IN SEARCH OF CONSTITUTIONAL FEDERALISM

G. Alan Tarr

Department of Political Science

Rutgers University

Camden, NJ 08102

tarr@camden.rutgers.edu

Prepared for delivery at the 2015 conference of the Western Political Science Association, Las Vegas, NV.

IN SEARCH OF CONSTITUTIONAL FEDERALISM

In *Comparative Federalism: Theory and Practice*, Michael Burgess observes that the meaning of “federalism” was contested during the drafting and ratification of the U.S. Constitution, with the “formidable proponents [of the Constitution] virtually commandeer[ing] the term `federal’,” which their opponents insisted should be reserved for confederations.[[1]](#endnote-1) The Anti-Federalists may have been correct as to the traditional meaning of federalism; but as Burgess recognizes, the framers of the new Constitution were jettisoning that understanding in favor of a new system that combined national and confederal features. As might be expected, their innovation left much unresolved, and this incompleteness has ensured that debate about American federalism has been a recurring feature of American political life. Thus, three decades after the Constitution’s ratification, Chief Justice John Marshall observed that “the question respecting the extent of the powers actually granted [to the federal government] is perpetually arising, and will probably continue to arise, as long as our system shall exist.”[[2]](#endnote-2) Woodrow Wilson concurred a century later, noting that “the question of the relation of the States to the federal government cannot be settled by one generation because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.”[[3]](#endnote-3) Fundamental disagreements about federalism also continue on the Supreme Court. When the Rehnquist Court launched its “new federalism” initiative, the justices were sharply divided, and this pattern seems likely to continue on the Roberts Court, if its highly contentious ruling upholding the Obama Administration’s national-health-care program is any indication.[[4]](#endnote-4) This chapter analyzes competing perspectives on constitutional federalism both on the U.S. Supreme Court and in recent scholarly commentaries. It concludes with comments on the state of American constitutional federalism and of research on that topic.

The Supreme Court’s “New Federalism” Jurisprudence

In the early 1990s, the Supreme Court under Chief Justice William Rehnquist embarked on a controversial “new federalism,” seeking to demarcate mutually exclusive spheres of federal and state authority.[[5]](#endnote-5) The Rehnquist Court’s rulings dealt with the scope of federal power under the Commerce and Necessary-and-Proper Clauses; the scope of congressional power under the post-Civil-War amendments; congressional power to require state legislative and executive action; and the scope of state sovereign immunity. In all these areas, the Court’s rulings limited federal power and secured state prerogatives. Conversely, its rulings on preemption during the same period tended to protect the federal sphere from state encroachments, so the Court’s aim was not merely to enhance the power of the states. The Roberts Court has continued to supervise the constitutional division of power, reinterpreting congressional power under the Necessary and Proper Clause and signaling a willingness to scrutinize alleged federal coercion under the Spending Clause.

Underlying these rulings was a revival of the doctrine of “dual federalism,” which holds that the Framers reserved important powers to the states and that federal powers should be interpreted narrowly in order to prevent the federal government from using its delegated powers to usurp the reserved powers of the states. Put differently, dual federalism seeks to ensure that a federal balance is maintained. As a five-member majority put it in *National League of Cities v. Usery* (1976), “an otherwise valid use of the Commerce Clause runs afoul of the Tenth Amendment, if it impairs the States’ integrity or their ability to function effectively in a federal system.”[[6]](#endnote-6) Under this understanding, then, the two levels of government are coequal sovereigns, and each is supreme within its own sphere, so the federal government cannot undertake any action, even in the exercise of its enumerated powers, that infringes on the functions reserved to the states.

The Commerce Power

Initially, under Chief Justice John Marshall, the Supreme Court broadly interpreted congressional power under the Commerce Clause. Writing in *Gibbons v. Ogden* (1824), Marshall argued that since the commerce power was designed to promote the free flow of goods among the states, Congress could address all obstacles to that flow, no matter how local they might be. Thus, congressional power extended to “that commerce which concerns more states than one”—a formulation that encompassed but was not limited to interstate commerce. Insofar as intrastate activities affected commerce “among the several states,” they too were subject to congressional regulation. Under Marshall’s principle, as the expansion of business enterprises produced a more interdependent national economy, the range of economic activities subject to congressional regulation likewise increased.

To avoid this result, which they saw as threatening the domain of state power, dual federalist justices in the 1890s began to limit congressional power under the Commerce Clause. The Court narrowed its definition of “commerce,” circumscribed the “effects on commerce” that Congress could address, and limited the purposes for which commerce might be regulated in order to safeguard the states’ “police power.” Not until 1937, with the “switch in time that saved nine,” did the Court abandon dual federalism and re-endorse an expansive interpretation of the federal commerce power.

Since 1995, however, the Court has sought to limit the scope of the federal commerce power. In *United States v. Lopez* (1995), it struck down a federal enactment creating gun-free zones near schools; and in *United States v. Morrison* (2000), it invalidated a provision of the Violence Against Women Act that established a right to sue perpetrators of gender-based violence in federal court. Speaking for the Court, Chief Justice Rehnquist insisted that congressional statutes regulating noncommercial activity in areas of traditional state concern were subject to searching judicial scrutiny, in order to maintain the balance of power between nation and state. To accept the tenuous connection between the regulated activities and commerce as sufficient to justify congressional intervention, he contended, would in effect remove all limits on congressional regulatory authority and create a unitary system. However, the Court did not pursue a consistent course. In *Gonzales v. Raich* (2005), it rejected a challenge to the federal Controlled Substances Act (regulating drugs), insofar as it interfered with state programs that authorized physicians to prescribe marijuana for medical purposes and permitted patients to grow or purchase marijuana for those purposes. To the three dissenters in *Raich*, who had been in the majority in *Lopez* and *Morrison*,the federal law unconstitutionally interfered with the states’ ability to experiment in an area of traditional state concern and made it difficult to discern any activities not subject to federal regulation.

In *National Federation of Independent Business v. Sibelius* (2012), the Court considered the constitutionality of the “individual mandate” provision of the Patient Protection and Affordable Care Act, which imposed a financial penalty on persons who failed to obtain health insurance.[[7]](#endnote-7) Speaking for a five-member majority that included the Court’s liberal members, Chief Justice Roberts upheld the individual mandate through a strained interpretation of the federal taxing power. However, speaking for a different five-member majority that included the Court’s conservative justices, he ruled that the individual mandate did not pass muster under the Commerce Clause. While acknowledging that the Constitution grants Congress broad power to “regulate Commerce,” it “presupposes the existence of commercial activity to be regulated” and that the individual mandate did not regulate “existing commercial activity.” Rather, it compelled individuals “to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.” For the Court to construe the Commerce Clause to allow Congress to regulate individuals “precisely because they are doing nothing would open a new and potentially vast domain to congressional authority” and “would bring countless decisions an individual could potentially make within the scope of federal regulation, and . . . empower Congress to make those decisions for him.” This the Court declined to do.

The Necessary and Proper Clause

Even so, the Roberts Court might have upheld the individual mandate under the Necessary and Proper Clause, insofar as it furthered the implementation of Obama’s health-care reform. Indeed, two years earlier in *United States v. Comstock* (2010) the Roberts Court had maintained that “the Constitution’s grants of specific federal legislative authority are accompanied by broad powers to enact laws that are `convenient or useful’ or `conducive’ to the authority’s `beneficial exercise.’”[[8]](#endnote-8) But Chief Justice Roberts contended that even if the individual mandate was “necessary,” that was insufficient. Congressional statutes must also be “proper,” that is, they must not “undermine the structure of government established by the Constitution.” If they do, he insisted, such laws are not “consist[ent] with the letter and spirit of the constitution” (quoting *McCulloch*) but are “in the words of The Federalist, ‘merely acts of usurpation’ which ‘deserve to be treated as such.’ ”[[9]](#endnote-9) It will be interesting to see how far the Roberts Court will push this structural limit on the exercise of congressional power.

The Court’s “Commandeering” Jurisprudence

The Rehnquist Court also sought to safeguard state decision-making by striking down congressional efforts to “commandeer” state officials into carrying out federal programs. In *New York v. United States* (1992), the Court held unconstitutional a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required a state that had failed to provide for disposal of that waste to take possession of it and to become liable for all damages suffered by the generator or owner of that waste as a result of the state’s failure to take prompt possession. Speaking for a six-member majority, Justice Sandra Day O’Connor asserted that “[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”[[10]](#endnote-10) Five years later, the Court in *Printz v. United States* (1997) struck down provisions of the Brady Handgun Violence Prevention Act that required state and local law-enforcement officers to conduct background checks on prospective handgun purchasers. Speaking for a five-member majority, Justice Antonin Scalia noted that “we held in *New York* that Congress cannot compel the State to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly.” Such conscripting of state officers to carry out a federal program not only violated the states’ “residuary and inviolable sovereignty” but also transgressed the constitutional separation of powers by transferring responsibility for the “faithful execution of the laws” from the President to state law enforcement officers.

Sovereign Immunity and the States

In *Seminole Tribe of Florida v. Florida* (1996), Chief Justice Rehnquist held for a five-member majority that Congress lacks power under the Commerce Clause to abrogate states’ sovereign immunity, which is protected by the Eleventh Amendment. In taking this position, Rehnquist faced a major textual problem: by its terms, the Eleventh Amendment simply does not bar the kind of suit brought in this case by the Seminole Tribe.[[11]](#endnote-11) Rehnquist nevertheless proclaimed that a “blind reliance upon the text of the Eleventh Amendment” would be “overly exacting,” insisting that the amendment constitutionalizes the idea that “first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to suit without its consent.”

In a series of subsequent cases, a closely divided Court extended *Seminole Tribe*. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999), *Kimel v. Florida Board of Regents* (2000), and *Trustees of the University of Alabama v. Garrett* (2001), it conceded that Congress has power to abrogate the states’ sovereign immunity under Section 5 of the Fourteenth Amendment. But it narrowed Congress’s enforcement power by announcing it would examine whether there was “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”[[12]](#endnote-12) In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (1999), the Court invalidated a federal statute subjecting states to suits under federal statute for false and misleading advertising. In *Alden v. Maine* (1999) it ruled that Maine’s probation officers could not sue the state in state court for failing to abide by the overtime provisions of the federal Fair Labor Standards Act. Finally, in *Federal Maritime Commission v. South Carolina State Ports Authority* (2002), it ruled that state sovereign immunity barred actions against nonconsenting states even in federal regulatory agencies. Since that ruling, however, the Court has become somewhat more deferential to Congress. In *Nevada Department of Human Resources v. Hibbs* (2003), it ruled that state employees could sue their employers in federal court for violation of the federal Family and Medical Leave Act, and in *Tennessee v. Lane* (2004) that disabled persons could sue states in federal court when their right of physical access to state courts was limited in violation of the federal American with Disabilities Act.

Preemption

During the twentieth century, the federal government entered various policy areas—for example, environmental protection, race relations, and consumer protection—that previously had been state concerns. When federal and state policies are complementary, this expansion of federal power produces no conflict. But when they are not, the Supremacy Clause mandates that federal policy preempt inconsistent state laws. When congressional statutes make no reference to preemption, courts must decide “whether the state action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”[[13]](#endnote-13)

Beginning in the late 1930s, the Supreme Court adopted a presumption against preemption, proclaiming that “the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.” However, the Rehnquist Court tended to assume the incompatibility of state law with federal initiatives. This is reflected in rulings invalidating state laws that touched on foreign affairs (e.g., *Crosby v. National Foreign Trade Council* [2000] and *American Insurance Association v. Garamendi* [2003]). It is also evident in rulings blocking on preemption grounds claims in tort law: tort claims against tobacco companies (*Cipollone v. Liggett Group* [1992]), state laws regulating the display of cigarette advertisements (*Lorillard Tobacco Co. v. Reilly* [2001]), and remedies under state law for design defects in automobiles (*Geier v. American Honda Motor Company* [2000]). The Roberts Court has continued this trend. This willingness to strike down state law may seem inconsistent with the “new federalism’s” solicitude for state power and state sovereignty. But it fits smoothly into the dual federalist constitutionalism championed by the Supreme Court, because that “model understands different regulatory targets as properly local or national and then segregates jurisdiction accordingly (by preempting improper local activity and enforcing the limits of the federally enumerated powers).”[[14]](#endnote-14)

The Spending Power

Article I, Section 8 authorizes Congress “to pay the debts and provide for the common defense and general welfare of the United States.” This broad grant of power worried the Anti-Federalists, who asserted that it would transform the national government into a government of indefinite, rather than enumerated, powers. In *Steward Machine Company v. Davis* (1937) and *Helvering v. Davis* (1937), the Court confirmed that the spending power was an independent grant of power, not limited by the reserved powers of the states. So Congress could use its spending power to regulate indirectly matters that it could not regulate directly, by attaching conditions on the funds that it made available to states and localities. Because states could choose whether or not to forgo the federal funds, the Supreme Court held that states were not coerced by Congress’s imposition of conditions on their distribution. However, as Justice Sandra Day O’Connor—a member of the “federalism five”--noted in her dissent in *South Dakota v. Dole* (1987), given the sizable amounts involved, in practice the potential loss of even some federal funds might in effect coerce states to alter their policies.[[15]](#endnote-15)

The Roberts Court embraced the notion that federal grant programs might be unconstitutionally coercive in *National Board of Independent Business v. Sebelius*.The statute at issue in *Sebelius* substantially expanded eligibility under Medicaid, a cooperative program under which the federal and state governments jointly provide health insurance for indigents. Although states could choose whether or not to participate in this Medicaid expansion, failure to do so would result in the termination of all their federal Medicaid funds. This provision was so punitive, the Court reasoned, that it “passed the point at which pressure turns into compulsion” and in effect coerced state participation. In this respect it was no different from the federal commandeering struck down in *New York* and *Printz*. Such a “gun to the head” (to use the Court’s colorful language) is inconsistent with “ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.”[[16]](#endnote-16) Although the Court did not attempt to define the distinction between pressure and compulsion, thus leaving unresolved how closely it would scrutinize the conditions imposed in other grant programs, it hinted at a new basis for judicial intervention to protect state autonomy.

Neo-Marshallian Federalism

The revival of dual federalism has generated extensive commentary, much of it critical, both on and off the Court.[[17]](#endnote-17) One approach, adopted by the dissenting justices in the new federalism cases, has been to harken back to the constitutional understanding prior to this revival, as reflected in the Court’s precedents since 1937. More ambitiously, some scholars have looked to the constitutional vision of the Founders and of Chief Justice John Marshall to critique dual federalism. A prime example of this latter approach is Sotirios Barber’s *The Fallacies of States’ Rights*.

Barber contrasts the Rehnquist/Roberts understanding of the Constitution and of the balance of power it protects with the more nationalist understanding of the character and aims of the Constitution espoused by Chief Justice John Marshall. Consider, first of all, the issue of state sovereignty, which is a major underpinning of the Court’s position. The problem with this, as the Court has acknowledged, is that state sovereignty is not mentioned in the Constitution, so it must be understood as implicit in the Founders’ design. This is not on its face a fanciful notion --- after all, neither federalism nor the separation of powers is expressly mentioned either. However, in failing to include an explicit guarantee of state sovereignty, the Founders were deliberately departing from the Articles of Confederation, whose Article XIII states: “Each State retains its sovereignty, freedom and independence.” The decision not to include such a guarantee at least raises the question whether this was meant to signal a change in constitutional principle.[[18]](#endnote-18)

More generally, the Constitution should be understood, Barber (and Marshall) insist, as a purposive document, a means to achieve certain identifiable ends. These ends can be ascertained from the Declaration of Independence, which the Constitution was meant to implement: “to secure these rights, Governments are instituted among Men . . . and whenever any Form of Government becomes destructive of these ends, it is the Right of the People . . . to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” They also can be found in the Preamble of the Constitution, and they are implied by the enumerated powers granted to Congress in Article I, section 8, which are means for achieving identifiable ends. What is missing from this account, of course, is any consideration of the division of power between nation and state. This omission is not inadvertent, because the Constitution is not fundamentally concerned with preserving particular structural arrangements. Also, because the Constitution is meant to ensure security against external foes, national prosperity, internal order, and other ends, the powers of the national government must be adequate to the accomplishment of those objectives. As Marshall put it in *McCulloch v. Maryland* (1819): “The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.” If those means involve intrusion on traditional state powers or require shifts in the distribution of power between nation and state, that is consistent with the constitutional design, which is to promote accomplishment of national objectives. Thus Barber finds no constitutional obstacle to the temporary “commandeering” of state officials in *Printz v. United States* or the creation of an “individual mandate” in *Sebelius*. Certainly the achievement of important national objectives such as gun control and the provision of health care should not be sacrificed to the end of preserving some, for Barber, fictitious state sovereignty.

In support of this position, Barber points to James Madison’s argument in The Federalist No. 45:

But if the Union, as has been shown, be essential to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain; if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?

Thus, a division of powers between nation and state may exist in practice, but the protection of such a division was never an aim of the Constitution. As Madison noted in The Federalist No. 46, “federal and States governments are in fact but different agents and trustees of the people.” From this it follows (in The Federalist No. 45) that “the real welfare of the great body of the people is the supreme object to be pursued; and . . . no form of government whatever, has any other value, than as it may be fitted for the attainment of this object.” A particular division of powers may or may not, depending on circumstances, contribute to good government. There can be no “categorical limits” on national power because the objectives of the national government are superior to those of the state governments. That is inherent in the idea that the national government serves the welfare of the whole nation, while each state serves the welfare of only part of the people, and in any event the Supremacy Clause removes any doubt on that account. [[19]](#endnote-19) There may be value to a decentralization of power, but that value is contingent on circumstances, instrumental rather than inherent. The Constitution is not fundamentally about “federalism” or about a “federal balance”—neither term appears in the document. State governments may exercise those powers not granted to the national government, but the grants of power must be read broadly in order that the aims for which they were given may be achieved.

It may be, as Marshall observed in *McCulloch*, that “the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise so long as our system shall exist.” But this says less about the intrinsic difficulty of the question than about the character of the nation’s politics. The only limitations on the national government’s powers are those enshrined in the Constitution’s rights guarantees and in the limited objectives for which the national government was created. But the means to those ends are not limited, and thus Spencer Roane, who attacked the decision in *McCulloch*, was probably correct when he observed that a government limited in its objectives but not in the means by which they might be attained, was not a very limited government.[[20]](#endnote-20)

The Political Safeguards of Federalism

When the Supreme Court abandoned dual federalism in the late 1930’s, it adopted a new and more encompassing view of federal powers and accorded a strong presumption of constitutionality to congressional regulation of the economy. The Court justified this by arguing that the primary safeguards for state interests and prerogatives were political, not jurisprudential. The states’ role in the composition of the national government and the selection of national officials would serve to protect them against federal overreaching. Over time a substantial scholarly literature developed describing—and celebrating--these political safeguards of federalism.[[21]](#endnote-21) When the “federalism five” resurrected dual federalism, the dissenting justices also responded by stressing this political safeguards rationale. This is evident in *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the case that overruled *National League of Cities v. Usery*, in which Justice Harry Blackmun claimed that “the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority.”[[22]](#endnote-22)

Critics of the political-safeguards approach noted that it relies on a process to safeguard federalism rather than undertaking a substantive inquiry into what ends the national government is authorized to pursue. By foregoing that inquiry, it offers even greater potential scope to the national government than the neo-Marshallian approach does.[[23]](#endnote-23) Critics also argue that the states’ role in the federal government has shrunk. Whereas states initially determined who was eligible to vote for the House of Representatives, constitutional amendments and the Voting Rights Act have nationalized voter qualifications. Even more important, whereas state legislatures initially elected senators, under the Seventeenth Amendment senators are now popularly elected and thus lack that close connection to state officials. Thus the obsolescence of the political safeguards of federalism requires more active judicial intervention to ensure the federal balance. But some scholars respond that the states continue to play an important role in the design and implementation of federal programs, thus protecting against federal dominance or overreaching.[[24]](#endnote-24) Beyond that, whatever the original federal balance, the people have by constitutional amendment chosen to alter that balance, and there is no justification for increased judicial intervention to undo that choice.[[25]](#endnote-25)

Balanced Federalism

Some scholars have questioned whether there is an “original understanding” of federalism at all. They assert that given the novelty of the system being created, the Constitution did not mandate “any particular and timeless balance among its components” but rather “accepted certain types of change as natural and desirable.” Some Founders expressly recognized this—for example, Alexander Hamilton in The Federalist No. 82 noted that “‘tis time only that can mature and perfect so compound a system.” Thus these scholars view the endemic disagreements about constitutional federalism as inherent in the Constitution itself, rather than the result of flawed interpretations, noting that “that structure simply incorporated too many mutable and malleable parts divided by far too many murky and manipulable lines either to define or to sustain any single and true balance.”[[26]](#endnote-26)

Erin Ryan offers an alternative vision of American constitutional federalism rooted in this constitutional indeterminacy in *Federalism and the Tug of War Within*. She rejects the Supreme Court’s resurrection of dual federalism, claiming that it moves from the uncontested premise that the state and federal governments have separate sources of authority to the unjustified conclusion that they exercise that authority in mutually exclusive jurisdictional spheres. This view of American federalism is too simple, because the Constitution, in addition to delineating mutually exclusive spheres, also establishes a large “gray area” in which there is considerable overlap of authority. Furthermore, the Court’s emphasis on jurisdictional separation is inconsistent with the political practice that has developed under the Constitution, which entails a great deal of power sharing and state-federal bargaining. Thus although dual federalism may be internally consistent, it is externally inconsistent. “The boundary between state and federal power is far more contingent and collaboratively determined than acknowledged” by dual federalists.[[27]](#endnote-27)

Yet if Ryan rejects judicial enforcement of dual federalism, she also questions the judicial abdication of political-safeguards federalism. State-federal collaboration may promote good government, but cooperative federalism offers a description of what is, not of what should be. Relying exclusively on the political safeguards of federalism makes sense only if one cherishes the unrealistic hope that “if federalism really matter[s], Congress will see that it is taken care of.”[[28]](#endnote-28) Judges must therefore enforce the boundaries of state and federal jurisdiction when they are clear. Yet much of what government does falls into the large gray area of overlapping interjusdictional concerns. This overlap may occur because a particular policy issue implicates the powers of both the state and federal governments. For example, local regulation of land use may lead to environmental problems that inextricably connect it to the protection of navigable waterways, which is a federal concern, given the waterways’ connection to interstate commerce. The overlap may also occur because the Constitution does not make clear which government is the appropriate regulator. Jurisdictional overlap occurs as well as a result of the increasingly national impacts of local phenomena, ranging from greenhouse gas emissions to childhood obesity. And even in areas where the Constitution may seem to offer direction, the federal government may profit from local expertise and enforcement capability or the states from national coordination where state political incentives could encourage regulatory abdication. “Although federal preemption of local participation in preventing and responding to an act of terrorism is theoretically permissible, it would be both counterproductive and absurdly inefficient.”[[29]](#endnote-29) Similarly, federal efforts to prevent wetlands loss and state efforts to deal with vehicular pollution illustrate the advantages of cooperation, while the aftermath of Hurricane Katrina reveals the tragic consequences of a lack of cooperation.

As an alternative to dual federalism and political-safeguards federalism, Ryan proposes a “balanced federalism” framed in terms of the purposes federalism is meant to serve. These purposes include a multiplicity of values that are only partially consistent: (1) maintenance of the checks and balances that protect individuals against tyranny, (2) promotion of accountable and participatory government, (3) various benefits associated with local autonomy, including diversity, innovation, and interjurisdictional competition, and (4) pragmatic problem-solving, including the “exchange of unique regulatory capacity to cope with interjurisdictional problems.” For a constitutional interpreter relying on “balanced federalism,” then, the challenge in each instance is to strike the “best balance of protection afforded these underlying values when tensions arise.”[[30]](#endnote-30) The Rehnquist and Roberts Courts have done a poor job striking the balance because they have delineated mutually exclusive federal and state spheres, whereas prevailing political practice has recognized the ubiquity of cross-jurisdictional regulatory problems and the need for intergovernmental efforts to deal with them, More specifically, Ryan suggests that while dual federalism prevents tyranny by emphasizing the checks and balances of jurisdictional separation, it compromises the problem-solving value by inhibiting intergovernmental collaboration even when needed. And while it may reduce voter confusion in service of the accountability value, it serves localism values only superficially. In contrast, cooperative federalism, which develops “either because neither side has all the legal authority it needs to effectively solve the problem, or because compelling circumstances make a partnership approach necessary,” forestalls tyranny through the checks and balances of jurisdictional overlap and serves the problem-solving value, even if it less effective in enforcing accountability.[[31]](#endnote-31)

Yet Ryan cautions that it would be a mistake to place too great a reliance on the Supreme Court. Balanced federalism requires a sensitivity to context and the dynamics of established working relationships, and often the other branches of government at both the state and federal levels are better at striking the appropriate balance. In particular, she describes how the balances struck through bargaining between state and federal executive-branch officials ensure the protection of federalism values without sacrificing the advantages of policy collaboration. “Fair bargaining” serves the ends of federalism, and thus the outcomes of “negotiated federalism” are entitled to considerable judicial deference. The collaboration that results, Ryan concludes, “recognize[s] the existence of the states not simply as geographical entities but also as significant centers of the regulation of human affairs,” which is what federalism is meant to accomplish.[[32]](#endnote-32)

Competitive Federalism

For Michael Greve, the elements of overlapping jurisdiction and cooperative arrangements that Ryan applauds represent distortions of the constitutional design. Indeed, he describes the system of federalism that originated in the 1930s as turning the Constitution “upside down” by repudiating the competitive federalism of earlier eras.[[33]](#endnote-33) Greve views federalism as a mechanism for disciplining governments by putting them in competition with one another, encouraging states to compete with each other to attract business, investment, and productive citizens through packages of goods and services. Citizens and businesses then can vote with their feet, so citizen choice disciplines state governments just as consumer choice disciplines producers. It follows that policies that that allow states to join together (cartelize) interfere with the advantages of federalism. So too do arrangements that blur jurisdictional boundaries and disconnect policy from revenue generation, thereby interfering with governmental accountability to the people. The crucial question for Greve is not whether the United States is more or less federal but what kind of federalism exists. “A competitive federalism that disciplines government at all levels is worth having. A cartel federalism that empowers government at all levels is pathological, and quite probably worse than wholesale nationalization.”[[34]](#endnote-34)

In arguing that competitive federalism is rooted in the Constitution, Greve does not pretend that such a system was in the mind of the Founders. This would hardly be credible, given competitive federalism’s roots in public choice and neoclassical economics. But he insists that competitive federalism “illuminates the elementary calculus of the United States Constitution” and is compatible with its “foundational premises and ascertainable structure,” and so it can be seen as the foreseeable consequence of the Founders’ constitutional choices and thus as equivalent to the intention of the document. [[35]](#endnote-35) In particular, he emphasizes that “the Constitution makes no explicit provision for asymmetries or equalization. It permits concurrent taxation and commands formal state equality—and lets the outcomes be what they may.”[[36]](#endnote-36) Thus, “like separation of powers, federalism was an instrument for controlling governmental power by dividing it and harnessing individual interest and ambition to the service of republican ends.”[[37]](#endnote-37)

Greve contends that the Supreme Court must play an active role in supervising American federalism and striking down efforts to avoid its stringent requirements. Among these market-protective and pro-competitive requirements are the Privileges and immunities Clause, the prohibitions found in Article I, section 10, and the dormant commerce clause, which “exposes producers in each state to interstate competition [and] bars states from procuring local advantages by means of exploiting outsiders. “[[38]](#endnote-38) Such judicial scrutiny is necessary because governments quite naturally seek to avoid a competition with winners and losers; yet the Court’s record is mixed at best.

One way of avoiding interstate competition is to have the federal government impose (the same) policies on all the states. According to Greve the Supreme Court’s emasculation of the enumeration of powers since the New Deal has encouraged this approach, particularly when the states know that they can participate in the design and implementation of federal programs. Indeed, he views New Deal constitutionalism as state-government-friendly, because in increasing the scope of its activities, the federal government has not displaced the states but involved them in programs. “While the federal initiatives of the 1930s of course involved the national government in domains theretofore beyond its purview, they also built state capacity and enabled states to run programs that, to all practical intents, had been beyond their abilities.”[[39]](#endnote-39)

A second way to avoid competition is to ensure that the federal expansion of activities does not preclude state regulation. Thus in the wake of the New Deal, the elimination of limitation by enumeration through an expansive commerce clause was complemented by an undermining of the supremacy clause through a presumption against preemption. Greve thus applauds the Rehnquist Court’s willingness to scrutinize state laws on preemption grounds as reinforcing competitive federalism. A third way to avoid policy competition is through nationalization of policy experiments. Justice Louis Brandeis celebrated how federalism allows courageous states to experiment, but Greve notes that such experimentation rarely leads to policy diversification. Rather, interest groups that succeed in one or a few states tend to support nationalization of the policy in order to avoid competition from states that make other policy choices.

In sum, Greve concludes that “our constitutional federalism is the product of a single sovereign people, which has allocated specified powers to different agents.”[[40]](#endnote-40) However, since the 1930s those agents have succeeded in throwing off their constitutional shackles and, with the blessing of the Supreme Court, have created a system that encourages intergovernmental cooperation but at the expense of the public. The aim must be, then, not to conform constitutional doctrine to political practice but to reinvigorate the Constitution’s division of powers to reform that practice. For only then can federalism again be a boon for that single sovereign people.

Conclusion

Our survey confirms that the debate over American constitutional federalism has lost neither its intensity nor its topicality. Scholars disagree about the meaning of federalism, the aims of the Founders in creating a federal system, and the extent to which those aims can—and should—guide contemporary interpretation of the Constitution. Justices too debate whether the Constitution was meant to secure a federal “balance” and what role judges should play in safeguarding federal arrangements. Finally, many participants in the debate detect a divergence between the operation of American federalism today and the original constitutional design, though they differ as to whether political practice should be brought into conformity with the constitutional design or whether constitutional doctrine should be altered to reflect better contemporary practice.

One may be encouraged by the vitality of the debate and by the fact that American constitutional federalism continues to attract the attention of the nation’s leading constitutional minds. However, one may also be discouraged by the absence of consensus this scholarly engagement has produced. Indeed, writing less than two decades ago, one scholar lamented that there is “virtually no important issue of federalism on which a particular point of view command[s] a clear consensus of the scholars of the field.”[[41]](#endnote-41) There is likely no other field of American constitutional law about which such a claim could be made. Therefore, perhaps future scholars should turn their attention to explaining the lack of consensus, which might reasonably be viewed as a failure, and consider whether a shared understanding of American federalism is possible.

NOTES

1. Michael Burgess, *Comparative Federalism: Theory and Practice* (London: Routledge, 2006), p. 57. [↑](#endnote-ref-1)
2. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). [↑](#endnote-ref-2)
3. Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908),p. 173. [↑](#endnote-ref-3)
4. *National Federation of Independent Business v. Sebelius* , 567 U.S. \_\_\_ (2012). [↑](#endnote-ref-4)
5. One might argue that the “new federalism” began with *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which five justices struck down application of the minimum-wage and overtime-pay provisions of the Fair Labor Standards Act to state employees. But this ruling spawned no progeny and was overruled less than a decade later by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). [↑](#endnote-ref-5)
6. *National League of Cities v. Usery*, 426 U.S. 833, 843 (1976). [↑](#endnote-ref-6)
7. Some low-income persons were exempted from this requirement. [↑](#endnote-ref-7)
8. *United States v. Comstock*, 560 U.S.126, \_\_\_ (2010). [↑](#endnote-ref-8)
9. *National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_, \_\_\_. [↑](#endnote-ref-9)
10. *New York v. United States*, 505 U.S. 144, 178 (1992). [↑](#endnote-ref-10)
11. The Eleventh Amendment reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” The members of the Seminole Tribe were not “Citizens of another State, or Citizens or Subjects of any Foreign State” bringing suit under the federal court’s state-citizen diversity jurisdiction (granted by Article III in the original Constitution but then subsequently repealed by the Eleventh Amendment). Rather, they were suing under the federal court’s federal-question jurisdiction, which was granted by Article III and unaffected by the Eleventh Amendment). [↑](#endnote-ref-11)
12. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000). This test originated in *City of Boerne v. Flores*, 521 U.S. 507 (1997). See Evan H. Caminker, “`Appropriate’ Means-Ends Constraints on Section 5 Powers,” *Stanford Law Review* 53 (2001): 1127-1199. [↑](#endnote-ref-12)
13. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1970). [↑](#endnote-ref-13)
14. Erin Ryan, *Federalism and the Tug of War Within* (New York: Oxford University Press, 2011), p. 3. [↑](#endnote-ref-14)
15. There is some scholarly support for this position. See, for example, Ilya Somin, “Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments,” *Georgetown Law Review* 90 (2002): 461-502. [↑](#endnote-ref-15)
16. *National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_, \_\_\_. [↑](#endnote-ref-16)
17. Not all the commentary has been negative—see, for example, Steven G. Calabresi, “Federalism and the Rehnquist Court: A Normative Defense,” *Annals of the American Association of Political and Social Sciences* 574 (2001): 24-36, and Keith L. Whittington, “Taking What They Give Us: Explaining the Court’s Federalism Offensive,” *Duke Law Journal* 51 (2001):477-520. However, overall commentary has been quite critical—see, for example, Mark Tushnet, “William Rehnquist’s Federalism,” in Craig M. Bradley, ed., *The Rehnquist Legacy* (Cambridge University Press, 2006), and John T. Noonan, *Narrowing the Nation’s Power: The Supreme Court Sides with the States* (Berkeley: University of California Press, 2002). [↑](#endnote-ref-17)
18. See H. Jefferson Powell, “The Compleat Jeffersonian: Justice Rehnquist and Federalism,” *Yale L. J.* 91 (1982): 1317, 1367 (1982). [↑](#endnote-ref-18)
19. Barber, *Fallacies of States’ Rights*, p. 43. For related critiques of balance federalism, see Robert Lipkin, “Federalism as Balance,” *Tulane Law Review* 79 (2004): 93-166, and Caleb Nelson, “Preemption,” *Virginia Law Review* 86 (2000): 225-305. Nelson argues that the Supremacy Clause serves as an injunction against the judicial “harmonization” of federal and preexisting state law. [↑](#endnote-ref-19)
20. Roane, who was chief justice of the Virginia Supreme Court, attacked *McCulloch* in a series of newspaper articles, to which Marshall, writing anonymously, replied. These articles are collected in Gerald Gunther, ed., *John Marshall’s Defense of McCulloch v. Maryland* (Stanford, CA: Stanford University Press, 1969). [↑](#endnote-ref-20)
21. The classic exposition of this idea is Herbert Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,” *Columbia Law Review* 54 (1954): 543-556. More recent elaborations of this position include: Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University of Chicago Press, 1980), and Larry Kramer, “Putting the Politics Back into the Political Safeguards of Federalism,” *Columbia Law Review* 100 (2000): 215-293. [↑](#endnote-ref-21)
22. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 553-554 (1985). [↑](#endnote-ref-22)
23. Thus Barber notes that “process federalism is the only form of federalism that opposes the idea that the enumeration of national powers implies limited ends.” See Barber, *Fallacies of States’ Rights*, pp. 13-14. Similarly, dissenting in *United States v. Comstock*, Justice Clarence Thomas observed: “McCulloch accords Congress a certain amount of discretion in assessing means-end fit under this second inquiry. However, unless the end itself is “legitimate,” the fit between means and end is irrelevant. This limitation was of utmost importance to the Framers.”(560 U.S. 126, \_\_\_ [2010]) [↑](#endnote-ref-23)
24. See, for example, John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking* (Norman: University of Oklahoma Press, 2009), and Larry D. Kramer, “Putting the Politics Back into the Political Safeguards of Federalism,” *Columbia Law Review* 100 (2000): 215-293. [↑](#endnote-ref-24)
25. See Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* (Lanham, MD: Lexington Books, 2001). [↑](#endnote-ref-25)
26. Edward A. Purcell, Jr., *Originalism, Federalism, and the American Constitutional Enterprise* (New Haven, CT: Yale University Press, 2007), pp. 7, 193. See also Erin Ryan, *Federalism and the Tug of War Within* (New York: Oxford University Press, 2011), which notes “the constitutional indeterminacy that enables alternative theoretical models of federalism” and “affords space for multiple interpretations.” (pp. 1, 107) [↑](#endnote-ref-26)
27. Ryan, *Federalism*, p. 339. My account of Ryan’s book draws on my review in *Publius: The Journal of Federalism*, published online at: <http://publius.oxfordjournals.org/content/early/2013/04/22/publius.pjt018.full> . [↑](#endnote-ref-27)
28. Ryan, *Federalism*, p.213. [↑](#endnote-ref-28)
29. Ibid., p. 158. [↑](#endnote-ref-29)
30. Ibid., pp. 38-39. [↑](#endnote-ref-30)
31. Ibid., pp. 66-67, 146. [↑](#endnote-ref-31)
32. Ibid., p. 107. [↑](#endnote-ref-32)
33. Michael S. Greve, *The Upside-Down Constitution* (Cambridge, MA: Harvard University Press, 2012). He states that the constitutional order “has been revolutionized in the very specific sense of having been stood on its head.”(2) For analysis of the strengths and weaknesses of competitive federalism in practice, see Daphne A. Kenyon and John Kincaid, eds., *Competition Among States and Local Governments: Efficiency and Equity in American Federalism* (Washington, DC: Urban Institute Press, 1991). [↑](#endnote-ref-33)
34. Greve, *Upside-Down Constitution,* p. 5. [↑](#endnote-ref-34)
35. Ibid., pp. 7, 16, and 36. [↑](#endnote-ref-35)
36. Ibid., p. 81. [↑](#endnote-ref-36)
37. Ibid., p. 55. [↑](#endnote-ref-37)
38. Ibid., p. 81. [↑](#endnote-ref-38)
39. Ibid., p. 244. See also John Joseph Wallis and Wallace E. Oates, “The Impact of the New Deal on American Federalism,” in Michael D. Bordo, Claudia Goldin, and Eugene N. White, eds., *The Defining Moment: The Great Depression and the American Economy in the Twentieth Century* (University of Chicago Press, 1998), p.171, documenting that the state share of total government revenues from own sources rose from 16.4% in 1927 to 21.7% in 1934 to 28.2% in 1940.. [↑](#endnote-ref-39)
40. Greve, *Upside-Down Constitution*, p. 408, note 8. [↑](#endnote-ref-40)
41. David L. Shapiro, *Federalism: A Dialogue* (Evanston, IL: Northwestern University Press, 1995), p. 6. [↑](#endnote-ref-41)