



## Federalism Anew

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One of the most remarked-upon events of the recent past is the August 2014 death of a black teenager, Michael Brown, at the hands of a white police officer, Darren Wilson, in Ferguson, Missouri. Attention initially focused on individual actions and local circumstances, but quickly expanded to a broader set of injustices. Brown died just days before he was scheduled to start college, a significant accomplishment in his local context. His school district's graduation rate was less than 62 percent, compared to 96 percent in a wealthier district down the road, belying Missouri's constitutional commitments to public education and equal protection, and calling into question federal efforts to 'leave no child behind' in the new millennium.<sup>1</sup> An older federal commitment—to desegregation—had also bypassed Brown's community. Indeed, federal subsidies and regulatory choices, combined with the legacy of discriminatory, state-sanctioned zoning and real estate industry practices, had helped transform this formerly all-white suburb of St. Louis into a predominantly black "ghetto." Federal efforts to remedy these patterns (for example, through housing vouchers) had proven less successful.<sup>2</sup>

In other ways, federal power was unmistakably present on the streets of Ferguson. In the nights of unrest that followed Brown's death, police from nearby municipalities patrolled in camouflage, rode atop armored tanks, and launched tear gas into crowds, deploying equipment and tactics that flowed directly from federal grants and giveaways. The federal Department of Justice also eventually intervened in Ferguson, after a grand jury declined to indict Wilson under state law. Applying federal civil rights law, the DOJ, too, declined to pursue an indictment, but condemned the

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- 1 Nikole Hannah-Jones, *School Segregation, the Continuing Tragedy of Ferguson*, ProPublica, Dec. 19, 2014, available at <http://www.propublica.org/article/ferguson-school-segregation> (last accessed Dec. 4, 2015); No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002).
- 2 Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of its Troubles*, Economic Policy Institute, Oct. 15, 2014, available at <<http://www.epi.org/publication/making-ferguson/>> (last accessed Dec. 4, 2014).

Ferguson Police Department for “a pattern of unconstitutional policing” marked by “clear racial disparities.”<sup>3</sup>

One way to understand Ferguson is through the lens of federalism—not federalism theory or federalism doctrine, but “federalism in practice.” In Brown’s life, as in his death, we see the workings of a complex polity, in which responsibility for particular functions of government spans multiple levels of authority, in intricate and historically determined ways, and with unequal impacts on citizens. Our essay is about that federalism—about the legal distribution of power within the U.S. federal system, the ways that actors at different levels of government actually exercised their power, and the consequences of those choices for the human experience of governance.<sup>4</sup> In what follows, we discuss recent legal-historical scholarship (including our own) that explores federalism-in-practice, focusing on the 20<sup>th</sup> century. We also explain why we hope to see more such scholarship in the future.

## I. FEDERALISM-IN-PRACTICE IN U.S. LEGAL HISTORY: A SKETCH OF THE FIELD

Our excitement about new legal histories of federalism-in-practice should not be interpreted as a general accusation of federalism neglect. The early national and antebellum federalism literature is particularly rich,<sup>5</sup> and legal historians of every era have chronicled the Supreme Court’s federalism jurisprudence with enthusiasm and ingenuity.<sup>6</sup> When it comes to post-Reconstruction developments, however, we have noticed less attention to federalism, particularly its practical workings.<sup>7</sup>

- 3 Department of Justice Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson, Mar. 4, 2015, and United States Department of Justice Civil Rights Division, Investigation of the Ferguson Police Department, Mar. 4, 2015, both available at <<http://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri>>.
- 4 We borrow the term “federalism in practice” from Harry Scheiber & Malcolm Feeley. Harry N. Scheiber and Malcolm M. Feeley, *Introduction, in Power Divided: Essays on the Theory and Practice of Federalism* viii (Harry N. Scheiber & Malcolm M. Feeley, eds., 1989). Our approach to federalism also takes inspiration from Judith Resnik, who has urged “de-essentializing federalism” across space and time, and Heather Gerken, who has called attention to U.S. federalism’s multiple contemporaneous forms. See Judith Resnik, *Federalism(s)’ Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in *FEDERALISM AND SUBSIDIARITY* 371 (James E. Fleming & Jacob T. Levy eds., 2014); Heather K. Gerken, *Our Federalism(s)*, 53 WILLIAM & MARY L. REV. 1549 (2012).
- 5 See, e.g., ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010); Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 L. & HIST. REV. 205 (2012); Kristin A. Collins, ‘Petitions without Number’: Widows’ Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements, 31 L. & HIST. REV. 1 (2013); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); GAUTHAM RAO, *NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE* (forthcoming 2016).
- 6 See, e.g., Logan E. Sawyer III, *Creating Hammer v. Dagenhart*, 21 WILLIAM & MARY BILL R.J. 67 (2012); Barry Cushman, ‘Carlene Products’ and Constitutional Structure, 2012 SUP. COURT REV. 321; John W. Compton, *Easing the Shoe Where It Pinches: The ‘Lottery’ Case and the Demise of Dual Federalism*, 40 J. SUP. CT. HIST. 133 (2015). In emphasizing these authors’ focus on jurisprudence, we do not intend to characterize their work as purely doctrinal or lacking attention to political and social context.
- 7 Our impression is that legal historians of the modern U.S. were more attuned to federalism-in-practice in the late 1970s and 1980s, when Harry Scheiber published a series of articles on the topic. See, e.g., Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & SOC. REV. 57 (1976);

We attribute this lack of attention to two perceptions, common among U.S. historians generally. The first is of federalism as increasingly irrelevant. A main theme in 20<sup>th</sup> century U.S. history is the rise of a powerful federal government, whose authority trumped that of the states and extended ever-further into individual lives.<sup>8</sup> The second and related perception is that, precisely because federalism lacked bite in the 20<sup>th</sup> century, invocations of federalism must have been pretexts for reactionary political projects—whether undoing the gains of Reconstruction and the civil rights movement (federalism as synonymous with “states’ rights”), or rationalizing libertarian opposition to economic regulation. When historians mention modern federalism, they often give it the valence that political scientist William Riker did in his memorable 1969 essay: rather than seeing federalism as a “real force” in the American political system, they treat it as “a constitutional legal fiction which can be given whatever content seems appropriate at the moment,” including, too often, “depriving blacks of freedom.”<sup>9</sup>

These perceptions have persisted for a reason. The federal government’s power did expand, and federalism rhetoric did serve as vessel for cargo that many historians find despicable. Beginning in the 1980s, historian Edward Purcell has explained, Nixon and Reagan appointees to the Supreme Court cited federalism concerns in a series of decisions that closed the courts to marginalized groups, whittled away New Deal statutory protections, and “ruthlessly” narrowed the reach of federal civil rights laws. Such decisions “fit snugly,” Purcell observes, with the Republican Party’s efforts to woo white voters opposed to desegregation—a political strategy that also relied heavily on federalism rhetoric.<sup>10</sup>

We worry, though, that these perceptions have hindered historians from recognizing federalism’s enduring importance for American law and policy. Looking across the 20<sup>th</sup> century, there remained central areas of governance—such as education, family law, and criminal justice—where the legal concept of federalism, along with its institutional legacies, helped prevent the federal government from fully occupying the field. In other important policy realms, such as welfare and healthcare, federal authorities ultimately created national frameworks, but afforded states important policymaking roles and wide latitude in administration.<sup>11</sup>

Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOLEDO L. REV. 619 (1978); Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & SOC. REV. 663 (1980). Thereafter, interest seems to have faded. There are exceptions, of course. One noteworthy example is Hendrik Hartog’s *Man and Wife in America: A History* (2000), which documents how husbands and wives navigated the country’s diverse marriage and separation regimes between the 1790s and the 1950s.

<sup>8</sup> See, e.g., LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 597 (2002) (observing that by the end of the 20<sup>th</sup> century, federalism posed no real constraint on the federal government).

<sup>9</sup> William H. Riker, *Six Books in Search of a Subject or Does Federalism Exist and Does it Matter*, 2 COMP. POLIT. 146 (1969). For a more recent iteration of this argument, see Norman W. Spaulding, “*Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*,” 103 COLUM. L. REV. 1992, 2050 (2003), where he calls federalism “a legal fiction that has . . . become pernicious”.

<sup>10</sup> Edward A. Purcell, Jr., *The Courts, Federalism, and the Federal Constitution, 1920-2000*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA, 127, 162–63, 171 (Michael Grossberg & Christopher Tomlins eds., 2008).

<sup>11</sup> We recognize differences of opinion on whether such arrangements should be characterized as “federalism” or, instead, some form of administrative decentralization, the likes of which could be found in non-federalist systems. Compare Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014), with

Scholars in two other fields—political science and public law—have been more attuned to these developments and their consequences. For example, political scientist Kimberley Johnson has used regression and factor analyses of federal statutes to reveal the Gilded Age foundations of the New Deal’s “cooperative federalism” (the phenomenon whereby states and the federal government work together to pursue shared policy goals, often via federal grants-in-aid).<sup>12</sup> Political scientists have also demonstrated how the structure of cooperative programs—for example, whether the states or the federal government were assigned the bulk of administrative responsibility—mattered for whether programs perpetuated inequalities across the lines of gender and race.<sup>13</sup> Scholars of public law, meanwhile, have drawn on statutes, regulations, and judicial decisions to spotlight the counterintuitive ways in which states retained and even gained power via major federal statutory schemes,<sup>14</sup> and to document recent examples of “uncooperative federalism” (states dissenting from federal projects that rely on state cooperation).<sup>15</sup>

We turn next to how legal historians are enriching such findings, and why we hope this work will continue.

## II. NEW LEGAL HISTORIES OF FEDERALISM-IN-PRACTICE

In this section we offer examples of recent legal-historical scholarship that engages rigorously with federalism-in-practice. We focus on three policy areas that were once the near-exclusive jurisdiction of the states and that have arguably never been “federalized”: poor relief, education, and criminal justice.<sup>16</sup> Each example is characterized by our field’s hallmark attention to contingency, complexity, and human experience, offering ground-level perspectives that complement the broad frameworks generated by historically informed political science. Each also draws on

Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). At the very least, these arrangements are a legacy of federalism, which is enough for our purposes.

- 12 KIMBERLEY S. JOHNSON, GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877-1929 (2006).
- 13 SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY (1998); ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE (1998). Political scientists have also produced useful synthetic overviews of federalism-in-practice. See, e.g., DAVID BRIAN ROBERTSON, FEDERALISM AND THE MAKING OF AMERICA (2011); MARTHA DERTHICK, KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM (2001).
- 14 Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011).
- 15 Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009). There is now a vast law review literature on the practical workings of U.S. federalism. A useful entry point is the recent *Yale Law Journal* symposium on *Federalism as the New Nationalism*, 123 YALE L.J. 1889 (2014).
- 16 For other recent legal histories of “federalism-in-practice” covering other policy areas, see, for example, Stephanie Hunter McMahon, *To Save State Residents: States’ Use of Community Property for Federal Tax Reduction, 1939-1947*, 27 L. & HIST. REV. 585 (2009); Tom I. Romero II, ‘A War to Keep Alien Labor out of Colorado’: The “Mexican Menace” and the Historical Origins of Local and State Anti-Immigration Initiatives’, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 63 (Carissa Byrne Hessick, ed., 2014); AJAY MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929 (2014); 63 Tomiko Brown-Nagin, *Two Americas in Healthcare: Federalism and Wars over Poverty from the New Deal-Great Society to Obamacare*, 62 DRAKE L. REV. 101 (2014).

sources that go beyond “formal law,” distinguishing this research from much of the work in public law.<sup>17</sup>

### A. Poor relief

The economic devastation wrought by Hurricane Katrina and the Great Recession, combined with the furor over 2010’s landmark healthcare act, presented scholars with pressing research questions: why, in a country of such wealth, were many Americans so economically vulnerable? Why, in an age of seemingly robust equal protection guarantees, did vulnerability remain correlated with race, gender, and geography? And why, in the face of desperate need, is the idea of federal social welfare legislation so deeply controversial? Legal historians have engaged these questions by studying change over time in which level(s) of government ministered to the poor—traditionally a local responsibility, but increasingly a function of state and federal government—and by tracing the consequences of these changes.

Michele Landis Dauber’s *The Sympathetic State* (2013) offers a prime example. The book opens with President Franklin Roosevelt’s Committee on Economic Security, hard at work drafting what would become the Social Security Act of 1935. Some members feared, however, that the federal government simply lacked constitutional authority to enact unemployment and old age insurance programs, absent an express delegation of power. Far from a legal fiction, then, federalism operated as a meaningful constraint on even committed reformers. The Committee moved forward, Dauber argues, thanks to key participants’ deep and historically informed understanding of Congress’s constitutional authority to tax and spend. Since the 1790s, disaster relief had been widely recognized as an appropriate exercise of the federal spending power, even for disasters that were entirely manmade. *The Sympathetic State* explains how New Deal narrators, ranging from John Steinbeck to the President himself, made the Great Depression fit the disaster frame and thereby surmounted the obstacle that federalism posed.<sup>18</sup> Dauber also reflects on the costs of this framing: it implies that American federalism is compatible with a robust welfare state, but only insofar as its beneficiaries are “blameless victims” of circumstances beyond their control.<sup>19</sup>

Federalism is also central to Karen Tani’s *States of Dependency* (2016), a revisionist history of New Deal welfare programs. Historians have tended to view these programs as little more than a federally subsidized extension of the Elizabethan poor law, a system of relief that placed responsibility for the poor at the local level. While recognizing the ways in which New Deal public assistance programs built on traditional poor relief, Tani emphasizes how these programs reordered power and responsibility within a divided system of government. Under the Social Security Act of 1935, Congress invited states to submit plans for long-term, state-run assistance

<sup>17</sup> See Heather Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 St. Louis U. LJ. 997, 1012, 1014 (2015), where she critiques law professors who study federalism for “look[ing] to formal instantiations of authority . . . rather than informal evidence of power,” and for not “look[ing] closely enough at areas where we can’t trace federal-state interactions through traditional legal sources.”

<sup>18</sup> MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* (2013).

<sup>19</sup> *Id.* at 228–29.

programs; if the plans operated according to federal specifications, states could expect generous federal matching funds. The federal criteria fell short of what some reformers wanted. For example, in deference to powerful Southern senators, Congress failed to set a floor for benefits. Nevertheless, the federal rules incentivized states to professionalize their administrative machinery; to implement uniform statewide procedures for allocating benefits; to eliminate relief-giving practices that reformers considered irrational (such as giving non-cash “in kind” benefits); and to accept regular federal monitoring.<sup>20</sup>

This shift did not occur quickly or evenly, and it brought other unanticipated changes. A main contribution of *States of Dependency*, and other histories of federalism-in-practice, is to document such ripple effects. For example, one consequence of New Deal public assistance grants, Tani argues, was the circulation by federal welfare administrators of the notion that welfare was a “right” and its recipients, rights-holders. Prevented by the strictures of federalism from ordering local welfare officials around, federal administrators hoped that rights language (expressed in speeches, guidance documents, and so on) would instill the correct attitude in ground-level workers. Rights concepts, after all, were antithetical to traditional locally controlled poor relief, but fit well with the more centralized, uniform system that the New Deal incentivized.<sup>21</sup> Looking further downstream, to the late 1940s, Tani shows how this rights language provided ammunition for anti-New Deal conservatives challenging what they saw as an independence-crushing, socialized state. By the 1960s, however, this same rights language had inspired legal liberals’ campaigns on behalf of the poor—campaigns that would again reorder the practices of American federalism.<sup>22</sup>

Elisa Minoff explores similar themes in her prize-winning dissertation on the law and politics of internal migration between the Great Depression and the 1970s. During these decades, she shows, the flow of people across internal borders taxed the federalized social safety net nearly to the breaking point. Particularly problematic, Minoff explains, was the system’s reliance on the centuries-old concept of “settlement”—the idea that every indigent person belonged, and thus could be “charged,” to a territorially based community. By the 1930s, the scale of that community had shifted (in law, at least), from the local level to the state level; migrant advocates envisioned a further scaling-up, via legislation establishing federal financial and administrative responsibility for all poor citizens. In the failure of these proposed

20 KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (forthcoming 2016). On the import of these grant-in-aid conditions for state and local government, see also MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* (1970).

21 Karen M. Tani, *Welfare and Rights before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314–83 (2012); TANI, *STATES OF DEPENDENCY*, *supra* note 20. For an example of a more geographically specific “ripple effect,” see Karen M. Tani, *States’ Rights, Welfare Rights, and the ‘Indian Problem’ Negotiating Citizenship and Sovereignty, 1935-1954*, 31 L. & HIST. REV. 1 (2015), where she describes how New Deal public assistance programs created new citizenship possibilities for American Indians living on reservations in the Southwest.

22 TANI, *STATES OF DEPENDENCY*, *supra* note 20. On the connection between the Supreme Court’s welfare rights jurisprudence and the practices of American federalism, see R. Shep Melnick, *Federalism and the New Rights*, 14 YALE L. & POLICY REV. 325 (1996); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015).

reforms, which she tracks in detail, Minoff sees evidence of federalism's enduring influence.<sup>23</sup> Migrant advocates were more successful in federal court, Minoff observes, where they helped establish a constitutional right to travel and thereby marked poor people as citizens of not only their states, but also the nation. The resulting decisions stopped well shy, however, of establishing federal responsibility for public welfare.<sup>24</sup>

## B. Public education

For much of the 20th century, public education resembled welfare: a subject of deep national concern but limited federal jurisdiction. Today, the appearance of local control persists—schools are still funded by local property taxes and run by locally elected school boards. But the federal and state governments also exert significant influence—for example, via testing standards, anti-discrimination guarantees, and generous subsidies.

Tracy Steffes's *School, Society, & State*, a legal history of U.S. education reform between 1890 and 1940, explains both how public education became a state and national concern and why local governments nonetheless appear to be running the show.<sup>25</sup> At the beginning of the period under study, the federal government had no role in the administration of public education, and proposals for direct federal aid were consistently defeated. Steffes reconstructs the networks of philanthropists, educators, and concerned citizens who, nonetheless, effectuated nationwide reforms (for example, the consolidation of rural schools), and thereby facilitated the sort of centralization, standardization, and professionalization that in other policy areas were the work of federal authorities.<sup>26</sup> Like Dauber, then, Steffes illustrates how policymakers could at once accept federalism as a real constraint and also imagine and implement large-scale solutions to social problems.

Steffes also reconstructs how state governments came to exert extraordinary influence over public education. Steffes tracks the work of state legislatures as they enacted compulsory attendance laws, mandated particular textbooks, and established state-level education bureaucracies. Framed as "service to localities," these initiatives preserved the appearance of local control, but promoted centralization and uniformity.<sup>27</sup> By 1940, public education looked more similar, from place to place, than ever before. Subsequent federal interventions, such as the aid to poor children offered under the Elementary and Secondary Education Act of 1965, would not have been possible without this coalescence.

- 23 Elisa Martia Alvarez Minoff, "Free to Move? The Law and Politics of Migration in Twentieth-Century America" (Ph.D. diss., Harvard University, 2013).
- 24 *Id.*; Elisa Alvarez Minoff, *Legal Services Attorneys and Migrant Advocates Join Forces: Shapiro v. Thompson (1969)*, in *THE POVERTY LAW CANON* (Marie Failinger & Ezra Rosser eds., forthcoming 2016). For other recent and emerging legal-historical work on welfare and federalism, see Alexander Gourse, "Restraining the Reagan Revolution: The Lawyers' War on Poverty and the Durable Liberal State, 1964-1969" (Ph.D. diss., Northwestern University, 2015); Brooke Depenbusch, "Working on Welfare: Down and Out in the U.S.A., 1935-1962" (Ph.D. diss., University of Minnesota, in progress).
- 25 TRACY L. STEFFES, *SCHOOL, SOCIETY & STATE: A NEW EDUCATION TO GOVERN MODERN AMERICA, 1890-1940* (2012).
- 26 *Id.* at 9, 11, 13–82.
- 27 *Id.* at 83–117.

Kathryn Schumaker brings Steffes's story into the late 20<sup>th</sup> century, to a time when the federal role in education was still fiercely debated, but enforcing the Fourteenth Amendment in public schools had become a clear federal concern. Complementing the rich literature on federal efforts to compel compliance with *Brown v. Board of Education*, Schumaker explores the influence of federal grants—made available under Presidents Johnson, Nixon, and Carter—to support voluntary desegregation in districts not subject to federal court orders.<sup>28</sup>

Schumaker's case studies of Waterloo, Iowa, and Cairo, Illinois, offer useful counterpoints. In the late 1960s, both of these small Midwestern cities reeled from demographic shifts, plummeting school enrollments, fiscal crisis, and racial conflict. Local officials responded differently, however. Waterloo school officials used federal funds to implement an unprecedented desegregation plan, albeit one that failed to address black students' more expansive aspirations for educational equality.<sup>29</sup> Cairo, in contrast, rejected opportunities to apply for federal funding, even as fiscal conditions grew so bleak that the school system could not pay its utility bills. The predominantly white school board feared that conditions on federal money would necessitate more aggressive desegregation efforts than Cairo had previously implemented.<sup>30</sup> Such findings deepen our understandings of cooperative (and uncooperative) federalism. Federal funds could serve as levers of local control, but only if local actors chose to accept them—and even then, the scope of change was often limited to the minimum requirements of federal law.

### C. Crime, punishment, and policing

Between the 1970s and the 2000s, the American prison population ballooned to historically and internationally unparalleled heights, reflecting what scholars have labeled a “punitive turn” across local, state, and federal laws and policies.<sup>31</sup> Sociologists, political scientists, and legal scholars have been alert to this development for some time—historians, less so. Following Heather Ann Thompson’s 2010 clarion call in the *Journal of American History*,<sup>32</sup> however, a burgeoning legal-historical literature on the postwar “carceral state” has now emerged.<sup>33</sup> Of necessity, these new histories of crime, punishment, and policing track federalism-in-practice. After

28 Kathryn Anne Schumaker, *Investing in Segregation: The Long Struggle for Racial Equity in the Cairo, Illinois, Public Schools*, 14 OHIO VALLEY HIST. 49–67 (2014); Kathryn A. Schumaker, *The Politics of Youth: Civil Rights Reform in the Waterloo Public Schools*, 72 ANNALS OF IOWA 353 (2013); Kathryn Schumaker, “Civil Rights and Uncivil Society: Education, Law, and the Struggle for Racial Equity in the Midwest, 1965–1980” (Ph.D. diss., University of Chicago, 2013).

29 Schumaker, *The Politics of Young*, *supra* note 28, at 365–66, 379–82.

30 Schumacher, *Investing in Segregation*, *supra* note 28, at 62, 64.

31 See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); MARIE GOTTSCHALK, THE PRISON AND THE GALLows: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006).

32 Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703 (2010).

33 See, for example, the special issues on the “carceral state” of the *Journal of American History* (2015), the *Journal of Urban History* (2015), and the *Journal of African American History* (2015). A related literature focuses on the federal government’s efforts to regulate drugs and alcohol. See, e.g., KATHLEEN J. FRYDL, THE DRUG WARS IN AMERICA, 1940–1973 (2013); LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE (2015).

all, despite the massive expansion of the federal government in the 20<sup>th</sup> century, most criminal law enforcement remained (and remains) the province of local and state officials. Federal power has undeniably affected how state-level actors developed the criminal law and how local officials enforced it, but in complex and often unintuitive ways.

One important strand of this literature, exemplified by the work of Elizabeth Hinton, “follows the money.” As with welfare, the federal government became involved in urban crime control primarily through the policy tool of grants-in-aid. Hinton shows how the federal funds authorized by the Law Enforcement Assistance Act of 1965 and the Safe Streets Act of 1968 underwrote more coercive state and local approaches to criminal justice, including increased surveillance of inner-city neighborhoods and the acquisition of military-grade weapons.<sup>34</sup> The federal government encouraged these expenditures through presidential rhetoric declaring a “war against crime,” as well as incentives such as 90 percent federal reimbursement of police hardware purchases.<sup>35</sup> Scholars are also tracing how these federal incentives were received at the local level, examining, for example, how the Los Angeles Police Department deployed federal equipment in pioneering a new, militarized model of urban policing, and how Chicago’s Cook County Jail used federal grants to build thousands of new cells.<sup>36</sup>

A second strand of this literature examines the development of criminal defendants’ constitutional rights.<sup>37</sup> In what some scholars have framed as a paradox, the “punitive turn” coincided with dramatic expansion of procedural protections: federal directives encouraged local officials to “get tough” even as federal judges sought to rein in these same officials’ traditional discretion. Viewing these developments side by side, scholars of criminal procedure, most notably the late William Stuntz, have theorized an inverse relationship between procedural rights and substantive justice.<sup>38</sup> Historians are now building their own theories by investigating local implementation of federal court edicts.

Sara Mayeux’s work on the right to counsel—the outcome of the Supreme Court’s 1963 decision *Gideon v. Wainwright*—exemplifies the trend. Moving beyond familiar liberal laments over what *Gideon* has failed to achieve, Mayeux looks at this decision in much the same way that other scholars are looking at grants-in-aid: as a directive from federal authority to state and local authority. Seen in this light, *Gideon*

34 Elizabeth Hinton, ‘A War Within Our Own Boundaries’: Lyndon Johnson’s Great Society and the Rise of the Carceral State, 102 J. AM. HIST. 100, 109–10 (2015). For the book-length elaboration of this argument, see ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (forthcoming 2016).

35 Hinton, *supra* note 34, at 101, 110.

36 Donna Murch, *Crack in Los Angeles: Crisis, Militarization, and Black Response to the Late Twentieth Century War on Drugs*, 102 J. AM. HIST. 162, 165–66 (2015); Max Felker-Kantor, “Managing Marginalization from Watts to Rodney King: The Struggle Over Policing and Social Control in Los Angeles, 1965–1992” (Ph.D. diss., University of Southern California, 2014); Melanie D. Newport, “Jail America: The Reformist Origins of the Carceral State” (Ph.D. diss., Temple University, in progress).

37 We focus here on the Warren and Burger Court eras. On important developments from the 1920s and ’30s, when criminal procedure was first “constitutionalized,” see, for example, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICHIGAN L. REV. 48 (2000).

38 See especially WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

did lead to something remarkable: the establishment of hundreds of local public defender offices—a remaking of the landscape of indigent defense not unlike the remaking of American poor relief that occurred after the New Deal. This remaking, however, was ordered by the federal gavel, not incentivized by the federal purse, and—picking up a theme from Schumaker’s work—that difference mattered. With no tradition of federal support for defender services and no clue from the Supreme Court about where to find funds, state and local officials worked it out jurisdiction by jurisdiction, resulting in a public defender system in which inadequate, cobbled-together budgets were the norm, and “volume representation” an accepted practice. Advocates now point to these phenomena as evidence of *Gideon*’s neglect in our harsh and conservative times. But these conditions initially stemmed not from neglect, Mayeux suggests, but from good-faith efforts to implement *Gideon*’s mandate within the larger and necessarily compromised context of American federalism.<sup>39</sup>

These findings demonstrate what historians, in particular, can contribute to the study of the “carceral state” and the “punitive turn.” In discussing these trends, legal scholars and advocates often valorize federally protected procedural rights but blame politicians and local officials for undermining those rights in practice. Mayeux reminds us that the Warren Court crafted its celebrated constitutional criminal procedure decisions in a context in which local and state actors would necessarily determine the meaning of these new rights, both through decisions about individual cases and through larger-scale allocative and administrative choices. We misunderstand the significance of individual rights when we decouple them from the practical operations of American federalism.

Federalism has, of course, figured centrally in the narratives of some aspects of constitutional criminal procedure, especially the Fourth Amendment’s protection against “unreasonable searches and seizures.” Lawyers and legal scholars have interpreted the Warren Court’s Fourth Amendment jurisprudence as a federally imposed mechanism for preventing local police and prosecutors “from victimizing, not just criminal defendants in general, but black defendants in particular.”<sup>40</sup> Recognizing that under “our federalism,” the federal government could not simply take over the job, federal judges used the Constitution to constrain the way that state and local actors approached their work.

But here, too, new historical research is changing the narrative, by attending to how ordinary Americans themselves made sense of their day-to-day confrontations with government power—which was not necessarily through the framework of local vs. federal control. In a series of articles and her dissertation-in-progress, Sarah Seo has been exploring the connection between the Supreme Court’s Fourth Amendment jurisprudence and the rise of the automobile, which reshaped how Americans interacted with, and thought about, police. Traditionally police officers had focused on society’s margins, Seo argues, but with the rise of the automobile, police came into contact with a broader swath of the population, including business executives, law professors, and other self-described “respectable” types. When

39 Sara Mayeux, *What ‘Gideon’ Did*, 116 COLUM. L. REV. (forthcoming 2016).

40 Stuntz, *The Uneasy Relationship*, *supra* note 38, at 50; see also Stuntz, *The Collapse of American Criminal Justice*, *supra* note 38, at 217.

dissatisfied with police encounters, these “respectable” citizens spoke up, even as they recognized the important function that police served in an automotive society. As complaints filtered through legal-professional and civil libertarian networks, Seo shows, proceduralism emerged as a common-sense judicial solution to the threat of arbitrary policing; the Fourth Amendment offered a convenient doctrinal hook. The result is a different take on “federalism-in-practice”—one that reveals how momentous legal changes that might seem, on the surface, to be about the federal government protecting a minority group from racist local officials may, upon historical investigation, owe as much to commonalities of experience that transcended race, class, and geography.<sup>41</sup>

### III. CONCLUSION

Taken together, these examples suggest a future for U.S. legal history in which federalism is central—not just at the time of the Founding or in the lead-up to the Civil War, but right up to the present. Extending our imagination and methodological tools well beyond Supreme Court doctrine, legal historians will illuminate the many ways in which federalism has affected politics and policymaking, whether through entrenched beliefs about the proper allocation of jurisdictional authority or through the existence (or non-existence) of particular legal-administrative machinery at crucial decisional junctures. Such research will also help reconstruct ordinary people’s experiences with “the state”—which is, and always has been, much more than the federal government.

This federalism—which we have called “federalism in practice”—has long engaged scholars in political science and public law. We are excited to see historians claiming a seat at the table. Any appraisal of what federalism can do in the future should take careful stock of what federalism has already done, or failed to do, for Americans in the past.

41 Sarah A. Seo, *The New Public*, 125 YALE L.J. (forthcoming 2016); see also Sarah A. Seo, *Antinomies and the Automobile: A New Approach to Criminal Justice Histories*, 38 L. & SOC. INQ. 1020 (2013).