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HOW FEDERALISM CAN PROMOTE A NATIONAL COMMITMENT TO THE RULE OF LAW

1. INTRODUCTION

The obligation of the government to obey the law constitutes a central element in most conceptions of the “Rule of Law”. Ensuring the legality of governmental action advances the core rule-of-law value¹ of protecting against arbitrary government conduct. References to “the government”, however, elide the reality of multiple, overlapping governing authorities. Federal systems, such as the United States, feature subnational units with constitutionally recognized roles. Even in systems not formally constituted as “federalist,” subnational governments proliferate at the local and regional level. This multiplicity of governments intersects in complex ways with the concept of the rule of law. Each of these governments might potentially engage in arbitrary acts of oppression violating rule-of-law principles. Early studies of federalism emphasized the need to ensure that each government acted within its constitutionally defined sphere of authority. More recent federalism scholarship focuses on the overlap and intersection of local and national authority². This interconnection presents important ways to safeguard the rule

¹ Definitions of the Rule of Law vary, but government accountability, conformity to legal norms, and protection of human rights serve as common features. See, e.g., World Justice Project, *Factors of the Rule of Law*, available at <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018/factors-rule-law> (visited February 20, 2019). Some definitions of the Rule of Law are purely procedural. For a discussion of different approaches and defense of a substantive conception, see M. Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, “University of Pittsburgh Law Review” 2010, Vol. 72. For a classic discussion of the distinction between a procedural and substantive conception of the rule of law, see R. Dworkin, *A Matter of Principle*, Cambridge 1985, pp. 11-18.

² For a discussion of the evolution of conceptions of federalism, see R. Schapiro, *Polyphonic Federalism*, Chicago 2009, pp. 31-53.

of law. Each government can act to check abusive practice by other governments. Each can stand as a bulwark against the tyranny of other governmental actors.

The history of federalism in the United States illustrates the important function of governments in restraining abuses by other governments. At times, the federal government has played a vital part in attempting to limit discrimination and violence sanctioned, and often perpetrated, by state and local governments. More recently, states have undertaken an active role in seeking to limit illegal activity by the national government. States have assumed an especially significant position in addressing illegal inaction by the federal government. When the government undertakes civil or criminal enforcement activity against an individual, that person can almost always obtain judicial review of the legality of the governmental action. However, when the government fails to enforce the law, no individual may be sufficiently aggrieved to have “standing” to initiate litigation. The failure to enforce environmental laws, for example, may cause harm to many people, but it may be the case that no one has suffered the kind of particularized injury required to invoke a judicial forum³. Though the emerging doctrine lacks clarity, it appears that states may be able to assert standing in cases in which no individual could. States thus have a distinctive role in triggering judicial review of potentially illegal government inaction. In this way, national and subnational governments can oversee each other and promote review of the legality of each other’s activities.

This article offers an overview and analysis of the different modalities by which the interaction of states and the national government may promote the rule of law. State and federal interaction can take many different forms. Sometimes the states work against the national government; sometimes the states work with the national government; and sometimes the states work independently of the national government, but seek to promote national goals. I term these interactions, resistance, collaboration, and redundancy. In addition, the states can pursue these distinctive goals either by litigating against the national government in court or by direct action, such as state regulatory, legislative, or constitutional initiatives. Litigation figures most prominently in state resistance to national policy. Cooperation and redundancy generally take place through direct action. Even with respect to these modes of interaction, though, litigation against the national government does play an important supporting role.

As I will argue, this taxonomy illuminates two important insights about federalism in the contemporary United States. The traditional view of federalism understands the states and the federal government to occupy separate, largely non-overlapping domains. In this conception, federalism entails erecting a barrier between state and federal enclaves of authority. Along similar lines, the tradi-

³ For an overview of the requirements of standing, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

tional concept of federalism distinguishes between matters of national and local concern, and assigns these topics, respectively, to the national government or to the states. As referenced by Chief Justice William Rehnquist in *United States v. Lopez*, this model emphasizes the “distinction between what is truly national and what is truly local”⁴.

Neither of these principles hold true in the United States today. First, federalism operates through the dynamic interaction of states and the national government. While earlier conceptions of federalism focused on the division of authority between states and the national government, contemporary theories of federalism highlight the dynamic interconnection between states and the national government⁵. In this more recent conception, the goals of federalism are advanced not by separating the spheres of national and state jurisdiction, but by managing the ongoing overlap of state and federal activity. Second, the state and federal interaction often relates to matters of national policy. In the instances I will discuss, when the states engage in resistance, collaboration, or redundancy, they do not base their actions on features distinctive to their particular states. The states do not claim that some local factor warrants an exemption from an otherwise appropriate national policy. Rather, the states engage in a discussion about the best rules for the country as a whole. When Texas objects to President Obama’s immigration policy, California works with the national government to enforce environmental laws, or Massachusetts finds a state constitutional right to same sex marriage, the states are not arguing about the policy in their states in particular. Instead, the states are supporting or attacking the policy generally. They base their arguments on theories of what should be legally mandated everywhere. This national focus appears most clearly in litigation. The states seek judicial remedies designed to influence national policies throughout the United States, not just in their states. With respect to direct action by the states, the initial focus of the state activity is more limited. When state courts interpret the state constitution or a state legislature enacts laws, the immediate impact is constrained by state boundaries. The reach of state laws generally ends at the geographical boundaries of the state. However, as the case of same-sex marriage in Massachusetts well illustrates, the grounds of the decision may be generally applicable and the impact of the decision may be felt nationwide. Whether by litigation or by direct action, the states seek to catalyze action by the national government and to promote a uniform national policy. Contrary to the image of federalism fostering local variation, the dynamic federalism studied here promotes a single invariant rule. Locally focused action by states is a means to influence national policy, not an end in itself. The primary contribution of federalism is not to allow states

⁴ *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

⁵ See R. A. Schapiro, *From Dualist Federalism to Interactive Federalism*, “Emory Law Journal” 2006, Vol. 56.

to choose their own rules, but instead to allow the states to drive the national government toward a better national rule.

This national focus provides a critical link between federalism and the rule of law. Promoting the rule of law is a national obligation. The federal government has the duty to ensure that laws are fairly enforced and that human rights are honored everywhere in the United States. Inhabitants of the United States should enjoy the benefits of the rule of law throughout the country. The protection of the rule of law should not vary based on state of residence. In keeping with this fundamental national commitment to the rule of law, federalism cannot be a license for state deviation on fundamental matters. Certainly in the history of the United States, federalism, understood as state autonomy on issues of civil rights, has stood as an enemy to the rule of law⁶. This article emphasizes an alternative conception of the structure and operation of federalism. This federalism serves as a powerful promoter of the rule of law. In the contemporary United States, it is often government inaction that presents the greatest threat of tyranny. Through resistance, cooperation, and redundancy, states prod the national government to enforce the law and to protect human rights. By targeting the federal government, either through litigation or direct action, the states seek to move national policies closer to a rule-of-law ideal. Twenty-first century federalism can play a powerful role in addressing the twenty-first century challenges to the rule of law.

2. MODALITIES OF STATE-FEDERAL INTERACTION

State interaction with the national government can take many forms. First, states can resist the national government. They can challenge federal conduct on the basis of alleged illegality or on other deviations from rule-of-law principles. Second, states can cooperate with the national government to assist in the implementation of national policy. Third, states can act independently of the national government, seeking to advance policies, perhaps first on the state level, but eventually on the national level. In this third category of redundancy, states promote policies that could be, and in the state's opinion should be, adopted at the national level, but have not yet been accepted or opposed by the national government. I term this category "redundancy" for two reasons. First, the state offers an alternative source of protection for the citizens of the state. For example, even if the federal constitution does not protect the right to same-sex marriage, the state constitution can safeguard that right within the state. Second, the states provide an alternative mechanism for influencing national policy. Individuals can pro-

⁶ *Ibidem*, pp. 45-47.

mote a federal right to same-sex marriage or a federal commitment to addressing climate change. However, in addition to individual action or lobbying, the states themselves can adopt policies that may serve as a model, inspiration, goad, or embarrassment for the national government and thereby influence national policy.

2.1. RESISTANCE

State resistance to national policy through litigation has garnered much recent attention. States have been engaged in litigation against the national government since the founding of the republic⁷. However, such suits were rare before the growth of the modern regulatory state in the twentieth century⁸. Disputes over the scope of state and federal regulatory authority did end up in court, but the suits generally involved individuals seeking relief from governmental enforcement actions⁹. The states and the federal government did not directly confront each other as adverse parties. When the states did attempt to challenge the limits of national authority in suits against the federal government, the courts generally rebuffed such actions. For example, in the post-Civil War period states sought to attack the federal Reconstruction Acts as violations of state sovereignty. The United States Supreme Court rejected the suits as nonjusticiable¹⁰.

In the 20th century, suits by states against the federal government have become more common. Two categories of state actions against the federal government have proved relatively unproblematic. First, states have been able to assert their proprietary interests in suits against the national government. Proprietary interests refer to the kinds of interests that ordinary private litigants might assert, relating, for example, to the ownership of property or the participation in business enterprises¹¹. Thus, a state could sue the federal government for violations of the National Environmental Policy Act, based on harms to state-owned property¹². Second, states have been allowed to pursue sovereignty interests in cases against the federal government. These sovereignty interests include federal regulations of state governments¹³.

However, a third category of suits, in which states assert “quasi-sovereign” interests, have proved more controversial. These suits represent the prime means

⁷ For a brief overview, see R. A. Schapiro, *Judicial Federalism and The Challenges of State Constitutional Contestation*, “Penn State Law Review” 2011, Vol. 115.

⁸ See J. R. Nash, *Sovereign Preemption State Standing*, “Northwestern University Law Review” 2017, Vol. 112.

⁹ *Ibidem*, pp. 986-987.

¹⁰ *Ibidem*, p. 987.

¹¹ *Ibidem*, p. 989.

¹² See *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002).

¹³ See, e.g., *New York v. United States*, 505 U.S. 144 (1992); see also R. A. Schapiro, *Judicial Federalism...*, pp. 990-991 (discussing state litigation of sovereign interests).

for states to resist federal policy through litigation. Quasi-sovereign interests refer to a state's interest in the well-being of its inhabitants and in the state's proper treatment within a federal system. The concept of quasi-sovereign interests intersects with the notion of *parens patriae* actions. *Parens patriae* actions refer to cases in which the state brings suit to protect its citizens¹⁴. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*¹⁵, the United States Supreme Court recognized the propriety of *parens patriae* suits and explained that they sought to vindicate quasi-sovereign interests¹⁶. The Court further summarized the characteristics common to quasi-sovereign interests:

“First, a State has a quasi-sovereign interest in the health and wellbeing – both physical and economic – of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system”¹⁷. In *Snapp*, the Supreme Court allowed a suit by Puerto Rico alleging that the defendants had discriminated against Puerto Ricans in favor of foreign nationals in violation of federal law.

Notably, the defendants in *Snapp* were private parties. *Parens patriae* suits by states against the federal government have faced additional hurdles. In *Massachusetts v. Mellon* in 1923, the Supreme Court rejected a *parens patriae* action by Massachusetts against the United States¹⁸. In *Mellon*, Massachusetts challenged the allegedly uneven tax burdens associated with the federal maternal health program. The Court held Massachusetts's attempt to protect its citizens from the laws of the United States violated important tenets of federalism:

The citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status¹⁹.

Thus in *Mellon* the Court held that because the federal government represents the interests of all of the citizens of the United States, the states could not maintain an action against the federal government asserting the rights of its citizens. In upholding the suit in *Snapp*, the Court noted the rule of *Mellon* and emphasized

¹⁴ See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600-07 (1982) (discussing *parens patriae* action).

¹⁵ *Ibidem*.

¹⁶ *Ibidem*, 607.

¹⁷ *Ibidem*, 607.

¹⁸ See *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923).

¹⁹ *Ibidem*, 485-486.

that Puerto Rico was bringing its action against private defendants, not against the United States²⁰.

Mellon seemed to raise a high bar for states seeking to vindicate quasi-sovereign interests in suits against the United States. However, returning to the Court 84 years after *Mellon*, Massachusetts found a path for a successful suit against the United States. In *Massachusetts v. EPA*²¹, the state alleged that the federal government was violating federal law by refusing to regulate greenhouse gases linked to global warming. A divided Court held that Massachusetts did have standing to bring the suit. The Court distinguished *Mellon* on the theory that in the instant case the state sought the enforcement of federal law, rather than attempting to shield its citizens from the application of a federal statute²².

Massachusetts v. EPA represented an important milestone in the interaction of states and the federal government. In distinguishing *Mellon*, the Court gave a green light to suits by states alleging that the national government was failing to enforce the law. Further, the suit highlighted the importance of state standing. Environmental laws often regulate one defined group of entities for the benefit of the people as a whole. Parties who are subject to the regulations will have standing to challenge the application of the law. However, potential beneficiaries of the law may face burdens in asserting claims that the government is violating the law by refusing to regulate. Given the generalized nature of the benefit, plaintiffs challenging non-enforcement may have difficulty demonstrating the kind of individualized and particularized harm required to support standing in federal court. In upholding standing in *Massachusetts v. EPA*, the Court asserted that states were entitled to “special solicitude” in the standing analysis²³. The Court noted that in joining the union, states forswore military action against each other. By surrendering this sovereign prerogative, the Court explained, the states earned privileged access to a judicial forum²⁴.

Massachusetts v. EPA provides a model of recent resistance through litigation in another respect, as well. Massachusetts clearly was seeking to influence national environmental policy. To establish standing, Massachusetts did proffer a harm to the state. Massachusetts argued that global warming caused by unregulated greenhouse gases would cause sea levels to rise, damaging the state’s coastal areas²⁵. However, while the relevant injury related directly to Massachusetts, the remedy did not. The state did not ask for the Environmental Protection Agency to regulate greenhouse gases emitted in Massachusetts or with special impact on Massachusetts. The state wanted the EPA to regulate greenhouse gases

²⁰ See *Alfred L. Snapp...*, 458 U.S., 610, n.16.

²¹ 549 U.S. 497 (2007).

²² *Ibidem*, 520, n. 17.

²³ *Ibidem*, 520.

²⁴ *Ibidem*, 519-20.

²⁵ *Ibidem*, 521-22.

to the full geographic boundaries of its regulatory authority. The goal of the litigation was to create environmental policy for the nation.

Global warming of course is a global problem with global impact. With the possible exception of mitigation efforts, state-specific solutions seem futile²⁶. However, not just with respect to global warming, but with regard to a broad range of other issues as well, state resistance takes the form of litigation seeking to determine national policy. Certain states tend to take the lead in the litigation, and the cases tend to reflect the relative political leanings of the national government and the states. Notably, Texas spearheaded suits challenging the policies of the Obama administration. Then-Attorney General of Texas Greg Abbot proudly showcased his opposition to President Obama's initiatives. Abbot colorfully described his job as follows: "I go to the office in the morning, I sue Barack Obama, and then I go home"²⁷. Press reports estimate that Texas sued the Obama administration at least 48 times²⁸. California has taken the lead in suing the Trump administration²⁹.

Immigration has proved a fertile area for resistance. For example, Texas brought suit challenging the Obama administration's Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"). Pursuant to DAPA, the federal government planned to confer a protected status on people who did not have lawful immigration status and who had children who were citizens or lawful permanent residents, as long as the parents met certain requirements³⁰. DAPA would have offered protection to an estimated 4.3 million people³¹. The federal government generally would not undertake removal proceedings against people accorded DAPA status. As is often the case when the government declines to enforce a law, it was not clear whether anyone would have standing to challenge the government's decision. Texas, joined by 25 other states, brought suit alleging that the promulgation of DAPA violated the Administrative Procedure Act and other federal statutes and also breached the President's constitu-

²⁶ For a discussion of addressing climate change in a federal system, see E. Schlager et al. (eds.), *Navigating Climate Change Policy. The Opportunities of Federalism*, Tucson 2011.

²⁷ See A. Liptak, *Trump v. California: The Biggest Legal Clashes*, "New York Times" 6 April 2018, A18.

²⁸ See N. Satija et al., *Texas vs. the Feds – A Look at the Lawsuits*, "Texas Tribune" 17 January 2018, available at <https://www.texastribune.org/2017/01/17/texas-federal-government-lawsuits/> (visited February 25, 2019).

²⁹ See A. Liptak, *Trump v. California...*; A. Hart, *From Birth Control to the Border Wall: 17 Ways California Sued the Trump Administration in 2017*, "Sacramento Bee" 19 December 2017, available at <https://www.sacbee.com/news/politics-government/capitol-alert/article188901094.html> (visited March 2, 2019); X. Becerra, *Fighting Federal Rollbacks*, State of California Department of Justice website, available at <https://oag.ca.gov/environment/rollbacks> (visited February 25, 2019).

³⁰ See *Texas v. United States*, 809 F.3d 134, 147-48 (2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

³¹ *Ibidem*, 148.

tional duty to “take care that the laws be faithfully executed”³². The United States Court of Appeals for the Fifth Circuit upheld an injunction against the implementation of DAPA. Citing *Massachusetts v. EPA*, the Court of Appeals found that Texas was entitled to “special solicitude” in the standing inquiry³³. When the case reached the United States Supreme Court, the ruling of the Court of Appeals was affirmed by an equally divided court³⁴. Texas recently filed a similar suit challenging the predecessor to DAPA, the Deferred Action for Childhood Arrivals (“DACA”) program, which grants protected status to people brought to the United States as children³⁵. It is estimated that 1.2 million people are eligible for DACA, and more than 600,000 people have been granted DACA status³⁶.

The Affordable Care Act (“ACA”)³⁷ has served as another locus for state litigation. With regard to its imposition of various requirements, private parties subject to the legislation could challenge its provisions. Thus, while states actively participated in the cases, the key attacks on the enforcement of the ACA featured private plaintiffs³⁸. With respect to the Trump administration’s decision to expand exemptions from the ACA’s requirements, thus regulating less private conduct, the states took the lead in challenging the federal government’s proposed regulatory inaction. Five states brought suit in federal court in California contesting the exemptions³⁹. Citing *Massachusetts v. EPA* and its reference to “special solicitude” for states⁴⁰, the district court held that the states did have standing and enjoined the new exemptions.

The DAPA and recent ACA suit share the key features of *Massachusetts v. EPA*. The actions assert that the federal government is acting illegally when it refuses to enforce federal law. Although standing to attack non-enforcement decisions can be difficult to obtain, the courts grant “special solicitude” to the states and uphold their standing. The states do assert harms to their states, but the relief they seek is the reversal of a national policy. They argue that the federal government must enforce the law everywhere in the United States.

³² U.S. Const. Art. II, § 3.

³³ *Texas v. United States*, 809 F.3d at 151.

³⁴ *United States v. Texas*, 136 S. Ct. 2271 (2016).

³⁵ See M. Astor, *Seven States, Led by Texas, Sue to End DACA Program*, “New York Times” 2 May 2018, A14.

³⁶ See *Texas v. United States*, 809 F.3d at 146-47.

³⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

³⁸ See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *King v. Burwell*, 135 S. Ct. 2480 (2015); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

³⁹ *California v. Health and Human Services*, 281 F. Supp. 3d 806 (2017), *aff’d*, 911 F. 3d 558 (2018)..

⁴⁰ *Ibidem*, 821 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)). The Court of Appeals for the Ninth Circuit affirmed, though limited the injunction to bar enforcement only in the plaintiff states. *California v. Azar*, 911 F. 3d 558 (2018).

Resistance also occurs through direct action by states. Immigration again offers a significant example. In protest against the immigration policies of the Trump administration, cities, counties, and states announced that they would refuse to cooperate with federal authorities on immigration matters⁴¹. These refusals were in sense local. The governmental bodies could dictate only the procedures that they would follow within their boundaries. At the same time, the policies the localities sought to challenge were national. They wanted a change in immigration policy for the country. Their actions were necessarily local, but their aims were not.

Both by litigation and by direct action, states and sometimes localities resisted the enforcement priorities of the national government, priorities that they found oppressive. In certain instances the states asserted that the national government flouted the law by abandoning its obligation of enforcement. In these cases states litigated challenges to non-enforcement that might have been unavailable to private parties. The “special solicitude” to state standing proved crucial. Sometimes the states took issue with the particular manner and aggressiveness of enforcement. Both through litigation and by direct action, the states sought to defend the rule of law by pressuring the federal government to honor its affirmative obligation to enforce statutory provisions and to safeguard human rights. Federalism provided a means for the states to influence the federal government. Specifically, the states sought to promote a uniform national policy that they believed would better vindicate the rule of law.

2.2. COOPERATION

States cooperate with the national government across a broad range of areas. “Cooperative federalism” is the general term to describe the many contexts in which states take responsibility for implementing national policy⁴². The classic accounts of cooperative federalism assume a subordinate role for the state in dutifully implementing national mandates, perhaps tailoring the particular practices to accord with local circumstances. Jessica Bulman-Pozen and Heather Gerken, however, have pointed out that even in the realm of “cooperative federalism,” states play an active role in shaping national policy⁴³. Indeed, Bulman-Pozen and Gerken specifically distinguish between state efforts to shape the implementation of federal policy within their boundaries and state attempts to change national

⁴¹ See Ch. N. Lasch et al., *Understanding ‘Sanctuary Cities’*, “Boston College Law Review” 2018, Vol. 59; T. Kopan, *What Are Sanctuary Cities, and Can They Be Defunded?*, CNN.com 26 March 2018.

⁴² For an overview of cooperative federalism, see P. J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, “North Carolina Law Review” 2001, Vol. 79.

⁴³ See J. Bulman-Pozen, H. K. Gerken, *Uncooperative Federalism*, “Yale Law Journal” 2009, Vol. 118.

policy⁴⁴. California's role in implementing the Clean Air Act offers a notable example of spurring change in federal policy through formal collaboration. California has used its authority under the Clean Air Act to implement more aggressive regulation of pollution, with the effect of impelling other jurisdictions, and eventually the federal government, to adopt the more stringent standard⁴⁵. Thus, even when acting within a collaborative mode, states can drive the national government toward preferred levels of enforcement.

Cooperation begins with direct action by states. However, as Bulman-Pozen and Gerken point out, collaboration may involve some conflict. This conflict may give rise to state suits against the United States. For example, when the Trump administration threatened to limit California's ability to implement the Clean Air Act in its chosen manner, California, along with 16 other states and the District of Columbia, sued the EPA⁴⁶. The litigation seeks to vindicate California's right to cooperate with the national government in enforcing air pollution requirements and through that collaboration to propel national policy toward greater protection of the environment. The website of California Attorney General Xavier Becerra articulates this policy as follows, "Where General Becerra can work cooperatively with the federal government to protect the environment and public health he'll do so, but where the federal government becomes an obstacle, he won't hesitate to sue"⁴⁷.

2.3. REDUNDANCY

In some instances, the states develop their own approach to national issues, independently of the federal government. In these situations, the states neither seek to block federal policy nor act as implementers of federal regulations. The state executive and administrative apparatus might drive the initiatives or the state courts might take a leading role.

In *Massachusetts v. EPA*, a state directly resisted the federal government's inaction with regard to climate change. However, states also have pursued their own climate change policies, rather than attacking the federal government's lassitude. California has played a leading role in undertaking initiatives designed to cut carbon dioxide emissions⁴⁸. Other states, too, have taken action, sometimes grouping together in collective efforts to reduce greenhouse gases. States

⁴⁴ *Ibidem*, 1272-1273.

⁴⁵ *Ibidem*, 1276-1278; R. A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, "Harvard Law & Pol'y Review" 2009, Vol. 3.

⁴⁶ See H. Tabuchi, C. Davenport, *California Sues Trump Administration Over Car Emissions Rules*, "New York Times" 2 May 2018, A17.

⁴⁷ X. Becerra, *Fighting Federal Rollbacks*, State of California Department of Justice website, available at <https://oag.ca.gov/environment/rollbacks> (visited February 25, 2019).

⁴⁸ See Schapiro, *Polyphonic...* p. 119.

even have engaged in cross-border discussions with Canadian provinces seeking to develop shared plans to address global warming⁴⁹. These kinds of geographically limited approaches, by themselves, can have little impact on a global problem. As Kirsten Engel, in particular, has noted, the true significance lies in their impact on actions at the national (or even international) level⁵⁰. By their various efforts, state seek to focus attention on the issue of climate change and persuade or embarrass the federal government into taking action.

The area of LGBT rights further illustrates the significance of redundant state efforts. In the 1986 case of *Bowers v. Hardwick*⁵¹, the United States Supreme Court refused to offer constitutional protection to same-sex sexual relations. The Court upheld a Georgia statute that criminalized same-sex sexual contact. The Georgia Supreme Court pursued its own path. In *Powell v. State* in 1998, the Georgia Supreme Court held that the Georgia Constitution's protection for privacy invalidated the statute upheld in *Bowers*⁵². Referring to *Powell*, among other cases, the United States Supreme Court overruled *Bowers* in its 2003 decision in *Lawrence v. Texas*⁵³. The states then took the lead again. Building on the language in *Lawrence*, the Supreme Judicial Court of Massachusetts found a state constitutional right to same-sex marriage in *Goodridge v. Department of Public Health*⁵⁴. The *Goodridge* decision helped to set the stage for the broader recognition of same-sex marriage in the states and the eventual decision of the United States Supreme Court in *Obergefell v. Hodges*⁵⁵, holding that the United States Constitution guaranteed a right to same-sex marriage.

In this area, the states did not directly attack or even intersect with the federal government. However, the states had a profound effect on national policy. The Massachusetts court's decision in *Goodridge* engaged issues of liberty and equality at a high level of generality. The case extensively analyzed federal constitutional decisions and articulated theories of liberty and equality that were equally applicable in federal constitutional doctrine⁵⁶. *Goodridge* also opened the doors to myriad examples of same-sex marriages. Same-sex marriage became no longer a hypothetical

⁴⁹ *Ibidem*; K. Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, "Urban Lawyer" 2006, Vol. 38.

⁵⁰ See K. Engel, *State and Local Climate...* p. 1027.

⁵¹ 478 U.S. 186 (1986).

⁵² *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

⁵³ See *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

⁵⁴ 798 N.E.2d 941 (Mass. 2003).

⁵⁵ 135 S. Ct. 2584 (2015).

⁵⁶ See, e.g., *Goodridge v. Department of Public Health*, 798 N.E.2d at 966 ("The history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded'", quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996)); *Ibidem*, 968 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect'", quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

possibility, but a lived reality. That reality had an exceptionally important impact on the decisions of other states, and eventually the United States Supreme Court, in recognizing a right to same-sex marriage. In all of these ways *Goodridge* demonstrates the concept of redundancy. Even if federal constitutional doctrine does not recognize a right to same-sex marriage, the states can provide an alternative mechanism of protecting that right within their states. The opinion in *Goodridge* and the reality it produced had a broad impact throughout the United States. As with resistance and cooperation, redundancy provides a way for states to spur the federal government and to drive national policy toward greater protection of human rights.

Redundancy begins with state law initiatives. As with cooperation, redundancy does not start in a courthouse with the state suing the national government. However, as with cooperation, states' attempt at independent actions may lead them into litigation with the national government. States and the federal government may square off over the authority of the state to pursue its own regulatory path. Net neutrality offers a recent example of the sometimes short road from the statehouse to the courthouse. This controversy concerns the authority of telecommunications companies to control the flow of the internet traffic they carry. The Obama administration issued "net neutrality" rules, prohibiting telecommunications companies from imposing differential cost or access restrictions on internet content providers. The United States Court of Appeals upheld the "net neutrality" rules⁵⁷. Under the Trump administration, the Federal Communications Commission revoked the "net neutrality" rules⁵⁸. Pursuing an independent way to protect consumers, California enacted its own "net neutrality" rules⁵⁹. The United States then filed suit against California, seeking to block the state's regulations⁶⁰. As states use local laws to influence national policies, it is not surprising that their efforts elicit pushback from the national government.

3. CONCLUSION

The intersection of the rule of law and federalism presents something of a puzzle. Promoting the rule of law must be a national commitment, with the national government assuming ultimate responsibility. How, then, can federalism, a system of distributing power among subnational entities, align with the national responsibility? A traditional response would focus on the dangers of centralized power.

⁵⁷ *United States Telecom Assoc. v. FCC*, 825 F.2d 674 (D.C. Cir. 2016).

⁵⁸ See C. Kang, *F.C.C. Repeals Net Neutrality Rules*, "New York Times" 15 December 2017, A1.

⁵⁹ See C. Kang, *California Lawmakers Pass Nation's Toughest Net Neutrality Law*, "New York Times" 1 September 2018, A1.

⁶⁰ See C. Kang, *Justice Department Sues to Stop California Net Neutrality Law*, "New York Times" 1 October 2018, A14.

One might fear that an all-powerful central government could more easily assert tyrannical authority over its inhabitants. This traditional response corresponded well with the traditional view of federalism, sometimes termed “dual federalism,” which understands the states and the national government to exercise authority over distinct and generally non-overlapping domains. In this view, national powers are strictly limited so as not to intrude into enclaves of state sovereignty. If the federal government represents the chief threat to the rule of law, dual federalism promotes the rule of law by restraining the reach of national power.

As the examples in this article evidence, however, the rule of law may require government action to enforce the law and protect human rights. From this perspective, government inaction may pose a serious threat to the rule of law. How does federalism address this challenge? As I have argued, federalism can indeed play an important role in fighting inaction and promoting action by the national government. This function of states in spurring, rather than restraining, government action accords with the contemporary view of federalism, which emphasizes the inevitable and desirable interaction of states and the national government. The relationship of the states and the national government may take the form of resistance, cooperation, or redundancy, and states have various tools to advance their positions. What unites all of these modes and instruments is the goal of states to influence national policy. The ultimate aim of state action is not local deviation, but national uniformity. The strategy may be plotted in Boston, Austin, or Sacramento, but the target is Washington, D. C.

By setting their sights on national policy goals, states promote the national commitment to the rule of law. Of course, there is no guarantee that any individual state action will necessarily advance the rule of law. Perspectives on the rule of law may vary, and state initiatives may deviate from rule-of-law ideals. However, states have a critical role in offering additional perspectives on these vital questions, in promoting judicial resolution of contested issues, and in raising public awareness of the potential threats to the rule of law. States provide a significant counterweight to the perspective of the national government. That kind of pluralism and debate helps to advance a robust public discussion of what actions the federal government should take to enforce the law and protect human rights. In a democracy, that kind of public attention may serve as the ultimate protector of the rule of law.

BIBLIOGRAPHY

- Astor M., *Seven States, Led by Texas, Sue to End DACA Program*, “New York Times” 2 May 2018, A14
- Becerra X., *Fighting Federal Rollbacks*, State of California Department of Justice website <https://oag.ca.gov/environment/rollbacks> (visited February 25, 2019)

- Bulman-Pozen J., Gerken H. K., *Uncooperative Federalism*, “Yale Law Journal” 2009, Vol. 118
- Dworkin R., *A Matter of Principle*, Cambridge, Mass. 1985
- Ellis M., *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, “University of Pittsburgh Law Review” 2010, Vol. 72
- Engel K., *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, “Urban Lawyer” 2006, Vol. 38
- Hart A., *From Birth Control to the Border Wall: 17 Ways California Sued the Trump Administration in 2017*, “Sacramento Bee” 19 December 2017, available at <https://www.sacbee.com/news/politics-government/capitol-alert/article188901094.html> (visited March 2, 2019)
- Kang C., *California Lawmakers Pass Nation’s Toughest Net Neutrality Law*, “New York Times” 1 September 2018, A1
- Kang C., *F.C.C. Repeals Net Neutrality Rules*, “New York Times” 15 December 2017, A1
- Kang C., *Justice Department Sues to Stop California Net Neutrality Law*, “New York Times” 1 October 2018, A14
- Kopan T., *What Are Sanctuary Cities, and Can They Be Defunded?*, CNN.com 26 March 2018
- Lasch Ch. N. et al., *Understanding ‘Sanctuary Cities’*, “Boston College Law Review” 2018, Vol. 59
- Liptak A., *Trump v. California: The Biggest Legal Clashes*, “New York Times” 6 April 2018, A18
- Nash J. R., *Sovereign Preemption State Standing*, “Northwestern University Law Review” 2017, Vol. 112
- Satija N. et al., *Texas vs. the Feds – A Look at the Lawsuits*, “Texas Tribune” 17 January 2018, available at <https://www.texastribune.org/2017/01/17/texas-federal-government-lawsuits/> (visited February 25, 2019)
- Schapiro R. A., *From Dualist Federalism to Interactive Federalism*, “Emory Law Journal” 2006, Vol. 56
- Schapiro R. A., *Judicial Federalism and The Challenges of State Constitutional Contestation*, “Penn State Law Review” 2011, Vol. 115
- Schapiro R. A., *Not Old or Borrowed: The Truly New Blue Federalism*, “Harvard Law & Pol’y Review” 2009, Vol. 3
- Schapiro R., *Polyphonic Federalism. Toward the Protection of Fundamental Rights*. Chicago 2009
- Schlager E. et al. (eds.), *Navigating Climate Change Policy: The Opportunities of Federalism*, Tucson 2011
- Tabuchi H., Davenport C., *California Sues Trump Administration Over Car Emissions Rules*, “New York Times” 2 May 2018, A17
- Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, “North Carolina Law Review” 2001, Vol. 79
- World Justice Project, *Factors of the Rule of Law*, available at: <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018/factors-rule-law> (visited February 19, 2019)

Summary

Promoting the rule of the law is a national responsibility. The obligation to ensure legality and advance human rights rests on the national government. This article analyzes how federalism, a system of distributing power among subnational entities, can promote this national goal. The article explores how states in the United States have played an important role in encouraging the federal government to enforce the law and safeguard rights. By means of resistance, cooperation, and redundancy, states have moved the United States closer to rule-of-law ideals. The state action sometimes takes the form of litigation, with states bringing suit against the federal government. Such suits have particular significance in challenging illegal inaction by the national government, as when the federal government fails to enforce environmental laws. Litigation by states may overcome standing barriers that would limit such suits by private individuals. States may also engage in direct action by pursuing their own policies that promote the rule of law. In these areas, the states may oppose the federal government, cooperate with the federal government, or act in an independent, parallel manner. What unites all of these modes and instruments of state-federal interaction is that the goal of states is to influence national policy. The state action may begin within the boundaries of a particular state, but what motivates the state initiative is a vision applicable to the nation as a whole. The ultimate aim of state action is not local divergence, but national uniformity. Federalism serves not as a license for local deviation from national norms, but instead as a means for states to engage actively in creating policy at a national level. In this way, independent state activity can indeed promote the national obligation to promote the rule of law throughout the country.

KEYWORDS

federalism, Rule of Law, standing

Streszczenie

Wspieranie praworządności należy do obowiązków każdego kraju. Obowiązek zapewnienia rządów prawa i praw człowieka spoczywa na rządach krajowych. Artykuł ten analizuje sposób, w jaki indywidualne stany Stanów Zjednoczonych Ameryki Północnej zachęcają rząd federalny do przestrzegania prawa oraz wprowadzania mechanizmów zmierzających do zabezpieczenia praw obywatelskich. Rządy stanowe przez wykorzystanie opozycji, sprzeciwu czy też współpracy z rządem federalnym doprowadziły do zbliżenia się Stanów Zjednoczonych do ideałów praworządności. Czasami działania sta-

nów polegają na wnoszeniu spraw sądowych przeciwko rządowi federalnemu. Pozywanie rządu federalnego ma szczególne znaczenie, gdy rząd federalny działa sprzecznie z prawem lub w przypadku jego bezczynności w odniesieniu do kwestii ochrony środowiska. Spory sądowe prowadzone przez stany mogą usuwać ograniczenia polegające na tym, że osoby prywatne nie mają legitymacji do wszczynania takich spraw. Stany mogą również angażować się bezpośrednio i niezależnie od rządu federalnego w realizację własnej polityki promującej rząd prawa. W takim rozumieniu administracja stanowa może działać w opozycji do rządu federalnego, może z nim współpracować, a także podejmować działania równoległe. Wspólnym celem tych metod działania instrumentów stosowanych przez administracje stanowe jest wpływ stanów na politykę krajową. Działania podejmowane przez administracje stanowe mogą rozpocząć się w granicach stanu i dotyczyć obszaru określonego stanu, ale motywacją tych inicjatyw jest wizja odnosząca się do całego państwa. Ostatecznym celem podejmowania działań przez administracje stanowe nie jest odróżnienie się konkretnego stanu od innych, ale perspektywa wprowadzenia podobnych rozwiązań na poziomie krajowym. Federalizm nie służy wprowadzaniu lokalnych (stanowych) odstępstw od norm krajowych, ale jest środkiem umożliwiającym stanom aktywne zaangażowanie się w tworzenie polityki na poziomie krajowym. W tym znaczeniu niezależna działalność stanów może realnie wspierać obowiązek promowania praworządności w całym kraju.

SŁOWA KLUCZOWE

federalizm, praworządność