. Experimentation also enables the citizens to choose from an assortment of solutions to the same problem.[82] When states

77. Wiseman & Owen, *supra* note 46, at 1121; *see also* Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 946 (2011) (observing "a frequent justification of federalism [is that it allows] states to make independent choices provid[ing] a kind of laboratory to test policies"); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 493 (1954) ("The federal system has the immense advantage of providing forty-eight separate centers for [policy] experimentation.").

78. *See, e.g.*, Hart, *supra* note 77, at 491–94 (describing the structure and growth of federalism). *But see* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 614–16 (1980) (finding risk aversion, free riding, and other issues often stunt innovation from beginning purely at the local level).

79. New State Ice Co. v. Liebmann, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting).

80. Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 817 (2015) (quoting Oregon v. Ice, 555 U.S. 160, 171 (2009)) (further noting "[d]eference to state lawmaking 'allows local policies [to be] "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry"'").

81. United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

82. For example, in response to the COVID-19 epidemic, State A may listen to their citizens' desire for mask mandates while neighboring State B decides that concern is at a much lower level, so masks are merely optional instead. Ideally, citizens would have the option to reside in or frequent one

experiment correctly, the country develops informed plans to tackle issues requiring a quick response while permitting a desirable degree of variety for citizens.[83]

Unsurprisingly, this Article places policy innovation atop the federalism values hierarchy because it most easily translates to prioritizing citizen preferences relative to the other identified values. There are two ways in which policy innovation and experimentation ensure anti-tyrannical rule and closeness to government. Firstly, policy innovation and experimentation require accounting for the wants and needs of the entire citizenry by making varied policy choices across states and municipalities. In accounting for these different desires, society staves off any one person or entity seeking to install their own individualistic policy decisions against the wishes of the greater public. Through policy innovation and experimentation, tyranny is rendered obsolete. Secondly, policy innovation and experimentation require closeness to citizens for informational purposes. And the closer to the citizens the government is, the more information can be extracted and used to make good policy.[84] Aside from satisfying other values, policy innovation is also vital for its own sake. The country, policymakers, and citizens are always susceptible to unexpected needs to pivot and account for change.

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state over the other, depending on what they sought out of their local and state government representatives.

83. Wiseman and Owen expand on what proper experimentation looks like by outlining three (of a possible six) basic requirements and premises of any valid experiment:

> First, a policy experiment should *reflect one or more hypotheses*. An experiment, at its core, is a test of an idea, and it is difficult to run a meaningful test without first deciding on the idea(s) to test.
>
> Second, experimentation requires *policy differentiation*. That differentiation might occur by design, as in a controlled, randomized experiment, or researchers may opportunistically exploit policy differences that arise naturally. But in either case, the differentiation should allow a comparison that will put the experimental hypothesis to the test.
>
> Third, experimentation requires *control* of confounding variables. In a controlled experiment, experimenters can randomize the distribution of subjects into groups with different treatments, and they can control variables by focusing differentiation on a single key attribute. For natural experiments, such control is much more difficult.

Wiseman & Owen, *supra* note 46, at 1137 (2018) (emphasis added).

84. *See* Deborah Maranville, *Welfare and Federalism*, 36 LOY. L. REV. 1, 7–8 (1990) (explaining states are in a better position to meet citizens' needs than the federal government). In examining the case for greater State power, Maranville notes that "the state can more easily obtain accurate information about its citizens. . . . The state can concentrate on a limited product line more closely tailored to meet the needs of its citizens, than the benefits provided by the federal government." Deborah Maranville, *Welfare and Federalism*, 36 LOY. L. REV. 1, 8 (1990).

Governments must remain able to factor in change quickly. A federalist structure that prioritizes experimentation does precisely that.

There are many issues that citizens often disagree on nationwide. And this divergence does not dissipate when evaluating citizen preferences on a state-by-state level.[85] People want and expect different results from the same conflicts. Federalism requires the people to maintain a close relationship with the government to realize citizens' preferences and expectations. One solution to these concerns is tyranny or forced adaptation of the values of a handful of individuals, like the Executive Branch. As we have explored, the issue with that solution is that it is neither Constitutionally permissible nor societally desirable because it replaces the desires of the many with those of the few.[86] Instead, society can move towards better fulfilling the values of federalism by ensuring citizen preferences are at the fore of the federalist structure. Doing so will guarantee the continued decline of tyranny while also moving the people closer to the government.

C. *Can Courts be Responsible for Materializing the Values of Federalism, or Are There Other Vehicles Better Situated for That Endeavor?*

Some scholars remain torn on how beneficial federalism is, in practice, at realizing the goals identified in the previous subsections. For instance, Rubin and Feeley argue federalism "achieves none of the beneficial goals that the Court claims for it."[87] While Friedman has similarly quipped that "[t]he values of federalism are invoked regularly in much the same way as 'Mom' and 'apple pie': warm images with little content."[88] Disagreement from these great academic minds is always welcome, but their quarrel is misplaced. The notion that federalism has little practical value is false. Cases like *Gonzales v. Raich* show precisely how important it is to properly define and understand how federalism affects the federal government's powers over citizens that desire access to marijuana for medicinal or

85. For example, citizens in neighboring states may share opposing views on issues like: abortion, school choice, COVID-19 measures, environmental regulations, or gun regulations.

86. Having just escaped a monarchal rule, the Framers took explicit steps to ensure no branch was powerful enough to override the other two.

87. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907 (1994).

88. Friedman, *supra* note 64, at 319.

recreational purposes.[89] How courts understand and incorporate federalism into their decisions affects citizens. Perhaps Friedman and other scholars' gripes against the Supreme Court are brought to light by reframing their position. Rather than arguing that federalism fails to achieve its beneficial goals, these scholars should argue that the goals have evolved.

Courts have typically deployed federalism as a shield. For example, the Court has blocked Congress from enacting laws that constitute improper exercises of power under the Commerce Clause,[90] stopped the federal government from commandeering state actors to enforce federal regulatory programs,[91] and prevented Congress from enabling private citizens to carry out suits against states.[92] This is the Court's role and asking them to do anything more compromises their position in the Constitution's overall scheme. The Legislative Branch—both state and federal—and the Executive Branch are often the swords of federalism. These Branches enjoy the flexibility to experiment in a way courts could never dream of. Friedman mistakenly blames the Judicial branch (the shield) for the Executive and Legislative branches' (the swords') flaws.[93] Friedman does not consider that

89. *See* Gonzales v. Raich, 545 U.S. 1, 15–22 (2005) (holding regulation of marijuana under the Controlled Substances Act was within Congress's commerce power because production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market).

90. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 551 (1995) (concluding the Gun-Free School Zones Act was invalid because it did not regulate an activity arising out of or connected with a commercial transaction that substantially affected interstate commerce, and thus, was beyond Congress' power under the Commerce Clause).

91. The *Printz* Court held that:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz v. United States, 521 U.S. 898, 935 (1997).

92. *See, e.g.*, Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 58–76 (1996) (explaining under the Eleventh Amendment, all states are regarded as sovereign entities, thereby implying states may not be sued by parties without their consent, even if they are given authority to regulate those parties' activities through receipt of federal funds).

93. Friedman stated:

> In sum, constitutional doctrine undervalues federalism. National power has been expanded enormously, with state regulatory autonomy concomitantly narrowed. The cases for the most part provide no coherent theory of when national authority may be exercised, nor do they display much in the way of understanding what values might support a respect for state authority. In the one area in which the Court has any theory of national authority (the dormant commerce cases), the primary actor is the judiciary itself, and the impact of that judicial policy could be devastating

the Court's job is not to carry out the goals of federalism. When ruling over a case or controversy, courts must simply identify the goals and consider them, among many other factors. Ensuring change is the President's responsibility as they execute laws.[94] Similarly, Congress affects change by making necessary and proper laws.[95]

Put another way, the Executive and Legislative Branches benefit from working in a mostly non-adversarial system.[96] The federal government can choose to defer to states on some issues in place of setting and enforcing a more national agenda. A state might choose to pursue litigation for many reasons in response to the federal government's action, forcing the interaction to become adversarial. But the states could collectively decide to do their best to realize the national directive, working with the government to bring their vision to fruition. Ultimately, the states have some natural choice, at least at first, in how adversarial the nation-state dynamic is. Courts do not enjoy this flexibility. The nine Justices cannot look at the facts of the case and dismiss the action, ordering the states to try what the federal government proposed. Nor could the Court tell the federal government they are dismissing its case because the states have a better method for dealing with some policy concerns in the country. Courts' hands are tied; they must take in the facts, account for the law, and apply them to the facts at hand with little concern for what makes for the best policy for the country. Given the Executive and Legislative Branches' perceived flexibility, localization and increased adaptation of the Home Rule doctrine are exceedingly viable options for Congress and the Executive to materialize

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to state autonomy. Curiously absent from the doctrine of federalism is any assessment of the specific weight of state interests, any understanding of when national authority properly is exercised, or any attempt to balance state and national interests in a theoretically coherent fashion.

Friedman, *supra* note 64, at 364–65.

94. *See* U.S. CONST. art. II, § 3 (requiring the President "shall take Care that the Laws be faithfully executed").

95. S*ee* U.S. CONST art I, § 8 (permitting Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

96. Political gridlock is always a risk. In any given day, month, or year the Executive and Legislative branches feel anything but non-adversarial. However, the stakes differ starkly at these levels because compromise can be reached. Litigation requires a winner and adoption of their position. This is just not the case when it comes to politics. In fact, compromise is often the name of the game in these Branches.

preference satisfaction, ensure the government's closeness to people, and reduce the likelihood of tyranny.[97]

IV. WHY FEDERAL AND STATE GOVERNMENTS SHOULD EMBRACE PREFERENCE-BASED FEDERALISM

Before introducing any framework that alters the current federalism dynamic, it makes sense to grapple with the incentives and disincentives of exiting the status quo. After all, why would states and the federal government willingly play ball? As it stands, when a state asks a locality to jump, that locality, in turn, must ask, "how high?" There must be some hook to reel in the federal government and states. The reasons the federal government and states should adopt preference-based federalism are at least three-fold: (1) preference-based federalism can serve as a release valve for all of the responsibilities that federal and state governments have subsumed over the years; (2) preference-based federalism makes a virtually political process possible; and (3) preference-based federalism provides verifiable evidence that some ideas are objectively unworkable. To the latter point, this Article argues there is inherent value in figuring out what ideas *will not* work.

A. *Preference-Based Federalism as a Release Valve for Federal and State Governments*

It is a story as old as time. States and federal governments operate on finite resources, making each unit of resources increasingly more valuable.[98] One solution to the fleeting resources problem is delegating tasks rather than maintaining complete control. Bender observes that, "[B]ecause of the federal government's focus on escalating administrative costs for federal level programs designed to remedy state and local problems, additional pressure exists to delegate power to local units of government."[99] The argument is simple: delegating decision-making or experimentation privileges to municipalities will help ensure that federal and state governments give precious resources where they are most needed. Working with localities removes guessing from the equation, limits overspending or

97. Bender, *supra* note 31, at 231.

98. *See, e.g.*, *What is the National Deficit?*, FISCAL DATA, https://datalab.usaspending.gov/americas-finance-guide/deficit/trends/ [https://perma.cc/UN62-43YM] (noting the U.S. government has not had a surplus since 2001).

99. Bender, *supra* note 31, at 231.

overcompensating, and generally increases efficiency while concentrating responsibility on local leaders better suited for these tasks.[100]

Consider the federal government's response to COVID-19 again. One measure President Biden took in January 2022 was to fund the purchase and shipping of around 400 million masks throughout the country.[101] No reasonable person would disagree that someone needed to send masks to stunt the continued spread of COVID across the country. At the same time, a valid concern is whether the federal government approached mask distribution in the most fiscally responsible manner. Following mask guidance from the Center for Disease Control, the Biden administration ordered and shipped out N-95 masks.[102] Assuming the administration attempted to be frugal about the brand of N-95 mask, they could have spent as little as ten dollars for every three masks.[103] That transaction would cost the administration over 1.3 billion dollars, plus shipping costs, which are difficult to estimate. As far as who received the masks, the administration sent them to all pharmacies and supermarkets participating in the "federal retail pharmacy program—which includes major grocery stores and retail pharmacy chains."[104]

While not a terrible plan to distribute masks, there are glaring inefficiencies in the methodology of purchasing and distribution that preference-based federalism would help solve. The government inadequately accounted for cities, counties, and townships that systematically refused to wear masks in response to the pandemic. One study reported that some counties in Florida had mask usage as low as 10–

100. *See id.* ("Home rule returns legislative power to cities, towns, and counties under the philosophy that those closest to the people can best minister to their needs. In turn, such a delegation of power could in theory reduce the federal government's responsibility for the social and economic difficulties local units face.").

101. *See* Rachel Treisman, *The Biden Administration will Give out 400 Million Free N95 Masks*, NPR (Jan. 19, 2022, 9:15 AM) https://www.npr.org/2022/01/19/1074037421/the-biden-administration-will-give-out-400-million-free-n95-masks [https://perma.cc/55AN-X26G] ("The Biden administration plans to send 400 million N95 face masks to give out free through pharmacies and community health centers, part of an effort to increase access to high-quality masks to control the spread of COVID-19.").

102. *Id.*

103. *See* Carolin Lehmann, *Mask Mandates Could Be Coming Back this Month. Here's Where to Find N95 Masks on Sale*, CBS NEWS (Aug. 30, 2022, 74:33 PM) https://www.cbsnews.com/essentials/n95-masks-covid-19-protection/ [https://perma.cc/WA93-DPDJ] (articulating the Biden Administration's plan to distribute N-95 masks).

104. Treisman, *supra* note 101.

16% at the height of the pandemic.[105] Further, states like North Dakota and Montana saw counties with mask rates as low as two percent.[106] These rates prove that the need for masks is significantly lower in these states, yet there is no suggestion that the administration accounted for these statistics when distributing purchased masks. It is likely that these states received fewer masks because of the sheer absence of pharmacies and supermarkets compared to large cities. However, the mayors in these cities could have still provided useful metrics on what their citizens needed, ultimately saving the federal government money. The federal government can also garner additional favor among citizens by showing they are accounting for what citizens desire rather than forcing mask mandates on unwilling people.

B. *Reducing Reliance on Courts to Ensure Society Moves Closer to a Purely Political Process*

As this Article has explained, courts may not be the best place to test the fluidity of federalism.[107] Playing in the joints is best reserved for federal and state governments. These Branches are better suited to listen to citizens through municipal representatives and respond accordingly with affirmative policy choices. Consequently, one goal of federalism should be to achieve a virtually political process for determining policy directives. Preference-based federalism moves toward this goal by removing courts from the equation as much as possible, allowing them to focus more pointedly on violations of the Constitution.

To be clear, this theory of federalism is not forcing courts into a diminished capacity for nefarious purposes. In *Commonwealth Edison Co. v. Montana*, the Supreme Court considered whether a Montana severance tax violated the Supremacy and Commerce clauses.[108] In *Edison*, the Court expressed that they were:

105. *See* Josh Katz et al., *A Detailed Map of Who Is Wearing Masks in the U.S.*, N.Y. TIMES (July 17, 2020) https://www.nytimes.com/interactive/2020/07/17/upshot/coronavirus-face-mask-map.html [https://perma.cc/6X89-74Z5] (providing a detailed map of mask usage per state and county in the United States).

106. *Id.*

107. *See* discussion *supra* Part III.C (proposing courts best use federalism as a shield to protect over-encroachments by the federal government on state governments and vice-versa).

108. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (finding Montana did not run afoul of the Commerce or Supremacy clauses when they enacted a tax levied at varying rates on Montanan coal producers and miners).

> [D]oubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases.[109]

The Court added that "[u]nder our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress."[110] The Court conceded that some federalism questions "must be resolved through the political process."[111] Preference-based federalism moves towards a more political process for the same reasons set forth in *Commonwealth Edison Co.* The theory recognizes the limitations judges face when presiding over policy decisions, shifting the burden to the Executive and Legislative Branches instead. The approach relieves courts of unnecessary duties and permits local governments to become more prominent players. Reducing the judiciary's role while increasing local governments should enable a shift towards more political Branches.[112]

C. *The Value of Exploring What Policies Will Not Work*

Recall Justice Kennedy's declaration that "[s]tates [] perform their role as laboratories for experimentation to devise various solutions where the *best* solution is far from clear."[113] His sentiment implies that policy experimentation also leads to solutions that fall short of the best. Depending on one's perspective, there is plenty of value in experimenting to determine what does not work. And this value might be equal to testing to discern what does work.

For example, the torts field has been the target of concentrated state experimentation for decades.[114] These experiments have ranged from the changing restrictions on private "rights and remedies" for personal injury claims to "reviving the common law tort of public nuisance in efforts to

109. *Id.* at 628.

110. *Id.*

111. *Id.*

112. *See generally* Carl M. McGowan, *Federalism–Old and New–and the Federal Courts*, 70 GEO. L. J. 1421 (1982) (exploring the role federal courts should play in our federalist structure).

113. United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (emphasis added).

114. *See* Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1503 (2009) (cataloging "state legislative 'tort reform' efforts," "common law tort [reform efforts]," and "environmental [tort reform efforts]").

obtain injunctive relief and damages for harm caused by lead paint, gun violence, greenhouse gas emissions, and mortgage foreclosures."[115] There is more than one way to tackle a problem like lead paint or gun violence. But society may never learn *the most* effective fix to gun violence if every state attempts the same solution. There lies the value of trying different fixes. Each attempt helps states discern which solutions are ineffective, marginally effective, or incredibly effective fixes to many states' problems. New York enacted a gun regulation regime focused on requiring applicants for unrestricted concealed-carry licenses to prove a special need for self-defense.[116] Time will tell if this type of restriction is permissible, there is no doubt there is little value in every state attempting the same kind of licensing regime at the same time.

A more hotly contested example is abortion regulation. In *United States v. Texas*,[117] the Texas legislature enacted a law prohibiting abortions after roughly six weeks of pregnancy.[118] The Texas law also permitted private citizens to sue for damages against citizens who violated the law.[119] Put away concerns about how the law nefariously escapes judicial review by allowing private citizens to enforce the statute through a private suit instead of a state actor.[120] Instead, imagine a world where the Supreme Court took this case on the merits and released an opinion finding that Texas's law is an unconstitutional restriction on a woman's right to abortion. This Article argues that there is still value in Texas enacting this statute in the first place. Essentially, the law assessed whether private citizens were content with the effects while garnering commentary from the nation about the enforcement mechanism structure. Texas is trying to reflect specific values it believes its citizens have and created a novel legislative solution to bring forward its citizens' preferences.[121] Whether or not that method was constitutionally sound or permissible is mainly irrelevant. Texas will have effectively

115. *Id.*; *see also* Ruslan Kondratyuk, *Public Nuisance Cause of Action in Lead Paint Litigation*, 16 U. BALT. J. ENVTL. L. 103 (2009) (exploring the resurgence of public nuisance claims as private rights of actions under common law public nuisance doctrine).

116. *See* New York State Rifle & Pistol Assn. Inc. v. Bruen, 142 S. Ct. 2111, 2122–23 (2022) (explaining the New York's current gun regulation regime).

117. United States v. Texas, 142 S. Ct. 522 (2021).

118. United States v. Texas, 566 F. Supp. 3d 605, 620 (W.D. Tex., 2021), cert. granted before judgment,142 S. Ct. 14 (2021).

119. *Id.*

120. *Id.*

121. *See* Tex. Health & Safety Code § 171.202 (stating "Texas has compelling interests from the outset of a woman's pregnancy").

accomplished another experiment to explore the boundaries of abortion regulation in a finite space with people that care intensely about it. There is value in Texas's experiment because it provides another data point in the overall abortion regulatory framework. It also informs other states that might decide to adopt the same experiment or alter the experiment to reflect what their citizens desire.[122]

V. THE FRAMEWORK: EXAMINING THE FUNCTIONALITY OF PREFERENCE-BASED FEDERALISM

With all the necessary pieces fleshed out, this Article now outlines how states and the federal government can incorporate localities under preference-based federalism. Qualified immunity is a controversial issue that will show the framework's flexibility.[123] First, this Article identifies why qualified immunity is ideal for preference-based federalism. Second, it maps out how federal and state governments should use localities in the framework and citizens' roles in ensuring their preferences are communicated. Lastly, it explains how state and federal governments should respond to positive results from the experimentation versus how they should respond if adverse effects occur.

A. *Why Qualified Immunity*

Qualified immunity[124] provides an excellent foundation because it has already proven to be a troublesome doctrine to fix at the federal and state levels.[125] At the national level, Senators Edward Markey (D-MA),

122. Shefali Luthra & Barbara Rodriguez, *Abortion Providers' Main Legal Challenge to Texas' Six-week Abortion Ban is Effectively over*, THE 19TH (March 11, 2022), https://19thnews.org/2022/03/senate-bill-8-texas-abortion-ban-remains-enforced-supreme-court/ [https://perma.cc/L57X-FXCN] (noting "Oklahoma and Idaho's state Senates have passed bills that would emulate Texas' six-week ban").

123. *See generally* William Baude, *Is Qualified Immunity Unlawful*, 106 CAL. L. REV. 45, 46 (2018) ("The doctrine of qualified immunity prevents government agents from being held personally liable for constitutional violations unless the violation was of clearly established law.") (internal quotations omitted).

124. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 3 (2017) ("Qualified immunity shields government officials from constitutional claims for money damages so long as the officials did not violate clearly established law. The Supreme Court has described the doctrine as incredibly strong—protecting all but the plainly incompetent or those who knowingly violate the law.") (internal quotations omitted).

125. *See id.* at 58 ("[I]mmunity's role in Section 1983 litigation is the product of decisions made by multiple actors—judges, defendants, plaintiffs, and the litigants' attorneys.") Part of the problem with qualified immunity likely rests on the fact that it is a judge made doctrine. Had it been a legislative

Elizabeth Warren (D-MA), and Bernie Sanders (I-VT) have cosponsored the "Ending Qualified Immunity Act" and have gained little traction in their efforts to move it through Congress.[126] While at the state level, "[a]t least 35 state qualified-immunity bills have died in the past 18 months."[127] Interestingly, only Colorado has carried out a ban on qualified immunity, but Iowa took a step in the opposite direction, strengthening qualified immunity for police officers.[128] State consensus on what to do about qualified immunity is in disarray.

Qualified immunity is not easy; it requires courts to balance "states' sovereign interests in recruiting competent officers and providing incentives for those officers to faithfully enforce state law."[129] While courts engage in their balancing efforts, states also try to "reduc[e] state-sanctioned violence, increas[e] accountability when unnecessary state-sanctioned violence occurs, redress[] systemic racism, and combinations thereof."[130] To make things more intricate, the federal government is also responsible for protecting its officers from civil liability as they seek to enforce necessary national directives, like border security.[131] Qualified immunity presents a situation that involves all major players in today's federalist structure, has proven difficult to change outright, and may require differing responses for different cities and regions. This Article now explores how preference-based federalism fares in tackling this issue.

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effort from the beginning, society might have already seen an increased willingness by policymakers to tamper down its effects.

126. S. 492, 117th Cong. (2021); H.R. 1470, 117th Cong. (2021).

127. Kimberly Kindy, *Dozens of States Have Tried to End Qualified immunity. Police Officers and Unions Helped Beat Nearly Every Bill.*, THE WASHINGTON POST, https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/CH7R-83TN].

128. *Id.* (noting Arkansas, too, has strengthened qualified immunity in their state, although these added protections only extend to college and university officers).

129. Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L. J. 229, 230 (2020).

130. Fred O. Smith Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 125 (2021).

131. *See, e.g.*, Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022) (considering whether qualified immunity bars a First Amendment speech retaliation and Fourth Amendment claim when a federal border patrol agent suggested to their supervisors that Egbert be investigated by the IRS after engaging in an allegedly unconstitutional search and seizure).

B. *How Preference-Based Federalism Functions and Incorporates Local Governments*

1. Laying Out the Experiment

Before working through the procedural steps of the experiment, it is necessary to lay out the hypothetical experiment. The experiment consists of two competing options. The first option is for a state to eliminate the qualified immunity defense at the state level. This would make qualified immunity unavailable for all state and local government employees. New Mexico has already enacted similar legislation:

> Under [New Mexico law], if a state or local government employee infringes someone's rights within their scope of employment, the victim can sue the government *employer* for damages under the *state* constitution. Crucially, this new cause of action specifically bans qualified immunity as a legal defense.[132]

The second option juxtaposes the first, requiring a state to strengthen qualified immunity. Iowa has taken this approach in evolving its qualified immunity doctrine through the "Back the Blue Act."[133] The Act codifies the Supreme Court's articulation of the qualified immunity standard:

> [A]n employee of the state subject to a claim brought under this chapter shall not be liable for monetary damages if any of the following apply:

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132. *See* Nick Sibilla, *New Mexico Bans Qualified Immunity For All Government Workers, Including Police*, FORBES (Apr. 7, 2021, 4:00 PM), https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/?sh=3ddee8a979ad [https://perma.cc/P96R-477C] (quotations omitted) (emphasis in original); *see also* H.R. 119, 2021 Leg., 55th Sess. (N.M. 2021) (creating a cause of action for a "person who claims to have suffered a deprivation of any rights" due to government actions).

133. *See* Press Release, Kim Reynolds, Governor, Iowa, Flanked by Iowa Law Enforcement, Gov. Reynolds Signs "Back the Blue Act" into Law (June 17, 2021), https://governor.iowa.gov/press-release/flanked-by-iowa-law-enforcement-gov-reynolds-signs-%E2%80%9Cback-the-blue-act%E2%80%9D-into-law%C2%A0%C2%A0%C2%A0%C2%A0 [https://perma.cc/YSC4-C23E] ("I made it clear in my Condition of the State Address that Iowa's law enforcement will always have my respect . . . . Today's bill embodies that commitment in a historic way. The public peace is too important, and the safety of our officers too precious, to tolerate destructive behavior."); *see also* Baldwin v. City of Estherville, 915 N.W.2d 259, 280 (Iowa 2018) (upholding the qualified immunity defense, the court noted that Iowa's understanding of the defense stems from the common law of the State and its foundation in tort law and explained that "due care [is] the benchmark. . . . Accordingly, to be entitled to qualified immunity a defendant must plead and prove as an affirmative defense that she or he exercised all due care to comply with the law.").

> a. The right, privilege, or immunity secured by law was not *clearly established* at the time of the alleged deprivation, or at the time of the alleged deprivation the state of the law was not sufficiently clear that every reasonable employee would have understood that the conduct alleged constituted a violation of law.
> b. A court of competent jurisdiction has issued a final decision on the merits holding, without reversal, vacatur, or preemption, that the specific conduct alleged to be unlawful was consistent with the law.[134]

Essentially, the experiment requires two states to bolster or eliminate the qualified immunity defense. These contrasting positions highlight the very best and worst of the doctrine in a controlled environment.

2. Working Through the Procedural Steps: Figuring Out Time, Place, and Manner

The first step in the preference-based federalism framework is for the national and state governments to identify where experimentation occurs. Choosing the location sounds like it could be more troublesome than it should be, especially if states refuse to subject their citizens to being guinea pigs. But this should not be a problem for qualified immunity because the federal government already has a list of states making affirmative efforts to legislate qualified immunity.[135] It makes sense to choose states other than those that have engaged in previous attempts to rectify qualified immunity. Selecting different states will keep the experiment fresh and increase understanding by all parties that this is a nationally sanctioned trial.

For the sake of argument, imagine that the federal government chooses a traditionally liberal state, California, and a historically conservative state, Missouri, to be the states hosting the federal government's experiment.[136] Additionally, assume that neither California nor Missouri have engaged in any qualified immunity legislation efforts and are starting anew to figure out what policy they would like to attempt.[137] Aside from political parity, these states also differ in size and geographic region, with California having nearly

134. S. 342, 89th Gen. Assemb., 2021 Sess. (Iowa 2021) (emphasis added).

135. Kindy, *supra* note 127.

136. The framework's flexibility is highlighted by choosing politically and geographically different states. However, the framework is not necessarily weakened by choosing two liberal states in close proximity either.

137. Whether each state actually has made legislative efforts to change qualified immunity does not discount the framework. Rather, for the sake of the hypothesis, it makes sense to exercise an extra degree of control over the circumstances.

seven times the population of Missouri.[138] After selecting the states that will participate, the federal government should hand it over to the states for the next part. Under preference-based federalism, each state would choose one or two cities, towns, or subregions—similar to the federal government's selection process—to contain the scope of the experiment and constrain the number of citizens for which they must account.

State representatives might choose Modoc County[139] and Los Angeles County as their ideal localities for California.[140] And for Missouri, state representatives could select Bates County[141] and St. Louis County.[142] In theory, these states chose these counties because they are politically opposed, geographically distanced, and likely to capture varied opinions among the citizens of their states. At this point, each state would pass the baton to their localities, explaining to them the goal of the experimentation without handicapping the locality that experiments. The latter part is crucial because states must capitalize on the personal relationship localities have with their citizens and remain hands-off intimate details of how the locality extracts information through experimentation.

How each locality extracts its citizens' preferences is not essential to determining the experiment's effectiveness. Perhaps for the bigger counties, St. Louis and Los Angeles, the local leaders engage in a version of notice-and-comment rulemaking.[143] This methodology would be better suited for large counties because it provides an easily accessible means to solicit opinions from various citizens. Perhaps the local leaders could create a

138. UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/CA [https://perma.cc/7D8B-XXTW] (showing the population estimate as of July 2021 in California was 39,142,991 people); UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/MO [https://perma.cc/822Z-T8DS] (showing the population estimate as of July 2021 in Missouri was 6,169,823 people).

139. *California Election Results 2020*, POLITICO, https://www.politico.com/2020-election/results/california/ [https://perma.cc/JA8K-3CTD] (showing 71.7% of voters voted for Trump in Modoc County, while only 26.5% voted for Biden).

140. *Id.* (revealing 71% of voters voted for Biden in Los Angeles County, while only 26.9% cast their vote for Trump).

141. *Missouri Election Results 2020*, POLITICO, https://www.politico.com/2020-election/results/missouri/ [https://perma.cc/N537-SVUL] (indicating in Bates County, 78.4% of eligible voters voted for Trump, while only 19.9% voted for Biden).

142. *Id.* (displaying in St. Louis County, 61.2% of voters voted for Biden, while 37.2% voted for Trump).

143. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 477 (2011) (noting one version of commentary rulemaking, the textbook version, "assumes that the rulemaking process has three discrete stages that occur in a specified order: notice, opportunity for comment, and the final rule").

website to collect and manage these opinions and solicit them under the guise of potential legislative changes to the state's approach to qualified immunity. After some predetermined period, the locality could check back in with the state to communicate concerns or agreeance for a particular policy version that addresses qualified immunity. The state could permit the municipality to proceed with the promulgation of an ordinance that memorializes the policy. Moreover, this ordinance might contain a sunset provision,[144] subsequently calling for a new commentary period after citizens have had time to see the law in action.

The local leaders might lean toward a more town hall or direct democracy-style of citizen preference extraction for Modoc and Bates Counties, as they are significantly smaller than their counterparts in the experiment. Given the intimate nature of town hall-style governance, there is a strong likelihood that local leaders leave the meetings with ample understanding of what their citizens want to see out of qualified immunity lawmaking. Local leaders would report to the state, gain the blessing to continue with their experiment, and implement a means of checking the progress over some duration of time agreed upon by the locality and state representatives.

No matter how localities extract information from their citizens, there must be intentional communication between them, both at first and some period after the rule has been in effect. Communication is vital on all fronts. Local leaders must communicate with citizens to evaluate and reevaluate preferences. They must then communicate with states to seek guidance and report the results of their discussions with citizens. And states must share overall findings with the federal government to discern whether the experiment results benefit national policy directives. If the framework sounds incredibly simple, that is because it should. The overall value of preference-based federalism is not how much it shakes up current understandings of federalism and vertical federalist dynamics.

144. Will Kenton, *Sunset Provision*: *What It Is and How It Helps Investors*, INVESTOPEDIA, (Mar 19, 2022), https://www.investopedia.com/terms/s/sunsetprovision.asp [https://perma.cc/EDH9-QFS5] (defining sunset provision as "a clause in a statute or regulation that expires automatically on a specified date. A sunset provision provides for an automatic repeal of the entire or sections of the law once that sunset date is reached. Once the sunset date is reached, the language subject to the provision is rendered void. To extend the length of time that a provision subject to a sunset clause is effective, Congress must amend the statute, or the regulatory authority must amend the regulation, as applicable.").

As previously outlined, any successful experiment requires an idea or hypothesis to test, policy differentiation among test subjects, and control of confounding variables.[145] The hypothesis, stemming largely from citizens' preferences, is that qualified immunity is desirable or undesirable. Localities facilitate policy differentiation with input and control from federal and state governments. And federal and state governments control confounding variables through their preemptory powers. Among other things, these variables include strictness of local ordinances, unreasonable citizen preferences, and bad faith by local representatives.

The scenario above had the federal government taking the initiative by volunteering which states would participate in the experiment. This framework in no way robs states of the opportunity to volunteer themselves for experiments, regardless of prior legislative efforts. Or states could also suggest experiments to the federal government. States might also choose to proceed with an experiment of their own volition.[146] Localities could even solicit potential policy experiments from their citizens to remain on the cutting edge of contemporary issues. Who begins the experiment is not the essential part. What is vital is that the federal and state governments recognize that localities have a crucial role in the overall process because of their ability to extract citizens' preferences. Ultimately, disregarding preferences defeats the entire purpose of the framework.

C. *What States and the Federal Government Do With the Results of Local Experiments*

After the framework has run its course, state and federal governments should have mountains of data points to inform a final policy decision about qualified immunity. Ideally, the final policy decision will align with citizens' preferences because citizens of both states chose a constitutionally workable solution at the end of the experimentation period. In this scenario, federal and state governments should do everything possible to codify the people's will. If both Californians and Missourians come to similar enough conclusions on qualified immunity, the federal government should consider implementing a national policy based on the experiment's results. Suppose the citizens of the two states try implementing irreconcilable policies. In that case, the federal government might consider deferring to states

145. Wiseman & Owen, *supra* note 46, at 1137.

146. The latter option assumes that states will not act contrary to areas where they are clearly preempted by federal law.

individually to adopt a measure that is consistent with the federally sanctioned experiments.

No matter what, the federal and state governments must respect the citizens' wishes. Allowing experimentation only to disregard what people asked for may be perceived as disingenuous by citizens. Moreover, it might jeopardize the legitimacy of the political process and the trust citizens have in their lawmakers at every level. The best practice the federal government can engage in when faced with a constitutionally acceptable policy that cuts against what the administration supports is to permit additional experiments with additional guidance. For example, if the result of the qualified immunity experiment in Missouri or California is that states should strengthen qualified immunity through lawmaking—which is the opposite of what Congress or the Executive desired—neither Branch should simply set the results aside in favor of their preferences. State and federal governments should instead permit the results to stand and conduct additional testing to find out if the results were outliers or if the concern for qualified immunity is misplaced or sensationalized by particular factions in the country.

That is not to say it is never appropriate for the federal or state government to disregard experimentation results completely. Perhaps if the federal government suspected that Bates County, Missouri, only wanted to strengthen qualified immunity because it increased the likelihood that racial minorities would be harmed or killed by law enforcement. At that point, the federal government would have a duty to step in and further investigate the experiment and the intentions of the citizens that participated. There would also be clear constitutional reasons for forbidding continued adoption of such racially charged qualified immunity legislative efforts, effectively bolstering the legitimacy of the federal or state government that stepped in rather than harming it.[147] Like most things, the framework is not all good and has the potential for governmental abuse. The upcoming section grapples with these challenges, proposing some possible solutions.

VI. INEVITABLE CHALLENGES TO THE FRAMEWORK AND SOME SOLUTIONS

Localization theories have always had their share of pitfalls. At its core, preference-based federalism is unavoidably a derivative of traditional

147. *See* U. S. CONST. amend. XIV § 1 (forbidding states from "depriv[ing] any person of life, liberty, or property, without due process of law").

localization theory. Therefore, preference-based federalism is susceptible to the same pitfalls as any other theory premised on localization or the Home Rule doctrine. These pitfalls include: (1) a lack of constitutional anchor to which the framework can attach itself; (2) the possibility that federal and state governments will merely feign greater deference to localities and ultimately taint experiments; (3) the chance that localities operate their experiments in bad faith, abusing the trust of their overseers to move some other political agenda forward; and (4) the need to account for conflicts like federally sanctioned § 1983 claims.[148] This Article considers these concerns in the upcoming section.

A. *The Lack of Constitutional Support for Municipalities*

Judge Barron was correct in asserting that "[a]s a formal legal matter, the federal Constitution does not treat local governments as anything approximating coequal sovereigns."[149] This sentiment is true in both the national-local and state-local contexts, as many state constitutions intentionally limit the power that local governments possess and exercise at any given time.[150] For example, states have subjected localities to strict financial constraints to preserve their dominance over localities.[151] Some might believe that local governments lacking a constitutionally-backed voice is damning of the framework. This view could not be further from reality. As previously noted, the preference-based framework is complementary.

148. 42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.S. § 1983 (1996).

149. Barron, *supra* note 4, at 390.

150. *Id.* at 391 (noting "state constitutional law overwhelmingly favors expansive state supremacy over local governments. Indeed, some of the more significant state constitutional limitations on the state's power to define its relationship to its local governments expressly point in the direction of ensuring state supremacy").

151. *See, e.g.*, GERALD FRUG, LOCAL GOVERNMENT LAW 641–42 (3d ed. 1994) (examining state imposed limitations on the ability of cities and municipalities to generate revenue).

Another important implication of that point is that it does not require a change in the Constitutional status quo to be effective.

On the contrary, the framework's ability to leave the status quo serves as a boon to its implementation. We have established that federal and state governments might hesitate to adopt the framework because they already have complete control over localities.[152] Preference-based federalism accounts for the fact that localities are not in control. The framework allows federal and state governments to have confidence in delegating authority to localities. That state and federal governments know they are not altering the Constitutional protections they possess only serves to bolster their confidence even more. But what if a state decides that some action a local leader took is too harmful or unreasonable? That state retains the ability to flex its authority by completely or partially ending the experiment. The goal is not necessarily greater local government power, although that will happen through implementing the framework. The goal is to maximize the values of federalism by implementing citizens' will. And local governments are necessary to make this happen.

B. *Federal and State Governments Will Feign Deference*

It is likely that federal or state governments will pretend to grant sufficient deference to localities as they attempt to experiment with hotly contested issues. Revisiting the qualified immunity experiment, focusing on Los Angeles county is helpful.

Maybe a few months into the Los Angeles qualified immunity experiment, local leaders decided that they wanted to try a stringent rule that completely eradicates the qualified immunity defense. The local leaders then put it through notice-and-comment, where it garners majority support from the citizens. And finally, the rule goes into effect with a sunset provision calling for reevaluation in a year. Shortly after the promulgation of the new law, a state trooper receives a tip from one of their informants that someone is selling cocaine in Los Angeles county. Acting on that tip, the officer prepares an affidavit and presents it to a deputy district attorney, who approves the document. The state trooper goes to a local judge with the approved affidavit and obtains a warrant to search the residence of the alleged cocaine dealer. After kicking down the alleged perpetrator's door and exploring the home, the trooper finds no drugs. While searching the

152. *See* discussion *supra* Part IV.

house, the state trooper broke the wrist of the alleged perpetrator's spouse while trying to handcuff and restrain her.

The alleged perpetrator and his wife persuaded the Los Angeles District Attorney to pursue criminal charges against the officer for assault in response to the ordeal. The couple also chooses to file a § 1983 suit to hold the officer financially responsible for relying on faulty intel.[153] The state trooper loses the criminal trial because they cannot rely on the qualified immunity defense because of Los Angeles county's experiment. The § 1983 suit remains pursuable because the state has chosen to narrow the experiment exclusively to criminal applications of the qualified immunity doctrine.[154]

Now suppose the entire ordeal the state trooper went through causes concern among California state representatives. The state representatives might respond by suspending the experiment or ending it altogether because they believe the test is causing harm that misaligns with their policy preferences. States that intrude on experiments sacrifice the integrity of the overall enterprise and send a disingenuous message to localities trying to enact policies their citizens desire. A state that does this has technically done nothing wrong, and no cause of action would accrue that local leaders could seek. Dillon and Home Rule states lack the power to defy state directives or prevent preemption of ordinances passed at the local level.[155]

While no one can guarantee that the preference-based framework avoids this type of behavior by the states, this Article can explain how the framework discourages it. Firstly, state representatives will hesitate to make sudden changes that might affect their chances for reelection.[156] By engaging with the preference-based framework in the first place, state representatives will open Pandora's box from a purely political standpoint.

153. *See* discussion *infra* Part VI.D (revealing how the experiment runs into a challenging problem on the civil litigation front because a state cannot structurally close off a plaintiff's pursuit of a § 1983 claim; however, a solution is explored in reality later in the section).

154. *See generally* People v. Camarella, 54 Cal.3d 592, 597–601 (Cal. 1991) (providing a similar fact pattern to the hypothetical in Part VI.B).

155. *See* discussion *supra* Part II.B–C (noting the lack of power localities possess relative to states).

156. Kindy, *supra* note 127 (recalling how former New Mexico legislator Stephanie Maez highlighted that fear of retaliation at the voting booth may drive supporters of ending qualified immunity away from publicly supporting the effort: "'If a lawmaker is concerned about police coming out and endorsing their opponent in the next election cycle, they will think twice before they do the right thing,' Maez said. 'With crime being such a huge issue here, lawmakers don't want to look soft on crime.'").

Citizens will not take kindly to states flipping on their promise to bring their preferences to the fore and will retaliate in the voting booth. Secondly, state representatives have other remedial options to undesirable results—especially for qualified immunity and unreasonable imprisonments. In the fact pattern cataloged above, the state can use its pardon power after the trial court convicts to free the state trooper. The state could then expunge the trooper's record and massage things over with the agency or provide another monetary reward to offset any harm resulting from the locality's experiment.[157] Of course, this is not a perfect solution. Still, it is a solution that avoids interfering with the vital work municipalities engage in when they experiment with complex polarizing issues.[158]

C. *Localities Might Operate Against the Interests of Vulnerable Groups When Wielding Greater Deference*

Federal and state governments are not the only ones susceptible to feigning good-faith implementation of the framework. Localities also have the propensity to overreach the deference provided by the states or the federal government. A fear of rooting power in localities is that local elites will increase their political influence immensely, compared to the increase in power by the average citizen in a locality. As Stewart points out, the Framers were also wary of this: "Federalist No. 10 attributed the danger of oppression to the increased opportunity for dominance by a local elite or faction when political power is dispersed territorially into small units."[159]

The framework puts this worry to bed rather quickly. State and federal governments are not losing any power in implementing preference-based federalism. Therefore, either federal or state officials can promptly shut down local elites if they are suspected of tainting the experiment local leaders have been tasked with conducting. It is also reasonable to trust that local leaders will operate in a manner that protects the added power they receive under the preference-based framework. Part of the excellence of

157. This compensation could also mean that the state foots the bill for any damages that result from a § 1983 lawsuit.

158. *See generally Clemency,* DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/facts-and-research/clemency [https://perma.cc/59HU-DVNP] ("All states and the federal government have a process for lowering the sentence or pardoning those facing criminal charges.").

159. Stewart, *supra* note 66, at 921 (citing THE FEDERALIST No. 10 (James Madison) (B. Wright ed. 1961)).

the framework is how easily it can be implemented and taken away for truly valid and non-arbitrary reasons.

A resulting concern from states stepping in to shut down local experiments is how quickly states could do so when required. For instance, perhaps New Jersey chooses to experiment with its gun regulation laws.[160] New Jersey decides to loosen its regulatory regime for their experiment and eliminate universal point-of-sale background checks on handgun purchases.[161] New Jersey then works with the federal government to choose Camden as the locality for its experiment. Suppose two weeks into the experiment, Camden sees a significant uptick in handgun sales and homicides resulting from the use of handguns. At that point, New Jersey state representatives decide they need to pull the plug on the experiment to protect Camden citizens. The concern here is how quickly New Jersey can undo the experiment. One more problem is how many resources New Jersey must pour into correcting the situation in Camden. In the immediate, state governments are well-equipped to combat this situation. State constitutions give governors many of the same executive functions that the President enjoys. For example, the New Jersey Constitution provides that "[t]he executive power shall be vested in a Governor."[162] State constitutions empower governors to issue executive orders most of the time.[163] Governors use executive orders in "situations requiring immediate attention."[164] Drastic upticks in gun-based homicides have been enough to

160. *See Universal Background Checks*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/universal-background-checks/ [https://perma.cc/FXN5-Q4WP] (noting New Jersey currently requires a background check for all gun purchases at the point of sale which extend to all firearms purchased through licensed or non-licensed vendors).

161. *Id.*

162. N.J. CONST., art. V, § I, para. 1.

163. The National Governors Association highlights that:

> The authority for Governors to issue executive orders is found in state constitutions and stat[ut]es as well as case law or is implied by the powers assigned to state chief executives. Governors use executive orders—certain of which are subject to legislative review in some states—for a variety of purposes, among them to:
>
> trigger emergency powers and related response actions during natural disasters, weather events, energy crises, public health emergencies, mass casualty events, and *other situations requiring immediate attention*.

Governor's Powers and Authority, NAT'L GOVERNORS ASS'N, https://www.nga.org/governors/powers-and-authority/ [https://perma.cc/MGU5-RQYB] (emphasis added).

164. *Id.*

get the attention of state executives at least once before.[165] The Governor can enforce an executive order reverting gun laws in Camden back to how they are in the rest of the state. The Governor can then concentrate additional state police power into Camden to help local authorities enforce the order.

New Jersey's hypothetical gun regulation experiment did more harm than good. But it provides a great example of how state governments exercise control over experiments that have gone awry. Camden may see a prolonged uptick in handgun violence because of the experiment in the long run. But an inescapable reality of policy experiments is that they will rarely come without risk. Federal, state, and local governments must work to identify potential risks before experimentation occurs and throughout experiments. It is impossible to prevent all the dangers of an experiment, but swift action by representatives can significantly mitigate these risks.

There is also information government officials can take away from the brief New Jersey experiment. For example, New Jersey might conclude that handguns are a significant cause of gun-based homicides. New Jersey could take additional measures to regulate handgun purchases with this information. Or New Jersey might decide that shotguns and rifles are not the problem—assuming homicides with these weapons remained steady over the brief experiment. With that information in mind, New Jersey might move to regulate these types of weapons more loosely.

D. *Federal Remedies Prevent an Experiment Altogether*

Another potential concern for experimentation is that the current federal structure renders experimentation impossible. This concern is especially prevalent in an experiment centered on qualified immunity. What is to stop a citizen from circumventing the localities ordinance, which abolishes qualified immunity by filing a § 1983 claim against a state officer in federal court? The short answer is nothing. The long answer is that states and localities must structure experiments to insulate them from federal overreach. States could ask Congress to amend or alter § 1983 to suspend the law altogether in counties engaging in experiments. But that is likely

165. *See, e.g.*, *Cuomo Issues Executive Order Declaring Gun Violence in NY a Disaster Emergency*, NBC NEW YORK (July 6, 2021, 3:26 PM), https://www.nbcnewyork.com/news/local/watch-gov-cuomo-to-make-major-announcement-on-gun-violence-in-new-york/3141332/ [https://perma.cc/U78L-8NWX] ("Gov. Andrew Cuomo has issued the first-in-the-nation Executive Order declaring gun violence in New York as a Disaster Emergency—the first step in a comprehensive plan that aims to tackle the surge in gun violence throughout the state.").

unrealistic, undesirable, and perhaps even unconstitutional. Instead, states and localities must operate within their bounds to find a solution.

For example, states and localities could limit the experiment to only criminal actions where the qualified immunity defense would have been available.[166] Experimenting this way avoids potential conflicts with federal civil law. It preserves remedial options for citizens that might otherwise have been able to seek monetary damages for their constitutional harm. Focusing only on the criminal defense aspect of qualified immunity allows the federal government to retain one more layer of control. Federal prosecutors could choose to forgo all criminal charges throughout the length of an experiment by leaning on their right of prosecutorial discretion.[167] Narrowing the experiment to criminal charges must be done entirely, not halfway.

To be clear, the value of the qualified immunity experiment does not decrease because states narrow the scope to purely criminal matters. State and federal governments can obtain comprehensive data about the effects removal of qualified immunity have through the lens of criminal law. States can then use this data to bring about more significant change moving forward. Citizens can also learn through this type of policy innovation. Citizens may subsequently advocate for particular policy choices given the new information discovered through local experimentation.

For preference-based federalism to work, federal, state, and local governments must get creative in concocting experiments. Working together, in good faith, should allow experiments in any area. Preference-based federalism should not require governments to avoid politically controversial subjects like qualified immunity.

E. *Citizens May Not Buy Into the Framework*

The final consideration is whether citizens would be interested in participating in the experiment in the first place. The entire framework rests

166. *See* discussion *supra* Part V.B.2 (contemplating how the experiment affects the criminal trial of the state trooper, leaving possible federal civil remedies intact).

167. *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 2 (2009) ("In American criminal procedure, there are few legal constraints on prosecutorial discretion. The limits that exist stem from other areas of law—equal protection and due process—and these constraints rarely lead to successful prosecutorial misconduct claims."). *But see* Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1076 (1997) (analyzing SCOTUS case law, and explaining how Poulin concluded "the protection from selective prosecution has been a disfavored right.").

on the premise that citizens want politicians to maximize their preferences. Yet this may not be the case. Politics have become increasingly charged in today's society.[168] The stakes have never been higher, and citizens might reasonably fear the possibility that experiments will act against their interests. For preference-based federalism to catch on, politicians must be able to sell the premise to their constituents. After representatives sell the framework, they must follow through on the alleged benefits.

The answer to ensuring citizens buy into preference-based federalism in these politically tumultuous times is simple. Politicians must do their jobs and persuade citizens to act in their best interest. Persuasion is a part of the territory when engaging in law and politics.[169] Consequently, politicians are accustomed to convincing their constituents that one option is better than another. Politicians must use their persuasiveness to convince their constituents that preference-based policy experimentation would produce ideal results quicker than any other alternative. Presumptively, politicians will not have to persuade everyone in the locality to support experimentation. Some citizens will naturally rationalize that a preference-based theory of federalism makes sense because it allows them to act in their self-interest.[170]

Politicians must focus on the citizens that remain unconvinced of the framework's superiority. There are ample ways for politicians to engage in persuasion in today's world. Firstly, politicians can roll out the idea of calculated policy experimentation through social media and targeted television ads. These ads could use various methods—like satire or dramatization—to persuade hesitant citizens to support policy experimentation in their state or locality.[171] Or politicians can take a more

168. *See, e.g.*, *America's Biggest Issues*, HERITAGE, https://www.heritage.org/americas-biggest-issues [https://perma.cc/R7J9-J4EF] (revealing political adversariness runs the gambit today). It seems like something new surfaces every day. Heritage points to some recent policy issues that have fostered political animosity among the populous: health care, immigration, election integrity, environmental, and welfare, among other things.

169. *See* M.D. Feld, *Political Policy and Persuasion: The Role of Communications from Political Leaders*, 2 J. CONFLICT RESOL. 78, 79 (1958) (noting "political official[s] stand[] in a radically different position, one which requires him to issue mainly persuasive communications").

170. *See* Christina Pazzanese, *The Art of Political Persuasion*, THE HARVARD GAZETTE (June 19, 2015) https://news.harvard.edu/gazette/story/2015/06/the-art-of-political-persuasion/ [https://perma.cc/QU4R-C6QG] (noting "[t]he idea behind the rational actor theory [is] that people seek to act in their own self-interest") (internal quotations omitted).

171. *See generally* R. Lance Holbert, John M. Tchernev, Whitney O. Walther & Sarah E. Ersalew, *Young Voter Perceptions of Political Satire as Persuasion: A Focus on Perceived Influence, Persuasive Intent, and Message Strength*, 57 J. BROAD. & ELEC. MEDIA 170 (2013) (examining the effect of satirical advertising).

direct approach to ease citizens' concerns by engaging with naysayers directly. Ultimately, politicians must only obtain a critical mass of the citizenry to experiment in an area effectively. Complete buy-in is impossible. But with most citizens on board, states can release localities to conduct their experiments.

VII. CONCLUSION

Federalism matters, and how federal and state governments interact is vital to protecting the integrity of the country's Judicial, Legislative, and Executive Branches. In light of this recognition, society must continue to reevaluate its federalist structure and evolve. This Article has argued that the time for evolution is now. Through hard work, trial and error, and a little luck, the United States has matured into a thriving republican democracy. Part of this evolution has diminished any real concerns that society is in danger of reverting to tyrannical or monarchal rule. Considering this, it is time society reconsiders how it values federalism. Right now, the most essential values of federalism are extracting citizens' preferences and ensuring they are close enough to the government to have a reasonable effect on policy innovation across their locality and the nation.

The best tool state and federal governments have to reconstruct the federalism hierarchy are local governments. Local governments have begun to rise again with the increased usage of the Home Rule doctrine, but they will always lack genuine autonomy. Preference-based federalism is a framework that capitalizes on the current state-locality dynamic to facilitate the delegation of power to local governments. By implementing this framework, federal and state governments can more easily figure out what citizens are calling for on the ground level and facilitate policy innovation through localized experimentation. While there are sure to be hiccups in relying on local governments, the framework moves modern-day understandings of federalism to a deeper level through the deliberate inclusion of local governments.