

Federalism and Dissent
by
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The Poynter Center
for the Study of Ethics and American Institutions
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**Introduction by
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Over the course of the 2003-04 academic year, select faculty from IU Bloomington met ten times to read and discuss materials on “Democracy and Dissent,” drawing on classical and contemporary political theory, Supreme Court cases, and examples from American history. Thus began a new initiative at the Poynter Center, the annual Interdisciplinary Seminar and Fellowship.

The essay that follows my introductory remarks grows out of the seminar’s year-long interaction, and my purpose here is to briefly summarize the group’s work on this topic.

One aim of the Interdisciplinary Seminar and Fellowship is to focus on a theme that has topical and philosophical aspects, and “Democracy and Dissent” fit that bill. The topical aspect drew from the fact that dissent has enjoyed little intellectual and cultural capital in our post-9/11 world. In the current political climate, dominated by pugilistic print and media celebrities, dissenting speech has been trivialized as “uncivil” or, worse, unpatriotic.¹

Yet that judgment seems unfair. While some dissenting activity can be ill-considered, that fact is no less true of activity that uncritically endorses political policies or candidates. Carving out a space in which dissent can be understood as a vital component of a healthy democracy was one of the seminar’s principal aims.

The philosophical work in the Interdisciplinary Seminar and Fellowship was driven by the need to overcome a serious lacuna in scholarly literature. Little theoretical work has been devoted to the idea of dissent. Surveying major works in contemporary political philosophy and democratic theory, one is hard pressed to find extensive discussions of dissent. That fact is striking given the legal and other protections that surround dissenting activity, along with

the fact that dissent has played an important role in the development and reform of democratic institutions. That such an important feature of our political life has received so little attention was worrisome, and perhaps explains why few resources exist to address those who dismiss dissenting activity when it chafes against the views of those in power.

One premise that informed our topical and philosophical inquiry was that dissent is a core feature of democratic citizenship. In that respect we viewed dissent not chiefly as the work of marginalized or alienated citizens, as dissent's detractors suggest, but as a key ingredient of responsible politics. Essential to understanding dissent is the idea that political authority in democracies relies on the consent of the people—that democracy, strictly speaking, means “rule of the people.” As we know when we hear about elections that offer only one candidate, consent without options is meaningless.

That we lack resources for thinking clearly about dissent is made worse by the fact that dissenting practices are widespread in American public life. At the highest levels of the American judiciary, dissenting opinions are a mainstay of legal reasoning. Debate in the legislative branch presupposes the value of disagreement in the formation of legitimate and sound public policy. The very idea of “checks and balances” in the three main branches of American politics presupposes the need to respect different institutional mandates and the interests of various constituencies. In public life more generally, allowing those with a minority opinion in committees, public hearings, or fact gathering sessions to record their views is often an expression of recognition and respect. Large institutions in the private and public sector have undergone notable reforms in the wake of whistleblowing. Democratic practice walks gingerly along a path that seeks consensus that avoids the perils of

group-think. Without institutions that protect dissent and social criticism, that path would be inaccessible.

Dimensions of Dissent

Interdisciplinary inquiry into democratic dissent reveals several dimensions. Briefly stated, these are epistemological, political, social, moral, and rhetorical.

At the *epistemological* level, dissent can improve quality of reason-giving in democratic deliberations. Dissenters require their interlocutors to clarify their reasons, defend their assumptions, and respond to challenges. Not infrequently, their questions open up new information and generate points of view that broaden the imagination's horizons. Reason-giving is improved when those who present their arguments are held to account. Dissenters can improve rationality by insisting on accountability.

Second is a *political* aspect, the fact that dissent is essential to democratic legitimacy—the need of democratic institutions to enjoy the consent of the governed. Policies and practices would lack legitimacy if the opportunity to contribute to their formation is restricted.

Acknowledging the value of dissent makes political processes more inclusive.² Dissent can rectify power imbalances, thereby ensuring that deliberative processes are informed by a greater number of those who would be affected by policies or practices on the public docket.

A third aspect of dissent is its *social* dimension, focusing on the relationship of dissenters to the political majority or, more interestingly, to a tradition of political commitments. Dissenters may wish to stand apart from the political majority for the sake of defending more general traditional values. Others may dissent as an end in itself, to challenge authority. On this score, it may be

useful to distinguish between instrumental and categorical dissent. One set of dissenters spots hypocrisy and expresses dissent as a means for honoring traditional verities. The latter expresses dissent as an end in itself, either to express its ongoing dispute with political authority or to function, self-reflexively, as a prophetic reminder of dissent's historic importance in democratic reform.

Dissent also has *moral* aspects insofar as it involves responsibilities that attach to rights. The core question here concerns the obligations that accompany the expression of dissent, especially the obligation to respect persons and the duty of fair play or reciprocity that follows from such respect.³ Dissenters must address the questions of modes of dissent, the possibility of uncivil dissent, as well as the problem of avoiding co-optation in the policies or practices to which they object.⁴

Finally, dissent has *rhetorical* aspects. Dissent is not always, or often, a discursive practice. It can also be symbolically expressed. Discursive dissent typically provides reasons for disagreement; symbolic dissent aims to broaden imaginative horizons, to re-frame the way a problem is seen, and to propose alternative patterns of reflection.

¹ See, e.g., Ann Coulter, *Treason: Liberal Treachery from the Cold War to the War on Terrorism* (New York: Crown Forum, 2003).

² Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000).

³ James F. Childress, *Civil Disobedience and Political Obligation*, (New Haven: Yale University Press, 1969), 123-64; John Rawls, "The Idea of Public Reason Revisited," in *Collected Papers*, ed. Samuel

Freeman (Cambridge, Mass.: Harvard University Press, 1999), 573-94.

⁴ Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed., Benhabib (Princeton: Princeton University Press, 1996), 67-94; Chantal Mouffe, "Deliberative Democracy or Agonistic Pluralism?" in *Social Research* 66:3 (Fall 1999), 745-59; David Estlund, "Deliberation Down and Dirty: Must Political Expression be Civil?" in *The Boundaries of Freedom of Expression and Order in American Democracy*, ed., Thomas R. Hensley (Kent, Ohio: Kent State University Press, 2001), 49-79.

Federalism and Dissent

On July 4, 1854, William Lloyd Garrison burned a copy of the United States Constitution at a meeting of the Massachusetts Anti-Slavery Society, as an act of symbolic protest. Garrison denounced the Constitution as “a covenant with death, an agreement with hell” because it protected the institution of chattel slavery.¹ Decades before most Americans would concur, Garrison demanded that African-Americans should receive equal rights at law. In his first editorial in *The Liberator*, in 1831, Garrison emphasized his alienation from those around him, even his fellow New Englanders: “During my recent tour for the purpose of exciting the minds of the people by a series of discourses on the subject of slavery, every place that I visited gave fresh evidence of the fact, that a greater revolution in public sentiment was to be effected in the free states—and particularly in New-England—than at the south. I found contempt more bitter, opposition more active, detraction more relentless, prejudice more stubborn, and apathy more frozen, than among slave owners themselves.”²

In light of this self-portrait, it seems natural to understand Garrison as that paradigmatic American loner, the individual dissenter, following his own conscience even when public opinion runs against him. At points, Garrison seems to invite us to see him in this way. He insists that he will listen to and speak for his God, regardless of the calumny that might be heaped upon him: “I am in earnest—I will not equivocate—I will not excuse—I will not retreat a single inch—AND I WILL BE HEARD. The apathy of the people is enough to make every statue leap from its pedestal, and to hasten the resurrection of the dead. . . . I desire to thank God, that he enables me

to disregard ‘the fear of man which bringeth a snare,’ and to speak his truth in its simplicity and power.”³

Yet, as conventional as it might seem, this understanding of Garrison would misinterpret his work, because even in dissent, he was decidedly a part of his time and place. He couched his appeal in the rhetoric and conceptual categories of a particular tradition of Protestant radicalism, a tradition with a special home in New England.⁴ Without Massachusetts’ long history of preacherly Jeremiads, Garrison could not have written as he did, because he would have lacked a language with which to speak and an audience with ears to hear—that is to say, an audience that understood the power and resonance of his language. So firmly did Garrison feel this regional connection that at one point, he joined other New Englanders in advocating secession from the Union, so that they could escape association with the morally pollutant slave power.⁵ In short, even as he protested that he was not at home, indeed even *in* protesting that he was not at home, Garrison was most at home.

Even Garrison’s particular denunciation of New England’s sins grows from his conviction that New Englanders, of all people, should have done better. After his dispiriting tour of New England, he resolves not to give up but to appeal to the proud traditions of his neighbors: “This state of things afflicted, but did not dishearten me. I determined, at every hazard, to lift up the standard of emancipation in the eyes of the nation, *within sight of Bunker Hill and in the birth place of liberty.*” Only after asserting this regional primacy does Garrison rebuke the nation as a whole for failing to honor its own ideals, which are contained in the Declaration of

Independence but which were born at Bunker Hill: “Assenting to the ‘self-evident truth’ maintained in the American Declaration of Independence, ‘that all men are created equal and endowed by their Creator with certain inalienable right—among which are life, liberty and the pursuit of happiness,’ I shall strenuously contend for the immediate enfranchisement of our slave population.”⁶

In this posture, Garrison is typical of dissenters: they must stand apart from their community (otherwise they are not dissenters), but they must still be a part of that community (otherwise they will have no language to speak and no audience to hear). Luckily, a large and complex republic contains many traditions of thought, and one way that dissenters may strike their difficult balance is to invoke a less dominant tradition to critique another, more dominant one. Sometimes dissenters recall their immediate neighbors to their own better selves: Garrison, for example, speaks for the tradition of New England probity against what he perceives to be the current sinfulness of his region.

But in a federal republic, dissenters have another option: they can invoke the tradition of their own region against the tradition of another region or of the center. Though he condemns the conduct of living New Englanders, Garrison is really asserting the superiority of his region’s ancient culture against the South’s. Indeed, New Englanders have sinned chiefly in allowing themselves to be co-opted by the slavocracy: “Let southern oppressors tremble—let their secret abettors tremble—let their northern apologists tremble—let all the enemies of the persecuted blacks tremble.”⁷

In this way, constitutional federalism can help to create and sustain a strong practice of dissent. Although we tend to idealize the dissenter as a lonely outsider, dissenters in a democracy need connections to other people. They must be embedded in the language, concepts, and styles of a particular community to which they can appeal. Indeed, very often, dissenters claim to be the true inheritors of a region's tradition—in a sense, the ultimate local insider. But for this practice to work, a constitutional republic must have a variety of regional cultures.

Federalism can help these local cultures by protecting state governments, which can sub-gird dissenting cultures, both those that dissent from the federal government and even those that dissent from the state government itself. States may use social policy to foster local cultures; their very existence generates multiple political conversations, yielding different local cultures; and they can serve as symbols around which dissenters organize their politico-cultural identities. If rightly constructed, therefore, a federal system can serve as an important bulwark for dissent itself. If wrongly constructed, on the other hand, a federal system will simply allow states to quash all dissent in the name of unity.

In this essay, I explore this important—and, to some, counter-intuitive—connection between dissent and federalism. Part One explains that in much constitutional law and commentary, dissent and federalism are imagined to be in tension. Part Two argues, by contrast, for the importance of local cultures to the practice of dissent; and Part Three examines how constitutional federalism can help

sustain those cultures. One word on the scope of the argument is in order: I do not mean to suggest that dissent is always a political good, nor to offer a theory of the difference between good and bad dissent, nor to specify an ideal relationship between the dissenter and the mainstream. These are all important questions, but in this limited compass, my goal is more modest: to argue that, contrary to conventional wisdom, federalism can nurture dissent—leaving open the question of when we might actually want it.

The Perceived Tension Between Federalism and Dissent

A century and a quarter after Garrison, Martin Luther King, Jr. would have surely doubted whether federalism can sub-gird dissent. Prophetically dissenting from the white supremacist views of many of his neighbors, he challenged the claim that “states’ rights” protected the South’s system of de jure segregation. For him and others, federalism probably symbolized not dissent but the power of the states to suppress dissent. In believing that federalism and dissent are in tension, King would today have a lot of company. Liberals tend to embrace the ideal of the lonely dissenter speaking truth to power, resisting the enforced conformity of local communities. By contrast, communitarian conservatives tend to celebrate federalism, with its promise that local governments can protect consensual local cultures against those who would subvert it. The one point upon which conservatives and liberals can agree therefore is that dissent tends to threaten strong federalism and strong federalism tends to threaten dissent.

In modern constitutional law, a

particularly vivid example of these attitudes is provided by the Supreme Court's analysis of whether the Due Process clause of the Fourteenth Amendment protects procreative and sexual rights against restrictive state legislation. Progressive justices tend to support these rights, freeing individuals from the domination of local cultures—such as women desiring an abortion or gay persons desiring to express their sexuality.⁸ By contrast, conservative justices tend to oppose these rights; they would allow states to determine whether and how to allow sexual and procreative autonomy, so as to protect local cultures.⁹ Similarly, in the field of pornography, liberals tend to recognize strong rights to publish and distribute materials that local cultures find objectionable, but conservatives would be more protective of those local cultures.¹⁰

This disjunct between federalism and dissent is also reflected in the conventional organization of constitutional law itself. The field is commonly divided into three subjects: federalism, separation of powers, and individual rights. Federalism is thus studied as one area of constitutional law; the rights of dissenters as part of individual rights, a different area.¹¹ This conceptualization goes all the way back to the founding of the Constitution. In his famous *Federalist* Number 10, for example, James Madison worried that state governments might be captured by locally dominant majorities, who would then restrict personal liberties, especially of dissenters from the established religion. Madison therefore urged the adoption of the Constitution, which would transfer power from the states to the central government. He predicted that federal government would be so

riven with division that an oppressive majority would be less likely to congeal and thus less able to attack liberty.¹²

In response, the author of *Brutus* 1 contended that power should remain with the states because at the local level, citizens were more likely to share a common good. As a result, state governments both could and would protect the common good. At the federal level, by contrast, congressmen represented groups so unlike that they shared little. As a result, congressional politics could be nothing more than the pursuit of narrow self-interest, and congressional legislation could be nothing more than the victory of a larger electoral army over a smaller. To forestall that possibility, *Brutus* argued against the adoption of the Constitution, so as to keep power in the more cohesive states.¹³ For *Brutus*, then, the point in federalism is to allow the states to express their common goods—in other words, to foster rich local cultures with few if any dissenters. If the states included many dissenters, state governments would be little better than Congress, because in the face of social division, the legislature could be only a field of competition among contending groups.

In the history of the United States, the tension between dissent and federalism has been especially evident in the legal traditions of the South. From early in the nineteenth century until at least the middle of the twentieth, southern states invoked the doctrine of states' rights to protect their peculiar institutions against dissenters. Before the Civil War, state governments forbade the printing and distribution of abolitionist materials; southern representatives to Congress secured legislation barring the passage of such

materials through federal mail; and they engineered the notorious gag rule blocking the discussion of abolitionist proposals in Congress.¹⁴ Even after the Civil War and the adoption of constitutional amendments extending equality to African-Americans, southern states invoked the doctrine of states' rights to defend the Jim Crow system of separate-but-equal.¹⁵ A century later, they were still insisting that federalism guaranteed their power to protect the "southern way of life" against dissenters among southern blacks, civil rights workers, and meddling lawyers from the Justice Department.¹⁶ Here we have a veritable paradigm for the phenomenon: sometimes federalism, in protecting local cultures, also silences dissent and enforces a stifling oppression.

Correlatively, central governments often must disrupt local cultures in order to free individuals; or, less charitably, one might say that central governments often seduce dissenting individuals to help break the power of those local governments that dare to defy Leviathan. Either way, the center must re-imagine the legal map of the country: in place of traditional communities with meaningful boundaries, the central government sees a nation of abstract individuals without distinguishing characteristics such as race, gender, or regional identity. These individuals relate directly to the federal government, rather than through state intermediaries, and the federal government protects their right to be free from restrictive local cultures. Federal jurisdiction seeps across the map like an acid wash, dissolving the old communities' distinctions between "us" and "them" insiders and outsiders—the very distinctions that gave those communities identity.

In the United States, the Fourteenth

Amendment has been a primary vehicle of that acid wash. The southern experience is again especially important. For some time after the Civil War, the Supreme Court abandoned southern Blacks to the tender mercies of Jim Crow, but beginning in the 1940s, the justices undertook to realize the promise of the Civil War amendments—however belatedly. The Court handed down a string of cases that assaulted some of the foundations of the southern legal system, and the southern states sought desperately to defend their culture against these inroads. Sometimes, the Court would strike down one discriminatory scheme, only to watch the state enact another, equally discriminatory one. At times, the Court and the southern states seemed locked in a culture clash to determine whether the country would be composed of restrictive communities or abstract individuals.¹⁷ Eventually, Congress became involved. The legislative majority's suspicion of the southern states was so profound that it forbade the states from changing their electoral practices without first getting the permission of the Justice Department. In effect, Congress presumed the states of the old Confederacy to be guilty of racism until proved innocent.¹⁸

This story is broadly familiar, so I offer only one example, a case that wonderfully illuminates these tensions. In 1970, when memories of the civil rights movement were still fresh, James Blumstein moved to Tennessee to teach law at Vanderbilt University, and he almost immediately tried to register to vote. Under Tennessee law, however, new residents could not vote until they had lived in the state for one year and in the country for three months. Blumstein—a "foreigner" to the state,

Jewish, and a law professor to boot—challenged this restriction, arguing his own case pro se. In *Dunn v. Blumstein*,¹⁹ the Supreme Court held that Tennessee’s rule violated the Fourteenth Amendment. According to the Court, the state law “divide[d] residents into two classes, old residents and new residents, and discriminate[d] against the latter to the extent of totally denying them the opportunity to vote.”²⁰ Because the law burdened Blumstein’s rights to vote and travel, it could be upheld only if it survived strict scrutiny, i.e., only if it advanced a compelling state interest in the least burdensome way possible.²¹

Tennessee argued, inter alia, that its durational residency requirement assured that voters would have “a common interest in all matters pertaining to [the community’s] government.”²² In other words, new residents would be assimilated into the local culture, seeing things in the same way as older residents: “By this, presumably, the State means that it may require a period of residence sufficiently lengthy to impress upon its voters the local viewpoint.”²³ The Supreme Court had little patience for this argument. According to the justices, the demand for a common interest was really just a desire to quash disagreement. Not only was that desire not a compelling state interest, it was itself constitutional proscribed: “‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible...All too often lack of a [‘common interest’] might mean no more than a different interest.”²⁴ And the Court pointedly insisted that the Old South may no longer seek to insulate itself against dissenting voices from a different

background: “[T]he fact that newly arrived [Tennesseans] may have a more national outlook than long-time residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of a chance to influence the electoral vote of their new home State.”²⁵

The Importance of Local Cultures to Dissent

Plainly, then, local cultures can and sometimes do stifle dissent, and federal intervention can and sometimes does protect dissent. This dynamic is, however, only one side of the coin, because local cultures can and sometimes do promote dissenting traditions as well. These traditions empower individuals to resist the federal government and/or even the states themselves, by providing a language, a set of concepts, and an audience responsive to that language and those concepts. Martin Luther King, for example, espoused a universal message, but he spoke in a distinctly southern language—dissenting Black, and Christian to be sure, but southern all the same, and every bit as southern as the idea of white supremacy. He appealed first to other southern Black Christians, and only later did he invoke the aid of the federal courts and the Justice Department, whose primary language was always that of abstract individual rights. Just as without New England, there would have been no Garrison, so without Dixie, there would have been no King.²⁶ Similarly, according to the Supreme Court, James Blumstein offered a dissenting voice in Tennessee not as an abstract individual but as the bearer of “a viewpoint characteristic of the region from which [he had] come.”²⁷

In these cases, even as one local culture sought to stifle dissent, another sought to dismantle that very local orthodoxy.

We must accordingly re-imagine our set of players: instead of a lonely romantic dissenter speaking truth to power, we have representatives of one local culture resisting representatives of another, more powerful one. Re-imagining in this way reveals that to have meaningful dissent, we must think not only about freeing dissenters from restrictive cultures but also about protecting the cultures that support those dissenters. As I will elaborate in the next section, this re-imagination is important when designing or interpreting a constitution's federal structure and practice.

Dissenters depend on dissenting cultures in a number of ways. In a classic work,²⁸ Michael Walzer explicates some of them. Walzer recognizes—indeed, lampoons—the pose of alienation that some dissenters have always struck, rejecting local culture in favor of objective truth: “Now the critical enterprise was said to require that one leave the city, imagined for the sake of the departure as a darkened cave, find one's way, alone, outside, to the illumination of Truth, and only then return to examine and reprove the inhabitants.”²⁹ In recent decades, critics have adopted this pose even more, claiming to be “alienated, disaffected, and unattached, without a secure social place, a recognized role, or honor among his fellows.”³⁰ Here again is the common idea that local cultures frustrate, rather than support, dissent.

Yet Walzer begs to differ from this conventional wisdom. He asserts that dissenters are most effective when connected to their community: “Criticism is most powerful. . . when it

gives voice to the common complaint of the people or elucidates the values that underlie those complaints.”³¹ This communal connection is important for several reasons. First, it gives the critic a sustaining motive when the going gets tough: he wants to make his community better. By contrast, alienation leads to withdrawal, not engagement: “[I]f he were a stranger, really disinterested, it is hard to see why he would involve himself in their affairs.”³² The dissenter may be motivated by disappointment in his community, as Garrison was in New England, but disappointment implies a connection, a hope that one's people can do better: “We have an idea about how institutions ought to function or how people ought to behave. And then something happens, the authorities act with unusual brutality; or something doesn't happen, the people are passive and indifferent; and we feel ourselves thrust into the company of social critics.”³³ More deeply, the dissenter may feel that because he is implicated in the destiny of his community, he must object when the community is victimized or victimizes others: “A moral tie to the agents of brutality and indifference is more likely to serve [than disinterested desire for the well-being of humanity]. We feel responsible for, we identify with particular men and women. Injustice is done in my name, or it is done to my people, and I must speak out against it. Now criticism follows from connection.”³⁴ In short, the critic's typical posture is “antagonistic connection,”³⁵ as he needs “to find a place to stand, close to but not engulfed by” the company of his community.³⁶

Beyond sustaining their own motivation, dissenters need connection for the practical reason that in order to effectuate change, they must speak to

their audience from a common store of values. The audience must be able to understand the speaker, must recognize some of their beliefs in her words, and must believe that they can become what she urges. Walzer's analysis is profound: "The crucial dependence is not theoretical but practical: people are capable of doing only what they believe or can be brought to believe ought to be done. Just as critical theory fails unless it can provide a recognizable account of everyday experience, so criticism generally will fail unless it draws its strength from everyday conceptions of God and morality. The critic starts, say from views of justice embedded in the covenantal code or from the bourgeois idea of freedom, on the assumption that what is actual in consciousness is possible in practice, and then he challenges the practices that fall short of these possibilities."³⁷

For the dissenter to sustain her motivation and reach her audience, therefore, she needs to be connected to her community. Correlatively, to support a variety of dissenting voices, communities must themselves be variable in their beliefs. To be sure, critics sometimes claim a singular objective knowledge, such that no one can rightly dissent from their (dissenting) views: "[T]here would be no point in having more than one such person. If he knew the Truth and judged us without passion, impartially, like a total stranger, we could only listen in silence....[H]ad he time and energy enough, such a critic could serve the whole world, a Hercules among critics."³⁸

Those who claim direct knowledge of objective Truth may begin as dissenters but end as would-be dictators who silence all discordant voices. To

protect against this temptation to orthodoxy, it is important that there be a number of communities to support a range of dissenters: "[T]here is no Hercules, no single all-sufficient critic... We participate in the critical enterprise by supporting one critic or group of critics against the others... A modern democratic society is a confabulation of critics. But then it makes no sense to look for global reach; each society is its own confabulation."³⁹ For that reason, locally dissenting cultures help to facilitate dissent in a large state: "[T]he idea of marginality probably does better than... 'estrangement' in explaining the birth and breeding of social critics. They come from some remote and neglected part of the country (Silone), or from an imperial colony (Camus), or from a declining social class (Orwell), or they are members of or choose to identify themselves with a lowborn, oppressed, or pariah group."⁴⁰

In addition to these practical benefits, dissenters need to be connected to local communities for conceptual reasons. Different communities provide dissenters with different languages, traditions, perspectives, attitudes, and categories; they break the intellectual dominance of the center or a regionally pre-eminent culture. They allow the dissenter to see things that might be otherwise obscured. They can provide him with an identity that endorses his own connection to the dissenting perspective: it is normal that people like the critic should see things in the particular way that the critic sees things. As an example: conquerors commonly seek to impose an ideology that naturalizes the conquest. The conquerors are superior; the natives are barbarous and hence undeserving of the land or incapable of self-government.

Or the conquerors bring the benefits of civilization to the natives, who should accordingly be grateful for their coerced assimilation. But if they manage to retain their local world-views, natives will be less likely to buy into this imperialist mindset. Indigenous traditions offer a window out of the totalizing mental world that the conquerors would impose, so that natives can remember that life under conquest is not just hard but wrong.

Sometimes these dissenting traditions may even change the views of those who hold power at the center. Consider the evolving attitude of Chief Justice John Marshall toward tribal governments. Even early in his career and within his own frame of values, Marshall worried that conquest of the natives might be unjust. Yet he concluded that because his own nation, and therefore his own office, grew out of conquest, he could not question the rights of conquest in his role as a federal judge: “Conquest gives a title that the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals [such as Marshall himself] may be, respecting the original justice of the claim which has been successfully asserted.”⁴¹ The conqueror’s legal ideology prevents the conqueror’s judges from doubting the morality of the conquest; it silences what might have been a powerful voice of judicial dissent. Marshall never wholly transcended this limiting view of his own role; to some extent, the conquering mindset always naturalized the conquest for him.

And yet, on the subject of native rights, Marshall’s relationship with his own community would become increasingly troubled because of two cases brought before the Court by the

government of the Cherokee Nation.⁴² The Cherokees had traditionally enjoyed self-government and immunity from the jurisdiction of Georgia, the state that surrounded them. They adopted a constitution and law codes, and they published newspapers in the Cherokee language. In other words, they practiced a form of federalism, in that they exercised local self-government within a larger nation. By this practice, they kept alive the idea that they should govern themselves in their own way, despite the purported superiority of the conqueror’s culture. When the state of Georgia attempted to destroy their government and extend jurisdiction over them, the Cherokees dared to challenge the state’s aggression before the Supreme Court.⁴³ And dissenting native voice called to the parts of Marshall’s conscience that themselves dissented from the conqueror’s consensus.

Marshall ruled against Georgia for the most mainstream of reasons: federal law guaranteed Cherokee self-government against state incursion.⁴⁴ In other words, the tribe won only because the dominant conquering body (Congress) willed that it should be so. Within a short time, Congress would change its mind, allowing Georgia’s writ to run across Cherokee country.⁴⁵ Yet even Marshall’s timid holding was deeply challenging in its own day. If the conquerors were really superior, really had brought the benefits of civilization, then Marshall’s construction of federal policy—that it guarantees tribal self-government—seems implausible at best. In other words, underneath his cautious legal analysis lies a much more radical notion: perhaps the tribes were entitled to rule themselves; perhaps they had a status like that of European states; perhaps they were not so inferior.

In dicta, Marshall allowed these dissenting ideas to surface. At the start of the first Cherokee case, Marshall cast the Indians as innocent victims, much fallen from earlier greatness because of Euro-American pressure: "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To retain this remnant, the present application is made."⁴⁶

In the second Cherokee case, Marshall goes further, portraying the tribes as states with rights co-equal to those of European nations: "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other, and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied..."⁴⁷ He claims that no European state could have believed that it had a right to control the tribes: "The extravagant and absurd idea that the feeble settlements made on the seacoast...acquired legitimate power...to govern the people, or occupy the lands from sea to sea, did not enter

the mind of any man."⁴⁸ And in rhetorical questions, he ridicules the notion that cultural superiority gave Europeans the right to govern the tribes: "Did these adventurers, by sailing along the coast, ...acquire....rightful dominion over the numerous people who occupied it? Or has Nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufactures?"⁴⁹ In the end, Marshall returned to his conviction that courts of the conqueror cannot question the rights of conquest, whatever its moral errors: "But power, war, conquest, give rights, which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend."⁵⁰

Even if Congress had no moral right to control the tribes, it had the legal power to do so. Given the tone of his dicta, Marshall might have eventually changed his mind even on this point, but he died soon after. As a result, the Cherokees remained subject to Congressional power, but their dissenting tradition, nurtured in federalism, offered an escape from the conqueror's orthodoxy. By bringing this tradition to court, they secured two landmark cases that would prove hugely important. Against much of the prevailing opinion of his day, Marshall held that Congress' general policy was to protect tribal self-government, so that absent an express Congressional statement to the contrary, courts would presume that tribes have the right to make their own rules and be governed by them.⁵¹ In later decades, federal courts would use this presumption to fashion broad protections for the tribes.

Federalism and Dissent

Regionally distinctive cultures can

facilitate dissent in two ways. First, drawing on a local culture, dissenters may be able to critique the culture dominant at the center, especially in the federal government. Second, drawing on one local culture, dissenters may be able to critique a different local culture that is regionally dominant, especially in the state government. The question is how federalism may sub-gird these cultures so as to help dissent, rather than suffocate it.

Judges have adduced many benefits for federalism, but dissent as such plays a limited role in these lists. Nevertheless, their theories lay down building blocks for an argument that federalism may support dissent, even if the judges themselves do not directly make that argument. For example, in his (dissenting) opinion in *New State Ice Co v. Liebmann*, Justice Louis Brandeis offers a famous defense of federalism: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”⁵²

Brandeis’ thesis is often summarized by the formulation that the states are “little laboratories.” In this conception, federalism helps to facilitate a certain kind of dissent: one state, standing alone, may act on its view of the good, even if that view dissents from all the other states. Yet this sort of dissent is quite limited. For one thing, Brandeis’ use of the terms “laboratory” and “experiment” suggest that dissent-within-federalism is a kind of scientific investigation in public policy. One state can experiment with a program without imperiling the others, so that the potential bad effects of the experiment will be confined. But in the end, the

point in science is to yield objectively correct answers: one state tries a policy to determine whether it is right or wrong. And this view of governance grows directly from the progressive tradition in which Brandeis hatched his own views.⁵³

In other words, although Brandeis celebrates the way that federalism promotes variability, his position also has the potential to suppress dissent. Federalism allows states—not individuals—to dissent, and the states’ experimentation should produce objectively right answers, as shown by social science. In this rendition the states bear a distinct resemblance to Walzer’s Hercules among critics: “If [the state] knew the Truth and judged us without passion, impartially, like a total stranger, we could only listen in silence.” In fact, “had [a single state] time and energy enough, such a critic could serve the whole world.” As a result, “there would be no point in having more than one such” state.⁵⁴ For Brandeis, in fact, there is no reason in the abstract to have more than one state; multiple states simply have more “time and energy” to conduct their experiments without injuring the others.

Another traditional view of federalism is that the states counter-balance the power of the federal government, creating space for liberty by keeping the center from imposing an orthodoxy. In recent decades, Justice Lewis Powell was perhaps the most eloquent judicial exponent of this view. In his (dissenting) view in *Garcia v. SAMTA*,⁵⁵ he argues that American federalism grew from a “fear that the National Government would be too powerful and eventually would eliminate the States as viable political entities.”⁵⁶ To “ensure that the States would serve as an effective ‘counterpoise’ to the power

of the federal government,” the Framers sought to reserve for them a “separate sphere of sovereignty.”⁵⁷ To that end, they were given the power to regulate the citizens’ “personal interests and familiar concerns,” so they would be perceived as “the immediate and visible guardian of life and property.”⁵⁸ As a result, the states “would attract and retain the loyalty of their citizens,” their “affection, esteem and reverence.”⁵⁹ The division of power thus promotes a division of affection, a “balance designed to protect our fundamental liberties.”⁶⁰

Again, dissent figures in this account of federalism, but its role is notably limited. According to Powell, the Framers created rival power centers in the states to block the imposition of a federal monarchy, thus facilitating a kind of dissent. Like Brandeis’, however, Powell’s federalism empowers state governments, rather than individuals, to dissent. To be sure, he predicts that reserving power to the states will “protect our fundamental liberties”—meaning, presumably, our individual rights. But the way that federalism preserves our rights is by giving power to the states, who are supposed to safeguard liberty against Congress. To counter-balance the federal government in this way, the states need not only reserved power but also the loyalty, affection, and even reverence of their citizens—not exactly a prescription for individual dissent against the states themselves. Indeed, although he surely did not intend this implication, Powell’s language might suggest that federalism might stifle dissent, rather than promote it. If the goal of federalism is merely to block federal over-reaching by creating reverence toward the states, then one

could find in it a prescription for smothering local dissent in the name of unity against the center. And that is just the version of federalism that was espoused by the defenders of slavery and Jim Crow.

Indeed, even in protecting the states, Powell’s federalism does not appear to authorize a real spectrum of views. In Powell’s account, the federal government is power-hungry, and the states seek to shelter the flower of liberty against it. Powell never intimates that federalism protects a variety of independent political traditions so as to facilitate dissent. Instead, the states are quite similar: instead of protecting different life ways, they all stand alike for “our fundamental liberties.” And in resisting the federal government, they are objectively in the right, faithful to the American Way of Life. Again, the states (as a liberty-loving bloc) resemble Walzer’s Hercules among critics, and as loyal adherents, we are supposed to rally “round the flag.”

We return to the ambiguous relationship between federalism and dissent: the former can promote but also suppress the latter. If we are concerned about dissent, we need a federal system that will maximize the dissent-facilitating aspects and minimize the dissent-stifling ones.

In thinking about that question, conventional analyses of federalism, like those offered by Powell and Brandeis, are useful in emphasizing that federalism creates multiple power centers in the state governments. These analyses suggest, however, that the point in federalism is to allow these governments, as governments, to discern right answers, as defined by either social science or the tradition of American liberty—a view that has considerable

potential to quash dissent. To imagine a federalism that facilitates dissent, we need to emphasize the way that multiple power centers can promote a variety of cultural materials with which individuals, as citizens, may craft meaningful dissent. Federalism has the potential to promote dissent because it creates multiple sites of political governance, contestation and conversation. Because the states govern the fabric of collective life, they may sub-gird whole cultures, each differing from the others. As we have seen, dissenters draw strength and inspiration from such cultures; they exist not as lonely individuals but as participants in a conversation. To promote the practice of dissent, it is therefore not enough to protect individual rights, because dissenters depend on a rich polyphony of political cultures. In other words, individual rights of dissent may sometimes depend on a federalist structure for their effectuation.

Provincial governments may help dissenting cultures in two ways. First, the states may embrace, even identify with, a locally dominant tradition of dissent from the center: southern governments, for example, saw themselves as dissenter from northern tyranny. Second, state governments may protect the conditions necessary for the flourishing of local cultures that dissent from the culture dominant within the state, including the state government itself. In either case, states have at their disposal a number of tools.

First, state governments can pro-actively develop social policy to protect local cultures. Sometimes states pass legislation designed to help a local language, for example by making it a permissible language of official business, even when the central

government denies it that status. Governments generally control the curriculum in public schools, and they can use that power to transmit locally dominant or dissenting traditions. More generally, because dissenting cultures differ, each may demand a different form of social life to survive. For example, a tradition of laissez-faire economics may not long survive in a brutal totalitarian state; but equally an anti-materialist culture of dissent (like some versions of Christianity) may not long survive under a government that sees the market as the only appropriate model for all social organization.

Second, even if the state does nothing actively to promote local cultures, the simple fact that the state includes dissenting cultures within its geographical jurisdiction will tend to sustain those cultures. Because each state contains a different mix of traditions, each offers an opportunity for a different set of political discussions, contestations, and agendas for governance. In providing these opportunities, provincial governments have certain strengths. For one thing, they may prove durable sites for interaction because they are collective and institutionalized; with individual rights but no sustaining federalism, lone dissenters may become only rapidly fading voices. For another thing, local governments may offer local dissenters a meaningful chance of one day taking power; it would be far more difficult for dissenters to achieve comparable influence at the center. Vermonters have elected socialist mayors, but we will not soon see a socialist President. The prospect of setting policy may thus keep local traditions of dissent alive; it may also keep them responsibly engaged, rather than giving way to revolutionary

violence or alienated detachment.

Finally, in a federal system, states may serve as symbols around which dissenters can organize their political identities. In dissenting from the center, local citizens may see themselves as patriots of the margin: southern secessionists cast themselves as native sons of their states *and so* as opponents of the government in Washington. Such a self-conception offers the psychic benefit of being able to claim insider status in one place while insisting on distance from another place. The dissenter is not truly alone but speaks for a more organic local community. Such a political identity may even allow the dissenter to stand apart from not only the center but also the state. As we saw Garrison do, a local dissenter may criticize the local government and citizenry, but from the inside, as one of them. He appeals to their values, claims the status of native son, and speaks for the ideal community against the actual community. He purports to be the ultimate insider, closer to the true community than are even its real-world citizens. Such a stance may give his words power with a local audience, and it may give him emotional sustenance for the rough road.

States can help dissenting political identities in another way: while some claim identification with the ideal community, others adopt symbolic identities created as a dissent from that community, whether in its real-world version or its ideal. Again, Martin Luther King and the southern black churches provide a good example. Many southern whites cast themselves as native sons of their states, dissenting from Washington in the name of white supremacy; King and his allies created a local identity predicated around

resistance to that white power structure. These dissenters spoke from a particular location in southern society, in a southern idiom, about the experience of being Black in Dixie. They were, in short, southerners, not mirrors or help-mates of Justice Department lawyers, with their abstract individualism. Yet as southerners, their political identities could not have existed without federalism, because they defined themselves, in some measure, in contradistinction to southern “patriots,” who constructed their own symbolic identities around loyalty to southern states.⁶¹

Federalism thus facilitates dissent by undergirding local communities and traditions of dissent. Yet in the very process of protecting some cultures, the state may suppress others, in ways that cannot always be predicted. In entrenching the unregulated market to help free marketers, the state may be promoting a consumer society that corrodes anti-materialist Christianity. In entrenching white supremacy so that southern native sons felt at home, the southern legislatures pushed the civil rights movement to the edge. On the other hand, threatened traditions may thrive on adversity, and entrenched traditions may decline by relying on state aid rather than struggle. Either way, the state helps some and hurts others. By facilitating dissent, the state also suppresses it, and many federalism boosters welcome this suppression in the name of local truths.

To promote dissent, then, not every federalism will do: the question is whether a given federal system *on balance* helps or hurts dissent. As always, conditions are context-specific, and prediction is difficult. Nonetheless, our analysis suggests that federalism can

best facilitate dissent when it observes four general requirements. First, federalism should rest on states that contain multiple political, legal, social, and economic traditions, different from each other and from the center. Second, on the other hand, these traditions must not differ so much that they become mutually unintelligible or wholly incommensurate; in that case, the states could not share a single constitutional order, however loosely confederal, and secessionist movements would inevitably arise.

Third, in order to facilitate these dissenting cultures, federalism must rest on states that will, by their symbolic existence, political process, or social policy, help some traditions more than others. As a result, some communities will enjoy local pre-eminence relative to others. In the abstract, this condition is not to be decried. Federalism promotes dissent precisely by facilitating cultures that support the individual dissenter. To that end, these cultures must have the conditions necessary for their nurturance, and the advantage of federalism is that it can create different conditions for different cultures at the local level.

But no constitutional structure can protect every culture equally, as they require different conditions. Some insist that the state must be neutral as between rival conceptions of the good, but these liberals ignore the importance of culture to effective dissent—and even to individual autonomy. As Will Kymlicka explains, individual “freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us.”⁶² If persons existed free of culture, the state might be able to treat all alike by treating each as

an abstract individual; but as individuals in fact depend on culture, the state cannot be entirely neutral. Some language must be spoken, some economy established, some criminal code developed. In practice, each of these choices will nourish some cultures more than others, so we cannot hope for perfect neutrality. We can, however, hope that a locally dominant culture (which can serve the salutary goal of dissent from the center) does not become monolithic, closed, or oppressive of others, and instead remains fluid, complex, and open.

In a federal system, states are different from each other and the center in at least two ways, and we can apply our four dissent-requirements to these ways of being different. First, states contain different societies; citizens have different interests, ideas, languages, and so forth. Second, states have different governmental structures to represent their different societies; they deploy varying electoral rules, separation of powers, and so forth.

To promote dissent with respect to the first difference (states contain different societies), state boundaries should be drawn in such a way as to include communities that are meaningfully different from each other and the center. Some states might have a core culture, to provide their native son/daughter dissenters with a stable tradition and strong identity. But to make possible internal dissent, this core culture must not be overwhelming: it must either be open or not very dominant or both. To promote dissent, therefore, states should generally include other cultures as well, cultures with enough adherents to offer meaningful alternatives and counter-balances to the core culture. It may also be important to

divide the regionally dominant culture between several states, both to reduce its power in any one state and to encourage internal divisions within the culture. An exclusive focus on individual rights of dissent, without a tie to federalism, would ignore all these concerns: such a focus would insist that it is enough to guarantee strong constitutional rights, without worrying about politics and culture. But as we have seen, such an approach would weaken dissent, as it would give no support to dissenters from the local orthodoxy.

To promote dissent with respect to the second difference (states contain different governmental structures), the best course may vary with the different social compositions of the separate states. Always the goal is to empower dissenting voices through structural support, but that goal may entail different arrangement in different circumstances. Often, for example, proportional representation (PR) will best ensure that even small groups have some influence in the legislature: if a party wins as little as one per cent of the vote, it will receive one percent of the seats in the legislature, unless there is a threshold requirement. By contrast, majority/plurality systems may discourage small parties: unless they can win a plurality or majority of the votes in a single member district, they will receive no representation at all. If, for example, one regionally dominant party commands sixty percent support in the region, and if that support is spread evenly across the districts, it will win every single district, because it has a majority in each. Although it has only sixty percent support, it will command one hundred percent of the legislature—a nightmare for dissent.

Generally, therefore, proportional

representation will better promote dissent. And yet, even this recommendation depends on context, as there may be conditions under which a majority/plurality system best promotes dissent. Imagine, for example, that a state includes a powerful core culture and a fragmented set of tiny minority groups. Under a PR system, each group will command its proportional share of the legislature, but none will pose a real alternative to the dominant group. By contrast, under a majority/plurality system, the minority groups may band together to make up a majority or plurality in a particular district, because otherwise they will receive no representation at all. As these groups progressively unite, they may become a powerful dissenting voice in the region. In effect, the electoral system has encouraged them to submerge their differences so that, together, they can mark out a viable alternative to the local majority.

Under unusual circumstances, to promote dissent, it may even be important to use majority/plurality systems to increase the power of a state's core culture. Imagine that a state has a core culture that defines itself in opposition to a culture that is dominant both at the center and throughout the other states. This core culture, however, commands a bare majority in its own state, and the instate minority bloc is composed of people from the culture dominant at the center, is better financed, and has greater influence in the federal government. In short, the state's core culture is in danger of being swamped, so that it will no longer offer a significant dissenting voice. Under these circumstances, majority/plurality systems may actually help to promote dissent by, in a sense, "over-

representing” the state’s core culture. Although only fifty-two percent across the state (and sinking fast), they have a majority in, say, sixty or seventy percent of the districts, so that they have a commanding majority in the legislature. Such an arrangement may reduce dissent internal to the state, but nationwide, it would increase dissent by ensuring that there is a least one regional alternative to the culture of the center.

The possible permutations of constitutional design are endless, and as they depend on context, it is not possible to summarize them in advance. The general point is that it is not enough to draw states’ boundaries so as to include different social groups with a rich capacity for dissent, because the wrong governmental structure may silence potentially dissenting groups.

These two axes of difference, society and structure, interact to produce distinctive local identities and traditions of conversation and contestation. Once developed, these identities and cultures may generate new effects on the practice of dissent, so that federalism must adapt to these changes. For example, before the Civil War, many southern states contained distinct societies: a strong polar division along racial lines, an incipient white supremacist ideology, an economic system based partly on chattel slavery. It also had an electoral system that tended to over-represent the dominant white supremacist culture: majority/plurality elections for representatives, often from large multi-member districts, indirect election (by the state legislature) of U.S. senators and sometimes the governor, and so forth. It is not surprising that under these conditions, the interaction of society and structure produced a strong native son identity organized around white

patriarchalism and the peculiar institution. This identity, in turn, seems to have taken on a life of its own: as southern leaders were raised in it and felt honor bound to defend it, they increasingly emphasized southern distinctiveness, defined in opposition to northern ways. Eventually, this federal system became so turbulent that it violated our second requirement for facilitating dissent: federalism cannot rest on states so different that a single constitutional system cannot contain them, such that secession results.⁶³ In short, then, it is not enough merely to create the right federal system ab initio; as the system gives rise to identities and traditions, it may require adaptation to create a viable and variable range of dissenting voices.

Conclusion

Because of a cultural individualism so deep as to seem instinctive, Americans tend to rely on constitutional cartoons when thinking about dissent. We imagine Martin Luther King or William Lloyd Garrison—or any of the other famous American dissenters—as lonely prophets, crying out against oppressive local societies. Prophets they surely were, and alienated from some parts of their societies. But they were emphatically not alone: in truth, their words had power because they were deeply embedded in a dissenting communal tradition. Local cultures are not always the enemy of dissent. Instead, the two enjoy an ambivalent relationship: sometimes local cultures try to drive others out of existence, but at other times or even the same time, they pose the only viable alternative to views dominant at the center or in the state capital. In practice, individual dissenters depend on dissenting cultures for their

sustenance. To reject localism in the name of dissent is to throw the baby out with the bath-water: it may eliminate some oppression, but it may also suppress some inspiration. Fortunately, constitutionalists do not need to approach this problem on an either/or basis: either we have localism both good and bad, or we have no localism at all. Instead, we can try to discern a nationally appropriate federalism that will sub-grid those local cultures that aid dissent more than repress it.

Surely, for many Americans, this approach robs dissent of much of its emotional appeal. Speaking for one community in opposition to another means that we are not different in kind from the people whom we resist: unlike Walzer's Hercules among critics, we do not have a uniquely objective line to God's mind. Yet in the end, this awareness of our own embeddedness will likely prove a stabler foundation for the practice of dissent than will cartoons in which dissenters birth themselves. Such an awareness forces us to pay heed to the social conditions necessary to effective dissent, and it reminds us that even the wisest dissenters have no monopoly on truth.

¹ See William E. Cain, "Introduction," in *William Lloyd Garrison and the Fight Against Slavery: Selections from The Liberator*, ed. William E. Cain (Boston: Bedford Books, 1995), 35-36.

² William Lloyd Garrison, "To the Public," in *William Lloyd Garrison and the Fight against Slavery*, 71.

³ *Ibid.*, 72.

⁴ See Henry Mayer, *All On Fire: William Lloyd Garrison and the Abolition of Slavery* (New York: St. Martin's Press, 1998), xv-xvi, 300-304.

⁵ *Ibid.*, 313-316, 324-29.

⁶ Garrison, "To the Public," in *William Lloyd Garrison and the Fight Against Slavery*, 71.

⁷ *Ibid.*

⁸ For examples, see the opinion of Justice Ruth Bader Ginsburg (joined by Justice Stevens) in *Stenberg V. Carhart*, 530 U.S. 914, 951 (2000) and the opinion of Justice Anthony Kennedy (Joined by Justices Stevens, Souter, Ginsburg, and Breyer) in *Lawrence v. Texas*, 123 S.Ct. 2472, 2475 (2003).

⁹ For examples, see the opinions of Justice Antonin Scalia in *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) and (joined by Justices Rehnquist and Thomas) in *Lawrence v. Texas*, 123 S.Ct. 2472, 2488 (2003).

¹⁰ For an example of a communitarian conservative view, see the opinion of Justice Warren Burger (joined by Justices White, Blackmun, Powell, and Rehnquist) in *Miller v. California*, 413 U.S. 15, 16 (1973); for an example of a liberal view, see the opinion of Justice William O. Douglas in the same case, 413 U.S. 37.

¹¹ For an example, see the Table of Contents in one of the oldest and most popular casebooks on the market, Kathleen Sullivan and Gerald Gunther, *Constitutional Law*, Fifteenth Edition, (New York: Foundation Press, 2004).

¹² See James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Isaac Kramnick (London: Penguin Books, 1987), 122-28.

¹³ See *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham (New York: New American Library, 1986), 270-80.

¹⁴ See William W. Freehling, *The Road to Disunion: Secessionists at Bay 1776-1854* (New York: Oxford University Press, 1990), 287-352.

¹⁵ See Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (New York: Harper & Row, 1988), 564-612.

¹⁶ For powerful accounts of this period, see Charles Marsh, *God's Long Summer: Stories of Faith and Civil Rights* (Princeton: Princeton University Press 1997); Charles Black, "The Lawfulness of the Segregation Decisions," 69 *Yale L.J.* 421 (1960).

¹⁷ See Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structures of the Political Process*, Revised second Edition (New York: Foundation Press 2002), 90-129.

¹⁸ *Ibid.*, 546-671.

¹⁹ 405 U.S. 330 (1972).

²⁰ *Ibid.*, 334-35.

²¹ *Ibid.*, 336-43.

²² *Ibid.*, 354.

²³ *Ibid.*, 354-55.

²⁴ *Ibid.*, 355.

²⁵ *Ibid.*, 355-56.

²⁶ For magisterial accounts of King's southern context and intellectual formation, see Taylor Branch, *Parting the Waters: American in the King Years 1954-63* (New York: Simon & Schuster 1988); David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (New York: William Morrow 1986).

²⁷ 405 U.S. 356.

²⁸ Michael Walzer, *In the Company of Critics: Social Criticism and Political Commitment in the Twentieth Century* (New York: Basic Books, 2002).

²⁹ *Ibid.*, 13.

³⁰ *Ibid.*, 6

³¹ *Ibid.*, 16.

³² *Ibid.*, 20

³³ *Ibid.*, 22.

³⁴ *Ibid.*, 23.

³⁵ *Ibid.*, 22.

³⁶ *Ibid.*, 26.

³⁷ *Ibid.*, 19

³⁸ *Ibid.*, 17.

³⁹ *Ibid.*, 17.

⁴⁰ Ibid., 22

⁴¹ *Johnson v. M Intosh*, 21 U.S. 543, 588 (1823).

⁴² The two cases were *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁴³ See David H. Getches, Charles F. Wilkinson, and Robert A. Williams, *Cases and Materials on Federal Indian Law*, Fourth Edition (St. Paul, Minn.: West Publishing Co. 1998), 95-104, 126-27.

⁴⁴ See *Worcester*, 31 U.S. at 519-20.

⁴⁵ See Getches, Wilkinson, and Williams, *Federal Indian Law*, 98, 101, 127-28.

⁴⁶ *Cherokee Nation*, 30 U.S. at 1.

⁴⁷ *Worcester*, 31 U.S. at 542-43.

⁴⁸ Ibid., 544.

⁴⁹ Ibid., 543.

⁵⁰ Ibid., 543.

⁵¹ See *Williams v. Lee*, 358 U.S. 217 (1959).

⁵² 285 U.S. 262, 311 (1932).

⁵³ See Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition* (Boston: Little, Brown and Co., 1981).

⁵⁴ Walzer, *In the Company of Critics*, 17.

⁵⁵ 469 U.S. 528, 557-579 (1985).

⁵⁶ Ibid., 568.

⁵⁷ Ibid., 571.

⁵⁸ Ibid. Powell is here quoting from Alexander Hamilton's "*Federalist* No. 17, p. 107 (J. Cooke ed. 1061)."

⁵⁹ Ibid., 571. The second quotation is again from *Federalist* Number 17.

⁶⁰ Ibid., 572.

⁶¹ For a classic expression of this symbolic identity (defined in opposition to the southern white power structure and speaking for southern Blacks), see "Martin Luther King's Letter from Birmingham Jail" (April 16, 1963), <http://almaz.com/nobel/peace/MLK-jail.html>.

⁶² Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press 1995), 83.

⁶³ See Anne Norton, *Alternative Americas: A Reading of Antebellum Political Culture* (Chicago: The University of Chicago Press 1986).