

# VERMONT IS A CONSTITUTIONAL PROBLEM

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*Whether measured by population or by the size of its economy, Vermont is small. It is the second least populous state, with fewer residents than 28 cities and 107 counties. It has the smallest economy of any state. And there is no reason to believe this will change. It has one of the oldest populations, the lowest fertility rate, and it draws few migrants, domestic or foreign. There are a number of individual Americans who could buy all of the residential property in Vermont by themselves. If Amazon located its full “HQ2” in Vermont, it would have employed about 8% of the state’s population and be responsible for about 17% of Vermont’s annual Gross State Product. Vermont is just very, very small.*

*This Essay argues that neither the structural aspects of the Constitution nor our subconstitutional institutional design choices are well-suited for an ever-growing country with states as small as Vermont. Very small states make Congress less democratic, more likely to engage in pork-barrel spending, and more susceptible to the influence of single firms or interest groups. Very small states make “cooperative federalism” less effective, as small state governments are not ideal partners for the federal government in administering federal programs. Small and shrinking states are less likely to fulfill their legislatively assigned role of making necessary investments in physical and human capital and are more likely to need federal bailouts due to budget shocks. In short, very small states make both the national government and our federalism less effective.*

*In order to understand how the Constitution and American democracy work more broadly—and how to make them work better—we need to reckon with the big problems created by small states. Constitutional law rarely considers the differences between the size of states outside of a few narrow contexts, but small states like Vermont are so unlike big states like California or Texas that thinking of them in similar terms makes little sense. This Essay suggests ways to reframe debates about federalism and the Constitution more broadly to focus on the actual traits of states and not merely their legal status.*

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## INTRODUCTION: BEZOS TO BURLINGTON?

In September 2017, Amazon—one of the nation’s largest companies—announced it was going to build a second headquarters, likely in a city other than its current base in Seattle.<sup>1</sup> Cities around the country began competing to host the “HQ2,”<sup>2</sup> which was supposed to have housed 50,000 employees.<sup>3</sup> Over the course of 2017 and 2018, journalists and scholars made all sorts of predictions about the location of HQ2, from rich cities flush with high-tech talent and financial whiz-kids, like Boston or San Francisco, to growing cities, like Atlanta, Denver, Raleigh-Durham, and Austin.<sup>4</sup> Others suggested that Amazon could or should move its new headquarters to push a political agenda, locating in a “purple” state

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1. See Abha Bhattarai, *Amazon Is Seeking a Home for Its HQ2, a \$5 Billion Second Headquarters Somewhere in North America*, WASH. POST (Sept. 7, 2017), [https://www.washingtonpost.com/news/business/wp/2017/09/07/amazon-is-looking-for-a-city-to-site-a-second-5-billion-headquarters/?utm\\_term=.b363964b2fcd](https://www.washingtonpost.com/news/business/wp/2017/09/07/amazon-is-looking-for-a-city-to-site-a-second-5-billion-headquarters/?utm_term=.b363964b2fcd); *Amazon HQ2 RFP*, AMAZON, [https://images-na.ssl-images-amazon.com/images/G/01/Anything/test/images/usa/RFP\\_3\\_V516043504\\_.pdf](https://images-na.ssl-images-amazon.com/images/G/01/Anything/test/images/usa/RFP_3_V516043504_.pdf) [hereinafter *Amazon HQ2 RFP*].

2. See, e.g., Alison Griswold, *A Nearly Complete List of the 238 Places That Bid for Amazon’s Next Headquarters*, QUARTZ (Nov. 4, 2017), <https://qz.com/1119945/a-nearly-complete-list-of-the-238-places-that-bid-for-amazons-next-headquarters/>.

3. *Amazon HQ2 RFP*, *supra* note 1, at 1.

4. See, e.g., Emily Badger, Quoc Trung Bui & Claire Cain Miller, *Dear Amazon, We Picked Your New Headquarters for You*, N.Y. TIMES (Sept. 9, 2017), <https://www.nytimes.com/interactive/2017/09/09/upshot/where-should-amazon-new-headquarters-be.html> (listing Denver, Boston, Portland, and Washington, D.C. as the top four contenders); Leanna Garfield & Dennis Green, *These Are All of the Cities Amazon Could Choose for Its \$5 Billion Headquarters, Ranked by the Experts*, BUS. INSIDER (Jan. 18, 2018), <http://www.businessinsider.com/amazon-hq2-top-cities-ranked-2018-1> (meta-ranking with New York, Denver, Washington D.C., Austin, Boston, and Atlanta as the top six contenders); Noah Smith, *Mid-size City Might Win Amazon’s Contest*, POST & COURIER (Sept. 18, 2017), [https://www.postandcourier.com/opinion/commentary/mid-size-city-might-win-amazon-s-contest/article\\_42e258c8-9ca2-11e7-838a-b3c5236d8885.html](https://www.postandcourier.com/opinion/commentary/mid-size-city-might-win-amazon-s-contest/article_42e258c8-9ca2-11e7-838a-b3c5236d8885.html) (documenting Austin’s rise to becoming a serious tech hub, and suggesting that Raleigh—as well as Nashville and Minneapolis—fits the bill as an up-and-coming tech city that Amazon could transform into a bona fide Technopolis).

to increase support for the Democratic Party,<sup>5</sup> or in a declining Midwestern city as an act of economic citizenship and redistribution.<sup>6</sup>

No one in the mass media suggested that Amazon locate its new headquarters in Burlington, Vermont. Nor did Burlington make the “short list” for potential hosts.<sup>7</sup> This should not come as a surprise. After all, Burlington is a small city of only 42,000 people, situated in a metropolitan area of 200,000 or so.<sup>8</sup> Burlington International Airport only has flights to 11 other airports in 8 metropolitan areas.<sup>9</sup> Vermont is not a tech hotbed; it ranks 46th out of 50 states in employment in high-tech sectors.<sup>10</sup>

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5. See Ronald Brownstein, *Could Amazon Flip a State?*, ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/amazon-headquarters-politics/553394/> (noting that HQ2 could have substantial electoral implications in some states, but not advocating for Amazon to take such electoral consequences into account); Andrew Van Dam, *Could Amazon’s New Headquarters Flip the Presidential Vote in a Swing State?*, WASH. POST (Jan. 20, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/01/21/could-amazons-hq-choice-flip-the-presidential-vote-in-a-swing-state/?utm\\_term=.d4eb020607d2](https://www.washingtonpost.com/news/wonk/wp/2018/01/21/could-amazons-hq-choice-flip-the-presidential-vote-in-a-swing-state/?utm_term=.d4eb020607d2) (describing the likelihood that the location of HQ2 could flip a presidential election as “unlikely, but in certain scenarios, conceivable”).

6. See, e.g., Christina DesMarais, *Amazon’s Deadline for HQ2 is Today: Here Are the 5 Most Likely to Win*, INC.COM (Oct. 19, 2017), <https://www.inc.com/christina-desmarais/amazon-hq2-proposal-deadline-has-arrived-here-are-top-5-contenders.html> (describing a potential siting of HQ2 in Detroit as “a triumph for Amazon from a public relations standpoint . . . in one fell swoop, Amazon could be the catalyst for the rebuilding of one of America’s great cities”); cf. Robert Simpson & Dominic Robinson, *Amazon’s HQ2 is an Opportunity to Disrupt National Narratives on Economic Disparity*, BROOKINGS: THE AVENUE (Jan. 24, 2018), <https://www.brookings.edu/blog/the-avenue/2018/01/24/amazons-hq2-is-an-opportunity-to-disrupt-national-narrative-on-economic-disparity/> (backers of the Syracuse, NY bid for HQ2 touting “the opportunity for Amazon to disrupt one of the greatest challenges facing our region: its considerable racial and socio-economic disparities.” The authors assert that “[b]y coming to Syracuse, or any other mid-sized market, Amazon could have disrupted the site-selection industry and, as a result, broken new ground in bridging the divide between concentrated poverty and concentrated wealth.”).

7. Nick Wingfield, *Amazon Chooses 20 Finalists for Second Headquarters*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/technology/amazon-finalists-headquarters.html>. Nor is there any evidence that Burlington attempted to lure Amazon.

8. *Annual Estimates of the Resident Population: 2017 Population Estimates*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/bkkm/table/1.0/en/PEP/2017/PEPCUMCHG.US24PR> (last visited Apr. 11, 2019) (estimating a population of 218,395 in the Burlington-South Burlington, VT metro area); *QuickFacts: Burlington City, Vermont*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/burlingtoncityvermont/PST045216> (last visited Apr. 12, 2019) (search state/city field for Burlington City, VT) (estimating a population of 42,239 in Burlington, VT as of July 1, 2017).

9. *Where We Fly*, BURLINGTON INT’L AIRPORT, <http://www.btv.aero/arrivals-departures/where-we-fly/> (last visited Apr. 11, 2019). Among other characteristics, Amazon cared very much about the quality of local airports. See *Amazon HQ2 RFP*, *supra* note 1, at 5 (“Travel time to an international airport with daily direct flights to Seattle, New York, San

Amazon decided to divide its HQ2 between Long Island City in New York City and Crystal City in Northern Virginia, with each housing roughly 25,000 new employees (it later abandoned the Long Island City location in the face of local political opposition).<sup>11</sup> Would locating HQ2 in Burlington, Vermont have been a good decision for Amazon? Probably not. Burlington cannot compete with the high-skilled tech talent or transportation infrastructure you find in other cities. But moving to Burlington would have given Amazon substantial control over one of the most valuable assets in the world: a U.S. state.

That may seem like hyperbole, but Amazon HQ2 was supposed to be a *very* big corporate headquarters.<sup>12</sup> And Vermont is a *very* small state, ranking 49th among the states in population (only Wyoming is smaller)<sup>13</sup> and having the smallest economy, ranking 50th in Gross State Product (GSP).<sup>14</sup>

What would have happened if Amazon put the full HQ2 in Burlington? To start, Amazon would have directly employed roughly 8% of the state's population (7.4% if all HQ2 employees were newcomers to Vermont)<sup>15</sup> and almost 9.8% of the voting-age population.<sup>16</sup> Those numbers do not count all of the other people who would be related to those employees, or who would have jobs that were reliant on the new spending of Amazon employees. Amazon's HQ2 Burlington would have been Vermont's biggest nonstate-government employer by

Francisco/Bay Area, and Washington, D.C. is also an important consideration.” Burlington's airport offers direct flights to New York and Washington, D.C., but not to Seattle nor the Bay Area. Toronto is the only non-U.S. destination that can be reached via a direct flight from Burlington “International” Airport, and even this route is only available during the summer. *See Where We Fly, supra*.

10. *Cyberstates 2016*, COMPUTING TECH. INDUS. ASS'N (COMPTIA), <https://www.comptia.org/docs/default-source/advocacydocs/cyberstates/comptia-cyberstates-2016-vfinal-v2.pdf?sfvrsn=2>.

11. *See* Gabby Del Valle, *Amazon HQ2 to be Split Between Crystal City, VA, and Long Island City, NY*, VOX (Nov. 13, 2018, 11:49 AM), <https://www.vox.com/the-goods/2018/11/5/18066814/amazon-hq2-locations-selected>; J. David Goodman, *Amazon Pulls Out of Planned New York City Headquarters*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/nyregion/amazon-hq2-queens.html>.

12. *See Amazon HQ2 RFP, supra* note 1.

13. *Annual Estimates of the Resident Population: 2017 Population Estimates*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/bkmt/table/1.0/en/PEP/2017/PEPANNRES>.

14. *Gross Domestic Product by State, 3rd Quarter 2018*, BUREAU OF ECON. ANALYSIS, <https://www.bea.gov/system/files/2019-02/qgdpstate0219.pdf> (last updated Feb. 26, 2019) [Hereinafter *GDP by State 2018*]. The term “gross state product” can be used interchangeably with “gross domestic product by state.” Both terms refer to the market value of the goods and services produced by the labor and property located in a state.

15. Assuming 50,000 HQ2 employees and an estimated state population of 623,657, as of July 1, 2017. *See Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/bkmt/table/1.0/en/PEP/2017/PEPANNRES/0400000US50> (last visited Apr. 11, 2019).

16. Based on Vermont's estimated voting-age population of 506,832. *See Estimates of the Voting Age Population for 2017*, 83 Fed. Reg. 7142, 7143 (Feb. 20, 2018).

between six or eight times.<sup>17</sup> Even the half-HQ2's initially planned for Long Island City and Crystal City would have been the biggest employer in Vermont by three or four times. The estimated economic effect of Amazon on Seattle from 2010 to 2016 was \$38 billion.<sup>18</sup> By comparison, the annual GSP of Vermont is \$32.5 billion.<sup>19</sup> If the full HQ2 would have had, as Amazon claims, the equivalent effect on a local economy as its headquarters in Seattle, the effect would have been roughly equal to 17% of Vermont's annual GSP.<sup>20</sup>

No one company is as large relative to the state in which it is located as Amazon would have been relative to Vermont had it located the full HQ2 in Burlington.<sup>21</sup> Nothing about putting HQ2 in Burlington would have formally given Jeff Bezos, the CEO of Amazon, any power over the Governor and Senators of Vermont.<sup>22</sup> But an employer that dominates a state economy so extensively would have an enormous influence, through its employees' voices at the ballot box, and through the threat of exit.<sup>23</sup> Also, any state that is reliant on one employer—which a Vermont with an Amazon HQ2 would have been even if lots of other firms were lured by the new headquarters—would be at risk of wild economic booms and busts based on the fortunes of that employer.

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17. The largest single nonstate employer is The University of Vermont Medical Center, which employs between 6,400 and 7,500 people. *See State Profile: Largest Employers Vermont*, CAREERONESTOP, <https://www.careerinfonet.org/oview6.asp?soccode=&stfips=50&from=State&id=11&nodeid=12> (last visited Apr. 11, 2019); *Facts and Figures*, UNIV. OF VT. MED. CTR., <https://www.uvmhealth.org/medcenter/pages/about-uvm-medical-center/newsroom/facts-and-figures.aspx> (last visited Apr. 11, 2019).

18. *Amazon HQ2 RFP*, *supra* note 1, at 1.

19. *GDP by State 2018*, *supra* note 14; *Vermont*, BUREAU OF ECON. ANALYSIS, <https://www.bea.gov/regional/bearfacts/pdf.cfm?fips=50000&areatype=50000&geotype=3> (last visited Apr. 11, 2019).

20. *See supra* note 19 and accompanying text.

21. *See* Michael B. Sauter, *The Largest Employer in Every State*, 24/7 WALL ST. (Apr. 18, 2018, 12:06 PM), <https://247wallst.com/special-report/2018/04/18/largest-employer-in-every-state-2/> (listing the largest employer in every state).

22. There would be political risks as well, to be sure. The arrival of Amazon may create blowback among existing residents. Further, Amazon's employees may vote in ways designed to extract revenues from the firm. *Cf.* Jon Greenberg, *Up Close: The Political Machine That Runs New Haven*, YALE DAILY NEWS (Apr. 17, 2017), <http://features.yaledailynews.com/blog/2017/04/19/up-close-the-political-machine-that-runs-new-haven/> (discussing how a slate of officials associated with Yale University's employee unions won control of New Haven's Board of Aldermen, and how that control over the Board gives these unions "considerable leverage over the University").

23. If Amazon moved HQ2 to Burlington, what would it do with its influence over state government? Amazon's influence would allow it to shape the State's healthcare exchanges to phase out its need to offer health insurance, taking advantage of federal subsidies. Amazon could design state contract and corporate laws to its needs. And, through its influence on two U.S. Senators, Amazon would exert huge power in Washington. The possibilities are endless.

Although Amazon did not decide to build its HQ2 in Vermont, the thought exercise brings to the fore the very small size of Vermont.<sup>24</sup> Nationwide, there are 28 cities and 107 counties with a greater population than the State of Vermont, including Oklahoma City, Oklahoma, El Paso, Texas, Monmouth County, New Jersey, and Arapahoe County, Colorado.<sup>25</sup> Brooklyn, New York has more than 4 times as many residents; Los Angeles County, California, has more than 16 times as many.<sup>26</sup>

Further, the relative smallness of Vermont's economy and population is unlikely to change.<sup>27</sup> Vermont's population is growing very slowly, if at all.<sup>28</sup> Vermont is the 3rd oldest state, with a median age of 42.7 years.<sup>29</sup> Its few younger residents are not having many children: Vermont has the nation's lowest fertility rate among women 18–44.<sup>30</sup> Vermont is also tied for being the least racially

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24. It also forces us to reckon with the extremely large size of the modern American corporation, but that is not the subject of this Essay.

25. *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2017 Population*, U.S. CENSUS BUREAU (May 2018), <https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2017/PEPANNRSIP.US12A> (population of cities); *Annual Estimates of the Resident Population: 2017 Population Estimates*, U.S. CENSUS BUREAU, (last visited Apr. 11, 2019) (population of counties).

26. *Annual Estimates of the Resident Population for Incorporated Places supra* note 25 (Kings County (Brooklyn) estimated population in 2017 is 2,648,771; Los Angeles estimated population in 2017 is 10,163,507).

27. Evidence of the extremity of this problem comes from Vermont's own public policy. This year, Vermont passed a law offering subsidies up to \$10,000 for any person who can work remotely for a non-Vermont-based business to relocate to the State. Maya Salam, *Move to Vermont. Work from Home. Get \$10,000. (Or at Least Something.)*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/us/vermont-moving-money.html?nytmobile=0>.

28. Art Wolf, *Cheers! Vermont Sees First Population Increase Since 2013*, BURLINGTON FREE PRESS (Dec. 27, 2017, 11:04 AM), <https://www.burlingtonfreepress.com/story/money/2017/12/27/cheers-vermont-sees-first-population-increase-since-2013/982957001/> (noting population increased by 303 people in 2017 after falling for previous three years).

29. *The Nation's Older Population is Still Growing, Census Bureau Reports*, U.S. CENSUS BUREAU (June 22, 2017), <https://www.census.gov/newsroom/press-releases/2017/cb17-100.html#table2>.

30. *Life Stages and Populations: State and Territorial Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/fastats/state-and-territorial-data.htm> (last updated Mar. 31, 2017). This is despite, according to the classic jazz number *Moonlight in Vermont*, the fact that “[p]eople who meet in this romantic setting/Are so hypnotized by the lovely/Evening summer breeze/The warbling of a meadowlark/Moonlight in Vermont.” MARGARET WHITING, *MOONLIGHT IN VERMONT* (Capitol Records 1944). Given declines in the population of the eastern meadowlark in Vermont, one worries that this problem will get worse rather than better. Audubon Society, *Champlain Valley Bird Initiative*, AUDUBON, <http://vt.audubon.org/conservation/champlain-valley-bird-initiative> (last visited Apr. 11, 2019) (noting declining eastern meadowlark populations in Vermont).

diverse state in the union, at 95% white.<sup>31</sup> It has no major metropolitan areas<sup>32</sup> and does not attract many migrants, either domestic or foreign.<sup>33</sup>

As a result, even as the national population grows, Vermont's population is projected to stay relatively constant.<sup>34</sup> By 2030, Vermont will likely contain only 0.174% of the U.S. population.<sup>35</sup> This is the expected value of the population and does not capture how small Vermont might become relative to the rest of the country if things do not go well. A shock—anything from a major ice storm to declining demand for milk—could lead to substantially lower population numbers.

Vermont's small population and economy may or may not be a problem for Vermonters.<sup>36</sup> But Vermont's increasingly small stature in an increasingly

31. See Kevin O'Connor, *Is Vermont the Whitest State in the Union?*, VTDIGGER (Jan. 17, 2016), <https://vtdigger.org/2016/01/17/is-vermont-the-whitest-state-in-the-union/#.WclKua2ZO3A>. To be fair, Vermont is arguably the second-least diverse, as although it has the same percentage of whites as Maine, it has ever so slightly fewer non-Hispanic Whites (93.9% as compared to 94%). *Id.*

32. The Census Bureau has defined "major metropolitan areas" (MMAs) as areas with one million or more population. See Richard L. Forstall & James D. Fitzsimmons, *Table 3. Major Metropolitan Areas as Officially Define and as Defined Under Current Standards: 1940-1990*, U.S. CENSUS BUREAU, <https://www.census.gov/population/www/documentation/twps0006/table03.html> (last updated Oct. 21, 2011, 10:03 PM).

33. Between April 2010 and July 2017, Vermont's net domestic migration was negative, with 10,179 more people leaving Vermont for other states than vice versa. During the same time period, Vermont's net international migration—which includes the international migration of both native and foreign-born populations—was plus 5,352 people. Only Montana, Wyoming, and Maine had less net international migration than Vermont. *Estimates of the Components of Residential Population Change: April 1, 2017 to July 1, 2017*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Mar. 29, 2019).

34. The State of Vermont does not currently have a single set of official population projections. However, two separate projections produced by different state government offices each projected statewide population increases of fewer than 30,000 persons between 2010 and 2030. See Joyce Manchester, *The Challenges of Projecting Vermont's Population*, VT. LEGIS. JOINT FISCAL OFFICE, fig.3 (May 27, 2015), [http://www.leg.state.vt.us/jfo/issue\\_briefs\\_and\\_memos/Projecting\\_Vermont\\_s\\_Population\\_.pdf](http://www.leg.state.vt.us/jfo/issue_briefs_and_memos/Projecting_Vermont_s_Population_.pdf); see also *U.S. Population Projections Interactive Map*, WELDON COOPER CTR. FOR PUB. SERV., <https://demographics.coopercenter.org/united-states-interactive-map> (last visited Mar. 29, 2019) (projecting Vermont's population to be 617,969 persons in 2030 and 601,865 persons in 2040).

35. Based on a projected population of 617,969 for Vermont, see WELDON COOPER CTR. FOR PUB. SERV., *supra* note 34, and a projected total national population of 354.8 million by 2030, see *Demographic Turning Points for the United States: Population Projections 2020 to 2060*, U.S. CENSUS BUREAU, [https://www.census.gov/content/dam/Census/library/publications/2018/demo/P25\\_1144.pdf](https://www.census.gov/content/dam/Census/library/publications/2018/demo/P25_1144.pdf) (last visited Apr. 16, 2019).

36. There are surely some who like Vermont's small size. Dartmouth College is located in Hanover, New Hampshire, which sits directly across the Connecticut River from Norwich, Vermont. Daniel Webster famously said of Dartmouth: "It is, Sir . . . a small

large country is a *constitutional* problem for the United States. The size of Vermont and other small states—both in population and economic terms—creates substantial problems for the operation of our constitutional system and many of our most valued governmental programs and promises.<sup>37</sup> One of these problems, how small states have made the U.S. Senate less representative of the broader U.S. population, is quite straightforward and discussed regularly in the popular press.<sup>38</sup> This is indeed a problem, but it is only one of many constitutional and institutional challenges created by small and shrinking states, many not requiring constitutional amendment to reform.

While this Essay will argue that Vermont and other small states are a constitutional problem, it does not claim that Vermont's decline creates problems for interpreting the Constitution. Most work in constitutional law is about wrestling over the meaning of the Constitution and its interpretation, in court or outside of it.

Constitutional law has another face. Changed conditions or changing attitudes can render the Constitution—as a whole or in part—a not-so-effective or normatively unattractive mechanism for organizing a government. Despite the regular hosannas given to the genius of the Framers, there is no reason simply to accept that the U.S. Constitution is the best of all possible institutional mechanisms for structuring a government. In fact, many scholars—perhaps most notably my great colleague Bruce Ackerman and the inimitable Sandy Levinson—consider the Constitution to be a creaky document, far worse than constitutions from around the world that were written more recently.<sup>39</sup> Further, an increasingly large body of

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college. And yet *there are those who love it!*" John W. Black, *Webster's Peroration in the Dartmouth College Case*, 23 Q. J. OF SPEECH 636, 639 (1937). Similarly, Vermont's small population has its appeal; its small size may increase the capacity for self-government and what Hannah Arendt called "'public freedom'—the ability to participate actively in the basic societal decisions that affect one's life." Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1068 (quoting HANNAH ARENDT, ON REVOLUTION 114–15, 119–20 (1962)). But the appeal of this seems pretty niche—if lots of people felt strongly about Vermont's attractions, there would be more in-migration. Regardless, nothing in this Essay turns on whether you think Vermont is good or bad, whether you think Ben & Jerry's is delicious or overrated, or whether you like hiking in the Green Mountains. The question is what Vermont's small size means for the rest of the country.

37. While the details may be different, one could write a similar essay about Wyoming or North Dakota. And indeed I have. Several years ago, I wrote an essay assessing the viability of Washington, D.C. as a state that made some similar claims. David Schleicher, *Welcome to New Columbia: The Fiscal, Economic and Political Consequences of Statehood for D.C.*, 23 WM. & MARY BILL OF RTS. L. REV. 89, 90 n.7 (2014).

38. See *infra* notes 49, 57, and 58 and accompanying text for examples of discussion of this problem in the popular press.

39. See, e.g., SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (arguing that German-style "constrained parliamentarianism" provides a better constitutional model than either American-style separation of powers or British-style parliamentary supremacy); see also Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 9, 2013),



scholarship has examined the ways in which the Constitution was designed for a country with very different social conditions, one without clearly ideologically differentiated and polarized political parties<sup>40</sup> and without modern levels of income inequality among voters.<sup>41</sup> Constitutional lawyers must not only interpret the Constitution but also assess it and understand its pathologies.

Critiques of the Constitution can seem somewhat theoretical or dreamy. The Constitution isn't going anywhere and is quite unlikely to be amended substantially.<sup>42</sup>

But understanding the specific ways in which the Constitution fails can suggest ways to push back on the problems inherent in our constitutional order.<sup>43</sup> In particular, much of the operation of contemporary federalism is not formally constitutional. The organization of social-welfare programs, like Medicaid, and the relative role of the federal and state governments in funding things like infrastructure and higher education, are central parts of how we have designed our governing institutions and are challenged by the fact of small and shrinking states.

Part I will explore the decline of Vermont's population as a problem for Article I of the Constitution, the organization and operation of Congress. Part II will explore how the small population of Vermont changes the quality of federal-state cooperation. Part III will ask questions about how well state governments serve as providers of public goods and capital investment when populations decline substantially.

### I. VERMONT AS A PROBLEM FOR CONGRESS

The most obvious way a state's small and relatively declining population can affect the efficacy and normative attractiveness of the Constitution is by making the U.S. Senate less representative of the population of the Country. This

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<https://www.newyorker.com/magazine/2013/12/09/our-broken-constitution> (documenting contemporary critiques of the Constitution from both progressives and conservatives).

40. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2317–25 (2006).

41. See, e.g., GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 4, 15, 61–67 (2017).

42. And the hardwired parts of the Constitution—like having two Senators from each state—are quite immune to the types of informal amendment through judicial practice suggested in parts of the constitutional-law literature. See Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 322 (2009) (discussing how judicial updating of constitutional rules cannot address “core constitutional ‘rules’” like having two Senators from each state).

43. We often avoid these questions, seeking to use the commitments inherent in the Constitution to judge the quality of subconstitutional practice. See David Schleicher, *From Here All-the-Way-Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV 401, 412 n.96 (2013) (“I am going to assume that the Constitution here provides its own normative desiderata . . . . Although I am engaging in this assumption here, it is certainly a bad, if common, practice to assume that our political order is necessarily pretty good and that we should strive to be true to it.”).

Part will show that this is only one of the ways in which very small states make Congress a less useful or appealing institution for self-governance.

*A. The “Rotten Borough” of Vermont*

The design of Congress famously divides representation between representing states as entities in the Senate and the population in the House.<sup>44</sup> The Senate is best thought of as a deviation from the principle of equal popular sovereignty in the name of other values, in particular giving people representation as members of existing polities and representing those polities on an equal basis.<sup>45</sup>

If there is a tradeoff—between the benefit of representing states as entities at the cost of representation not being based on population numbers—inherent in giving equal representation to states in the Senate, it is a tradeoff that changes over time. Population flows can make the Senate less or differently representative of the broader population over time. And changes in party politics have made representing states as entities in the Senate less of a coherent concept, as polarization and the nationalization of politics have meant that Senators today do little to represent states as states, and more to represent the national party preferences of state residents.<sup>46</sup> That is to say, the benefits of the U.S. Senate’s design have gone down as the costs of its poor representation have gone up. Compared with even 40 or 50 years ago, it is increasingly difficult to justify today’s US. Senate, and tomorrow’s will be harder still.

America is not the first country to encounter the problem of unrepresentative districts. Prior to the Reform Act of 1832, Britain had a number of very small parliamentary boroughs, popularly known as “rotten boroughs.”<sup>47</sup> District boundaries for Parliament remained unchanged for decades even as populations shifted, meaning that districts that became sparsely populated were

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44. See generally Michael J. Teter, *Equality Among Equals: Is the Senate Cloture Rule Unconstitutional?*, 94 MARQ. L. REV. 547 (2010) (discussing the history of the Connecticut Compromise).

45. See David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1058 (2014) (“[S]enators were not intended to serve as ambassadors of state governments either. The Convention rejected proposals that would have given state governments control over senators, including the power to recall senators or punish them for ignoring the instructions of state legislatures . . . it was also a way to increase the types of representation afforded by the federal government to the people. William Pierce, a delegate from Georgia, made this point at the Convention when he said that the division of bicameral legislature into national and federal bodies meant that “the Citizens of the States would be represented both individually and collectively.”).

46. See *infra* notes 63–66 and accompanying text.

47. Rotten boroughs were those “whose constituency has dwindled severely or (in certain cases) ceased to exist altogether, but which still retains the power to elect a Member of Parliament.” *Rotten Borough*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/167785?redirectedFrom=rotten+borough#eid197308088> (last visited Apr. 11, 2019).

able to elect two members of Parliament, the same number as some large cities.<sup>48</sup> The elimination of these sparsely populated districts, rotten boroughs, is considered a crucial step toward the establishment of popular democracy in Britain.<sup>49</sup>

Vermont, Wyoming, and a few other states are on their way to becoming American rotten boroughs. The Senate was not designed to provide equal representation by population; the rule of equal representation for states has always been understood as a deviation from the democratic norms of equal representation, justified (if at all) by the representation it gives to states as entities. But over time, population changes have made the deviation far more extreme.

In 1790, the largest state had a population 11 times greater than that of the smallest one.<sup>50</sup> Today, the difference is 66 to 1.<sup>51</sup> Looking closely at Vermont makes this problem clear. Currently, Vermont has 1.6% of California's population.<sup>52</sup> And by 2030, Vermont's population is projected to be 1.4% of

48. CHARLES SEYMOUR, *ELECTORAL REFORM IN ENGLAND AND WALES: THE DEVELOPMENT AND OPERATION OF THE PARLIAMENTARY FRANCHISE, 1832-1885*, 45-49 (Archon Books 1970) (1915).

49. See Tristram Hunt, *Opinion, Rotten MPs Outraged 1830s Britain, but at Least Had the Sense to Reform*, *GUARDIAN* (Dec. 8 2009, 1:00 PM), <https://www.theguardian.com/commentisfree/2009/dec/08/mps-expenses-scandal-parliamentary-reform> (“[T]he Great Reform bill was carried in June 1832. Out went rotten boroughs, aristocratic dominance and blatant corruption; in came an expanded electorate and a changing class of MPs. The Reform Act failed to allow women the vote, excluded the working class, and could not eliminate venality; but it set in train the slow transformation of the Commons into a democratic and accountable body.”). When one of Britain's most infamous rotten boroughs, Old Sarum, was eliminated by the Reform Act in 1832, “its demise was greeted with a variety of mock funeral imagery . . . a coin issued to mark the passage of the Act, included a view of the bare countryside and an inscription, ‘Deserted in the year 1217, disfranchised June 7 1832.’” Stephen Farrell, *1820-1832: Old Sarum*, *HIST. OF PARLIAMENT* (2009), <http://www.historyofparliamentonline.org/volume/1820-1832/constituencies/old-sarum>.

50. Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, *N.Y. TIMES* (Mar. 3, 2011), [http://archive.nytimes.com/www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?\\_r%25E2%2580%25B0=%25E2%2580%25B0##smallstate](http://archive.nytimes.com/www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?_r%25E2%2580%25B0=%25E2%2580%25B0##smallstate).

51. *Id.* This is not the greatest disparity in American history, though. For instance, in 1900, the difference between the smallest (Nevada) and largest (New York) states was 171-1. Richard L. Forstall, *Population of States and Counties of the United States: 1790-1990*, U.S. CENSUS BUREAU, Mar. 1996, at 104, 112 <https://www.census.gov/population/www/censusdata/PopulationofStatesandCountiesoftheUnitedStates1790-1990.pdf> (New York population was 7,268,894; Nevada population was 42,335).

52. Vermont's estimated population as of July 1, 2017 was 623,657 persons. California's estimated population as of July 1, 2017 was 39,536,653. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Mar. 29, 2019).

California's population.<sup>53</sup> And this does not take into account any downside risk—one or two employers moving out could shift this very dramatically. Even so, this difference is about the same difference between the largest parliamentary seats and some of the rotten boroughs in the United Kingdom that were disenfranchised and merged into other districts in the Reform Act of 1832.<sup>54</sup>

The extent to which the Senate does represent the Country's current population is not only driven by the very smallest states. The 25 least populated states have only 15.8% of the total population of the United States.<sup>55</sup> Projections suggest that by 2030, two-thirds of the nation's population will live in 15 states.<sup>56</sup> When you take into consideration low turnout<sup>57</sup> and the fact that only 50%+1 of voters in a state (and sometimes less if there are multiple candidates) are necessary to elect a Senator, as few as 19 million people—less than 9% of the country's total citizen voting-age population—can support a majority coalition in the U.S. Senate.<sup>58</sup>

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53. See *Projections for the 50 States and D.C.*, WELDON COOPER CTR. FOR PUB. SERV., DEMOGRAPHICS RES. GRP., <https://demographics.coopercenter.org/national-population-projections> (last visited Apr. 11, 2019) (projecting Vermont's 2030 population to be 617,969 persons, and projecting California's 2030 population to be 43,751,116 persons).

54. For instance, the Borough of Downton had an estimated 100 eligible voters and a population of 3,519 before it was disenfranchised in the Reform Act of 1832. Stephen Farrell, *Downton*, HIST. OF PARLIAMENT (2009), <http://www.historyofparliamentonline.org/volume/1820-1832/constituencies/downton> (also noting that in practice, all of the votes were controlled by one man, the Earl of Radnor). Before reform, the Borough of Liverpool, which also sent two members to Parliament, had 3,500 and 5,000 eligible voters (and a population of more than 165,000 persons) in November 1830. Margaret Escott, *Liverpool*, HIST. OF PARLIAMENT (2009), <http://www.historyofparliamentonline.org/volume/1820-1832/constituencies/liverpool>.

55. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, *supra* note 52.

56. See *Projections for the 50 States and D.C.*, *supra* note 53 (projecting a total national population of approximately 360 million persons in 2030, with approximately 240 million persons living in the most populous 15 states) (click on "Total Population" link to download excel file containing population projections). As previously noted, *supra* note 34 and accompanying text, the U.S. Census Bureau does not currently make state-by-state population projections.

57. See *Voter Turnout*, FAIRVOTE, [http://www.fairvote.org/voter\\_turnout#voter\\_turnout\\_101](http://www.fairvote.org/voter_turnout#voter_turnout_101) (last visited Mar. 29, 2019) ("In recent elections, about 60% of the voting eligible population votes during presidential election years, and about 40% votes during midterm elections.").

58. According to the Census Bureau, the estimated citizen voting-age population (CVAP) of the nation was 222,464,710 persons as of July 1, 2017. The estimated CVAP of the least populous 26 states was 37,798,645 persons. *Voting Age Population by Citizenship and Race (CVAP)*, U.S. CENSUS BUREAU (Feb. 1, 2018), <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html> (download CSV [ZIP] file to access nationwide and state geographies). The statement that 19 million people could elect a majority coalition in the Senate is based on a 50% turnout rate, which is in line with average turnout in national elections in recent decades. See *Voter Turnout*, *supra* note 57.

Contemporary supporters of the design of the U.S. Senate argue that inequality of representation was always central to the idea of the Connecticut Compromise.<sup>59</sup> The House represents the people as individuals, while the Senate gave representation to the states as entities (and to their residents as members of state polities).

Politicians of the founding era disagreed about whether the Senate could be justified as anything other than a compromise, and whether there was a coherent normative argument beyond log-rolling for the structure of Congress and unequal representation in the Senate.<sup>60</sup>

But whatever the founding era or theoretical justifications for the Senate they rely on, modern-day apologists ignore two central points. The first is that the degree of inequality of representation in the U.S. Senate is getting worse over time.<sup>61</sup> But the second is that the argument used to justify this inequality—representation of states as unique political entities or differentiated political cultures—is getting worse as well. No matter where people start in their beliefs about the Senate, it is quite clear that the normative case for its institutional design has been getting worse over the past few decades.

Arguments that inequality in the Senate is justified because Senators represent states as entities, or represent their particularistic cultures and communities, are hard to match with current practice. The first reason is polarization. Voting in the Senate has become increasingly partisan and one-dimensional.<sup>62</sup> Of course, Senators seek pork for their state, and there are a few quirky Senators with somewhat-moderate political beliefs or particularistic

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59. See, e.g., Rich Lowry, *The Left's Foolhardy Attack on the Senate*, NAT'L REV. (Oct. 9, 2018), <https://www.nationalreview.com/2018/10/left-attacks-senate-constitutional-system/> (“The design of the Senate recognizes the status of the states as real governing entities with their own prerogatives under the Constitution.”).

60. See Jamelle Bouie, *Minority Rule Does Not Have to Be Here Forever*, SLATE (Oct. 14, 2018), <https://slate.com/news-and-politics/2018/10/minority-rule-not-in-the-constitution.html> (discussing disagreement about justifications for the design of the Senate); Schleicher, *supra* note 45, at 1050–62 (discussing efforts to justify state legislative appointment of Senators).

61. See Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 20, 2016) <https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html> (showing declining percentage of the population necessary to elect a Senate majority over the course of the 20th century).

62. See Sean M. Theriault & David W. Rohde, *The Gingrich Senators and Party Polarization in the U.S. Senate*, 73 J. POL. 1011 (2011) (recognizing that the Senate is very polarized and nearly as polarized as the House of Representatives); Nolan McCarty, *What We Know and Don't Know About Our Polarized Politics*, WASH. POST. (Jan. 8, 2014), [https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/?utm\\_term=.9beedcf2bbd8](https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/?utm_term=.9beedcf2bbd8) (reviewing lack of difference between polarization in the House and Senate).

concerns.<sup>63</sup> But over the last 30 years “dimensionality” in voting in the Senate, or voting along divides other than right–left, fell dramatically.<sup>64</sup> Voting behavior by a Democratic Senator from Vermont today is just not particularly distinct from the voting behavior of a Democratic Senator from California, nor is the voting behavior of a Wyoming Republican Senator particularly distinct from that of a Texas Republican. Senators increasingly vote as members of national political coalitions, not as representatives of particular political communities.<sup>65</sup>

Second, the politics of the different states are less distinct from one another than they once were. State politics is increasingly defined by the national political parties.<sup>66</sup> Voting behavior by the electorate in state elections and policy choices by politicians at the state level track national party divisions and respond to national political inputs to an increasing degree.<sup>67</sup> What happens in Iraq, or at the Federal Reserve, or in Donald Trump’s Twitter feed defines more and more of what happens in state elections.<sup>68</sup>

This has been a doleful trend. The nationalization of state politics has made state government much less responsive and accountable, as I have argued, and substantially weakens the case for federalism across any plausible justification for the practice, even as states continue to exercise very important policy discretion.<sup>69</sup> But it remains the case that states are less differentiated as polities than they once were. Self-identification with the nation and neighborhood now dominates identification with states.<sup>70</sup> Further, personal identification with states is increasingly defined around states’ cultural and natural traits (like history, the weather, or natural beauty) rather than around state politics.<sup>71</sup> Senators do not represent particularistic state political identities because, by and large, these particularistic identities do not exist or, at the very least, are less important than they once were.

If the case for the U.S. Senate is that it provides for representation for the particular cultures and politics of individual states, it is a much, much weaker case than it was before party polarization and the nationalization of party politics.

Now, nothing is forever, as it is at least theoretically possible that we see population shifts that make the representative inequality of the Senate less, or

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63. Think of Susan Collins (R-ME) or Joe Manchin (D-WV) as exemplars of moderations, and perhaps, of the libertarianism of Rand Paul (R-KY) as an example of some dimensionality in the Senate.

64. See NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES*, at Chapter 2 (2016).

65. *Id.*

66. See generally David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017); Jessica Bulman-Polzen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

67. See Schleicher, *supra* note 66, at 772–80.

68. *Id.*

69. *Id.* at 780–90.

70. See DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES* 169–95 (2018).

71. *Id.*

partisan realignments that reduce polarization and increase localization of senatorial behavior. But currently, the trend is going the other way on both. That is, the Senate is getting less representative of the broader population and is doing less to represent states as entities or particular state political cultures.

Depriving a state of equal representation in the U.S. Senate without its consent is an unamendable part of the U.S. Constitution.<sup>72</sup> But the case against the Senate has gotten stronger as states like Vermont have shrunk relative to a growing U.S. population, and the case for it has gotten weaker with party polarization and the nationalization of party politics. As a result, while it is not going anywhere, our attitudes toward the Senate might change. Much political rhetoric rests on the democratic credentials of the Senate, including claims about the ultimate democratic pedigree of the Supreme Court given its role in confirming judicial appointments. Further, changes could be made to make the Senate more representative by splitting up states like California or Texas or adding new ones.<sup>73</sup> Regardless of what steps are taken, the point should be made clearly: the U.S. Senate is increasingly hard to justify under contemporary circumstances.

#### ***B. The “Pocket Borough” of Vermont and the High Price of Milk***

Americans have long been concerned about the capacity of large corporations and trusts to use their economic influence to bully legislators into favoring private interests over the public welfare.<sup>74</sup> This concern is particularly important for small states. Because they have fewer people and less diversified economies, small states are more vulnerable to the concerted badgering of small groups of economically powerful people. As corporations become more concentrated and small states stay small, the risk of this type of influence will only grow worse.

This problem can become quite acute. One particular concern prior to the Reform Act of 1832 (and even after) was that parliamentary districts were not only small but effectively owned—and therefore electorally dominated—by one person.<sup>75</sup> Such districts were known as “pocket boroughs” because their

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72. U.S. CONST. art. V. (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

73. That said, the case for splitting up states or allowing new entrants should be based not on the Senate primarily, but rather on how well these entities would govern as states. See David Schleicher, *Welcome to New Columbia: The Fiscal, Economic and Political Consequences of Statehood for DC*, 23 WM. & MARY BILL RTS. J. 89 (2014) (arguing that there are substantial concerns about admitting Washington, D.C. as a state related to how good a governing body it would be).

74. Schleicher, *supra* note 45, at 1058 (discussing how this concern shaped debates over the Seventeenth Amendment).

75. See John Brooke, *1754-1790: The Constituencies*, HIST. OF PARLIAMENT (1964), <http://www.historyofparliamentonline.org/volume/1754-1790/survey/i-constituencies> (describing “burgage boroughs,” each of which was “‘one undivided and indivisible tenement, neither created nor capable of being created within time of memory, which has immemorially given a right of voting’”. In other words, the franchise in burgage boroughs was attached to property, not to persons, and could not be increased or diminished; and they were predestined to become pocket boroughs. For if one man owned a

parliamentary seats were held “in the pocket” of the dominant patron.<sup>76</sup> Famously, the constituency of Old Sarum had only 11 voters during the period from 1820 to 1832, but elected 2 members of Parliament.<sup>77</sup> Importantly, all of the property in Old Sarum was owned by one family.<sup>78</sup> The Pitt family owned the entire district from the 17th century through 1802 and sent to parliament William Pitt the Elder, who would later become Prime Minister.<sup>79</sup> In 1802, the Pitts sold the property at a huge premium over the value of the income it generated.<sup>80</sup> Prior to reform, parliamentary seats were for sale to the highest bidder.<sup>81</sup>

In the United States, during the run-up to the passage of the Seventeenth Amendment (which provided that voters, and not state legislators, would directly elect senators), there was a great national debate about a similar problem.<sup>82</sup> Among other issues that led to the passage of the Seventeenth Amendment, popular concern raged about the capacity of newly large corporations and trusts to use their economic influence to bully state legislators into choosing Senators that served

majority of the burgages, he was in a position to control the representation of the borough, no matter the size of the electorate; and a Member who could say that he sat by burgage tenure was understood to have an absolutely safe seat.”). During the period between 1754 and 1790, “there were 29 burgage boroughs in England, with electorates ranging from 300 at Malton to seven at Old Sarum . . . . In eight boroughs both seats were under the control of one patron (though the patrons changed through inheritance and sale of property) . . . .”) *Id.*

76. See, e.g., Michael Markus, *A Pocket Borough? Reformed Politics in Ripon, 1832-67*, 27 *PARLIAMENTARY HIST.* 330, 330-31, 342 (2008).

77. Stephen Farrell, *Old Sarum*, *HIST. OF PARLIAMENT* (2009), <http://www.historyofparliamentonline.org/volume/1820-1832/constituencies/old-sarum>. Old Sarum had as few as seven eligible voters during the period from 1754 to 1790. John Brooke, *1754-1790: The Constituencies*, *HIST. OF PARLIAMENT* (1964), <http://www.historyofparliamentonline.org/volume/1754-1790/survey/i-constituencies>.

78. See John P. Ferris, *Old Sarum: 1660-1690*, *HIST. OF PARLIAMENT* (1983), <http://www.historyofparliamentonline.org/volume/1660-1690/constituencies/old-sarum>.

79. See *id.*; Andrew Thompson, *William Pitt ‘The Elder,’* *GOV.UK: HISTORY OF GOV’T BLOG* (Mar. 11, 2015), <https://history.blog.gov.uk/2015/03/11/william-pitt-the-elder-whig-1766-1768/>; R.G. Thorne, *Old Sarum: 1790-1820*, *HIST. OF PARLIAMENT* (1986), <http://www.historyofparliamentonline.org/volume/1790-1820/constituencies/old-sarum>.

80. The borough was sold to Du Pré Alexander for a price of £43,000. G. Thorne, *Old Sarum: 1790-1820*, *HIST. OF PARLIAMENT* (1986), <http://www.historyofparliamentonline.org/volume/1790-1820/constituencies/old-sarum>.

81. For example, consider the activities of Sir James Lowther, described as “the biggest borough-monger of all” during the period between 1754 and 1790. Brooke, *supra* note 75. As John Brooke describes,

Lowther set out to monopolize the parliamentary representation of Cumberland and Westmorland, and by 1784 controlled seven seats in these counties (one for Cumberland, one at Carlisle, two at Cockermouth, two for Westmorland, and one at Appleby). In addition, he owned the pocket borough of Haslemere in Surrey, which he bought in 1780. Achieving this electoral empire cost him at least £100,000, and probably a good deal more.

*Id.*

82. Schleicher, *supra* note 45, at 1058.



corporate, and not public, interests.<sup>83</sup> The possibility that corporations or individuals would be able to buy Senate seats was not the only factor that spurred this substantive constitutional change, but it was a major public concern.<sup>84</sup>

Today's very small states raise similar concerns. Although Vermont is not a very poor state per capita—it ranks 31st in GSP per capita<sup>85</sup>—its economy is tiny. Vermont's GSP is the lowest of any state.<sup>86</sup> This means that one entrant could dominate Vermont's economic production. As noted above, the aggregate economic effect of Amazon's HQ2 is expected to be equivalent to 17% of Vermont's GSP.<sup>87</sup>

Vermont could theoretically suffer the same fate as former British pocket boroughs like Old Sarum. According to a 2015 estimate, the total value of property in Vermont is around \$60 billion, which is less than two-thirds of the value of property on the Upper East Side of Manhattan.<sup>88</sup> As of 2017, there were four Americans—Jeff Bezos, Warren Buffet, Bill Gates, and Mark Zuckerberg—who each have enough money to buy every single piece of property in Vermont.<sup>89</sup> In 2017, Apple, the computer company, could have bought all of the property in Vermont with less than one-quarter of its cash on hand (or with slightly more than a year of its annual net income).<sup>90</sup>

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83. *Id.*

84. *Id.*

85. *Per Capita Real GDP by State*, BUREAU OF ECON. ANALYSIS (May 4, 2018), <https://www.bea.gov/itable/drilldown.cfm?reqid=70&stepnum=11&AreaTypeKeyGdp=1&GeoFipsGdp=XX&ClassKeyGdp=naics&ComponentKey=1000&IndustryKey=1&YearGdp=2017&YearGdpBegin=-1&YearGdpEnd=-1&UnitOfMeasureKeyGdp=Levels&RankKeyGdp=1&Drill=1&nRange=5>.

86. *GDP by State 2018*, *supra* note 14.

87. *See supra* Part I.

88. Max Galka, *A Striking Perspective on New York City Property Values*, METROCOSM (June 24, 2015), <http://metrocosm.com/new-york-city-property-values-in-perspective/> (finding the value of property in Upper East Side to equal \$96 billion). Galka also estimated the total property value—as opposed to land value—of Vermont to be just below \$60 billion. *Id.*; *see also* William Larson, *New Estimates of Value of Land of the United States* 27, Table 3 (Apr. 3, 2015) (unnumbered working paper), <https://www.bea.gov/system/files/papers/WP2015-3.pdf> (estimating the value of land in Vermont at \$44 million).

89. Luisa Kroll & Kerry A. Dolan, *The Definitive Ranking of the Wealthiest Americans*, FORBES (Oct. 3, 2018, 7:00 AM), <https://www.forbes.com/forbes-400/list/#version:static>. Of course, for any of these individuals—or any other single actor—to actually buy all the property in Vermont would surely be harder. As landowners became aware that Vermont property was being amassed, they would surely hold out for extremely high prices, or perhaps refuse to sell.

90. Apple had \$267.2 billion cash on hand in the March 2018 quarter. Anita Balakrishnan & Sara Salinas, *Apple's Cash Hoard Falls to \$267.2 Billion*, CNBC:TECH (May 2, 2018, 8:40 AM), <https://www.cnbc.com/2018/05/01/apple-q2-2018-earnings-heres-how-much-money-apple-has.html>; *see also* *Apple Q4 FY17 Consolidated Financial Statements*, APPLE INC., <https://www.apple.com/newsroom/pdfs/fy17-q4/Q4FY17ConsolidatedFinancialStatements.pdf> (last visited Apr. 12, 2019).

These are extreme scenarios, but given Vermont's small economy, it is not hard to imagine a few individuals or firms dominating state politics.<sup>91</sup> While interest-group politics is clearly a large part of politics everywhere, a group can be quite small and still be a large part of a small state like Vermont's economy and politics. Take the dairy industry (which accounts for more than \$2 billion of Vermont's \$31 billion economy), which is able to exert exceptional influence on Vermont's congressional delegation.<sup>92</sup> One might think that lower milk prices would be good—more children could afford a healthy product, after all. But Vermont's congressional delegation has been focused for decades on preserving federal supports for high milk prices, driving up the cost of providing milk in order to save the local dairy industry.<sup>93</sup>

Vermont's Senators were central to establishing and protecting the Northeast Interstate Dairy Compact (a congressionally authorized inter-state compact that allowed New England dairy farmers to receive a higher minimum price than the current federal minimum price for the region and that created the Northeast Dairy Compact Commission, headquartered in Montpelier, Vermont) for years.<sup>94</sup> Party control of the U.S. Senate flipped in 2001 when Senator Jim Jeffords

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91. And there is no reason to believe that those individuals or firms will be residents of the state in question. As David Fontana has noted, out-of-state donors often dominate in-state donors—the top 5% of the nation's zip codes outspend the rest of the county by three times in congressional races, and average members of the House receive only 11% of their donations from their own district. David Fontana, *The Geography of Campaign Finance Law*, 90 SO. CAL. L. REV. 1247, 1272 (2017).

92. This does not make Vermont unique among small states; 23% of Wyoming's economy is tied up in energy extraction. *Wyoming*, BUREAU OF ECON. ANALYSIS (Mar. 22, 2018), <https://www.bea.gov/regional/bearfacts/pdf.cfm?fips=56000&areatype=STATE&geotype=3>.

93. For example, Vermont Senator George Aiken was a leading advocate for dairy price supports during his three-decade tenure in the Senate. *See, e.g., Dairy Price Supports of 1960: Hearings on S. 2917 Before a Subcomm. of Agric. Prod., Mktg., and Stabilization of Prices of the S. Comm. on Agric. and Forestry*, 86th Cong. 2-4 (1960) (statement of Hon. George D. Aiken, U.S. Sen. from Vermont); S. REP. NO. 93-1214 (1974) (supporting a Senate Resolution sponsored by Senator Aiken, requesting that the Secretary of Agriculture increase the support price for milk). The University of Vermont maintains a digital repository of documents pertaining to much of Senator Aiken's efforts in this area. *See Dairy and the U.S. Congress*, UNIV. OF VT. LIBR.: DIGITAL COLLECTIONS, <https://cdi.uvm.edu/islandora/object/uvmcdi%253Adairy> (last visited Mar. 29, 2019). Aiken's successor, U.S. Senator Patrick Leahy, picked up where Aiken left off as a staunch advocate in favor of federal price supports for milk. *See, e.g., Milk Price Supports: Hearing before the Subcomm. on Agric. Prod., Mktg. and Stabilization of Prices of the S. Comm. on Agric., Nutrition, and Forestry on S. 6, S. 80, and S. 910*, 96th Cong. 1-2 (1979) (statement of Sen. Patrick J. Leahy, Member, S. Comm. on Agriculture, Nutrition, and Forestry). For a critique of dairy price supports, see Michael McMenamin, *Dairy Price Supports: Still Milking the Public*, CATO INST. (Aug. 19, 1982), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa014.pdf>.

94. Following unsuccessful efforts by the Vermont delegation to pass the Northeast Interstate Dairy Compact in 1993-94, *see* 140 CONG. REC. 28,952-53 (1994)

became a Democrat, allegedly as part of a failed effort to preserve the Dairy Compact.<sup>95</sup> Further, Congress uses the Dairy Price Support Program to keep prices high through purchases of cheese, butter, and milk,<sup>96</sup> and between 2002 and 2012, Congress relied on Milk Income Loss Contract payments to farmers if prices fell too much.<sup>97</sup>

By national standards, the milk industry of Vermont is a footnote. But because it is in Vermont, it can play a political role that similar industries could not in other states. The power of the milk industry in Vermont has translated into

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(statement of Sen. Leahy), the Compact was included in the 1996 Farm Bill, Pub. L. No. 104-127, § 147, 110 Stat. 888, 919-920 (codified at 7 U.S.C. 7256 (2012)). *See generally* RALPH M. CHITE, CONG. RES. SERV., 96-814 ENR, THE NORTHEAST INTERSTATE DAIRY COMPACT (1996) (providing background on the formation of the Compact in the 1996 Farm Bill and an overview of how the Compact functions). The Dairy Compact's importance to New England farmers and its effect of increasing milk prices are highlighted in a seminal scene from *The West Wing*, in which fictional New Hampshire Governor and presidential candidate Jed Bartlett must explain to a dairy-farmer constituent why, during Bartlett's tenure in Congress, he voted against the Compact. In Bartlett's words,

Yeah, I screwed you on that one . . . I put the hammer to farms in Concord, Salem, Lanconia . . . Today, for the first time in history, the largest group of Americans living in poverty are children. . . . Let me put it this way, I voted against the bill because I didn't want to make it harder for people to buy milk.

*The West Wing: In the Shadow of Two Gunmen (Part I)* (John Wells Prods. & Warner Bros. Television Oct. 4, 2000).

95. *See Jeffords Leaves GOP*, ABC NEWS (May 24, 2001), <https://abcnews.go.com/Politics/story?id=121638&page=1>. The Compact ceased operation in 2001. Joseph V. Balagtas & Daniel A. Sumner, *The Effect of the Northeast Dairy Compact on Producers and Consumers, with Implications of Compact Contagion*, 25 REV. AG. ECON. 123, 126 (2003).

96. *See, e.g.*, RALPH M. CHITE, CONG. RES. SERV., 94-690 ENR, FARM COMMODITY PROGRAMS: THE DAIRY PRICE SUPPORT PROGRAM 3-5 (1995).

97. *See, e.g.*, *Fact Sheet: Milk Income Loss Contract (MILC) Program*, U.S. DEPT. OF AGRIC.: FARM SERV. AGENCY (Jan. 2009), [https://www.fsa.usda.gov/Internet/FSA\\_File/milc\\_09.pdf](https://www.fsa.usda.gov/Internet/FSA_File/milc_09.pdf). The MILC program was replaced in 2014 by the Margin Protection Program for Dairy Producers (MPP-Dairy), a voluntary insurance program that includes both catastrophic coverage at no cost to the producer and various levels of buy-up coverage. *Dairy Programs*, U.S. DEPT. OF AGRIC.: FARM SERV. AGENCY 7 (Aug. 2016), [https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/FactSheets/2016/farm\\_service\\_agency\\_programs.pdf](https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/FactSheets/2016/farm_service_agency_programs.pdf). The Vermont congressional delegation fought both for the renewal of the MILC program in 2008 and inclusion of the MPP-Dairy program in the 2014 Farm Bill. Susan Allen, *Vermont's Dairy Farmers 'Got MILC,'* TIMES ARGUS (May 3, 2008), <https://www.timesargus.com/articles/vermonts-dairy-farmers-got-milc/>; Kelsey Neubauer, *Desperate Dairy Farmers Given Lifeline in Federal Budget*, VT. DIGGER (Feb. 9, 2018), <https://vtdigger.org/2018/02/09/desperate-dairy-farmers-given-lifeline-federal-budget/>; Press Release, The Office of Senator Patrick Leahy, Leahy, Welch Encourage Dairy Farmers to Sign Up For New Insurance Program, (Sept. 4, 2014), <https://www.leahy.senate.gov/press/leahy-welch-encourage-dairy-farmers-to-sign-up-for-new-insurance-program->

higher milk prices for consumers, in part because of the relative power even a small industry can exert over Senators from a tiny state.

### C. Vermont and the Low Price of Pork

The presence of small states also changes the logic of legislative wrangling inside Congress. As states shrink, their senators become cheaper to buy off. Governing coalitions can spend an increasingly small amount of money in absolute terms to “sweeten the deal” for small-state senators. That is, we should expect a positive relationship between small states and the efficacy of pork-barrel spending.

There is a large debate about whether pork spending is good or bad, but it is surely significant. By changing the returns to different strategies for building a Senate coalition, small states may well alter the landscape of national politics.

One of the most notable changes in modern Congress has been the decline of what is commonly known as “pork-barrel” spending, or legislatively determined, district-specific spending projects. In 2010, Congress banned earmarks for specific projects.<sup>98</sup> This did not end pork-barrel spending, as members of Congress are quite clever and can get around bans like these.<sup>99</sup> But the

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98. In 2010, House Democratic leaders instituted an internal ban on earmarks directed to for-profit corporations. *See, e.g., House Dems Ban Earmarks to Corporations*, CBSNEWS (Mar. 10, 2010), <https://www.cbsnews.com/news/house-dems-ban-earmarks-to-corporations/>. In response, a ban on all earmarks was adopted as the internal policy of the House Republican Conference. *See, e.g., Jordan Fabian & Molly K. Hooper, House GOP Votes to Ban All Earmarks*, THE HILL (Mar. 11, 2010), <http://thehill.com/blogs/blog-briefing-room/news/86203-house-gop-approves-conference-wide-earmark-ban>. This initial one-year ban has been consistently renewed in both the GOP-controlled House and Senate. *See Earmark Elimination Act Would Eliminate Earmarks, but Both Trump and Some Democrats Want Earmarks Restored*, GOVTRACK INSIDER (Jan. 29, 2018), <https://govtrackinsider.com/earmark-elimination-act-would-eliminate-earmarks-but-both-trump-and-and-some-democrats-want-3837b05af341>. The ban on earmarks has garnered mixed reactions from lawmakers, and in 2018, Republicans in Congress have pushed both to reinstate earmarks and to permanently prohibit them. *See, e.g., Susan Davis, House GOP to Debate Bringing Earmarks Back*, NPR (Jan. 14, 2018), <https://www.npr.org/2018/01/14/577639518/house-gop-to-debate-bringing-earmarks-back>; *McCain & Bipartisan Senators Introduce Bill to Permanently Ban Earmarks*, MCCAIN.SENATE.GOV (Jan. 23, 2018), <https://www.mccain.senate.gov/public/index.cfm/2018/1/flake-mccain-bipartisan-senators-introduce-bill-to-permanently-ban-earmarks>.

99. *See, e.g., RUSSELL W. MILLS & NICOLE KALAF-HUGHES, R STREET POLICY STUDY NO. 83: EXIT EARMARKS, ENTER LETTERMARKS 3* (2017), <https://www.rstreet.org/wp-content/uploads/2017/01/83.pdf> (noting the rise of “an obscure practice called ‘lettermarking’ in which members write to the head of an administrative agency to request the funding”); James T. Walsh, Melanie Sloan, Rich Gold & Craig Holman, Opinion, *The Case for Restoring Earmarks*, WASH. POST (Jan. 23, 2018), [https://www.washingtonpost.com/opinions/the-case-for-restoring-earmarks/2018/01/23/6840063c-ffc7-11e7-8acf-ad2991367d9d\\_story.html?utm\\_term=.72a5bc35362f](https://www.washingtonpost.com/opinions/the-case-for-restoring-earmarks/2018/01/23/6840063c-ffc7-11e7-8acf-ad2991367d9d_story.html?utm_term=.72a5bc35362f) (“The current system has also allowed political interference we didn’t expect. Some officials in the executive branch and others, including members of Congress, have kept the earmark

earmark ban was indicative of an effort to reduce this type of spending. The reduction in pork-barrel spending has been so successful that there has been much writing in recent years calling for the return of pork-barrel spending, in order to make Congress more efficacious.<sup>100</sup>

Pork-barrel spending, under the classic models of Barry Weingast and John Ferejohn, is a mechanism for organizing a legislature.<sup>101</sup> “Distributive politics” norms are a way of cobbling together majorities by allowing everyone to get a piece of federal spending, even if it results in higher taxes and spending than

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tradition alive with less transparency by pressuring agencies to fund particular projects through phone calls (or “phonemarks”), letters (“lettermarks”) and meetings. These decisions are never publicly disclosed; in fact, while it was once common to read media reports about seemingly inexplicable funding decisions (e.g., a teapot museum), such reports are now rare.”); *see also* Kimberly Kindy, *After Earmark Ban, Lawmakers Try to Direct Money to Hundreds of Pet Projects*, WASH. POST (Nov. 29, 2011), [https://www.washingtonpost.com/politics/after-earmark-ban-lawmakers-try-to-direct-money-to-hundreds-of-pet-projects/2011/11/29/gIQA2L2WAO\\_story.html?utm\\_term=.290da531b132](https://www.washingtonpost.com/politics/after-earmark-ban-lawmakers-try-to-direct-money-to-hundreds-of-pet-projects/2011/11/29/gIQA2L2WAO_story.html?utm_term=.290da531b132) (documenting the efforts of various legislators to include funding for special projects in their districts despite the earmark ban).

100. *See* Citizens Against Government Waste, *2016 Congressional Pig Book: Historical Trends*, CAGW.ORG, [https://www.cagw.org/reporting/2016-pig-book#historical\\_trends](https://www.cagw.org/reporting/2016-pig-book#historical_trends) (last visited Apr. 11, 2019) (describing decline in pork); *see, e.g.*, Jonathan Allen, *The Case for Earmarks*, VOX (June 30, 2015), <https://www.vox.com/2015/6/30/8864869/earmarks-pork-congress>; Tyler Cowen, *Congress Needs to Bring Back Earmarks*, BLOOMBERG (Jan. 9, 2018, 1:22 PM), <https://www.bloomberg.com/view/articles/2018-01-09/congress-needs-to-bring-back-earmarks>; Trent Lott & John Breaux, *Opinion, Want a Functioning Legislative Branch? Bring Back Earmarks.*, WASH. POST: OPINION (Jan. 25, 2018), [https://www.washingtonpost.com/opinions/want-a-functioning-legislative-branch-bring-back-earmarks/2018/01/24/981b1672-0089-11e8-8acf-ad2991367d9d\\_story.html?utm\\_term=.ece1bc876057](https://www.washingtonpost.com/opinions/want-a-functioning-legislative-branch-bring-back-earmarks/2018/01/24/981b1672-0089-11e8-8acf-ad2991367d9d_story.html?utm_term=.ece1bc876057); Walsh et al., *supra* note 99. *But see, e.g.*, Jay Cost, *The Return of Earmarks Won't Solve Congressional Irresponsibility*, NAT'L REV. (Jan. 15, 2018, 9:00 AM), <https://www.nationalreview.com/2018/01/earmarks-congress-irresponsibility-stronger-party-structures-are-better-alternative/>; Michael Steel, *Yes, Congress is Broken. But Earmarks Will Only Make it Worse.*, WASH. POST (Jan. 17, 2018), [https://www.washingtonpost.com/opinions/yes-congress-is-broken-but-earmarks-will-only-make-it-worse/2018/01/17/d11c21fa-fb02-11e7-ad8c-ecbb62019393\\_story.html?utm\\_term=.b5597f3a1628](https://www.washingtonpost.com/opinions/yes-congress-is-broken-but-earmarks-will-only-make-it-worse/2018/01/17/d11c21fa-fb02-11e7-ad8c-ecbb62019393_story.html?utm_term=.b5597f3a1628). The most recent round of discussion about bringing back earmarks was catalyzed by President Trump, who told members of Congress in early 2018, “Our system lends itself to not getting things done, and I hear so much about earmarks — the old earmark system — how there was a great friendliness when you had earmarks. . . . Maybe all of you should start thinking about going back to a form of earmarks.” Alan Rappeport, *To Grease Wheels of Congress, Trump Suggests Bringing Back Pork*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/us/politics/trump-earmarks-pork-barrel-spending.html>.

101. *See* JOHN A. FEREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968, 2-3 (1974); Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 250 (1979).

people want in the aggregate.<sup>102</sup> These universal coalitions create something like a prisoner's dilemma—all members could be happier if everyone was constrained from eating their fill at the appropriations trough. But pork-barrel spending protects all legislators from their worst outcomes and, therefore, can produce a stable equilibrium.<sup>103</sup>

In theory, the amount of pork needed to push senators is related to the size, in terms of population and economic production, of the state they represent. As states get smaller relative to the national population (and as their GSPs get lower relative to the size of the federal budget), congressional appropriators should need to use fewer revenues to buy off small-state senators. This is clearly borne out in the data. As Frances Lee and Bruce Oppenheim show, as states get smaller, they get more federal funding per capita.<sup>104</sup>

If individual senators seek to maximize their own chances of reelection, then the political calculus they face changes as the state they represent gets smaller—both by population and by the size of the state economy. A small-state senator who demands pork in return for key votes on legislation may harm both the reputation of the national party and the senator's own connection to leadership. But doing so presumably buys support from some otherwise-skeptical constituents. In a smaller state, a senator will need less money to buy off skeptical constituents, simply because there are fewer of them. As states get smaller, the cost of buying the support of small-state senators should theoretically get lower.

Consider the (failed) effort to get Senator Lisa Murkowski (R-AK) to support the Republican effort to repeal Obamacare in 2017.<sup>105</sup> When it was revealed that the bill would substantially harm Alaska, the bill writers added in a

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102. See, e.g., Morris P. Fiorina & Roger G. Noll, *Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector*, 68 AM. ECON. REV. 256, 256–58 (1978); Kenneth A. Shepsle & Barry R. Weingast, *Political Preferences for the Pork Barrel: A Generalization*, 25 AM. J. POL. SCI. 96, 107–10 (1981); Weingast, *supra* note 101 at 254–56; Barry R. Weingast, Kenneth A. Shepsle & Christopher Johnsen, *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642, 642–58 (1981) [hereinafter *Distributive Politics*].

103. *Distributive Politics*, *supra* note 102, at 651 (“In those policy areas characterized by a project-by-project orientation, the geographic concentration of benefits, and the diffusion of costs, there is abundant evidence that universalism and reciprocity are prevailing decision rules in the U.S. Congress. The former practice assures any interested district a project; the latter, in recognition of the fact that district differences translate into different policy priorities, facilitates a process of mutual support and logrolling. These two practices combine to permit packages of distinct projects earmarked for interested districts to obtain the support even of those without a stake in the package in exchange for reciprocal treatment.”).

104. See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999).

105. Ultimately Senator Murkowski, along with fellow Republican Senators Susan Collins and John McCain, joined with Democrats in opposing the “skinny repeal” of Obamacare in July 2017. Maya Rhodan, *Meet the Women Senators Who Helped Stop the Health Care Bill*, TIME, <http://time.com/4877922/health-care-vote-senate-skinny-repeal-murkowski-collins/> (last updated July 28, 2017, 1:28 PM).

huge payment to Alaska to lessen the blow.<sup>106</sup> Doing so was relatively easy; there are just not enough people in Alaska to make pandering to them particularly expensive.<sup>107</sup> Interestingly, the Senate leadership was not willing to make sufficient payments to make the bill actually beneficial for Alaska or to successfully buy Murkowski's vote (perhaps it would have been *too* gross an effort and thus harmed the national party's brand elsewhere).<sup>108</sup> But the fiscal expense involved in doing so would have been manageable in a way that it would not have been had the swing senator been from California or Texas.

Vermont senators are known for their efforts to get pork.<sup>109</sup> Vermont Senator Patrick Leahy has long served on the Appropriations Committee and now is the leading Democrat on the Committee.<sup>110</sup> Senator Bernie Sanders was willing to anger his left-wing base to get the Air Force's F-35s to be based in the State.<sup>111</sup>

One can look at the low price of pork for Vermont in two ways. On the one hand, cheaper pork is good. Passing legislation requires a majority vote, and if leadership must engage in wasteful spending to secure the necessary votes, it is surely better if such spending is lower rather than higher. On the other hand, if as a normative matter, we would like senators to vote on the merits of bills, the ability of leadership to buy support with a few dollars is quite problematic.

106. See Jeff Stein, *The Kodiak Kickback: The Quiet Payoff for an Alaska Senator in the Senate Health Bill*, Vox (July 15, 2017, 8:00 AM), <https://www.vox.com/policy-and-politics/2017/7/15/15971642/alaska-republicans-health-care> ("Senate Republicans' newest bill includes a special \$182 billion fund . . . to help stabilize the Obamacare markets . . . . But to make sure it helps Alaska — and, perhaps, its moderate senator — lawmakers added a new clause to that special fund this week that will require at least 1 percent of it be spent on states where premiums run 75 percent higher than the national average. One percent may not sound like a big number, but we're talking about Alaska, which only has 700,000 people. The state is still set to receive nearly \$2 billion over 10 years.").

107. *Id.*

108. Had the Republicans' bill become law, Alaska was set to lose an estimated \$3.1 billion in federal Medicaid funds. *Id.* (citing MANATT HEALTH, IMPACT ON ALASKA OF MEDICAID PROVISIONS IN THE BCRA 4 (2017), <http://dhss.alaska.gov/News/Documents/press/2017/impactBCRA.pdf>).

109. See, e.g., Nina Burleigh, *Socialism, Syrup and Fighter Jets: Bernie Sanders on the Campaign Trail*, NEWSWEEK (Sept. 22, 2015, 6:28 AM), <https://www.newsweek.com/2015/10/02/bernie-sanders-campaigns-2016-presidential-campaign-democratic-party-374897.html> ("You know him as a grumpy socialist, but Vermonters know Bernie Sanders is also a pol who brings home the pork.").

110. *Issues: Appropriations Committee*, LEAHY.SENATE.GOV, <https://www.leahy.senate.gov/issues/appropriations-committee> (last visited Apr. 12, 2019). Senator Leahy was particularly successful at securing federal military in Vermont. See Ken Picard, *Paddy Warbucks*, SEVEN DAYS (Oct. 10, 2006), <https://www.sevendaysvt.com/vermont/paddy-warbucks/Content?oid=2127198> (documenting Leahy's ability to use his position on the Defense Subcommittee of the Senate Appropriations Committee to secure Department of Defense contracts for Vermont companies).

111. See, e.g., Burleigh, *supra* note 109; Tim Mak, *Bernie Sanders Loves this \$1 Trillion War Machine*, DAILY BEAST (Feb. 9, 2016, 12:01 AM), <https://www.thedailybeast.com/bernie-sanders-loves-this-dollar1-trillion-war-machine>.

One ironic implication of the low price of pork for states like Vermont is that it may push back to some small degree on the biggest force in politics: party polarization.

As I have argued, it is very clear that the reason why pork-barrel spending declined in recent years is party polarization.<sup>112</sup> Political scientists have long considered ideologically coherent political parties a counter-weight to pork-barrel spending. As Mat McCubbins and Gary Cox have argued, strong political-party organizations make members of a legislature cede their power to set the agenda and limit individual deviations from the party line.<sup>113</sup> In return for compliance, McCubbins and Cox argue that party leaders develop an attractive “party brand” that members can use in their elections.<sup>114</sup> Rather than being known for bringing home the pork, members run on the accomplishments of their party. Thus, where there are strong parties, legislators no longer need to dole out pork to build majority coalitions. Instead, the collective need to burnish the party brand builds and keeps in line majority coalitions.

Pork becomes less and less necessary as parties become more ideologically coherent and powerful. This dynamic is increased when there is polarization among the electorate and interest groups. In a world with relatively few swing voters, and in which real antipathy toward the other party is quite common, pork is less useful. If Republican voters think the Democrats are godless heathens, the ability of Democratic senators to get a bridge built in their district won't matter much to them at the voting booth.

However, there is a price for everything. If the cost of buying off voters goes down, one might imagine that the pork barrel can make a return, at least with respect to a subset of small-state senators. This would lead to a return of a more transactional, and less ideological, Senate, at least to some degree.

Debates over whether polarization is a positive or negative force have raged for decades. Little seems to stand in its way, though—polarization is an ever-increasing force in American politics. But very, very small states might be a roadblock to ever-increasing polarization, for good or for ill.

## II. VERMONT IS A PROBLEM FOR COOPERATIVE FEDERALISM

Federalism scholars generally think about decentralization along a single dimension. America can be more or less decentralized, but analysis of federalism usually proceeds as if the states were equally regulated by the federal government. In *Shelby County v. Holder*, the Supreme Court held that there is a “fundamental principle of equal sovereignty” that limits differential treatment, at least absent

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112. David Schleicher, *How Polarization Cooked Congress's Pork*, PRAWFSBLOG (May 8, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/05/-how-polarization-cooked-congresss-pork-.html>.

113. GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 19–20* (2005); GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 257–58* (2d ed. 2007).

114. See COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 113, at 32.



justification (although the many commentators and critics of that opinion showed quite persuasively that a principle of equal treatment is not generally followed or accepted).<sup>115</sup> But even beyond formal requirements of equal treatment, most scholarship on federal–state relations does not exert too much effort analyzing the differences among states, particularly if one excludes noticing differences in political-party control among the states and Congress.<sup>116</sup> But as this Part will show, differences among states in the size and make up of their population matters quite a lot in how they relate to the federal government, particularly to the design of cooperative-federalism regimes.

That said, scholars have not exactly missed the fact that states are different sizes. However, when they discuss differences in the sizes of states, it is largely in the context of discussing what scholars call “horizontal federalism,” or the ways states relate to and influence one another.<sup>117</sup> In that context, state size is obviously important. When California imposes a regulation on cars, or when Texas decides to buy a single history textbook for schools, regulated national industries often respond by adopting the policies of large states, influencing life in smaller states.<sup>118</sup> Regulations that in one state would not have much impact on interstate commerce will in another have big effects on outsiders due to differences in commuting patterns. And so forth.

But vertical federalism—the relationship between the federal government and states—is also very different for big and small states.<sup>119</sup> Much of the practice of modern federalism involves state administration and partial funding of federal programs. “Cooperative federalism,” as scholars refer to it, involves, well, cooperation between states and the federal government, with states operating and partially funding federal programs like Medicaid and Temporary Aid for Needy

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115. 570 U.S. 529, 542–43 (2013). For a summary of the criticism of *Shelby County*’s invocation of an “equal sovereignty” rule, see David Schleicher, *The Boundary Problem and the Changing Case Against Deference in Election Law Cases*, 15 ELECTION L. J. 247, 261 n.74–76 (2016).

116. Not all federalism scholars, though. For examples of scholarship discussing the ways differences between states structure federal-state relations, see, for example, Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 34 (2007); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 858 (1998); Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44–72 (2010); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2544–652 (2005).

117. See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 66–69 (2014) (reviewing literature on horizontal federalism and discussing the political benefits of spillovers from states).

118. *Id.* at 62.

119. As discussed above, there is an important literature on the degree to which states governed by Democrats or Republicans differ in their relation to the federal government (based on the national party in charge at the time). See Bulman-Pozen, *supra* note 66.

Families.<sup>120</sup> Similarly, areas of traditional state and local control, like transportation and education, have a substantial federal overlay of both funding and regulations.<sup>121</sup>

Cooperative federalism allows federal programs to be tailored to match local conditions, giving federal programs local, democratic input while also providing for federal oversight. As Robert Shapiro argues, at its best, cooperative federalism is symphonic or “polyphonic,” allowing states and the federal government to offer what they are best at in designing a program.<sup>122</sup> Scholars like Jessica Bulman-Pozen and Heather Gerken also praise the uncooperative aspects of cooperative federalism.<sup>123</sup> State officials can use their control over federal programs to dissent from federal policy, thereby forcing federal officials to overrule them or to make programmatic adjustments. By doing so, state officials can shape the federal policy agenda.<sup>124</sup>

But there is a deep normative question facing cooperative-federalism programs. Why use state governments to run federal programs? Decentralized federal administration can achieve many of the ends of cooperative federalism.<sup>125</sup> The EPA has branch offices around the country, each applying federal laws in a particular territory;<sup>126</sup> the federal appellate circuit courts are geographically spread

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120. See, e.g., DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 47 (2d ed. 1972); ROBERT A. SHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 89–91 (2009); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1556–60 (2012); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668–73 (2001).

121. For a sampling of recent scholarship discussing the federal government’s role in education, see Douglas N. Harris, Helen F. Ladd, Marshall S. Smith & Martin R. West, *A Principled Federal Role in PreK-12 Education*, BROWN CTR. ON EDUC. POL’Y AT BROOKINGS (Dec. 2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_20161206\\_principled\\_federal\\_role\\_browncenter1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_20161206_principled_federal_role_browncenter1.pdf); Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 CAL. L. REV. 565, 591–608 (2015); Shannon K. McGovern, Note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1522–25 (2011). In the realm of transportation, see ROBERT JAY DILGER, CONG. RESEARCH SERV., R40431, *FEDERALISM ISSUES IN SURFACE TRANSPORTATION POLICY: A HISTORICAL PERSPECTIVE* 18–43 (2015).

122. See Shapiro, *supra* note 120, at 95–98.

123. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1256 (2009).

124. See *id.* at 1287; Heather Gerken, *We’re About to See States’ Rights Used Defensively Against Trump*, VOX (Jan. 20, 2017, 2:14 PM), <https://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative>.

125. See Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV., 377, 388–89 (2017); Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1895 (2018).

126. *EPA Organization Chart*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/aboutepa/epa-organization-chart> (last visited Apr. 11, 2019).

out, setting precedent for a number of states;<sup>127</sup> U.S. Attorneys are federal officials that enforce federal law in specific places, either whole states or subsectors of states.<sup>128</sup>

That we use state governments so frequently to operate decentralized federal programs is a product of our constitutional system if not a requirement of it. State governments already exist, and their sovereignty is preconstitutional—the states are the entities that signed the Constitution. They have capacity to raise money independently through taxes, and they have elected officials who channel local opinion, at least in theory. And senators and representatives may seek to use federal programs to empower state officials. As a result, running federal programs through state governments is an attractive and easy mechanism for creating locally specific versions of federal policy.

But relying on state governments is also costly. States do not correspond to economic communities. Many metropolitan regions expand into a number of states;<sup>129</sup> running federal programs through states can thus lead to weird results, like having a single healthcare market and regional economy governed by many different versions of the same federal programs.<sup>130</sup> On the other hand, most

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127. *Court Role and Structure*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Apr. 12, 2019).

128. *See, e.g., Find Your United States Attorney*, OFFICES OF THE U.S. ATT'YS, <https://www.justice.gov/usao/find-your-united-states-attorney> (last visited Mar. 29, 2019).

129. The Census Bureau lists numerous Metropolitan Statistical Areas (MSAs) that extend between two or more states, including the Chicago-Naperville-Elgin, IL-IN-WI; Cincinnati, OH-KY-IN Metro Area; Kansas City, MO-KS; Louisville/Jefferson County, KY-IN; Memphis, TN-MS-AR; Minneapolis-St. Paul-Bloomington, MN-WI; New York-Newark-Jersey City, NY-NJ-PA; Omaha-Council Bluffs, NE-IA; Philadelphia-Camden-Wilmington, PA-NJ-DE-MD; Portland-Vancouver-Hillsboro, OR-WA; and Washington-Arlington-Alexandria, DC-VA-MD-WV metro areas. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017 – United States – Metropolitan and Metropolitan Statistical Area*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2017/GCTPEPANNR.US23PR> (last visited Mar. 29, 2019).

130. *See, e.g., Danny Lewis, Health Care in New York and New Jersey Is a 'Tale of Two Exchanges,'* WNYC NEWS (Dec. 13, 2017), <https://www.wnyc.org/story/health-care-new-york-and-new-jersey-tale-two-exchanges/> (describing the difference between the health-insurance marketplace in New Jersey, which uses the federal exchange, and New York, which runs its own exchanges, as “a tale of two exchanges. In New York, there’s a much more robust market and insurance premiums have not gone up as sharply. . . . There are only three insurers who are offering insurance on the ACA exchanges for 2018 in New Jersey, and you’ve seen rates go up there much more than you’ve seen for the New York market”). Significant differences between New York and New Jersey also arise in the area of welfare policy, according to the Center for Budget and Policy Priorities’ analysis of how each state spends its Temporary Assistance for Needy Families (TANF) funds. In 2016, New Jersey spent 29 percent of its TANF funds on “core welfare reform activities and 39 percent of funds on Pre-K, while New York spent 41 percent of its funds on core activities and only 9 percent on Pre-K.” *State Fact Sheets: How States Have Spent Funds Under the TANF Block Grants*, CTR. FOR BUDGET & POL’Y PRIORITIES,

metropolitan areas are smaller than states, and there's no particular reason that the same Medicaid system should apply in, say, Los Angeles and Shasta Counties in California.<sup>131</sup> Neither do states match political cultures nor identities much anymore.<sup>132</sup> Fights between liberal cities and conservative state legislatures are legion,<sup>133</sup> and often over the fate of cooperative-federalism programs.<sup>134</sup> In the presence of such disagreement, it is hard to say that having states run these programs does not lead to most residents getting what they want.

Because states neither really define nor match economic or political communities, it is not clear that they—and not, say, federal administrative entities or local governments—are the best partners for the federal government in running decentralized federal programs.

Further, relying on state governments makes running programs more complicated. If having elected officials operate federal programs provides the discursive benefits of uncooperative federalism, it also suffers the harms that follow from a less cohesive system of applying laws. Running the Affordable Care Act's Medicaid expansion and management of exchanges through state governments allowed a potent form of opposition to emerge but also resulted in inequalities in access to federal money for poor people across state lines,<sup>135</sup> and for less-than-terrific management in some places.<sup>136</sup>

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<https://www.cbpp.org/research/family-income-support/state-fact-sheets-how-states-have-spent-funds-under-the-tanf-block> (last updated Feb. 19, 2019).

131. See U.S. CENSUS BUREAU, *supra* note 129. Rhode Island is the only state defined by one MSA. See Schleicher, *supra* note 37, at 90 n.7 (2014) (38 of Rhode Island's 39 cities and towns are in the Providence MSA).

132. See HOPKINS, *supra* note 70, at 39–42.

133. See Nicole DuPuis, Trevor Langan, Christiana McFarland, Angelina Panettieri & Brooks Rainwater, *City Rights in an Era of Preemption: A State-by-State Analysis*, NAT'L LEAGUE OF CITIES (2018), <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> (compilation of legislative preemption across seven policy areas).

134. Emily Badger, *How States Rejecting the Medicaid Expansion Sabotaged Their Biggest Cities*, CITYLAB (Nov. 11, 2013), <https://www.citylab.com/equity/2013/11/biggest-obamacare-losers-cities-states-wont-expand-medicare/7537/>; Kyle Cheney, *ACA Enrollment: Mayors Hold the Key*, POLITICO (Feb. 10, 2014, 11:08 PM), <https://www.politico.com/story/2014/02/obamacare-enrollment-mayors-103306>.

135. For example, as of June 2018, 17 states had not expanded Medicaid eligibility under the Affordable Care Act (ACA), leaving more than two million low-income Americans without health insurance and in the “coverage gap,” meaning their incomes are too high to receive coverage via Medicaid but too low to receive marketplace subsidies. Rachel Garfield, Kendal Orgera & Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States That Do Not Expand Medicaid*, KAISER FAMILY FOUND. 1–2 (June 2018), <http://files.kff.org/attachment/Issue-The-Coverage-Gap-Uninsured-Poor-Adults-in-States-that-Do-Not-Expand-Medicaid>. In addition, many states are in the process of instituting work requirements as a condition of Medicaid coverage, after the Trump Administration announced that it would support such efforts. See, e.g., Dylan Scott, *The Trump Administration's Plan for Medicaid Work Requirements, Explained*, VOX (Jan. 12, 2018,

Cooperative federalism also, it is argued, makes state elections less responsive.<sup>137</sup> The package of services a resident of a state receives from state officials is partially determined by federal laws.<sup>138</sup> This puts voters in the difficult spot of having to allocate responsibility for problems in that package among federal and state officials. This is difficult for experts and impossible for most voters. This makes the likelihood of states serving as “laboratories of democracy” less likely, as voters will not know whom to credit with novel successes.<sup>139</sup>

All of these are well-rehearsed arguments. But notably, as some states get smaller, cooperative federalism changes substantially. First, the efficiency of federal programs falls considerably. If the federal government were to design administrative regions for the country to administer Medicaid, for instance, it would never create entities that only covered 600,000 people at the same time it created entities that covered over 50 million people, like California. But, in effect, the federal government does exactly this when it partners with a small state like Vermont. Using small-state governments is an inefficient mechanism for organizing federal programs, as a tiny administrative entity must bear heavy fixed costs and will often contain odd demographic profiles. Having a state as small as Vermont run a Medicaid program just does not make any sense.

Further, the laboratory-of-democracy effect is mixed. One reason to use state governments for federal programs is to promote innovations that can be copied by others. It may be easier to try radical innovations in small states—you have to convince fewer people. The federal government may also approve more experiments as the costs of failure will be borne by fewer people. But the value of local experiments as examples to other states should decline as states become more different from one another.

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12:45 PM), <https://www.vox.com/policy-and-politics/2018/1/11/16877916/medicaid-work-requirements-trump-guidance>. However, such efforts face an uncertain future, after a federal judge blocked the Administration’s approval of Kentucky’s work-requirement program. *Stewart v. Azar*, 313 F. Supp. 3d 237, 272 (D.D.C. 2018); see Dylan Scott, *Federal Judge Blocks Kentucky’s Medicaid Work Requirements*, VOX, <https://www.vox.com/policy-and-politics/2018/6/29/17517862/medicaid-work-requirements-kentucky-lawsuit-decision> (last updated June 29, 2018, 3:45 PM).

136. See, e.g., Jeff Manning & Hillary Borrud, *State of Oregon Says it May Have Dispensed Millions to Ineligible Medicaid Recipients*, THE OREGONIAN: OREGONLIVE (May 17, 2017), [https://www.oregonlive.com/business/index.ssf/2017/05/state\\_says\\_it\\_may\\_have\\_dispens.html](https://www.oregonlive.com/business/index.ssf/2017/05/state_says_it_may_have_dispens.html).

137. See John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U.L. REV. 89, 117–18 (2004) (arguing that conditional federal spending suppresses vertical competition and state-by-state policy variation); Schleicher, *supra* note 66, at 805–06.

138. Schleicher, *supra* note 66, at 805–06.

139. *Id.* at 785–86. For a general theoretical framework explaining why states innovate less than we might expect or hope them to, see Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 603–06, 607–12 (1980).

These problems can best be seen through looking at a small state's policy problems in one area: Vermont's adventures in creating a system of single-payer healthcare reform.

Following the passage of the Affordable Care Act, Peter Shumlin ran for Governor and won on a platform of passing single-payer healthcare in Vermont.<sup>140</sup> "He didn't want to build on what existed. He wanted to blow up what exists and replace it with one state-owned and operated plan that would cover all of Vermont's residents—an example he hopes other states could follow."<sup>141</sup> And then his government proceeded to try and create such a program.<sup>142</sup>

This is a clear example of how small states enable laboratories of democracy. Even in similarly liberal states, governments have shied away from taking such radical steps.

But it didn't quite work out the way Shumlin and others expected. The cost of providing such a service spiraled upwards, and Vermont's small economy was just not up to the task. The program would have cost \$4.3 billion in 2017, while Vermont's entire fiscal 2015 budget, including both state and federal funds, is about \$4.9 billion.<sup>143</sup> Even though total healthcare costs would have declined, the State would have borne the cost of paying for everything and would have had to pass a whole passel of taxes, imposing a new special income tax of 9.5% (on top of current rates that range between 3% and 9%) and introducing the 11.5% new payroll tax (on top of existing Social Security and Medicare payroll taxes).<sup>144</sup>

Governor Shumlin pulled the plug on the reform.<sup>145</sup> And the reason gets to the problems created by using small states to run healthcare programs: Shumlin noted, "I have learned that the limitations of state-based financing, the limitations of federal law, the limitations of our tax capacity, and the sensitivity of our economy make that unwise and untenable at this time . . . . The risk of economic shock is too high."<sup>146</sup> Vermont's economy was just too small and risk-prone to support such a radical policy change. Further, presumably because of its aging population, Vermont has unusually high healthcare costs per capita.<sup>147</sup> Had

140. Sarah Kliff, *How Vermont's Single-Payer Health Care Dream Fell Apart*, Vox (Dec. 22, 2014, 6:00 AM), <https://www.vox.com/2014/12/22/7427117/single-payer-vermont-shumlin>.

141. *Id.*

142. *Id.*

143. Jay Fitzgerald, *Costs Derail Vermont's Dream of a Single-Payer Health Plan*, BOSTON GLOBE (Jan. 25, 2015), <https://www.bostonglobe.com/business/2015/01/25/costs-derail-vermont-single-payer-health-plan/VTAEZFGpWvTen0QFahW0pO/story.html>.

144. *Id.*

145. See Kliff, *supra* note 140.

146. Letter from Gov. Peter Shumlin to Vermonters, *Green Mountain Care: A Comprehensive Model of Building Vermont's Universal Health Care System*, STATE OF VERMONT: OFFICE OF THE GOV. (Dec. 30, 2014), <http://hcr.vermont.gov/sites/hcr/files/pdfs/GMC%20FINAL%20REPORT%20123014.pdf>.

147. As of 2014, Vermont's healthcare spending totaled \$10,190 per capita. Only three states and Washington, D.C. spent more per capita. *Health Care Expenditures per*

Vermont had a more ordinary population—something a larger place likely would—or a larger economy, the experiment might have succeeded (or failed for different reasons).

The story, such as it is, shows both the promise and peril of very small states as partners in cooperative-federalism programs. It was much easier for Vermont to experiment because a small population is more likely than a large one to hold outlier positions on policy relative to national preferences. But the value of that experiment—what a California, for instance, can learn from Vermont's failed attempt to establish single-payer healthcare—is not clear. Vermont and California are so differently situated, and have such different populations, that the experiment's value is uncertain.

### III. VERMONT AS A PROBLEM FOR PUBLIC INVESTMENT

As a country, we rely on states to provide most of our public investment in physical and human capital. And we expect that they will do so without being bailed out by the federal government. Both of these ideas make some sense in the context of growing, long-lived states. But if some states are going to shrink and age substantially, there are reasons to believe that this allocation of responsibility will become more problematic over time.

States ratified the Constitution and are thus logically prior to it, giving them a preconstitutional status that is hard to upend. They are the sovereign entities that make up the United States, and there are no provisions for abolishing or removing states from the Union (and a history of secession running into, well, a few hurdles).<sup>148</sup> Unlike the federal government, which is a government of limited powers, state governments are sovereigns and have all powers not granted to the federal government, taken away by the Constitution, or limited by their own state constitutions.<sup>149</sup>

States are also our primary institution for providing nonfederal governance. The Supreme Court has long held that cities and counties have no independent constitutional status.<sup>150</sup> To the extent that officials in Washington,

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*Capita by State of Residence*, KAISER FAMILY FOUND., <https://www.kff.org/other/state-indicator/health-spending-per-capital?currentTimeframe=0&sortModel=%7B%22colId%22:%22Health%20Spending%20per%20Capita%22,%22sort%22:%22desc%22%7D> (last visited Mar. 29, 2019).

148. Cf. Joseph Blocher & Mitu Gulati, *Law and Market: Forced Secessions*, 80 L. & CONTEMP. PROB. 215, 227 (2017) (“There is at least one scenario in which expulsion might indeed be off the table, and that is where the nation itself has specified as much in its domestic law. For example, most constitutional lawyers would probably take the view that no matter the misconduct, it is constitutionally out of the question for the United States to expel an individual state, no matter what it does.”).

149. U.S. CONST. amend. X.

150. See *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (“In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government, which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and

D.C. cannot directly govern this very big country—either because the Constitution does not give the federal government the power to do so or because it is administrative or normatively unattractive—states are the entities through which most governance runs.

This trust in state institutions is backstopped by substantive protections for individuals *vis-à-vis* the states, including the application of constitutional amendments to the states through the Fourteenth Amendment, and other limits like the Contract Clause and the Dormant Commerce Clause. But such trust is also backstopped by guarantees about state politics.

The central federal constitutional regulation of state politics comes from the guarantee that residents are provided a Republican form of government.<sup>151</sup> Although the Supreme Court has long found questions under it nonjusticiable,<sup>152</sup> the Guarantee Clause is a central orienting point for understanding the relationship among states, citizens, and the federal government under the Constitution. The Constitution protects state power in part because it also guarantees that states will feature a Republican form of government. Discussion of the Guarantee Clause has usually focused on its role of guaranteeing some modicum of democratic control over state government.<sup>153</sup> However, it also contains an implicit guarantee that state governments will be like little countries, concerned about their long-term survival.

These two constitutional ideas—states are our central form of decentralized governance and states must provide Republican government—run through huge amounts of our subconstitutional policy making.

For instance, most investment in physical and human capital—highways, ports, schools—is conducted by states. While the federal government could, in theory, run public schools or build streets and sidewalks, we entrust state governments with most of the responsibility for investing in the future because we believe that states are long-lasting entities with proper incentives to make such investments reliably.<sup>154</sup> The federal government subsidizes state investments

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privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will.”).

151. U.S. CONST. art. IV, § 4.

152. See Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 604–10 (2018) (describing long-standing Supreme Court precedent that constitutional challenges under the Clause are nonjusticiable political questions and arguing that this interpretation is correct given the original public meaning of the word “guarantee”).

153. See Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 864–69 (1994) (arguing that the Guarantee Clause protects basic political rights and thus should be justiciable); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1479 (2005) (“[T]he Guarantee Clause should be a proper subject for judicial review when it is invoked as a guarantor of individual rights.”).

154. However, investment by state governments in areas such as education and capital infrastructure has fallen substantially, especially during and after the Great Recession. See Michael Leachman, Kathleen Masterson & Eric Figueroa, *A Punishing Decade for School Funding*, CTR. ON BUDGET & POL’Y PRIORITIES 4 (Nov. 29, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/11-29-17sfp.pdf> (twenty-nine states



through the tax code by providing deductions to federal income tax and for interest on state and local municipal bonds.

Further, the federal government has maintained a long-term policy of not bailing out state governments that face severe fiscal crises.<sup>155</sup> The federal government justifies this long-term policy on the grounds of moral hazard.<sup>156</sup> If the federal government offered bailouts, states would be more profligate. The no-bailout policy is supported by the supposedly republican nature of state governments. In theory, states should insure against downturns through the use of rainy-day funds, state constitutional protections against taking on excessive amounts of debt, and so forth.

As states get smaller and older, these premises begin to break down.

If a state's population becomes exceedingly old and the state continues to lose population, then the state's incentives for investing in the future theoretically should fall.<sup>157</sup> As the population ages, the case for paying taxes today for a road tomorrow gets worse, because current voters will enjoy the investment for less and less time. And if young people are leaving a state en masse, the case for physical capital investment falls because the current generation of children will likely not be around to reap the benefits, and the case for human capital investment falls because the state will not reap the benefits of the children's productivity. Why

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provided less overall state funding per student for K–12 education in the 2015 school year than in the 2008 school year; in 17 states, the cuts were 10% or more); Elizabeth C. McNichol, *It's Time for States to Invest in Infrastructure*, CTR. ON BUDGET & POL'Y PRIORITIES 10–11 (Aug. 10, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/2-23-16sfp.pdf> (between 2002 and 2014, total capital spending as a share of state GDP fell in 47 states); Michael Mitchell, Michael Leachman & Kathleen Masterson, *A Lost Decade in Higher Education Funding*, CTR. ON BUDGET & POL'Y PRIORITIES 2, 4 (Aug. 23, 2017), [https://www.cbpp.org/sites/default/files/atoms/files/2017\\_higher\\_ed\\_8-22-17\\_final.pdf](https://www.cbpp.org/sites/default/files/atoms/files/2017_higher_ed_8-22-17_final.pdf) (forty-four states spent less per student on higher education in the 2017 school year than in the 2008 school year; total state spending on higher education was 16%, or \$9 billion, lower in 2017 than in 2008, after adjusting for inflation).

155. This is honored in the breach. See Thomas Sargent, *An American History Lesson For Europe*, WALL ST. J. (Feb. 3, 2012), <https://www.wsj.com/articles/SB10001424052970204740904577193032770537826> (recounting the federal government's refusal to bail out insolvent states during the 1840s); see also David A. Skeel, Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677 (2012) (presenting the case in favor of federal bankruptcy for states, but discussing normative objections and practical obstacles to federal bailouts).

156. Cf. Lili Liu & Michael Waibel, *Managing Subnational and Credit Risks, in SOVEREIGN DEBT AND THE FINANCIAL CRISIS: WILL THIS TIME BE DIFFERENT* 277 (Carlos A. Primo Braga & Gallina A. Vinclette, eds.) (2011).

157. The great Bob Newhart, the star of the Vermont-set TV show *Newhart*, once noted, "I still feel 30, except when I try to run." Lindsay Lowe, *Happy Birthday, Bob Newhart! 10 of His Best Quotes*, PARADE (Sept. 5, 2014, 11:59 AM), <https://parade.com/335809/linzlowe/happy-birthday-bob-newhart-10-of-his-best-quotes/>. One wonders whether, say, voting for a new bond to a fund capital investment or for a candidate who proposes tax increases is like going for a jog in this respect.

invest in roads to places few people will live in the future? And why invest in a state university if local students and graduates are going to move to other states?<sup>158</sup>

Voters often care about public investments in education, in part, because such investments improve property values.<sup>159</sup> But this dynamic relies on there being a sufficient number of potential buyers for these properties who care about the state of, say, investment in public education. As population falls, there are fewer of these potential buyers, and thus the current homeowners' incentive to support public investments in education may decline. While this may be rational for state residents, it can be harmful to the remaining young people in the state, leading to less investment per capita than the federal government would prefer.

For instance, Vermont spends very little on higher education, likely reflecting the low odds that college graduates will stay in state (although, to be fair, it remains one of the biggest spenders per capita on K–12 schools).<sup>160</sup> Given its population trends, it is not hard to see a future in which the State simply declines to invest in the future more broadly.<sup>161</sup> The federal government will then

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158. See Rob Roper, *Vermont Second Worst At Keeping College Graduates*, ETHAN ALLEN INST., <http://ethanallen.org/vermont-second-worst-at-keeping-college-graduates/> (last visited Mar. 29, 2019) (nearly 70% of students who graduate from Vermont colleges subsequently leave the State for their first post-college jobs); cf. Zach Despart, *UVM's Incoming Class Has Fewer Vermonters*, BURLINGTON FREE PRESS (Sept. 28, 2015, 1:02 AM), <https://www.burlingtonfreepress.com/story/news/education/2015/09/28/uvms-incoming-class-has-fewer-vermonters/72566076/> (the UVM Class of 2019 has a smaller percentage of Vermonters than any other in the history of the 224-year-old institution).

159. WILLIAM A. FISCHER, *HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 1–18* (2005) (describing attentiveness of local homeowners to local policy because of its effect on housing values).

160. Just Vermont's per-pupil funding for K–12 education increased by 15% between 2008 and 2015. Leachman et al., *supra* note 154, at 5. Vermont spent more than \$18,000 per K–12 student in 2015, fifth highest among states in terms of per-pupil school funding. EDUCATIONAL FINANCE BRANCH, PUBLIC EDUCATION FINANCES: 2015, U.S. CENSUS BUREAU 40, June 2017, <https://www.census.gov/content/dam/Census/library/publications/2017/econ/g15-aspef.pdf>. But see Mitchell et al., *supra* note 154, at 5 (Vermont's inflation adjusted per student spending on higher education decreased by 14% between 2008 and 2017). “Vermont is near the bottom in its support for public higher education, and its public institutions collectively are the most tuition-dependent in the country . . . .” Tim Johnson, *Vermont in Basement for Higher-Ed funding*, BURLINGTON FREE PRESS, <https://www.burlingtonfreepress.com/story/news/local/2014/04/23/vermont-maintains-low-ranking-higher-ed-funding/8062207/> (last updated Apr. 24, 2014, 7:06 AM) A shrinking population in a state clearly reduces demand for lawyers' expert in the state's legal system, and incentives for investing in state law schools. See Katy Savage, *Vermont Law School Revokes Tenure for 75 Percent of Faculty*, VT DIGGER (July 15, 2018), <https://vtdigger.org/2018/07/15/vermont-law-school-revokes-tenure-75-percent-faculty/> (Vermont Law School revokes tenure for 14 out of 19 law professors).

161. Vermont's political system is surely biased toward protecting the interests of its aging and less-than-diverse population. Kiah Morris, one of only two female minorities that serve as state legislators, retired this past summer, due both to the low pay legislators receive and to a torrent of racial abuse she received while in office. She noted, “To serve in

face a serious question: can it really rely on states to provide investment if they are governed largely by older and decreasing populations? As it stands, around the country, states have spent less and less on investments in the future,<sup>162</sup> focusing state spending instead on healthcare and pensions.<sup>163</sup>

If a state is very small, it is more likely to face major economic and fiscal crises, as it is less geographically and economically diversified.<sup>164</sup> Shocks that would cause small local problems in a place like California—a single firm closing a plant, a local corruption case—can radically alter a small state’s economy and thus its fiscal picture. Theoretically, small governments should save more, but doing so is very hard politically and practically. Bailouts are more likely to be needed in small states that just can’t insure against big risks.

Further, there are reasons to believe that small states will have a greater degree of moral hazard, or belief that any fiscal crisis will result in a federal bailout (thus removing reasons to be fiscally prudent). After all, one reason the federal government wants to avoid bailing out states in fiscal crisis is that it does not want to set a precedent. But it is not clear that offering bailout funds to a Vermont would tell us anything about federal response to a crisis in, say, Illinois. After all, the cost to the federal government of bailing out a small state would pale in comparison to the cost (and the benefit) of bailing out a big one, making it hard to claim that a true precedent would be set by a bailout of a small state. (In contrast, a bailout to Illinois would tell us a great deal about how the federal government would respond to a fiscal crisis in New Jersey.) When this is combined with the political overrepresentation small states have in the Senate, it seems more likely that a small state would be bailed out, as the federal government would be less worried about establishing a precedent. If this is right, small-state officials are likely to be more reckless when fiscal times get tough.

The basic relationship between the federal government on one side and states on the other is premised on the idea of states as roughly equivalent entities that care about the future. Both of these assumptions will be tested as some states radically shrink.

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this state requires sacrifice, literally even financial sacrifice . . . It is a system set up for the wealthy and the retired.” Liam Stack, *Black Female Lawmaker in Vermont Resigns After Racial Harassment*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/kiah-morris-vermont.html>.

162. See Leachman et al., *supra* note 154, at 1 (declines in K–12 funding); McNichol, *supra* note 154, at 2–3 (declines in capital infrastructure as share of GDP); Mitchell et al., *supra* note 154, at 1 (declines in higher-education funding).

163. See Cezark Podkul & Heather Gillers, *Why Are States So Strapped for Cash? There are Two Big Reasons*, WALL ST. J. (May 29, 2018), <https://www.wsj.com/articles/why-are-states-so-strapped-for-cash-there-are-two-big-reasons-1522255521> (noting that “the proportion of state and local tax revenues dedicated to Medicaid and public pensions is the highest since the 1960s” and is crowding out investments in education and infrastructure).

164. See Schleicher, *supra* note 37, at 95–97.

#### IV. TOWARD A CONSTITUTIONAL LAW FOR VERY SMALL STATES

If Vermont is a problem, or even potentially a problem, for the Constitution, are there solutions?

For some aspects of the problem, there are specific solutions, although ones that would be hard to achieve politically.<sup>165</sup> For instance, the federal government and the governments of small states could try to move authority over cooperative-federalism programs to entities created through interstate compacts. Many entities that govern regional infrastructure were created through interstate compacts—most notable among them are the Port Authority of New York and New Jersey and Washington Metropolitan Area Transit Authority.<sup>166</sup> There is no conceptual or hard-wired constitutional reason why the Medicaid programs of Vermont and New York could not be run the same way. Running an interstate Medicaid program would have the benefit of broadening the risk pool and spreading fixed costs across a broader population.

However, such a move would require each state to work together. A large state may not want to cede any control, meaning that a small state that wants these gains would have to give up all control over policy-making in the area. Even this radical a move would not be totally unprecedented. Many small countries have adopted the U.S. dollar as national currencies, despite having no control over the actions of the Federal Reserve.<sup>167</sup> But doing so severely handicaps the capacity of state officials to change policy.

For other issues, very small states will need to consider taking preventative measures. For instance, acknowledging the risk that comes from not having a diversified economy should lead state governments to adopt more conservative fiscal practices, saving more for “rainy-day funds.” Similarly, small states should seek to integrate their policy-making apparatus with larger neighbors where possible—borrowing statutes and regulations, merging operations if they can—lowering the cost of administration even if it means reducing their ability to choose policies for themselves.

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165. You might think the solution is getting people to move to Vermont. But this would entail the loss of substantial agglomeration economies—workers are more productive in metropolitan areas, and particularly in metropolitan areas like the Silicon Valley and New York. See David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 *YALE L.J.* 78, 98–100 (2017). The differences are sufficiently large that it is unclear that even massive place-based policies could do much to attract migrants. See *id.* at 140–43. And any such efforts would involve very substantial costs. *Id.*

166. See Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 *YALE L. & POL'Y REV.* 163, 167–73 (2005) (discussing the use of state compacts to address regional policy concerns).

167. As of May 2018, the following countries used the U.S. dollar as their official currency: Ecuador, El Salvador, Zimbabwe, Timor-Leste, Micronesia, Palau, and the Marshall Islands. Mark Abadi, *More Than Two Dozen Countries and Territories Use the US Dollar as Currency*, *BUS. INSIDER* (May 23, 2018, 9:32 AM), <http://www.businessinsider.com/usd-countries-use-dollars-as-currency-2018-5>.

For still other aspects of the problems, there is no likely policy answer. Unless states acquiesce to removing their power, the U.S. Senate will surely remain a body that does not offer equal representation to residents of big and small states. In a world with very small states, this will be normatively less and less attractive, both because of the representational inequality and because of the susceptibility of small states to interest-group influence. But even on this issue, acknowledging the increasingly deep democratic flaws of the Constitution may change beliefs about some matters, from debates over admitting new states to questions about the democratic acceptability of judicial review.

Further, simply acknowledging the increasingly serious problems of the Constitution is valuable on its own. Understanding that our governing document and the design of our institutions is imperfect (and increasingly so) may lead to better political discussion, even when those imperfections are not likely to be changed.

Vermont may be small, but it provides an excellent vantage point for seeing the deep problems of our constitutional system.

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