

A MODEL OF CONTESTATIONAL FEDERALISM

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# **ABSTRACT**

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Theoretical problems continue to perplex scholars of American federalism. Despite an avalanche of literature, theoretical accounts of federalism are rare. Most work centers on technical debates on U.S. constitutional law, the economic effects of federalism, the role of courts in policing federal boundaries, or some other specific topic. Rarely are these disconnected subjects fused into a unified account, yet having a broader theory is crucial to resolving specific problems. Any theory of federalism must tell us why federalism is valuable, how and where to divide power between national and subnational government, and how to maintain that division over time. Whereas standard accounts of federalism either ignore or downplay one or more of these issues, this dissertation speaks to each of them. It has particular import for the questions of how federalism is supposed to check governmental power and how best to maintain the federal division of power over time.

This dissertation outlines the original structure of federalism in the U.S. Constitution and tracing its evolution over time. It argues that the framers, particularly James Madison, advanced a novel theory of federalism, labelled “contestational federalism.” On this view, federalism is analogous to inter-branch separation of powers in that both share two core characteristics: functional differentiation and contestation. Functional differentiation refers to a difference in function between the two separated levels of government for the purpose of promoting effective government. In other words, “local” objects of legislation are best performed by local governments, while “national” objects are best performed by the central government. Functional differentiation provides clear, defensible standards for determining which powers belong to

which level of government. Additionally, federalism was designed to be self-sustaining by means of “contestation” or mutual rivalry using constitutional checks and balances between the levels of government. The founders wanted each level of government to be able to sustain itself using mechanisms similar to the ways in which the three branches of the federal government may check each other. Specific checks and balances included the design of the Senate, Electoral College, and electoral system, which the founders believes would safeguard state power. The concept of constitutional contestation was also applied to military power and grafted into the Constitution in the Second Amendment. Originally, the Second Amendment was intended to preserve a military power for the states so that they could check the federal government militarily if necessary.

These safeguards, I show, have failed to adequately protect state power, leading to gradual centralization over the course of American history. The original design of the Senate and Electoral College was soon effaced by historical transformations, particularly the rise of political parties, that nullified their usefulness as safeguards of federalism. Likewise, contrary to the expectations of the founders’ and their disciple Alexis de Tocqueville, voters failed to support candidates favorable to local power. As a result, contestational federalism is virtually defunct.

This dissertation concludes by discussing possible means by which contestational federalism may be revived. A variety of reforms, most of which would require a constitutional amendment, are possible to minimize the negative influence of political parties on federalism, strengthen the means of contestation, or otherwise buttress federalism. However, these reforms are unlikely to attract widespread support, rendering the prospects of reinvigorating contestational federalism rather unlikely.

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I dedicate this work to my loving wife, Elizabeth, and to my parents, Doug and Betsy, who supported me in my studies. I am truly lucky to have them in my life.

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# INTRODUCTION

Modern political theory aims to form institutions rather than people. Eschewing attempts to fashion virtuous citizens through comprehensive educational programs, the moderns sought instead to erect political and constitutional mechanisms that facilitate good government in spite of the individual badness of each citizen. In particular, the attraction and success of political liberalism, which has come to dominate the modern world, depends largely on its claim that such structural mechanisms can induce public-spirited behavior from selfish political actors, maintaining good government without sacrificing liberty.

Federalism, or the constitutional division of sovereign governmental power between multiple levels of government, is one such mechanism. Federal states are comprised of non-overlapping and partially independent subnational jurisdictions defined on the basis of geography rather than function (Feeley and Rubin 2011, 12-13).<sup>1</sup> Unlike “unitary states” in which the central government retains full sovereignty, or confederations in which sovereignty resides with the member states, in modern federations neither the national nor the state (or subunit) governments<sup>2</sup> have complete governmental power. Rather, the people retain sovereignty, but divide the powers of government two constitutionally protected levels of government. Each level possesses both exclusive powers which may be exercised only by that level and “concurrent” powers shared with the other level.

Federalism is widely believed to promote a variety of normative goods, such as democratic politics, efficient and limited government, liberty, and union. Arguably, it brings

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<sup>1</sup> More precisely, federalism may be defined as “a means of governing a polity that grants partial autonomy to geographically defined subdivisions of the polity” (Feeley and Rubin 2011, 12).

<sup>2</sup> Throughout, I will refer to the subunit governments that compose a federal union as “states,” as this is the practice in the U.S., the primary focus of this dissertation, as well as other federations such as Australia.

democracy closer to the people by reducing the scale of republican government, promotes efficiency, liberty, and limited government by putting governments into competition with each other, and allows for diverse people to unite peacefully while retaining their different identities. If these claims are true, then a properly constructed federal system is of great interest to those concerned about the health of democratic politics.

Three questions related to federalism are of particular importance to the political theorist. First, the glowing characterization of federalism's value is far from uncontroversial, and one can certainly question some or all of its purported benefits. Second, the specific division of power in a federal system can take many forms. How ought power to be divided between the state and national governments? Third, it is not enough merely to found a federal system without paying attention to how this system is to be perpetuated. Some means or mechanism must be found by which the federal division of power can be maintained. The scholarly literature refers to such stabilizing mechanisms as the "safeguards of federalism." No matter how valuable it is, federalism will do no good unless it can be preserved. Clearly these questions are interrelated: to resolve any of these specific problems, one must have a broader theory that encompasses them all.

Yet, although federalism has been a constant subject of both political and theoretical debate, comprehensive theories are few and far-between. The voluminous body of literature on American federalism reveals a "surprising lack" of theoretical accounts of federalism (Feeley and Rubin 2008, 1-3). Most work centers on technical debates in U.S. constitutional law, or the economic effects of federalism, or the role of courts in policing federal boundaries, or some other specific topic. Rarely are these disconnected subjects fused into a unified account, and unanimity as to the value or proper structure of federalism remains elusive. The challenge facing scholars is

to construct a theoretical foundation for federalism that provides satisfactory guidance on the disputed issues.

This dissertation sets forth a theory of federalism which provides a coherent and unified answer to all of these questions, thus maximizing its benefits and minimizing its downsides to democratic states.<sup>3</sup> This model of federalism asserts that federalism is a subspecies of the concept of the separation of powers. As such, it is analogous to the separation of power between the executive, legislative, and judicial branches of government. While viewing federalism as a species of separation of powers has been rare in the federalism literature,<sup>4</sup> such an analysis yields far-reaching implications for current debates on the purpose and structure of federalism, the role of the Supreme Court in adjudicating it, popular constitutionalism, and the proper “safeguards of federalism.” Whether power is divided between two levels of government or between three branches of government, both cases establish a constitutional mechanism designed to promote vigorous and efficient yet limited government.

Fundamentally, federalism and separation of powers are analogous in that both share two principal features: functional differentiation and constitutional contestation. Functional differentiation involves the beneficial separation of the functions of government to promote strong and efficient governance. In the case of federalism, the division is between national and sub-national functions or objects of legislation. Constitutional contestation involves the mutual rivalry and checking that ideally maintains the division of power and prevents the accumulation

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<sup>3</sup> While this theory relates to federalism more broadly, this dissertation focuses on federalism in the American constitutional system. Due to its novelty and longevity, federalism remains one of America’s most celebrated contributions to political theory (Ostrom 1985, 2). Modern definitions of “federal republics” inevitably refer to the U.S. model, which has been copied by federations worldwide. It is arguably most helpful to theorize about federalism through an in-depth analysis of its most famous specimen.

<sup>4</sup> George Thomas (2008, 16) hints at federalism by including the “division of power between the national and state governments” among the “institutional innovations” that “structure” constitutional meaning, but his actual analysis focuses solely on inter-branch separation of powers. Also, see *Federalist* #51.

of power by one side. It is closely related to the “checks and balances” between the three branches of government established by the U.S. Constitution, such as the president’s power to veto bills of Congress. In the federal system, contestation empowers the state and federal governments to check and balance each other using their own formal, constitutional powers. Because the question of federalism’s preservation takes center stage in this dissertation, the theory of federalism defended here is called the “contestation model of federalism” or “contestational federalism.” However, the logic of contestation presupposes a theory of why federalism exists, what it is good for, and how it should be structured. Thus, the answers given to the three questions are interrelated.

This theory of federalism is not entirely novel. Echoes of the concept of contestation itself, though not the term, can be traced to the writings of American founders such as James Madison. Such writings, needless to say, have not gone unnoticed, and as we will see, discussions of various forms of contestation and related ideas recur occasionally in scholarship on the founding, the Constitution, and federalism. Scholars deploy the general concept of “checks and balances” in reference to federalism’s ability to check oppressive government, although judicial and other safeguards remain at the forefront. The concept of functional differentiation, too, has received scattered attention.

Nevertheless, this dissertation contributes to the federalism literature in several ways. The precise theorization and articulation of the contestation model sets my theory apart. Most references to contestation in the literature are tangential, superficial, and theoretically undefended, or are mere summaries of texts from the founding lacking sustained analysis, attention to detail, or updating to reflect modern circumstances.<sup>5</sup> Scholars rarely specify concrete

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<sup>5</sup> For example, Jenna Bednar provides a helpful discussion of how “structural safeguards” allow the state and national governments to check each other, which mirrors contestation fairly closely (2009, 98-107). But, she treats

means by which checks and balances are to take place. Not surprisingly, the notion of federalism as “balance” has rightly been criticized as undertheorized and vague (see Lipkin 2004). As chapter two asserts, federalism cannot “balance” anything without contestation. By comprehensively detailing federalist contestation and its role in preserving liberty, this work shows that it belongs in a category of its own. Moreover, it responds to objections in greater depth and analyzes the theory’s operation and application beyond the American context.

Second, checking and balancing (i.e. contestation) is mentioned in reference to federalism’s ability to check unlimited government, but is ignored in discussions of how to maintain the federal balance. This work represents the first book-length treatment of contestation as a means of adjudicating the federal boundary. No one has proposed contestation as the sole or primary safeguard of federalism, instead prioritizing other mechanisms such as informal safeguards (state-national bargaining for instance), various political safeguards such as the influence on the federal government that states derive from political parties, or judicial determination. Yet as this dissertation will argue, without contestation the ability of federalism to check unlimited government is undermined. One key virtue of contestational federalism is that the same mechanism that maintains the federal balance—contestation—also checks tyranny.

Third, my discussion of the means by which federalist contestation may be revived is novel. This work provides a broader scope and deeper grounding for contestation. As we will see, even scholarship that grasps elements of the contestational model does not provide a comprehensive theory of constitutionalism, examine the ways in which historical trends such as partisanship have affected the founders’ theory, or explore a variety of alternatives in light of the

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structural safeguards as one among many, does not adopt the Madisonian perspective of constitutional construction, and describes the judiciary as the “most intuitive” safeguard (2009, 96). Her treatment of structural safeguards is somewhat prefatory, does not draw heavily on the founders’ writings, and fails to discuss federalism’s relationship to American constitutionalism.

rise of partisanship. But one cannot understand or evaluate federalism without taking into account all of these considerations. The final chapter of this dissertation considers a wider variety of options for reviving contestation than can be found elsewhere in the literature.

In an attempt to provide a comprehensive theory, my dissertation draws upon diverse sources, including legal scholars, historians, political theorists, and political scientists studying comparative federalism, American political development, and American politics. Unfortunately, elsewhere these different literatures are rarely deployed in conjunction: “Although political scientists and legal scholars have written much about federalism and intergovernmental relations, they research for the most part proceeds on separate tracks. ... Political scientists almost never cite law review articles on the constitutional aspects of American federalism, and legal scholars rarely give more than cursory citations of the political science literature on federalism .... It is thus rare to get more than half the picture from either group of scholars” (Nugent 2009, 6-7). One may add that scholars of international or comparative federalism engage little with scholars, legal analysts, or political scientists studying American federalism. This dissertation brings to bear a broader perspective on federalism questions than is typical in contemporary scholarship.

Although this work cites a wide variety of sources, it draws upon four main literatures. First, I make heavy use of the literature in American political thought on federalism, particularly at the American founding. Second, I analyze American federalism in light of the theory of contestational constitutionalism described by, among others, Jeffrey Tulis (1980, 1988, 2010) and George Thomas (2008), which previously had been applied primarily to inter-branch separation of powers. No one else has attempted this task yet. Third, I apply the resulting analysis to the literature on the “safeguards of federalism,” which for the most part has been published by legal commentators in law reviews. Finally, I incorporate the insights from the

literature on international or comparative federalism into my analysis of American federalism. Overall, this work advances a normative argument regarding the proper organization of federalism without ignoring either its historical evolution or its contemporary operation.

In order to focus on contestation, this dissertation sidesteps important debates in the federalism literature. It does not discuss the specific allocation of powers to each level of government in any great detail. The economic effects of various kinds of federalism are treated cursorily. Most importantly, my theory is able to sidestep the landmine that is the question of state sovereignty. As chapter two makes clear, the contestation model rests on the commonplace and relatively noncontroversial view that, in the American regime, sovereignty lies with the people, who allocate power to two levels of government by means of a popularly ratified Constitution. There is space for contestation between the levels of government without deciding whether the states existed prior to the national government or vice versa, or whether the union is a compact of sovereign states versus the product of one national people. While all of these debates are important, the contestation model does not stand or fall based on the conclusion of any of them. I remain safely agnostic.

In sum, this dissertation proposes a novel means of maintaining the federal balance of power: contestation. Contestation over federalism offers the promise of producing a stable yet fluid division of power. Yet, as with any constitutional structure, it is intertwined with normative beliefs about government and constitutionalism. Contestation draws upon the view that dividing power is the best means to check it, that limited government is inherently desirable, and that decentralization is beneficial. While this dissertation makes some attempt to defend these claims, it also presupposes an audience favorable to strengthening federalism. Many readers will no doubt disagree with the normative premises underlying its argument, or with its concrete



application of these premises. If it does nothing else, this dissertation will promote debate over the large questions related to federalism. This work will be of interest to students of federalism, and will provide a useful template by which to evaluate the proper structure and safeguarding of federalism.

At this point, a general overview of the structure of this dissertation is in order. Chapter one surveys current scholarly opinion as to the most appropriate safeguard of federalism. The towering giant is judicial supremacy, which views the Supreme Court as the proper defender of federalism. Another group of commentators endorse the “political safeguards” of federalism, according to which various aspects of the political process ensure the protection of federalism absent judicial intervention. A third view, the informal safeguards view, holds that state can protect their interests informally through lobbying Congress and implementing federal laws. This chapter argues in detail that each of these methods of safeguarding federalism is inadequate.

Chapter two advances the contestational theory of federalism in detail. The source of federal stability must be found beyond the courts or the political party system. Drawing on the political theory of the American founding, it identifies the mechanism of constitutional contestation, or the wielding of formal “checks and balances” by opposing entities, as the proper means of arbitrating the federal boundary. Federalism comes to light as a species of the separation of powers, analogous to the division between the executive, legislative, and judicial branches of government. To borrow Madison’s famous phrase, “Ambition must be made to counteract ambition” in disputes over federalism just as in conflicts among the branches. In this scheme, contestation produces self-enforcing federal boundaries. After describing the theory in detail, chapter two charts its normative advantages. Contestation, I argue, elevates constitutional

discourse, preserves limited government, enables fluid but stable federal boundaries, and enhances popular sovereignty.

Chapter three deals with another aspect of contestational federalism at the American founding: the division of military power. It advances a largely novel interpretation of the Second Amendment which places two underappreciated concepts, contestation over federalism and auxiliary rights, at the center of its original meaning. It demonstrates that eighteenth century Americans viewed the right to keep and bear arms as an auxiliary right enabling the protection of more fundamental personal rights. Furthermore, the Second Amendment was ratified in response to Anti-Federalist concerns about the nationalization of military power in the new Constitution, which they feared would permit the federal government to oppress the people and destroy the power of the states. In response, Anti-Federalists sought to give states the means to contest and check oppressive federal activity—in extraordinary emergencies—with their own independent military power, a movement which eventually led to the Second Amendment. I argue that the amendment is best read jurisdictionally: it dealt with which level of government had authority to make firearms regulations rather than which regulations were acceptable. It was intended to maintain a balance of military power between the state and national governments by protecting the states' concurrent power to arm, organize, and train their citizen militias free from fears of federal disarmament. In contrast to reigning views that either permit or forbid gun regulation at both the federal and state levels, adopting this paradigm would prohibit all national firearms legislation but would also undermine support for incorporating the amendment against the states. Although the practicality of the founders' solution is questionable in the modern world, they produced a creative solution to the problem of divided sovereignty in federal republics that deserves to be incorporated into larger accounts of American federalism and contestation.

Chapter four recounts the origin and decline of contestational federalism since the founding, especially in light of the rise of the political party system. The first part of the chapter describes the original settlement regarding federalism as embodied in the U.S. Constitution. The founders presumed that there would be a natural antagonism and competition between the national and state governments, and sought to give each side means to influence the other. The founders argued that, despite the increase in federal power, state interests would be protected because states would retain the primary loyalties of the people, and because states would control the selection of national officeholders, particularly Senators. Thus, elections by both the people and state governments would naturally favor candidates supportive of state power. In the second and third sections, chapter two recounts the failure of these means of contestation. Section two documents how partisanship eroded the presumptively natural and eternal conflict between the two levels of government. With the rise of the political parties, the primary division of allegiances came to be along partisan, as opposed to institutional, lines, thus undermining contestation. State officeholders now have compelling incentives to compromise state power in order to ensure ideological victory, career advancement, and other goals. The third section evaluates the founders' claim that the states will retain their citizens' chief loyalty through an examination of Alexis de Tocqueville's analogous argument in *Democracy in America*. It finds that there are few reasons to believe that Americans have a deeper loyalty to their states than to the nation as a whole, and explains the various factors leading naturally to the erosion of state patriotism. Any attempted revitalization of contestation, chapter two concludes, must take the history and decline of contestation seriously.

Chapter five deals with two prominent objections to federalism. First, many argue that federalism harms individual rights, especially for minorities, by empowering local majorities to

enact unjust laws that could not succeed at the federal level. In response, chapter five argues that either level of government may pass unjust laws. After all, empowering local majorities also allows states to become leaders in protecting rights long before a national majority coalesces on the issue. I posit that the individual rights objection draws most of its strength from America's horrific experience with racism and segregation, which were entrenched in local majorities in the South. However, I argue that this experience was contingent and historical and for that reason does not apply well to federalism as such. Moreover, chapter four argues that the contestation model does not preclude judicial enforcement of individual rights, since individual rights are not proper subjects of contestation. The second objection states that federalism unleashes competition between the states, inducing a "race to the bottom" resulting in the under-provision of public goods. This chapter responds by surveying the empirical evidence on Race to the Bottom Theory, finding the evidence in its favor to be unpersuasive. Federalism does not appear to have led to a race to the bottom, and in fact many argue that it promotes economic and governmental efficiency.

Chapter six looks to the future, exploring what constitutional changes would be necessary to revitalize contestational federalism. In doing so, it acknowledges the very real damage done by partisanship to federal-state competition, which ought to temper expectations for the success of contestational federalism. However, chapter six discusses several reforms which might restore contestation over federal boundaries, evaluating each possibility on the basis of its feasibility, impact on other political processes, and likely results. While all options have downsides, I tentatively endorse the viability of a combination of several reforms. Although much of the material in this chapter is far from novel, these proposals are best viewed as invitations to further conversation rather than categorical plans for action.

# CHAPTER ONE: THE INADEQUATE SAFEGUARDS OF FEDERALISM

The next chapter presents the core of this dissertation: a comprehensive theory of how and why to structure and maintain federalism. But the need for a new theory presupposes that the old theories are insufficient. Such a view is far from self-evident, especially if the old theories are still quite popular—as indeed they are. This chapter attempts to cultivate a favorable audience for the novel theory set forth in this dissertation by analyzing the leading models of federalism adopted by contemporary scholars. The mechanism I call “contestation,” which lies at the heart of my theory, deals with the preservation of federalism over time. Thus, it is important to interact with the literature on the means by which the federal balance of power may be maintained—the so-called “safeguards of federalism.” This chapter critically examines the validity of each proposed safeguards of federalism, in each case, concluding that the safeguard in question contains serious flaws which render it an unreliable safeguard for state power. By revealing that the mutual recriminations of the partisans of each theory undermine each other, I demonstrate the inadequacies of reigning theories and the need for a new safeguard of federalism.

## The Debate on the Proper Safeguards of Federalism

There is significant disagreement on the question of the best safeguard of federalism. Most scholars support the “judicial safeguards of federalism,” according to which the Supreme Court should intervene to define and protect the federal boundary of power (Prakash and Yoo 2001; Marshall 1998). On this view, the court is seen as an impartial umpire capable of interpreting the text of the Constitution to find and enforce a proper distribution of power against both the political branches of the national government and the state governments. Advocates of

judicial safeguards argue that if the court did not intervene, the states would be powerless to prevent the centralization of power in the federal government.

By contrast, the so-called “political safeguards” thesis holds that a supervisory role for the courts is unnecessary because the political process adequately protects the rights of states. According to the original version of the “political safeguards of federalism,” the structure of the Constitution protects state and local interests by giving them a role in national political processes. In a path-breaking article, Herbert Wechsler (1954, 543–44) argued that the Constitution protected federalism by retaining the states as “sources of authority” and “organs of administration,” by giving states a role in the “composition and selection” of the national government, and by distributing authority so as to provide “some scope at least for the legal process of [federalism’s] enforcement.” For instance, congressional districts are attached to individual states, and senators represent their entire state. These factors render the states “the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics” (Wechsler 1954, 546). Wechsler (1954, 558) concluded that “the national political process in the United States ... is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.” His work prompted Jesse H. Choper (1977) to urge the Supreme Court to exercise judicial review on individual rights cases but not on behalf of structural concerns like federalism. Choper and his heirs reject judicial protections for state power on the grounds that the political process can be expected to allocate authority fairly without judicial intervention. The Supreme Court adopted this logic to limit judicial oversight of federalism in *Garcia v. San Antonio Metropolitan Transit Authority* (1985).<sup>6</sup>

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<sup>6</sup> *Garcia* held that Congress may, under the Commerce Clause, extend the provisions of the federal Fair Labor Standards Act, which regulated employment conditions and wages, to employees of state and local governments. In

Advocates of judicial safeguards have criticized the “double standard” whereby the Court determines federalism cases—but not other types of cases—to be non-justiciable. They assert that none of the justifications for it, such the claim that states can protect themselves politically, apply to federalism cases, and that the Court rules in other areas in which the participants arguably are protected by “political safeguards,” such as separation of powers and individual rights (Baker and Young 2001). Saikrishna Prakash and John Yoo assert that the founders anticipated judicial review and that no textual basis exists for shielding an entire subject area from it (Prakash and Yoo 2001, 1459–1523; c.f. Yoo 1997).

The political safeguards thesis has proven capable of adapting as well, spawning variations which seek to obviate criticisms of Wechsler. One view, which might be labelled the “partisan safeguards” thesis, holds that political parties serve to protect state power by forging links between state and national politicians. Riker (1964) famously argued that political parties were one of the few decentralizing features in American politics. “Riker suggests a number of reasons for party localism, including constitutional residency requirements for members of Congress and the power of the state legislatures to prescribe the manner of elections” (Volden 2004, 100; cf. Riker 1964, 91). Jenna Bednar (2009, 113-119) and Filippov et al. (2004, 203-05) have echoed Riker’s theory, but Larry Kramer provides the most comprehensive defense of the claim that parties give “state and local governments a powerful voice in national politics” (2000, 279). Kramer retains Wechsler’s “core insight” that the American political structure offers “states considerable protection from federal overreaching,” but argues that American federalism is safeguarded by “informal political institutions,” primarily political parties, rather than by Wechsler’s proposed mechanisms (2000, 219). Parties, he writes, assure “respect for state

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doing so, the Court ruled that the states did not require judicial protection from the federal government in part because they could protect their power through their representation in the structures of the federal government.

sovereignty” by linking “the fortunes of federal officeholders to state politicians and parties” (2000, 276). Historically, “decentralized” parties made “national officials politically dependent upon state and local party organizations,” fostering “a mutual dependency that induced federal lawmakers to defer to the desires of state officials and state parties” (Kramer 2000, 278). States are “the primary training ground for federal officials,” and former state officeholders “remain aware of and sympathetic to the concerns of state institutions” when in federal service (Kramer 2000, 285). Moreover, “labor-intensive” activities and “community contacts” required the help of local party leaders, who consequently obtained “enormous influence” (Kramer 2000, 280). As examples of successful party-led opposition to centralization, Kramer points to the Republican Party’s defeat of the Federalists and the Democratic Party’s elimination of the national bank in the 1830s.

John Nugent (2009) advances another variant of political safeguards, which may be called the “informal safeguards of federalism.” While conceding that “the Constitution specifies few formal means by which states can check the federal government,” he highlights the extraconstitutional and “informal powers and practices” states have developed to defend their jurisdiction, particularly lobbying and the implementation of national policy (Nugent 2009, 6). Substantial channels of communication and negotiation exist which give the states access and influence during the formation of federal laws. States also have substantial independent power to enforce (or under-enforce) and to interpret (or misinterpret) federal laws in ways favorable to their interests.

Bradford R. Clark has attempted to combine the judicial and political safeguards models. Clark (2001, 1324) argues that, because the “Supremacy Clause” limits the sources of legitimate law to the Constitution, formal treaties, and congressionally-enacted laws, it protects federalism



“by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism.” Clark accepts the validity of Wechsler’s political safeguards, yet insists that “[s]trict judicial enforcement of federal lawmaking procedure” is necessary to ensure that federal lawmaking takes place according to the procedures identified in the Supremacy Clause, which all incorporate political safeguards of state power (2001, 328). The primary alternatives to laws are administrative rules issued by the bureaucracy, non-treaty agreements exempt from the need for approval by the Senate, and federal common law developed by federal judges. None of these, Clark argues, are susceptible to state influence, and thus they favor centralization. The Court’s role, Clark insists, is not to protect states directly, but to establish a procedural groundwork within which states protect themselves against federal intrusion through the policymaking process.

This chapter assesses the validity of each of these safeguards. Although each likely provides some protection, all of them fail to safeguard federalism sufficiently. The following sections will argue that most of the literature on the value, structure, and safeguards of federalism contains invalid assumptions, incorrect facts, or faulty reasoning. This deficiency is seen most clearly in the failure of American jurisprudence to articulate a coherent legal theory as to the proper structure and safeguards of federalism. The attacks of each side usually have merit, but their aggregate effect is only to mutually undermine each other. The contestation model of federalism draws upon many of the arguments presented above, yet it pursues an independent course that avoids the criticisms leveled against conventional safeguards theories and attempts to correct their defects.

## The Inadequacy of the Judicial Safeguards of Federalism

It is fitting to begin with the “judicial safeguards” theory, whereby courts police federalism, given the enormous role the court has played in this dispute as well as the prevailing opinion in favor of this view. This section details the history of federalism jurisprudence in the United States, with a focus on the Supreme Court’s failed attempt to find an appropriate dividing line between state and national jurisdiction. The basic argument is that the Supreme Court, despite an attachment to federalism in theory, has been unable to adjudicate federal boundaries in an adequately clear, consistent, or rational manner. The Court has proffered a number of legal distinctions to discern the line between the state and national government, but each rule has proved to be difficult or impossible to elucidate and has failed to divide power in a fully satisfactory way. The Court has repeatedly found it necessary to abandon or substantially weaken the legal limits on federal power, yet apparently without wishing to undermine federalism itself. The failure of judicial safeguards ought to clear the ground for the reinterpretation of the safeguards of federalism proposed in later chapters.

This failure stems from a variety of factors. The basic problem is the seamless nature of the American economy, which is interconnected to such an extent that identifying definitively “local” or “state” and “national” objects of legislation is highly problematic. Almost anything can be considered “local,” and almost anything can be considered “national”—especially since, in the aggregate, even the most innocuous actions can have substantial effects on the national economy. Moreover, the judiciary is far from the impartial umpire envisioned by the American founders. As partisan actors, judges are ill-suited to safeguard federalism reliably or fairly. None of this means that the notion of judicial limits on the national government is absurd on its face, or that credible arguments cannot be advanced regarding the proper limit of federal or state power.

Many scholars, in fact, do make reasoned and even persuasive arguments along these lines. Yet, due to the problems identified in this section, such arguments are always going to be incapable of persuading doubters or creating unanimity without appealing to principles outside the constitutional text, rendering the judicial adjudication of federalism problematic at best.

### **The Constitutional Foundation of American Federalism**

Before discussing the jurisprudence of federalism, it will be helpful to outline the structure of federalism in the U.S. Constitution. Several constitutional provisions relate directly to federalism. The most important, the Supremacy Clause, declares that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” (U.S. Const., Art. VI). Without this clause it would be impossible to resolve conflicts arising from incompatible state and federal laws. Given that member states in a federal union must have some common laws, the only body capable of providing this unanimity is the federal government. Another prominent federalism provision, the Tenth Amendment, reads: “All powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people.” The Tenth Amendment articulates the so-called “enumerated powers” doctrine, which has become a “part of American constitutional orthodoxy” (Storing 1981, 65). According to this doctrine, which goes back to the founding era, the federal government has only those powers given to it by the Constitution, and thus must defend every exercise of power with reference to the constitutional text. During the ratification, in response to those claiming that the new Constitution would produce a consolidation of all powers in the national government, James Madison writes that the “jurisdiction” of the national government

“extends to certain enumerated objects only, and leaves to the states a residuary and inviolable sovereignty over all other objects” (*FP* 39:210). The powers of the national government, he states, are “few and defined” while those of the states are “numerous and indefinite” (*FP* 45: 292; see also Sheehan and McDowell 1998, 102-03).

Collectively, the Supremacy Clause and the Tenth Amendment establish the basic structure of federalism. The federal government may exercise only those powers enumerated in the Constitution, whereas all other powers may be exercised by the states, but within its proper jurisdiction, federal law is supreme over state law. Yet neither of these provisions really settle the matter. Both raise the question of exactly which laws are made “in Pursuance” of the Constitution and which are not: neither provision can limit federal or state power without an understanding of the scope of the federal government’s delegated authority—a topic on which they remain stubbornly silent. Thus, an understanding of the constitutional provisions relevant to federalism is necessary as a preparation for analyzing the structure of the American federal union.<sup>7</sup>

At first it might seem that a simple perusal of the powers granted to the federal government would be sufficient to determine the limits of its power. Yet, while federal supremacy is usually uncontroversial, there are several controversial clauses relevant to federalism.<sup>8</sup> The foremost of these is the Commerce Clause, which reads: “[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes” (U.S. Const., Art. 1, Sec. 8). The Commerce Clause was designed to

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<sup>7</sup> One set of clauses, the militia clauses, will go undiscussed for now but will reappear in chapter three.

<sup>8</sup> Examples of uncontroversial federal powers include, among others, the power to establish naturalization rules for immigration, to coin money and regulate its value, to establish post offices, to make and enforce copyright law, to punish piracy, to raise and maintain armies and navies (U.S. Const., Art. 1, Sec. 8). These grants of power have seldom attracted commentary because their text and context seem relatively clear, and because in most of these areas the need for national unity is obvious.

integrate the new nation economically by empowering Congress to overrule state laws favoring local commerce or discriminating against out-of-state actors. Another problematic constitutional provision is the Necessary and Proper Clause. This clause states that “Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States” (U.S. Const., Art. 1, Sec. 8). At first glance, the unrestricted sweep of this clause threatens to expand federal power beyond all bounds. Yet, at the founding, Federalists treated it as a axiomatic truism that did not expand congressional power indefinitely (*FP* #44). After all, the grant of power extends only to those means “necessary and proper” to the execution of Congress’s other powers.

The legal argument revolves around several major questions. What is “commerce”? And whatever one’s definition, what is commerce “among the several States” in particular? Also, what do “necessary” and “proper” mean, and in what ways does the Necessary and Proper Clause expand federal power? True to the ambiguous nature of the federal divide, historically much has depended on how various bodies—most notably the Supreme Court—have interpreted the terms of these constitutional provisions. Different interpretive schemes have huge impacts on the scope of federal versus state power. It is that task, or rather the failure of the task to provide an adequate jurisprudence of federalism, to which we now turn.

### **The Distinction Between Internal and External Commerce**

The history of federalism jurisprudence centers on the Commerce Clause. The first landmark case here is *Gibbons v. Ogden* (1824), in which John Marshall, writing for the Supreme Court, first defines the meaning of the Commerce Clause. Marshall asserts that Congress’s power over inter-state commerce is exclusive: Congress alone may regulate such commerce, not

the states. Moreover, he writes, “commerce” means not only “traffic” but also “the commercial intercourse between nations, and parts of nations” (22 U.S. 1, at 189-90). While this definition is quite broad, he clearly believes that some categories of commerce must fall outside the Commerce Clause, since an “enumeration presupposes something not enumerated” (22 U.S. 1, at 195). In *Gibbons*, Marshall offers two criteria to define what was not enumerated and thus left to the states. Each will be addressed in turn.

The first distinction Marshall makes in *Gibbons* is between “external” and “internal” commerce. The former, he declares, falls within Congress’s jurisdiction, while the latter must be regulated by the states. External commerce “concerns more States than one”—it is truly commerce “among” the states (22 U.S. 194). Internal commerce encompasses commercial activities “which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government” (22 U.S. 195). Although the Commerce Clause power, to be effectual, “cannot stop at the external boundary line of each State, but may be introduced into the interior,” it does not comprehend “completely internal” commerce “which does not extend to or affect other States” (22 U.S. 1, at 194). This broad definition raises the thorny question of what it means for commerce to “extend to” or “affect” other states, but otherwise seems plausible. It turns on what happens to commerce, its destination: interstate commerce crosses state lines, whereas in-state commerce is “completely internal.”

The internal/external distinction is susceptible to criticism. All objects of commerce, both imports and exports, spend time either internal or external to any state. As Greve (2012, 99) notes, “*the first and last leg of any interstate commercial transaction—the departure and docking of a ferry, the formation and execution of a contract, the sale of interstate goods at auction—must*

*of needs be local events.*”<sup>9</sup> Blocking the local events usually thwarts the entire transaction. Thus, federal power must of necessity extend to “local” events that do not appear by themselves to involve interstate commerce. Given the great variety of such events, at what point does all commerce become “external”?

The so-called “original package” doctrine, also articulated by Marshall, represents a further refinement of the internal/external distinction. In *Brown v. Maryland* (1827), John Marshall’s majority opinion ruled that a Maryland license tax on wholesalers of out-of-state goods constituted an unconstitutional impost duty on imports (cf. U.S. Const., Art. 1, Sec. 10). Although the states’ legitimate power to tax and the improper tax on imports may, “like the intervening colors between white and black, approach so nearly as to perplex the understanding,” Marshall nevertheless declared that a “distinction exists” (25 U.S. 419, at 441). More specifically, he ruled that imported goods in their “original form or package” cannot be taxed by the states, but once opened they “become incorporated with the general mass of property” in the state and may be taxed and regulated as such (25 U.S. 419, at 442-43).

Once again, Marshall’s position proved troublesome to apply in practice. The “original package” doctrine is widely perceived by scholars as “obviously ludicrous” (Greve 2012, 106), criticism as old as Justice Thompson’s dissent in the case. He castigated Marshall’s logic, arguing that the distinction between taxing goods on first arrival and taxing them thereafter, as well as the distinction between selling wholesale and retail, not only fails conceptually but does not even serve the purpose sought by the Court. If a state can tax an imported item at any stage in

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<sup>9</sup> This chapter relies heavily on Michael Greve’s analysis of federalism in *The Upside Down Constitution* (2012), but Greve’s commitments differ somewhat from mine. He is a libertarian committed to a “competitive federalism” in which states are forced to compete against each other. His primary fear is that states will band together to persuade Congress to pass legislation dampening competition between the states (“cartel federalism”). His legal analysis of federalism jurisprudence, however, is well-researched and persuasive.

the process—even after the item has left its original package—it can affect the willingness of merchants to import it (25 U.S. 419, at 455). If a state’s beer brewers, for instance, fear competition from imported wine, the state may impose a sales tax on wine to dampen consumption of it. Thus, “nothing short of a total exemption from state charges or taxes, under all circumstances, will answer the supposed object of the Constitution. And to push the principle to such lengths would be a restriction upon state authority not warranted by the Constitution” (25 U.S. 419, at 455). Moreover, it would prevent states from exercising their indisputable police power to restrict “infectious and noxious goods” (25 U.S. 419, at 457).

Largely for these reasons, the Court later abandoned the original package doctrine. *Welton v. Missouri* (1875) struck down a Missouri license tax on peddlers of out-of-state goods on the grounds that “[a] license tax required for the sale of goods is in effect a tax upon the goods themselves” (91 U.S. 275), even though the articles in question had long been removed from their original package. As such, the tax conflicted with Congress’s power to regulate interstate commerce, the purpose of which was to defeat “discriminating state legislation” (91 U.S. 275). To be effectual, the states must be prohibited from enacting “hostile or interfering legislation” against imported property “until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection,” which often occurs long after the original package has been removed (91 U.S. 281). In fact, this protection logically must extend to “final retails” (Greve 2012, 131).

A number of other cases, by forcing the Supreme Court to specify the distinction between internal and external commerce, revealed the difficulty of determining the limits of federal power. In *Paul v. Virginia* (1869), the Court held that issuing an insurance policy “is not a transaction of commerce,” even if the parties are “domiciled in different States,” because such



policies are “not subjects of trade,” cannot be “shipped ... from one State to another,” and have no “value independent of the parties to them” (75 U.S. 183). However, in *United States v. Southeastern Underwriters’ Ass’n* (1944) the Court held that insurance is commerce because the insurance business involved numerous “transactions” which “constituted a single continuous chain of events, many of which were multistate in character, and none of which ... could possibly have been continued but for that part of them which moved back and forth across state lines” (322 U.S. 537). Despite the fact that many of these activities “might, if conceptually separated from that from which they are inseparable, be regarded as wholly local,” the interconnected nature of economic activity entailed that no clear distinction could be made between “external” and “internal” actions (322 U.S. 537ff). Likewise, in *Atlantic Coast Line R. Co. v. Wharton* (203 U.S. 328, 1907), the Court ruled that state laws mandating that interstate trains stop at local transportation facilities—seemingly an “internal” regulation—violated the Commerce Clause, on the grounds that sufficient transportation facilities already existed and thus that the regulation unnecessarily hindered interstate commerce.

Such considerations eventually induced the Court to abandon the distinction between “internal” and “external” commerce altogether. In the name of federalism, the Court sought a natural boundary of national power, because without a limitation on the scope of interstate commerce the states risk becoming redundant and lifeless. “The flaw is that any stopping point will produce sharp discontinuities. ... Regardless of where one draws the line, it will crumble under the weight of incessant litigation and clever attempts at evasion” (Greve 2012, 106). No single stopping point prevents states from discriminating against out-of-state commerce without infringing on states’ legitimate powers. It seems as if the interconnected American economy cannot be dissected into discrete parts.

## **The Distinction Between Police Power and Commercial Regulations**

In addition to distinguishing “internal” and “external” commerce, *Gibbons* also distinguished between two categories of regulatory activity: commercial regulations and police power regulations. Among the powers reserved to the states, Marshall wrote, are so-called “police power,” including “Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c.” (22 U.S. 1, at 203). Although such laws may “have a remote and considerable influence on commerce,” they are exempt from federal regulation because they relate primarily to public health and safety, not commerce (22 U.S. 1, at 203). Their intent is not to discriminate against out-of-state merchants, but to protect the citizens of the state from legitimate dangers. In this distinction, the purpose or aim of the law determines its constitutional status. If a state law has sufficient justification as a means to promote the health or safety of the population, then it passes constitutional muster—even if it affects interstate commerce.

Once again, this standard is intelligible yet difficult to maintain in practice. As Michael Greve (2012, 98) notes, both distinctions in *Gibbons* “are indispensable at a conceptual level but all too often fail at the empirical, descriptive level.” The central problem here is that almost any exertion of the police power will have some effect, often quite large, on interstate commerce. Marshall concedes as much by acknowledging that state laws based on police power and federal laws based on the Commerce Clause “would often be of the same description, and might sometimes interfere” (22 U.S. 1, at 204-05). In such cases, he declares, states may enact regulations only so far as allowed by the federal government, but as soon as Congress acts, conflicting state laws are displaced due to the Supremacy Clause (22 U.S. 1, at 207-211). But if nearly everything can be considered either a regulation of commerce or an exercise of police

power, then what is to prevent federal laws from displacing state laws across the board? The Constitution's text, as written, provides little guidance in resolving these conflicts.

In many cases, purported instances of police power regulation can serve as cover for partial laws that privilege in-state actors or interest groups. The difficulty lies in “arresting factionalism at the state borders while protecting legitimate instances of state autonomy against federal overreach” (Greve 2012, 100). While “there must be *some* meaningful distinction between a legitimate state policy objective and protectionism in disguise,” very often the categories “do not refer to physically separate sets of activities” but to “the *same* activities under different descriptions” (Greve 2012, 98). For instance, in *City of New York v. Miln* (1837), the Court upheld a state law requiring ships coming into New York to provide a passenger roster and to post bail against their passengers becoming charges of the city's government. The regulation in question could be viewed either as an instance of police power, or as an attempt to make ship captains wary of transporting destitute or diseased passengers, and thus a *de facto* tariff on interstate commerce or migration. Accordingly, the *Passenger Cases* (1849) ruled that a tax on ships entering New York and Boston harbors which had been used to fund a marine hospital and boys reformatory—both impeccable instances of police power—constituted an unconstitutional tax on immigration.

Whereas the discriminatory intent seems clear in this case, there are hard cases in which a law with strong police powers justification are also regulations on interstate commerce. A good example is *Minnesota v. Barber* (1890), which overturned a Minnesota law requiring that cattle be inspected locally before being slaughtered. Given the very real possibility of tainted meat, this regulation is sensible and ordinarily would fall under the state's police powers. However, due to the difficulty of transporting live cattle across the country to be inspected locally, the regulation

amounted to a prohibition on the importation of meat slaughtered outside of Minnesota, even meat fit for consumption. The Court suspected that preventing such importation was the true motive for the law. Greve writes that “the meat-packing cases exposed the dichotomy between interstate commerce and state health and safety regulation ... as untenable. ... The Court continued to employ the language of ‘interstate commerce’ and ‘police powers,’ but it did so for purposes of analysis rather than segregation. It treated interstate commerce as an integrated system and then stacked up the interest in protecting that system against the states’ police power rationales” (Greve 2012, 131). In practice, it is not so easy to partition legislation into regulations on commerce and exercises of police power.

The refinement of the police power/commerce distinction in *Cooley v. Board of Wardens* (1851) fared no better. *Cooley* dealt with a law requiring ships entering the Philadelphia harbor to hire a local pilot or pay a fee. Although the law clearly favored local economic interests, the state claimed that local knowledge was needed to safely navigate the harbor, making the law a valid exercise of police power. The Court ruled that the law “is an appropriate part of a general system of regulations on the subject of pilotage, and cannot be considered as a covert attempt to legislate upon another subject under the appearance of legislating on this one” (53 U.S. 299). While acknowledging that pilotage relates to commerce, the Court held that only subjects that “are in their nature national, or admit only of one uniform system or plan of regulation, ... require exclusive legislation by Congress” (53 U.S. at 319). However, the national uniformity test, in addition to being “widely criticized as arbitrary and incoherent,” is “grossly underinclusive,” unable to prevent many instances of “protectionism and exploitation” (Greve 2012, 106-07). Surely, state regulations often impede interstate commerce without requiring a uniform national

system. It seems that the *Cooley* test cannot, by itself, settle the outer limits of the Commerce Clause power, and in fact has been abandoned by the Court.

### **Commerce Versus Manufacturing, Mining, and Agriculture**

In the decades between the Civil War and the New Deal, the Court expounded innovative doctrines to regulate the Commerce Clause, only to see them fail due to the intricacies of the modern economy. One involved a “subject matter” distinction between the subject of “commerce” and conceptually distinct activities such as “manufacturing,” “mining,” and “agriculture.” According to this logic, only interstate “commerce” proper was subject to federal jurisdiction, leaving regulation of other categories (e.g. factories, mines, and farms) to the states.

In *Kidd v. Pearson* (1888), the Court upheld an Iowa law forbidding the manufacturing of alcoholic beverages. Even though the goods in question were intended for the interstate market, the Court touted the “distinction ... between manufactures and commerce:” manufacture is “the fashioning of raw materials into a change of form for use,” whereas “buying and selling and the transportation incidental thereto constitute commerce” (128 U.S. 20). The Court argued that if regulating commerce “includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing” (128 U.S. 21). Such a power, the Court argued, would extend congressional power inappropriately into the details of local circumstances, eviscerate the police power of the states. It would invest Congress exclusively “with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate ... an interstate or foreign market?” (128 U.S. 21).

The Court also deployed the subject matter distinction in *United States v. E.C. Knight Co.* (1895). The court overruled federal action against an alleged monopoly on sugar refining on the grounds that manufacturing is distinct from commerce. The opinion declares that, while taking action to control the manufacture of a product may bring “the operation of commerce into play, it ... affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it” (156 U.S. 12). In other words, the federal power to regulate commerce kicks in only once the sugar has been refined and is on the market, because “[t]he fact that an article is manufactured for export to another state does not, of itself, make it an article of interstate commerce” (156 U.S. 13). The Court appealed to federalist principles to uphold the distinction between “the commercial power” and “the police power.” “while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government” (156 U.S. 13). Like *Kidd v. Pearson* (1888), *Knight Co.* warned of the “far-reaching” implications of a national power to regulate an activity “whenever interstate or international commerce may be ultimately affected” by it (156 U.S. 13).

In a similar way, *Hammer v. Dagenhart* (1918) overturned the Keating-Owen Child Labor Act of 1916, which restricted the interstate buying and selling of goods made with child labor. The Court argued that Congress cannot regulate child labor because “[t]he making of goods and the mining of coal are not commerce,” even if “these things are to be afterwards shipped or used in interstate commerce” (247 U.S. 251, at 272). Congress may only prohibit the interstate shipment of inherently objectionable articles of commerce, such as lottery tickets or prostitutes. Because, in the Keating-Owen Law, only the labor conditions were objectionable, the Court reasoned that it was really intended to regulate the conditions and not the goods themselves. The Court warned that “if Congress can thus regulate matters entrusted to local

authority by prohibition of the movement of commodities in interstate commerce, ... the power of the States over local matters may be eliminated, and, thus, our system of government be practically destroyed” (247 U.S. 251, at 276). In response to complaints that the lack of a national standard put states that regulated child labor at a competitive disadvantage in relation to unregulated states, the Court answered that the Commerce Clause “was not intended to give to Congress a general authority to equalize such conditions” or “to control the states in their exercise of the police power” (247 U.S. 251, at 273-74).

Despite its prominence over several decades, the subject-matter distinction suffered the same flaw as previous ones: federal regulation is either prohibited in cases where it is necessary or permitted where it is not necessary. *E.C. Knight Co.* made it nearly impossible to obstruct monopolies in manufacturing. Individual states cannot obstruct out-of-state monopolies given that they are forbidden from discriminating against out-of-state goods (by the dormant Commerce Clause and Art. 1, Sec. 10 of the U.S. Constitution).<sup>10</sup> Similarly, it is possible that *Hammer* undermined state efforts to regulate child labor.<sup>11</sup> Moreover, the subject matter distinction creates “sharp continuities” between “industries that are wholly immune from state regulation” those that are not (Greve 2012, 130). A (local) manufacturer of steam engines may be regulated differently than an (interstate) railroad, and unregulated out-of-state actors operate at a competitive advantage with respect to local businesses subject to state regulation.

A first step in the demise of the manufacturing/commerce distinction was *Northern Securities Co. v. United States* (1904). The Court argued that the Sherman Antitrust Act prohibited anything that “tends to restrain” or “tends to create a monopoly in” interstate trade or

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<sup>10</sup> The Dormant Commerce Clause refers to the longstanding doctrine that the Commerce Clause restricts states from unduly discriminating against or interfering with interstate commerce. In other words, the power to regulate interstate commerce is wholly or partly an exclusive federal power.

<sup>11</sup> But see Greve (2012, 186-88), who denies that the lack of federal regulation induced a “race to the bottom.”

commerce (193 U.S. 197, at 332). At the behest of the Roosevelt administration, the Court interpreted this mandate in broad terms, yet still maintained limits on the commerce power (Thomas 2008, 75-76). However, Justice Oliver Wendell Holmes Jr., in his dissent, warned that, according to “the logic of the argument for the Government,” there seems to be no part of life “with which on similar principles Congress might not interfere” (193 U.S. 197, at 402-03). It is not necessary to follow Holmes so far, but his dissent makes a forceful case that a wide variety of activities could “tend to restrain” interstate commerce.

*Swift & Co. v. United States* (1905) continued the demise of the subject-matter distinction. At issue was a “Beef Trust,” a combination of the nation’s leading meatpackers to suppress competition, fix prices, extract sweetheart deals from railroads, and blacklist noncompliant actors. Meatpacking is seemingly a “local” activity related not to commerce but to production—and thus, under the logic of *E.C. Knight Co.*, susceptible to monopolization. However, the process of selling beef involves both interstate and intrastate sub-processes, and the Court ruled that these categories of activities cannot be separated conceptually. Thus, the “scheme as a whole” is “within the reach of the law” because the “several acts” involved, though “lawful” in isolation, “are bound together as the parts of a single plan” (196 U.S. 396). Even if the meat from the slaughtered cattle is sold locally, the Court reasoned, the entire process constitutes a flow or interconnected chain of commerce bringing the slaughter and sale under federal jurisdiction. Moreover, the monopoly’s “effect upon commerce among the States is not accidental, secondary, remote or merely probable,” but substantial (196 U.S. 397). *Swift & Co.* highlighted the difficulty of cabining certain activities as “internal” or “external,” as “commerce” or “manufacturing.”



## Direct Versus Indirect Effects on Commerce

Yet another legal test to determine the extent of the Commerce Clause considered whether an activity had a “direct” or “indirect” effect on interstate commerce. In *A.L.A. Schechter Poultry Corp. v. United States* (1935), the Court unanimously held that part of the National Industrial Recovery Act of 1933 exceeded federal authority because the regulated activities (wages, hours, etc.) affected interstate commerce only indirectly and tangentially. According to the Court, “the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise ... there would be virtually no limit to the federal power, and, for all practical purposes, we should have a completely centralized government” (295 U.S. 548). As in previous cases, the justices relied on fears that *some* distinction or other is necessary to protect the federalist sandcastle from the inexorable tides of national regulation.

Yet shortly after *Schechter Poultry*, the Supreme Court promptly reversed course, partly in response to political pressure from President Roosevelt. In *NLRB v. Jones & Laughlin Steel Corp* (1937), the Court upheld the constitutionality of the National Labor Relations Board, ruling that “[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions, Congress has the power to exercise that control” (301 U.S. 1, at 2). Such activities include anything related to “productive industry,” such as labor disputes, thus dismantling the distinction between manufacturing and commerce (301 U.S. 1, at 2).<sup>12</sup> As with the subject matter distinction, the economy appeared to

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<sup>12</sup> However, the Court still acknowledged a distinction between local and national concerns (301 U.S. 1, at 30).

be too interconnected to permit a reliable calculation of “direct” versus “indirect” effects on interstate commerce.

Likewise, in *United States v. Darby* (1941), the Court upheld the Fair Labor Standards Act, which restricted the interstate shipment of goods produced under certain employment conditions and wage rates. It did not matter that the intention of the act was to regulate labor conditions and wages rather than the purchase or transportation of products across state lines. “The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction” (312 U.S. 100). *Darby* reiterated that the Court would no longer draw distinctions between “direct” and “indirect” influence on interstate commerce, or between “production” and “transport” of goods (312 U.S. 100, at 120, 124). The only requirement is that regulated activities must “have a substantial effect on interstate commerce” (312 U.S. 100, at 119).

Even this restriction would soon come to mean very little. *Wickard v. Filburn* (1942) defined the concept of a “substantial effect” on interstate commerce so as to give the widest possible latitude to congressional power. The Court ruled that even wheat both grown and consumed on a single farm may be regulated by the federal government, despite the fact that this activity only affected interstate commerce tangentially and indirectly. In *Filburn*, the federal government argued that the legislation under question was necessary to stabilize the price of wheat on the national market—if Wickard had not grown his own wheat, he would have bought it on the open market, raising its price. It made no difference that the individual impact of Wickard’s action had a miniscule effect on the price, the Court declared, because even local activities, in the aggregate, substantially affect the national economy (317 U.S. 111, at 127-28). *Wickard* effectively completed the removal of limits on federal power over interstate commerce.

## The Tenth Amendment

Although the Tenth Amendment would seem to relate strongly to federalism, the Court typically treats it as a nullity. “The Tenth Amendment,” *United States v. Sprague* (1931) declares, “added nothing to the Constitution as originally ratified, and lends no support to the contention that the people did not delegate [a particular] power to Congress” (282 U.S. 716). In *United States v. Darby* (1941), the Court declared the amendment to be “but a truism that all is retained which has not been surrendered,” a mere “declaratory” provision reaffirming “the relationship between the national and state governments as it had been established by the Constitution” (312 U.S. 124). As such, it has rarely been used to limit the power of the national government.

One of the only exceptions is *Erie Railroad Co. v. Tompkins* (1938). In *Erie*, the Court invalidated federal common law, overturning a century of federal case law, on the grounds that it violated the rights reserved to the states under the Tenth Amendment. After *Erie*, federal courts had to rely on state common law when hearing diversity cases (i.e. cases involving persons from different states or jurisdictions). In subsequent rulings, the Court has further restricted federal judicial power.<sup>13</sup> Though such rulings seemingly contradict the Court’s more usual approach, even a nationalist New Deal Court, it seems, was unwilling to leave federalism entirely undefended. The upshot is that the Tenth Amendment limits only federal judicial power, not legislative power.

For many decades following the New Deal, the Court declared a law unconstitutional under the Tenth Amendment only once, and even then soon reversed the ruling after it proved theoretically incoherent and impossible to implement. In *National League of Cities v. Usery* (1976), the Court overturned a federal law establishing a minimum wage for employees of state

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<sup>13</sup> *Younger v. Harris* (1971); *Alden v. Maine* (1999).

and local governments, ruling, in Chemerinsky's (2008, 23) words, "that Congress could not regulate states in areas of 'traditional' or 'integral' state responsibility." However, despite venturing a four-part test to determine which state responsibilities were off-limits in *Hodel v. Virginia* (1981), this decision was overturned in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) on the grounds that the distinction between integral and non-integral, and between traditional and nontraditional, state responsibilities could not be determined. It seems that the Tenth Amendment is incapable, on its own, of producing a theoretically coherent jurisprudence of federalism.

### **The Outcome of the New Deal: Cooperative Federalism**

According to New Deal jurisprudence, any attempt to discern real limits on federal power faces numerous obstacles. In fact, during the fifty years following 1935, no federal laws were declared to be unconstitutional for exceeding federal power under the Commerce Clause or other federalism reasons.<sup>14</sup> The Court extended the meaning of "commerce" and "affect" until virtually no distinct sphere of legislation was left to the states exclusively (cf. Chemerinsky 2008, 16-17). The end result was that the original conception of "dual federalism," according to which the state and federal governments have strictly defined and separated spheres, made way for a more flexible "cooperative federalism." The doctrine of enumerated powers has been weakened. Under cooperative federalism, the state and federal government share responsibility for most areas of legislation. Apart from the Bill of Rights, few judicial limitations on federal power remain.

It should be noted that the expansion of the Commerce Clause, by undermining the doctrines of "exclusivity" and the "dormant" Commerce Clause, led to a parallel—though

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<sup>14</sup> The exception is *National League of Cities* (1976), which, as already noted, was later overruled.

lesser—expansion of state power. The idea of a “dormant” or “negative” Commerce Clause holds that the Constitution’s grant of authority to Congress to regulate interstate commerce implies a corresponding restriction on state power in that area. In other words, Congress has “exclusive” authority to regulate interstate commerce. Although exclusivity was widely accepted in the nineteenth century—it was endorsed in *Gibbons*—it has since been largely abandoned (Greve 2012, 104). Prior to the New Deal, the Court held that the commerce clause permitted only a fairly narrow range of legislation, but that within that range congressional power was exclusive and automatically displaced state laws, “regardless of whether state law conflicts with federal law, and regardless of whether Congress had intended wholesale preemption” (Greve 2012, 209). However, as the extent of federal power under the Commerce Clause grew during and after the New Deal, the Court rejected exclusivity in favor of the doctrine of preemption, which holds that both governments may regulate in the same areas with the understanding that federal laws supersede conflicting state laws. Because federal laws are no longer exclusive, states are free to pass legislation in any area so long as there is no conflict with a federal law. True, states must accept the federal minimum—such as a minimum wage—in these areas, but may enact regulations in excess of the federal standard.

The Court’s decision to discard exclusivity and to expand the Commerce Clause power are related. Stephen Gardbaum (2007) argues that the “breadth” and “depth” of the Commerce Clause exist in an inverse relationship. If the federal government has the exclusive power to regulate commerce (depth), then it cannot also have wide latitude to make economic regulations (breadth), or else the states will be deprived of power to pass any laws at all. After all, “as the scope of ‘commerce among the states’ expands, the states’ power to govern their own affairs diminishes” (Greve 2012, 104). As federal power grew, “adherence to latent exclusivity

threatened a wholesale collapse into the center” (Greve 2012, 209). This is true especially if, as *Cooley v. Board of Wardens* (1851) states, “certainly Congress cannot re-grant” or “re-convey” any regulatory power to the states (53 U.S. 299, at 318). “In the end, the Court concluded that the commerce power is concurrent over virtually its entire range” (Greve 2012, 108), and adopted a presumption against the preemption of state laws by federal law (Gardbaum 2007).

Although political and ideological considerations were certainly important in the demise of dual federalism, it can be interpreted as a rational judicial response to the difficulty of finding coherent, workable legal doctrines regarding federalism. The American constitutional system is premised upon the idea that the nation ought to be one vast zone of commercial enterprise, unimpeded by laws favoring any particular region. In such an environment, commercial transactions cannot be cabined definitively as “local” or “national,” because every action has effects on the larger economy. In the aggregate, even thoroughly “personal” actions can affect interstate commerce. The logic here is hard to dismiss, but such arguments hardly amount to a meaningful philosophy capable of attaining the ends for which federalism was instituted.

### **The Federalism Revolution and Its Critics**

The New Deal is not the final word on the jurisprudence of federalism. In recent decades, the Supreme Court has revived constitutional limits on the federal government in the name of protecting state power, a trends which has been labelled the “Federalism Revolution.” The Federalism Revolution grew out of a very real problem exposed by the Court’s federalism rulings: if nothing is forbidden to the federal government, then nothing is reserved exclusively to the states. The seamless nature of the American economy creates a catch-22 for federalism jurisprudence. If Congress may not regulate commercial (or other) activity unless it crosses state borders, then it might be prevented from addressing problems that federal authority was designed

to prevent. On the other hand, if Congress may regulate anything affecting interstate commerce, then its powers are essentially unlimited, and autonomous state power is done for. Many consider this latter option to be both normatively wrong and utterly divergent from what most Americans thought they were creating in 1789. *Some* limits on federal power, critics argue, surely must exist, or what was the point of the doctrine of enumerated powers in the first place?

The primary cases of the Federalism Revolution, *United States v. Lopez* (1995) and *United States v. Morrison* (2000) , inaugurated a clear decentralist trend by reasserting limits on Congressional authority. In *Lopez* the Court ruled that the Gun-Free School Zones Act, which prohibited possession of a gun near schools, exceeded the federal government’s power under the Commerce Clause. To justify its decision, the Court appealed to the “constitutionally mandated division of authority” and asserted that “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front” (514 U.S. 552). *Morrison* ruled that the section of the Violence Against Women Act of 1994 giving victims of gender-motivated violence the right to sue in federal courts exceeded federal authority under the Commerce Clause. It also declared that the Fourteenth Amendment does not permit congressional supervision of gender-motivated violence by individuals, because “the Amendment prohibits only state action, not private conduct,” and the section of the Act in question “is directed not at a State or state actor but at individuals” (529 U.S. 598, at 599-600).

The opinions in *Lopez* and *Morrison* both held that the distinction between economic and noneconomic activity is central to the meaning of the Commerce Clause. The majority in *Lopez* conceded that Congress may regulate activities substantially affecting interstate commerce, but concluded that “the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce,”

nor is it a crucial piece of “a larger regulation of economic activity” (514 U.S. 549, at 549). *Morrison* declared that “gender-motivated crimes of violence are not, in any sense, economic activity” (529 U.S. 598). By leaving federal jurisdiction over truly economic subjects intact, these cases did not repudiate the core elements of *NLRB* (1937) or *Darby* (1941). However, the novel distinction between “economic” and “noneconomic” activity represents the first attempt in decades to determine what, if anything, falls afoul of the Commerce Clause.

To defend the distinction between economic and non-economic activity, both cases reasoned that, unless there are -some limits under the Commerce Clause, federal power is unrestricted and federalism is dead. The petitioners in *Lopez* had argued that keeping guns away from schools would improve the national economy by checking violent crime. The Court replied that according to this interpretation

Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. ... Similarly, ... Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law ... for example. Under the theories that the Government presents ... it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate. (519 U.S. 549, at 564)

Similarly, the majority opinion in *Morrison* rejected the petitioner's claim that stamping out gender-motivated violence would improve the national economy:

If accepted, this reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption. Moreover, such reasoning ... may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central Government, than the suppression of violent crime. (529 U.S. 599)



The Court did not deny that the activities in question had economic effects, instead arguing that a limit on federal power must exist somewhere simply because the Constitution requires one.

A second group of cases arising out of the Federalism Revolution narrowed federal jurisdiction by appealing to the Tenth Amendment. They relate mostly to the federal government's ability to "commandeer" or give orders to state officials. In *New York v. United States* (1992), the Court found that the "Take Title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 exceeded Congress's powers under the Commerce Clause. In the Court's view, ordering states to "take title" and assume liability for radioactive waste "lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment" (505 U.S. 144, at 146). Although it approved two less coercive incentives to comply with the law, it ruled 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" or to "compel the States to enact or administer a federal regulatory program" (505 U.S. 144, at 178, 188). Similarly, *Printz v. United States* (1997) overturned a portion of the Brady Handgun Violence Prevention Act commanding the "chief" law enforcement officer in each jurisdiction to conduct a background check before approving firearm permits. The Court ruled that "such commands are fundamentally incompatible with our constitutional system of dual sovereignty" (521 U.S. 898, 935). In this system, the states retain "a residuary and inviolable sovereignty" (521 U.S. 898, 899) as codified in the enumerated powers doctrine of the Tenth Amendment. "The power of the Federal Government," *Printz* warned, "would be augmented immeasurably if it were able" to commandeer state officials (521 U.S. 898, at 922).

While the impetus behind the Federalism Revolution is reasonable, it fails to adequately provide a coherent or consistent doctrine of federalism. The Court relies heavily on the idea that

*some* areas of legislation must be forbidden to Congress—or else the doctrine of enumerated powers is meaningless—but does not provide an iron-clad argument for why the limit is where the majority drew it and not somewhere else. The Court never supplies a theory or “principle that defines what areas the federal government may regulate and what areas are reserved to the states” (Feeley and Rubin 2008, 135-137). This section concludes that the Federalism Revolution is an imperfect guide in decisions about where and how to divide power between the state and federal governments. The Court’s rulings have “waffled famously” and “are inconsistent with constitutional text and with one another” (Bednar and Eskridge 1995, 1447). Moreover, the Court’s doctrines do not extend very far, are tentative, and are not applied clearly or fairly.

The Federalism Revolution has drawn heat from many legal commentators. Erwin Chemerinsky (2008, 58) declares that none of the Court’s assumptions can be derived from the Constitution or the intent of the framers. He writes: “it is unclear what makes something economic as opposed to noneconomic. Almost everything has some economic consequences, so this inevitably seems to require an arbitrary line, perhaps between direct and indirect effects. Yet, such a distinction between direct and indirect effects had earlier been tried by the Court and was then expressly rejected” (2008, 61).<sup>15</sup> It is not hard to imagine how violence against women could, in the aggregate, affect the economy—although it may be debatable whether this effect is “substantial.” Likewise, Feeley and Rubin (2008, 125-26) charge that the pro-federalist decisions “do not rest on a genuine political principle” and are “incoherent” because their doctrine “does not encompass any relatively uncontroversial core or group of situations” and “does not possess any convincing principle to support the distinctions it attempts to make.” There is widespread agreement, for instance, that First Amendment protections of free speech encompass criticism of

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<sup>15</sup> E.g. *A.L.A. Schector Poultry Corp. v United States* (1935) versus *Wickard v. Filburn* (1942).

the behavior and policies of governmental officials, whereas disagreement exists only with regard to ambiguous activity such as advertising, pornography, or defamation (Feeley and Rubin 2008, 126). But, because there is no analogous identifiable core in Commerce Clause cases, the Court's new federalism decisions seem more like "random firings" than statements of principle (Feeley and Rubin 2008, 126). It has not extended the principles in these decisions to other "expansive interpretations of Congress's enumerated powers," yet without providing a reason for why these federal actions are acceptable while others are not (Feeley and Rubin 2008, 133).

These voices are echoed by some Supreme Court justices. Justice David Souter, in his dissent in *Lopez*, argues that the Court's new distinction between economic and noneconomic activity too much resembles the "untenable jurisprudence" of the pre-New Deal era, such as the direct/indirect distinction (514 U.S. 549, at 608). Similarly, Justice Breyer's dissent in *United States v. Morrison* (2000) states that "the majority's holding illustrates the difficulty of finding ... a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the" Commerce Clause power (529 U.S. 598, at 656). Breyer then criticizes the intelligibility and lack of specificity of the "economic/noneconomic" distinction (529 U.S. 598, at 656). Due to "two centuries of scientific, technological, commercial, and environmental change," he writes, "virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate. ... And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause 'aggregation' rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect

upon interstate commerce” (529 U.S. 598, at 660). The New Federalism still has work to do to craft a coherent federalism jurisprudence.

In the eyes of critics, the Federalism Revolution’s Tenth Amendment jurisprudence is no more intelligible than its rulings on the Commerce Clause. Chemerinsky (2008, 76) argues that the “concept of dual sovereignty,” the premise underlying the Federalism Revolution, lacks specificity and cannot independently explain “why a federal law unduly intrudes state prerogatives” absent a normative theory of the proper structure of federalism. Moreover, Chemerinsky (2008, 18) criticizes the “striking tension between *Erie*’s reliance on the Tenth Amendment and *Darby*’s almost simultaneous proclamation that the Tenth Amendment is but a truism.” How can a truism limit federal authority? Likewise, Feeley and Rubin (2008, 139) ask why Congress may not give commands to state executives or legislators when federal courts may give commands to state executives and Congress may command state judges?<sup>16</sup> Moreover, they (2008,140) note, Congress imposes obligations all the time using the spending power, often in the form of conditional grants of money which the states can scarcely refuse. Once again, a persuasive legal distinction is elusive.

Given the deficiency of federalism jurisprudence, it is no surprise that the Court often deploys a vague slogan: the need for “balance” between the levels of government. Yet as Robert Lipkin (2004, 103-04) argues, the notion of “federalism as balance” is under-specified and does not “contain intelligible content” or provide “concrete instructions” regarding “when the balance is reached.” In the absence of a clear principle to allocate governmental power, “balancing”

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<sup>16</sup> In *Printz*, the Court justified this difference by arguing that, “unlike legislatures and executives,” judges “appl[y] the law of other sovereigns all the time” (521 U.S. 898, 907). Feeley and Rubin (2008, 140) are unimpressed by this logic: “Typically, however, lower courts are doing so because they are adjudicating the rights of private parties subject to those other sovereigns. This is not the rationale that requires state courts to follow congressional enactments, however; the real rationale is the basic structure of American government, as embodied in the supremacy clause. State courts must obey congressional enactments as long as those enactments lie within laws applicable to the entire nation; state executive officials must obey congressional enactments for the same reason.”

federalism is little easier than exchanging fictional currency. The Federalism Revolution cases rest on an “intuitive sense of balance totally devoid of even minimal precision and lucidity” Lipkin (2004, 109). He concludes that the Court is not an appropriate arbiter of federalist disputes (Lipkin 2004, 112). If this analysis is right, calls for “the appropriate balance” may be little more than ad hoc value judgments or disguised ideological displays.

Finally, it is even unlikely that the Federalism Revolution represents a vigorous revival of limits on federal authority. A wealth of research indicates that the “revolution” has been “relatively modest” (Clayton and Pickerill 2004, 85), taking place squarely in “continuity with the New Deal Constitution (Greve 2012, 309). For one thing, it followed—and perhaps was caused by—presumptively temporary pro-federalism developments in the political branches (Clayton and Pickerill 2004). Scholars doubt whether future courts will maintain the aggressively pro-federalist posture (Shortell 2012). The Federalism Revolution also has been two-sided, strengthening federal preemption power in addition to limiting Congress (Conlan and Dudley 2005; Shortell 2012). The Court’s strategy seems to be opportunistic rather than confrontational: it has limited the impact of its decisions, struck down only marginal laws, and accepted without question the core doctrines of the New Deal (Whittington 2001a). When it does intervene, its rulings have scarcely impacted Congress’ ability to draft laws, since they may often re-word legislation to pass constitutional muster (Dinan 2004). It repeatedly asserts its right to determine noneconomic moral and social questions such as abortion (Greve 2012, 315-16). Kathleen Sullivan concludes: “The Rehnquist Court surely revived the structural principles of federalism. But it maintained certain striking limits that kept these principles from bringing about a greater sea change in constitutional law. The Court did more to change the constitutional jurisprudence of federalism than it did to realign actual constitutional power. The question for the future is how

much generative power this jurisprudence will have” (Sullivan 2006, 00). The Supreme Court seems unable to generate autonomous and far-reaching decisions limiting congressional power, even when it appears willing to do so. Partisans of federalism should not hold their breath.

The inconsistent and hesitant nature of the Federalism Revolution is on display in *Gonzales vs. Raich* (2005). *Gonzales* held that Congress could prohibit the private consumption of locally-grown marijuana for medical purposes under the Commerce Clause, despite state opposition. At first glance, this issue appears to mirror *Lopez* and *Morrison* in that it involves a non-economic activity that is connected tangentially, if at all, to the larger economy. The Court justified its ruling by explaining that the regulation of marijuana was part of a larger system of drug regulation, yet to some the decision seems a lot like a capitulation to conservative ideology on drugs. And if Congress can legalize a regulation by making it part of a “broader” system of regulations, then Commerce Clause limits will not mean much anyway.

Another recent case, *National Federation of Independent Business v. Sebelius* (2012), reinforces the limits of the Federalism Revolution. At issue was the Patient Protection and Affordable Care Act, which required most Americans to purchase health care insurance (the “individual mandate”) and required states to accept a Medicaid expansion or else lose federal Medicaid funds. In a contentious 5-4 decision, the majority opinion held that the individual mandate was constitutional under the federal taxing power, but was not authorized by the Commerce Clause or the Necessary and Proper Clause, inasmuch as Congress may regulate existing commerce but not the decision not to engage in commerce (such as by failing to purchase health insurance). Despite ruling that the funding penalty for failure by state to expand Medicaid was impermissibly coercive, *Sebelius* was quite deferential to Congress and fits well

within the expansive New Deal federalism rulings. If the individual mandate to purchase health insurance is construed as a tax on those without insurance, it passes constitutional muster.

### **Conclusion: The Inadequacy of Judicial Safeguards**

In conclusion, there are reasons to rethink judicial supremacy in federalism questions. Judgments on federalism often appear to involve little more than fitting one's ideological predilections into one jurisprudential construct or another. Legal formulations to determine which powers belong to which level of government have proved to be vague and in need of normative principles not expressly in the constitutional text. Such determinations are hard to cabin in rigid legal rules, which are likely to be either over-inclusive or under-inclusive, excluding a power the national government ought to have or including a power it should not have. It is no surprise, then, that the Court has often reversed its course, abandoning longstanding tests in favor of new ones.

The difficulty of crafting legal rules is not the only downside of the judicial safeguards of federalism. Regardless of whether judges are able to draw clear distinctions, they are often unwilling to arbitrate federalism questions impartially. The analysis so far has assumed charitably that judges, although human, try to interpret the law in a fair and rational manner. But prevailing empirical models find that justices care overwhelmingly about policy outcomes and are motivated primarily by ideology rather than abstract legal rules (ex. Bailey and Maltzman 2011; Segal and Spaeth 2002; Maltzman, Spriggs, and Wahlbeck 2000). Studies of judicial behavior confirm the dominance of ideology in federalism cases, although "honest" (i.e. non-ideological) constitutional opinions still exert a much smaller effect (Parker 2011; Baybeck and Lowry 2000; Cross and Tiller 2000). Fallon (2002) and Erwin Chemerinsky (2008, 31) argue that Federalism Revolution rulings slant conservative, selectively applying the enumerated powers

doctrine to overturn laws on a partisan or political basis, for instance by assuming that state courts are more likely to rule against criminal defendants. In short, the “concepts of states’ rights and national supremacy are used opportunistically, when convenient, to defend specific rulings, but not as guiding principles for decision-making” (Baybeck and Lowry 2000, 96). If judges are merely partisans in robes, their claim to produce unbiased legal interpretations is unfounded.

It is important not to take the critique of judicial safeguards too far. None of this means that federalism itself is incoherent, or that judges and legal scholars should not attempt to draw principled lines in defense of federalism. Many such scholarly attempts have been undertaken (ex. Barnett 2014, 277-337; Epstein 1987; Berger 1996), and they deserve to be seriously considered. Nevertheless, it remains true that currently the best legal arguments are nationalistic, and for good reasons. Defenders of federalism would be imprudent to rely solely on judicial safeguards. They must temper either their expectations or seek new ways to preserve the federal balance of power.

### The Inadequacy of the Political Safeguards of Federalism

The Supreme Court has played an outsized role in federalism adjudication, as the length of the previous section indicates. Following the demise of judicial restrictions on federal power, however, new theories of how to protect federalism have proliferated. A number of scholars posit various “political safeguards of federalism” whereby certain features of the political process protect state interests. Perhaps, they reason, informal and political mechanisms can fill the gap created by the hollowing out of principled legal doctrines regarding federalism. Yet these theories also fail to identify reliable safeguards of federalism and turn out to be no less impotent in the face of ascendant nationalism.



The original version of the political safeguards thesis, first advanced by Herbert Wechsler, has exerted an enormous influence on the federalism literature. Wechsler (1954) argued that the Constitution protected federalism primarily by guaranteeing the territorial integrity of the states and by giving states a role in the “composition and selection” of the national government. Nevertheless, a growing body of scholarship casts doubt on this idea. Wechsler’s theory, Kramer (2000, 218) asserts, is “flawed and unpersuasive” because, “subsequent experience and later developments have robbed [it] of much, if not all, of its” initial plausibility. Bednar and Eskridge (1995, 1484) cite a number of scholars to show that the Court’s appropriation of the political safeguards thesis in *Garcia* (1985) has “taken an academic beating.” It seems increasingly clear that the processes identified by Wechsler and others are incapable of protecting the interests of states as states.

Political safeguards fail primarily because they are not actually structured to protect the power of states as states. Safeguards of federalism are supposed to protect the jurisdictional sphere of states as such. But while it is true that members of Congress come either from a state or a district lying within one state, they represent “geographically narrow *interests*” rather than “the governance prerogatives of state and local *institutions*” (Kramer 2000, 222). Because they are popularly elected, members of Congress represent their constituents and seek to satisfy their concerns.<sup>17</sup> Wechsler’s safeguards cannot represent states as such because, while they “(possibly) give state and local interests a greater voice in national politics,” they “do not necessarily protect state and local institutions. ... Federal politicians will want to earn the support and gratitude of local constituents by providing desired services themselves ... rather than giving or sharing

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<sup>17</sup> Popularly elected national officeholders might protect state power as such if the voters wanted them to do so, but as we will see in the following chapter, such a desire on the part of voters is highly unlikely. Voters want their representatives to solve problems, and generally do not care which level of government takes the lead.

credit with state officials. State officials are rivals, not allies” (Kramer 2000, 223-24; cf. Baker and Young 2001, 114). Representation of local geographical units may lead to localized pork-barrel spending, but does not normally lead to increased local control over independence resources. The same reasoning applies to the equal representation of the states in the Senate: it may require that policies have broad geographical appeal, but does little to protect state interests as such (cf. Kramer 2000, 224-25).

Even if the original constitutional structure established some political safeguards, subsequent developments have weakened the link between them and the states. The electoral college might have protected federalism if the power of states to select electors permitted them to choose pro-state electors. But soon after the founding state governments stopped directly choosing electors, and little connection remains between the views of the state governments and the electors’ views (cf. Kramer 2000, 225-26). “The only constitutional institution that did promote the representation of state institutional interests, the selection of senators by state legislatures,” has been eviscerated by the Seventeenth Amendment (Baker and Young 2001, 114). Likewise, the states’ power to draw congressional districts and determine voter qualifications has been removed since Wechsler wrote in 1954, in the Twenty-Fourth and Twenty-Sixth Amendments as well as court cases such as *Baker v. Carr* (1962), *Reynolds v. Sims* (1964), and *Wesberry v. Sanders* (1964).

Wechsler’s other political safeguards are equally weak. True, the states are constituent parts of the constitutional system, and as such shape the contours of political disputes. But there is no reason to think that state interests will systematically come out on top in those disputes. Also, while a tradition of deference to states exists, traditions do not sustain themselves and eventually collapse unless “some structural or cultural mechanism exists to replenish their

vitality” (Kramer 2000, 221). These factors collectively shed the political safeguards thesis of most of its validity.

John Nugent’s (2009) informal safeguards are harder to assess. They are wielded by state officials themselves, and so, unlike Wechsler’s safeguards, in theory protect the interests of state governments as such. And it certainly seems that states have some behind-the-scenes influence on what goes on in Congress and some leeway in enforcing federal laws. One may doubt, though, how powerful informal safeguards really are. States on this theory are just a handful among the hundreds of interest groups competing to lobby Washington. Even when they influence the content of a law, they will not secure autonomy for states, unless states are also empowered to veto legislation. Moreover, enforcing a law presumably cannot mean disregarding it; if a state did so, the federal government would doubtless find other ways to enforce it.

The variant of political safeguards that I have termed the “partisan safeguards” model also has substantial problems. Kramer (2000) and others argue that political parties create a mutual interdependence between federal and state officials that protects state interests. However, there are compelling reasons to believe that parties incentivize state politicians to acquiesce in legislation eroding their own jurisdiction. Thus, the federal government has benefitted more than the states from the erosion of federal-state contestation. “Partisan safeguards” are inadequate to ensure a stable and long-term division of power between the state and federal governments.

First, parties must be decentralized if they are to protect state power, making parties a contingent safeguard of federalism. Kramer’s (2000, 279) account features “reciprocity” and “mutual dependency” among state and national party members, but these factors can promote centralization or decentralization depending on which level is dominant (cf. Marshall 1998, 149). The effect of political parties “as intensifiers of centralizing or decentralizing tendencies depends

greatly on the vertical power distribution in the party systems” (Hadley, Morass, and Nick 1989, 82). Empirical research on federalism corroborates the contingent nature of the partisan safeguards of federalism. Willis et al. (1999), citing evidence from Latin American federalism, conclude that parties protect state power only when they are decentralized, whereas centralized parties promote centralization. Gordin (2004, 26, 32) finds that, in Argentina, the “reelection of legislators ... seems to be in the hands of the provincial governor and provincial party bosses,” and governors apparently “have a significant leverage on the selection and ensuing behavior of senators.” This system somewhat resembles the indirect election of U.S. senators prior to the Seventeenth Amendment. Interestingly, Gordin (2004) finds that divided control of the national and provincial governments by opposing parties results in greater fiscal transfers to the provincial level (fiscal decentralization). He hypothesizes that governors use their influence over the selection of senators to extract greater fiscal decentralization, and that they are more likely to do this when they do not share the president’s political party. This finding counters Kramer’s prediction that, due to vertical linkages between party members, fiscal decentralization would be higher during periods of intergovernmental “harmony.” Gordin (2004, 27) concludes that “partisan symmetry may reinforce either the preeminence of provincial or national interests, depending on where the party leader presides.” Thus, although the party system remained decentralized for much of American history, it is not a reliable safeguard because it is a historically contingent, rather than necessary, feature of American politics.

There is in fact substantial evidence that political parties in the United States have become increasingly nationalized over time. For decades after the founding, “the locus of political power of greatest concern to the average citizen continued to rest with state and local governments,” and “national parties, as compared with state organizations, remained weak”

(Filippov et al. 2004, 236). But much of this has changed. “Federal officeholders are no longer as beholden to state party organizations as they may once have been” (Marshall 1998, 150). For one thing technological improvement have negated one of the primary reasons that parties remained decentralized so long: the difficulty of transportation and communication over long distances (cf. Filippov et al. 2004, 236). The increasingly direct relationship between officeholders and their constituents also has attenuated the link between politicians and parties (Cain, Ferejohn, and Fiorina 1990). “The rise of the personal vote in the 1960s may have allowed members of Congress to distance themselves from a reliance on decentralized party mechanisms” (Volden 2004, 100). Even Kramer admits that the “enthusiastic backing of state and local party officials” was necessary only until the “late 1960s,” and that partisan safeguards “may have been compromised to some degree by twentieth-century developments” (2000, 279-80, 283).

The centralizing trend is especially evident in fund-raising, the heart and soul of political elections. Politicians increasingly rely on national organizations for resources and aid (Frymer and Yoon 2002, 977-1026; Hamilton 2001, 99). The “formerly all-powerful state and local politics, politicians, and organizations” have given way to “strengthened national parties,” interest groups, and campaign financing, which “perpetuate a centralized government and political system” (Walker 2000, xiv). Most of the enormous funding necessary for modern campaigns is supplied from the candidates themselves, “from PACs and individuals ideologically or pragmatically tied to the candidate without regard to state party affiliation or even state boundaries,” or from “the parties’ national organizations .... At virtually no time, however, are the state parties the key players in the fundraising enterprise” (Marshall 1998, 150-51). In sum, in the absence of decentralized parties, the partisan safeguards of federalism are inoperative.

Second, the partisan safeguard model assumes that politicians are enmeshed in a party network that spans both local, state, and federal governments, but this is often not the case. As Marshall notes, “many federal officeholders do not rise through party ranks” and thus are not much “indebted to the state political party” (1998, 149). That politicians increasingly build “their careers in the House of Representatives rather than in state and local party organizations may ... diminish the role of decentralized parties” (Volden 2004, 100). The increasing prominence of celebrity candidates, such as Donald Trump and Arnold Schwarzenegger, only exacerbates this trend. It goes without saying that the more the career trajectory of national officials departs from the traditional pattern, the weaker the link between state and national politicians becomes.

Third, there is an asymmetrical relationship between federal and state party members wherein state officials have greater incentives to sacrifice their institution’s power than do their federal counterparts. Given that politicians’ career paths typically lead from local to national offices rather than vice versa, politicians hoping to advance up the ladder must curry favor with politicians at higher levels.<sup>18</sup> The president is the party leader, and high-ranking national politicians hold the bulk of the seniority, influence, and patronage. Although the “spoils system” has been a feature of party politics since the 1820s, the “spoils” available for distribution have grown larger along with the national government, offering ever greater incentives to adopt a national orientation. “State politicians,” Kramer notes, “can earn reputations in the party by doing work for intergovernmental lobbies or favors for congressmen and other federal officials,” and ambitious federal “bureaucrats seek advancement through the party as well as within civil service ranks” (2000, 285). State politicians wishing to advance to federal office must refrain from antagonizing national party leaders (Hamilton 2001, 98–99). Of course, state politicians

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<sup>18</sup> Canada is a rare exception in which national politicians later serve at the provincial level (Fillippov et al. 2004, 209-210).

often disagree with federal policy or do not desire national office, and federal officials can be induced to support federalism on ideological grounds. Still, political parties harm states by loosening the ties between them and political actors.

Fourth, state officials have greater ideological reasons to sacrifice their institution's power than federal officials. This is because federal laws offer a quicker and bigger payout due to their nation-wide scope. In order to get an equivalent result at the state level, lawmakers would have to pass legislation in each state, an unlikely and difficult project. It is hard for ideologically motivated politicians to resist the temptation to pursue federal laws (cf. Greve 2012, 443, n. 43), especially if it is one's own preferences that are imposed on other states. Moreover, "state officeholders "reap the political benefits of their party's national success," such that the success of the party's goals at the federal level gives them a personal boost in state elections (Marshall 1998, 149). "For this reason ... one seldom hears of state legislators urging their own party members in Congress not to pass popular legislation" (Marshall 1998, 149).

Finally, federal officeholders face tremendous electoral pressure to address problems at the national level. It is false to assume that voters know or care whether politicians support the rights of either level of government; they want things done, and they do not care who does it. When voting, the "interests of the voters are the focus of attention, not the institutional interests of state and local governments" (Chemerinsky 2008, 27). Given their ignorance of the complexities of a federal system (McGinnis and Somin 2004), voters will often hold their elected officials responsible for issues that overlap state and federal jurisdiction, such as the economy or social welfare. Opposing a popular law for federalism reasons "will have no resonance with the electorate. ... If the public perceives the issue to be a national problem, federal lawmakers will be disposed to take federal action because they want to be responsive, and to be seen to be

responsive, to their constituents' concerns" (Marshall 1998, 152). The rising influence of wealthy donors and special interests further distracts from concern for federalism. Thus, despite its use as a slogan during high-profile debates, federalism does not appear to be an influential electoral consideration.

In sum, all current varieties of the political safeguards thesis appear to be incapable of protecting state power. The representation of the states in the national government gives voice to the interest of the people within those geographical regions, but does not protect the interests of states as states. Informal influence is too weak and uncertain to accomplish much. And political parties encourage state politicians in particular to support the expansion of federal power in order to accomplish partisan objectives. The safeguards of federalism must be sought elsewhere.

### The Need for a New Theory of Federalism

This chapter has explained how and why all current theories of the "safeguards of federalism" have serious defects. It is no surprise that historical evidence indicates that federalism safeguards have weakened over time. This claim is not universally acknowledged, and many scholars are satisfied with the performance of their favored safeguard. Yet a variety of voices observe a centralizing tendency in the United States (Marshall 1998), and other federations too have centralized over time (Burkhart 2009; Erk 2004; Arretche 2012; Rodríguez 1998; Filippov et al. 2004, 199-202). It is reasonable to conclude that current safeguards are insufficient to maintain a healthy federal balance of power.

In light of this failure, new means of adjudicating federalism questions must be found. Americans still want federalism, but we no longer know how to divide power (if we ever did). The comfortable scales of "dual federalism" have been ripped from our eyes, yet no comparable means of navigating federal disputes has emerged to take its place. Our discourse on federalism



is accordingly confused. We assume a role for states that they can no longer play under the rules of the modern game. This dissertation offers another solution. The following chapters advance and defend a novel theory of federalism, called “contestational federalism,” which addresses the central questions of federalism in an integrated and comprehensive theory. This theory aims to supply what rival theories do not: a rational plan for dividing power in a federal republic, a reliable means of preserving the division, and a robust defense of federalism’s value.

## CHAPTER TWO: A THEORY OF CONTESTATIONAL FEDERALISM

The previous chapter demonstrated the inadequacy of currently popular models of safeguarding federalism. For various reasons, the Supreme Court, political parties, and other indirect political safeguards are not sufficient to maintain an appropriate balance of power. In light of this failure, we are in need of a new theory of safeguarding federalism, or else federalism will become a contingent, unstable, and probably temporary arrangement. Broadly, any theory of safeguarding federalism must answer two primary questions. First, which powers ought to be given to which level of government? The federal boundary of power can be drawn in countless ways, and theorists struggle to reach consensus on what principle or principles should guide that division. Second, how ought the federal division of power to be maintained over time? A division on paper is useless unless the two sides can be prevented reliably from encroaching on each other's jurisdiction. Scholars are sharply divided on these questions, yet they precede, and certainly inform, political or constitutional debates over specific policies related to federalism.

This chapter presents a theory of federalism that provides coherent, integrated answers to these important questions. To this end, it draws a fruitful analogy between separation of powers and federalism. First, it describes the constitutional basis of both separation of powers and federalism, and the relation of each to popular sovereignty. Second, it shows how functional differentiation relates both to federalism and to separation of powers. In both cases, the separation of powers is grounded on a claim that each power is better at performing certain tasks, such that giving it independence to perform that task will facilitate good government. Second, this chapter describes the topic of contestation and relates it to separation of powers and federalism. Again, the contestation model argues that in both cases the division of power.

## How to Divide Power: Functional Differentiation

The first primary claim of the contestation model is that functional differentiation is the proper way to divide power in a separation of powers system.<sup>19</sup> Functional differentiation may be defined as a difference in function between the separated powers, such that each power performs a different task or purpose. It applies both to the branches of government within a separation of powers system and to the division of power between the state and national governments. The assignment of each function is far from arbitrary, as each function corresponds to a fundamental task of government. Inter-branch separation relies on a distinction between making law (legislative branch), executing law (executive branch), and judging law (judicial branch). Federalism distinguishes between “national” and “local” objects of legislation, entrusting the former to the federal government and the latter to the states. These distinctions are reinforced by giving each institution a particular institutional designs and structure enabling it to carry out its powers and accomplish its function well. This section unpacks the concept of functional differentiation, in both separation of powers and federalism, as well as its normative virtues.

### **Functional Differentiation and Separation of Powers**

Separation of powers as conceived by the American founders divides power on the basis of functional differentiation among the branches. Although the U.S. Constitution establishes some sharing of similar kinds of power,<sup>20</sup> the three branches are neither interchangeable nor

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<sup>19</sup> The primary alternative to functional differentiation is the view that federalism can only arise where drastically different political units are forced to join in union (Feeley and Rubin 2008). Such differences can be religious, cultural, ethnic, linguistic, or some other aspect of identity. It cannot be denied that that pre-existing differences in populations are a primary factor in the formation of federal unions, and that such differences persist and reinforce federalism after union. However, the contestation model insists that there are benefits to federalism that go beyond accommodating diverse viewpoints and identities, such that it is still valuable even in a population (such as the United States) relatively undivided along the lines mentioned above.

<sup>20</sup> Specifically: a bicameral legislature, the executive veto, and senatorial approval of presidential appointments and treaties. In fact, Madison argued against total separation and pointed to the American and British governments as examples of sharing power (*FP* 47: 300–308), although the states exhibited stricter separation of function (Rossum 2001, 75).

indistinguishable. Rather, each has a single, exclusive primary function corresponding to one of the great objectives of free government: expression of the popular will, protection of popular rights, and national security or self-preservation. Each function in turn requires a different set of core competencies or specializations. Thus, in the American system, Congress primarily enacts legislation to promote the general welfare and reflect the people's will, and thus must represent the people and be able to deliberate well; the Supreme Court interprets the law and maintains popular rights, which requires impartial judgment; and the executive above all maintains order and security, which requires energy and unity (Tulis 2003, 88-92; cf. *FP* 70, 374-75).

In a properly designed separation of powers system, each branch is given unique structural characteristics. For functional differentiation to work properly, the three branches should be designed so as to achieve the “virtue” necessary to carry out their function well (Kleinerman 2009, 13). In addition to checking governmental power, the separation of powers “was also instituted for effective governance: each branch is institutionally designed to meet the peculiar nature of its task” (Thomas 2008, 34). Accordingly, the Constitution endows each branch with a different collection of structures and powers—such as formal constitutional power, degree of democratic representativeness, mode of election, length of term, and number of office-holders—that enable it to perform its assigned function well (Tulis 1980, 208; Rossum 2001, 77). For instance, in order to facilitate representativeness and deliberation, the legislative branch is large and must be reelected frequently (especially the House), whereas the executive branch, which requires energy and unity, is filled by a single president with a relatively longer term.<sup>21</sup> The “assumption behind such a separation” is that “all governments perform certain kinds of functions, which are best performed in distinctive ways and by distinctive kinds of bodies. . . .

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<sup>21</sup> The Senate's six-year term was originally designed to help it serve as an aristocratic bulwark against populist democracy.

This division is not aimed primarily at mutual checking but at the efficient performance of certain kinds of tasks” (Storing 1981, 60). In fact, the whole project of the Federalists at the American founding centered on building strong, efficient government and refuting charges that this goal was incompatible with liberty (Flaumenhaft 1976, 210–211). Even the Federal Farmer, a prominent Anti-Federalist, agreed that “It is one of the greatest advantages of a government of different branches, that each branch may be conveniently made conformable to the nature of the business assigned to it” (Frohnen 1999, 225).

Because the characteristics of each branch suit only its own role, branches perform poorly when engaging in another’s core function, and constitutional degeneration occurs when branches excessively adopt another branch’s core competency. For instance, legislatures make poor executors, because the large number of members causes protracted discussion where unity and speed are needed, because many members render secrecy difficult, and because members’ greater dependence on public opinion and reelection weakens their ability to make independent or long-term decisions. Tulis argues that modern theorists are often blind to constitutional degeneration because they cannot account for the “very real differences that characterize, and ought to characterize, the activities of legislation, execution, and judgment” (1980, 208). The founders were especially concerned about the “present congress” under the Articles of Confederation: as a “single assembly,” it was unfit “to receive [the legislative and judicial] powers” because “they never can all be lodged in one assembly properly” (Federal Farmer, “Letter X;” see Storing 1981b, 2:284).

Functional differentiation improves governments. The contestation model opposes the longstanding criticism that separation of powers is only good for checking and balancing power, thus producing slow and inefficient government (ex. Neustadt 1990; Wilson 1885/2006). On the

contrary, far from wanting to hamstring government, the founders held that separation of powers and functional differentiation fostered powerful, effective, efficient government in a free republic. Because each function is distinct from the others, separating the functions allows for a kind of division of labor, wherein each branch and level of government, by specializing in just one function, performs its role better. Moreover, the Constitution gives each institution a mix of formal powers, institutional design, and electoral rules, which together enable them to excel at their function. If one branch attempted to make, execute, and judge the law, it would perform all three functions poorly and slowly.

### **Functional Differentiation and Federalism**

Just as with “horizontal” separation of powers, the American founders justified the “vertical” separation of powers by appealing to a salutary differentiation of function between the national and state governments. In their view, each should govern different “objects” of legislation: the states should have jurisdiction over “local” matters, while the federal government should control “national” matters. Far from being constrained by the unfortunate preexistence of states, most founders believed a federal division of power would allocate powers rationally based on which level of government could most effectively carry out that power. Federal states restrict and divide “governing powers ... not out of a desire to prevent governing, but to allow governance to the maximum extent required” (Elazar 1987, 91).

Statements to this effect are common in the U.S. ratification debates. In the preface to his published notes on the Constitutional Convention, James Madison (1985, 3) described the American system as “combining a federal form with the forms of individual Republics, as may enable each to supply the defects of the other and obtain the advantages of both.” Elsewhere he wrote that one of the “great objects” of the convention was to “give to the general government

every power requisite for general purposes, and leave to the states every power which might be most beneficially administered by them” (1999, 144). Madison was joined by a chorus of other voices. “The two governments act in different manners, and for different purposes,” stressed Edmund Pendleton, “the general government in great national concerns, ... the state legislatures in our mere local concerns” (in Wood 1969, 529). James Wilson assured Anti-Federalists that “whatever object of government is confined in its operation and effects within the bounds of a particular state should be considered as belonging to the government of that state; whatever object of government extends in its operation and effects beyond the bounds of a particular state should be considered as belonging to the government of the United States” (Sheehan and McDowell 1998, 77). “The states,” he later affirmed, “should resign, to the national government, that part, and that part only, of their political liberty, which placed in that government will produce more good to the whole than if it had remained in the several states” (Sheehan and McDowell 1998, 82). The precise definition of which powers are “confined” within a particular state, and which can be better managed by the federal government, was uncertain and is not essential to our purpose. Suffice it to say that, for the founders, federalism corresponds to separation of powers in that both rest on functional differences between separated institutions.

The basic impulse of functional differentiation has been adopted and clarified by modern federalism scholars. Theoretical accounts often invoke the principle of “subsidiarity,” according to which “government action should be taken at the most local level possible—or conversely, that higher levels of government should never take action that could be accomplished as well or better at a more local level” (Ryan 2012, 59). To be more specific, scholars “generally use two broad criteria to determine whether something is a “local” or “national” affair: promoting

efficiency and controlling externalities.<sup>22</sup> Uncontrolled negative externalities will unnecessarily reduce the general welfare and likely destabilize the federation. Generally speaking, theorists recommend decentralization as the default option, unless it creates inefficient outcomes or negative externalities. Jenna Bednar (2009, 41) lists some rules for allocating power in a federal system: “centralize to manage negative externalities; centralize if you need to encourage positive externalities; decentralize otherwise.”

The principles of functional differentiation and subsidiarity resemble what has been described as “collective action federalism.” The primary advocates of collective action federalism, Robert D. Cooter and Neil S. Siegel (2010, 135), argue that rather than “using formal distinctions to divide federal and state powers in Article I, Section 8,” we should pay attention to “the relative advantages of the federal and state governments. Formal distinctions that are unrelated to relative advantages will fail to advance the general welfare when applied to federalism problems.” They interpret the “General welfare” clause to mean that the federal government is empowered to act only when leaving a particular area of legislation to the states produces problems—such as collective action problems or spillover effects—that the states cannot solve on their own. For example, federal action is sometimes necessary to prevent economic warfare between the states, or to prevent a competitive “race to the bottom” leading to the underprovision of a public good. This distinction between federal and state power, Cooter and Siegel (2010) argue, excels that of “economic” (federal) vs. “noneconomic” (state) powers and other distinctions devised by the Court to divide power between the levels of government. The crucial factor is not which areas of policy are available to the federal government, but rather

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<sup>22</sup> “Externalities” refer to one state law’s spillover impact on other states, which are not normally taken into account when debating the law (they are “external” to the state’s calculus).



what situations, in any area, require a national response. Donald Regan (1995) offers an exposition of the federal commerce power that closely resembles collective action federalism.

The most important historical rationale for federalism is the need for national security. At the American founding, *The Federalist Papers* vigorously portrayed the horrors of war and dissension likely to arise from disunion (*FP* #2-8), and William Riker (1964) famously generalized that defense against external enemies is the motivation for the emergence of almost all federal states. Confederation allows small states to pool their resources to overcome the power differential between them and large states. However, if security is provided directly by the states themselves as opposed to the national government, then each state has an incentive to “freeride” by contributing less to the nation’s defense than other states, while still benefitting from the common security provided to the whole. To prevent freeriding, the national government must be empowered to marshal the whole nation’s resources in defense of the union.

More broadly, federalism scholars agree that some areas of legislation are more efficiently administered by local government and others by the national government. Despite its default preference for localism, the principle of subsidiarity cuts in both directions, favoring local, state, or national power depending on the circumstances (Ryan 2012, 63). Inman and Rubenfield (1997, 45) write that, among other things, “education, police and fire protection, sanitation, recreation, and even public health can be produced efficiently by relatively small communities,” while “basic research” and national security properly belongs to the federal government. More generally, Inman and Rubenfield (1997, 45-47) marshal a substantial body of empirical research to argue that “congestible” public goods (ones whose benefit declines as more people use it) usually are better provided for by the states or cities, while “pure public goods”

should be given to the central government.<sup>23</sup> “Local provision is efficient where the benefits are local, as with streetlights, and central or national provision is efficient where the benefits are nationwide, as with national defense” (Musgrave 1997, 66). A related reason to empower the central government is massive disparities of wealth between the states, which can be remedied best by the trans-regional redistribution of resources directed by the central government (cf. Bednar 2009, 29; Musgrave 1997, 68ff).

There are two reasons why different levels of government are more or less efficient in certain areas. First, each level has informational advantages in certain areas. “Decentralization can take advantage of information asymmetries” to produce more efficient outcomes (Bednar 2009, 29). In other words, local government know more about local needs and conditions and can respond more quickly when a need arises. “Decentralization may also create more services over all” since “[m]any public goods are ‘congestible,’” meaning “their benefit declines with the number who use it” (Bednar 2009, 46; also Borck 2002). Empirical evidence shows that smaller population size is associated with greater provision of public goods (Bueno de Mesquita et al. 2003, 207-08). Central governments sometimes possess information advantages as well. In today’s science-driven world, the sheer scale of federal resources gives it an advantage in scientific and technological research. Central governments are also better at coordinating massive projects that involve more than one state, such as an interstate highway system.

Second, each level of government has an advantage in problem-solving. Decentralization both enhances policy innovation by increasing the number of legislative units, and mitigates the harmful effects of mistaken policies by localizing them. Successful policies can be copied by

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<sup>23</sup> Pure public goods are nonexcludable (people cannot be prevented from enjoying them) and nonrivalrous (one person’s use does not detract from another person’s use).

other states, while harmful policies affect only the few states that initially adopt it.<sup>24</sup> In the area of scientific research, the dispersion of knowledge and resources might prevent group-think or excessive copying (Bednar 2009, 33). However, as the difficulty of the problems increases, decentralization-induced experimentation may have declining value as a problem-solving mechanism. To solve the toughest problems, such as the development of the atomic bomb during World War II, the sheer size and power of the national government provides a distinct advantage (Kollman et al. 2000). Chapter five explores the efficiency-related benefits of federalism in more detail.

In addition to efficiency, a second principle of federalism is to divide power so as to curb negative externalities and promote positive externalities. Often national intervention is necessary to prevent negative externalities arising from interstate competition. A clear problem at the American founding was economic conflict between the states due to their regulation of trade from outside the state. States had enacted discriminatory taxes or regulation aimed at promoting in-state traders at the expense of outsiders. The costs of such laws clearly crossed state lines; in fact, mutual trade barriers threatened to stifle trade and lead to internecine violence. Therefore, the Constitutional Convention gave Congress the authority to regulate interstate commerce and preempt state regulations. Put more generally, while discriminatory policies “may benefit any one jurisdiction, this may be at the cost of efficiency loss from the nation’s perspective” (Musgrave 1997, 70). Federal intervention may also be necessary to promote positive externalities. For example, the construction of a massive infrastructure project that will provide economic benefits to the entire nation may be too expensive for any one state to build. In sum,

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<sup>24</sup> However, as Bedar (2009, 31) notes, the advantages of policy innovation will only be captured if states share similar goals and pursue diverse policies. If states pursue the same policies, or have different goals, federalism does not enhance policy innovation.

scholars generally agree that a central government ought to curb negative externalities, such as inter-state pollution or trade barriers, and promote positive externalities, such as infrastructure improvements (Bednar 2009, 39-42).

Two clarifications are in order here. First, to defend the federalization of a policy, it is not enough to say that the federal government will “do it better.” Rather, the only objects of legislation which should be federalized are those which the states are incapable of undertaking at all—such as national security—or are incapable of undertaking without causing massive conflict between the states—such as regulation of interstate commerce. Valuing federalism only as a scheme for maximizing efficiency play into the hand of those who favor an expansion of national authority. After all, a conservative federal government will always determine that, for instance, a national policy of school choice is more “efficient” than a local preference for public schools, but progressives will stoutly deny this fact. Likewise, a progressive national government will insist that a single-payer health care system is more “efficient” than a diversity of state systems, but conservatives and advocates of federalism will deny this fact. The failure of state policy must be manifest and pervasive to justify federal action. It should be noted that nothing prevents state legislators from self-consciously attempting to benefit the people of their own state. There is no requirement that states pass laws on the basis of the good done to the world or even the nation. It is assumed that states will listen to their own citizens and pursue their welfare. The only requirement is that such pursuits do not undermine the federal union itself.

Second, talk of “efficiency” does not mean that economic growth is the only end of legislation, or that every question can be evaluated in terms of “efficiency.” Contestational federalism permits states to adopt differing views of the goal of legislation itself. Sometimes these divergent goals will intersect with arguments about efficiency, as when a debate over

whether to favor farming or manufacturing interests implicates what kind of citizens a state or nation wants to cultivate and how to structure society to do so. Likewise, different ways of organizing the justice system appeal to different moral values. In these and other areas, the question of “efficiency” is out of place, and states ought to be given autonomy unless and until their actions destabilize the federation. Not everyone agrees as the benefit of economic growth or the best way to achieve it, and states must be allowed to prioritize other goals above economics.

It is true that for a federal republic to exist, the states must share some common values and constitutional rules, but there is no need for uniformity on every issue. For example, the Constitution guarantees a republican form of government to each state and forbids state from granting title of nobility (U.S Const., Art. 4, sec. 4; U.S. Const., Art. 1, sec. 10), thereby preventing states from pursuing monarchy or aristocracy within their state. The founders apparently felt that without a common republican form of government, the union would be imperiled. Similarly, the Civil War amendments declared racial equality to be “fundamental” to national identity. However, in a number of areas it is permissible to allow states to diverge. For instance, would it necessarily destabilize the union if states were to adopt different interpretation of, say, the scope of religious liberty, or the proper extent of the safety net? The contestation model takes no position on which specific moral or ideological views must be shared in common, but does exhibit a default preference for giving states latitude.

### Contestation and the Safeguards of Federalism

The contestation model has direct relevance for the second main question regarding federalism: what are the best “safeguards of federalism,” or the proper means to maintain the federal balance of power? Assuming federalism is valuable, any viable theory of federalism must articulate a way to maintain a healthy division of power over the long term, as this is the

precondition for reaping any further benefits. My analysis presupposes the common view that the states are disadvantaged in relation to the federal government. Since, following the New Deal, the federal government has played the predominant role in American politics, the debate typically centers on whether and how the states have sufficient leverage or power to protect their jurisdiction.<sup>25</sup> Although, as we saw in chapter one, many scholars believe that other safeguards are sufficiently protecting the states, they generally agree that it is the states, rather than the federal government, that most needs safeguards.

Drawing once again on the literature on separation of powers, this section argues that the mechanism I call “contestation” is the best safeguard of federalism. “Contestation” refers to mutual contestation between the separated powers using formal or constitutional checks and balances. According to this view, the subunit governments should not rely on outside help from the Court or on informal influence through political parties, negotiation, implementation, and the like. Rather, they ought to be given a partial check on the national government through some constitutional means. This section outlines what contestation is and how it works in both separation of powers and federalism, focusing on the American context in particular. It notes that the states originally possessed avenues for contestation, although a full discussion of American federalism will be postponed to future chapters.

### **Contestation and Madisonian Separation of Powers**

In large part, contestation depends on a particular view of constitutionalism, specifically the allocation of power and the determination of constitutional meaning. Following George Thomas’ book *The Madisonian Constitution*, the contestation model asserts that American constitutionalism is “primarily about countervailing power and not about the legal limits

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<sup>25</sup> A good discussion of the constitutional underpinnings of this change can be found in Greve (2012).

enforced by courts. Put another way, the essence of the Constitution as fundamental law is its foundational division of power and authority and not its legality. This political division provides the constitutional order within which the constitutional text can take shape as law.” (Thomas 2008, 2). Rather than setting up a legal document whose meaning is determined by judges, the Constitution establishes “institutional forms” which empower constitutional actors, primarily members of the different branches of government, to “offer competing conceptions of constitutional authority and meaning” (Thomas 2008, 2). On this view, “[r]ather than vesting authority in any one branch of government, ... the fundamental law is best maintained when each branch adheres to, and defends, its understanding of the Constitution” (Thomas 2008, 2-3). The interplay between these conceptions, which amounts to the “deliberate fostering of tension within the separation of powers,” allows for the coordinate construction of constitutional meaning by all the branches (Thomas 2008, 3).<sup>26</sup> This model requires accepting the propriety of each constitutional actor putting forth a claim to constitutional meaning, without *a priori* equating any particular actor’s view with the Constitution’s true meaning.

This beneficial antagonism is sustained by means of contestation. The construction of constitutional meaning does not take place through consensus or even negotiation but through salutary conflict, what George Thomas (2008, 17) calls “a separation of powers rooted in countervailing power,” ultimately “cultivating an agonistic balance of power between them.” For contestation to work, each institutional actor must have a separate constitutional existence and source of power, including formal “checks and balances” on the other actors. Within inter-branch separation of powers, specific formal, constitutional checks include congressional impeachment

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<sup>26</sup> While this view resembles the theory of departmentalism, it is broader than some versions of departmentalism in that it empowers each branch to make claims about the meaning of the entire constitution, not just the specific powers of that branch (cf. Thomas 2008, 25).

of presidents and judges (cf. Kleinerman 2009, 111–12, 122–23; *FP* 65-66: 396-407), presidential appointment of judges, the presidential veto, senatorial confirmation of treaties and presidential appointments, and judicial review. The term “contestation” refers to the process by which constitutional actors advance their own interpretations of the Constitution’s meaning and defend them by deploying their formal and constitutional powers to check and balance other actors.<sup>27</sup>

In theory, mutual contestation produces a self-enforcing constitution and a relatively stable balance of power between the separated branches of government. Rather than relying on outside arbitration to resolve constitutional disputes, the founders sought to inculcate the self-enforcement of jurisdictional boundaries by promoting rivalry among the branches, supplying each with self-serving motivations to check other branches and promote its own view of constitutional meaning. “Countervailing power in this manner fosters the virtues and independence of the different institutions in a positive direction, while maintaining constitutional boundaries, and independence, by having them police one another” (Thomas 2008, 18). The Madisonian doctrine of separation of powers assumes that giving any one institution or branch the exclusive power to discern constitutional meaning is dangerous to liberty, since that institution might concentrate all power to itself and rule by oppressive means. Rather, power is controlled precisely by dividing it and inducing the holders of power to police each other—while giving the final word to the people as expressed in the Constitution and constitutional amendment.

The theory behind contestation is clearly visible in *The Federalist*. In essay #48, James Madison decried “parchment barriers,” stating that “a mere demarkation on parchment of the

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<sup>27</sup> For an overview of how contestation has worked in American history, see Thomas (2008) and Whittington (2001b).



constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of the powers of government in the same hands” (*FP* 48:268, 272). After refuting several alternative means of adjudicating the separation of powers, Madison declared in *Federalist* 51 that liberty is best maintained “by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.” “In order to lay a due foundation for that separate and distinct exercise of the different powers of government,” he continued, “it is evident that each department should have a will of its own.” The “great security” against the “concentration” of power in one branch “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional rights of the place.” “Each department”, he wrote, was given the “power of self-defense” so that “each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights” (*FP* 51: 320–22).

### **Contestation and Federalism**

In the contestation model, federalism incorporates contestation in just the same way as does inter-branch separation of powers. Giving one level of government the sole power to determine the federal boundary would be just as unwise as giving one branch the power to adjudicate the separation of powers. This point was recognized by the founders, as chapter four discusses in greater detail. Madison explicitly connected separation of powers with federalism, writing that “In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments [i.e. branches]. Hence a double security arises to the

rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself” (*FP* 51:282). The mutual interplay between the different actors requires salutary compromise and negotiation by preventing any one actor from determining the federal boundary.

As with separation of powers, contestational federalism requires each actor to have “means of contestation,” formal or constitutional powers by which they can check their rivals. Means of contestation can take a variety of forms, but generally fall into two categories: influence mechanisms and veto mechanisms. Influence occurs when one level of government has some type of direct representation in the other level of government. For example, in the United States prior to the Seventeenth Amendment, and in many federations today, the lower level of government may elect representatives to serve in one house of the national legislature, allowing them to influence the federal government by selecting representatives favorable to state power. Veto power occurs when one level of government may annul the actions of another level through a constitutional mechanism, although in many cases such an annulment can be overridden. Although examples of inter-level veto power are rare, James Madison proposed giving the federal government a comprehensive veto of all state laws, which he considered necessary to prevent the disintegration of the union. It is important to note the both “influence” and “veto” means of contestation are valid ways to establish contestational federalism. Even though influence mechanisms operate silently behind the scenes, they still permit inter-level checking and balancing.

In the original constitutional settlement, the American founders established two means of contestation available to the state. While these examples will be considered much more fully in chapter four, it is worth summarizing them here. First, the state governments were given a role in

the selection of federal officeholders, especially U.S. senators and presidential electors in the electoral college. This power theoretically ensured the selection of federal politicians favorable to state power. Second, the founders believed that the electoral system would promote the selection of federal officeholders favorable to state power, because the people would have a natural preference for localism and, logically, for candidates who shared that preference. Both means of contestation, in should be noted, were influence mechanisms rather than veto mechanisms.

Despite relying on self-interested constitutional argumentation, contestational federalism does not relativize or exclude claims about federalism's original meaning or proper structure within American constitutionalism. The Constitution restrains government by establishing a clear structural framework within which rival governments engage in constitutional debate and contestation, a framework which presupposes disagreement over the "proper" federal arrangement. Thus, the contestation model invites appeals to the Constitution's original meaning. As Madison stated, laws are "more or less equivocal until their meaning [is] liquidated and ascertained by a series of particular discussions and adjudications" (*FP* 37:196). The founders intended the Constitution's text and principles to serve as fodder for elevated constitutional rhetoric and argumentation. Statesmen are encouraged to connect their claims in favor of their own department's power to the text of the Constitution itself, as well as the principles and ideals embodied in it. The "Madisonian framework is structured to protect and further the substantive ends, or aspirations, of the Constitution. ... Madison does not reject the notion of 'fixed' meaning or first principles in favor of constitutional indeterminacy" (Thomas 2008, 19). Acknowledging the ambiguity of language and the inevitability of disagreement about federalism's original meaning, or about how best to further lofty constitutional goals, clearly

neither implies that there are no answers to such questions nor prevents one from having an opinion on them.<sup>28</sup>

Nor does the contestation model preclude arguments that appeal to normative values or goods beyond the Constitution itself. Sotirios Barber (2013, 162) asserts that “Process federalism,” which resembles the contestation model, especially its abandonment of judicial intervention, is “antirational and antiliberal” because it requires abandoning all “conceptions of the good.” But the theory of contestational federalism is quite compatible with contrasting views regarding the “good life” and the role of government in attaining that life. Madison himself exclaims that “justice is the end of government” (*FP* 51:283) and that “the transcendent law of nature and of nature’s God ... declares that the safety and happiness of society are the objects at which all political institutions aim” (*FP* 43:241). While such grand sentiments often produce protracted debate over how they apply on the ground, and a gap between our ideals and practices may be inevitable (cf. Thomas 2008, 21), a model that prioritizes constitutional conflict can easily accommodate a broad range of normative argumentation. The contestation model’s only non-negotiable claim is that, because separation of powers has intrinsic value in that it facilitates the pursuit of other overarching goods (however conceived), nothing can justify destroying the strength or autonomy of the various levels or branches of government.

### **Contestation and the Popular Safeguards of Federalism**

The emphasis on giving political actors themselves the constitutional motives to resist encroachments on their authority exists in apparent tension with another refrain of American political thought: the sovereignty of the people. The American experiment in self-government was founded upon the idea that the people themselves are the true rulers of society. Democratic

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<sup>28</sup> Even Purcell, who stresses the ambiguity of federalism’s original meaning, acknowledges that the Constitution provides “varying degrees of normative guidance” and “relatively clear” rules and principles (2007, 197, 189-90).

political systems typically rely heavily on popular elections, recalls, referenda, and the like. Some scholars even advocate the “popular safeguards” of federalism, according to which the people as a body should police federalism and punish violations (Kramer 2005; Tushnet 2000). Jenna Bednar (2009) endorses popular safeguards as part of a multi-faceted enforcement scheme. The contestation model of federalism seems out of place here. By giving government officeholders the primary levers of power, the means of contestation, it contravenes, to some extent, democratic or populist systems that empower the people as a body. Given that contestational federalism derives in large part from the theory of the American founders, it might be seen as just another anti-democratic mechanism they used to restrain the people.<sup>29</sup>

It is undeniable that the architects of the U.S. Constitution placed great importance on popular vigilance to safeguard America’s constitutional structure. Madison (1999, 502) wrote that to “secure all the advantages of” a confederated republic “every good citizen will be at once a centinel over the rights” of “the people” and the “rights and authorities” of both “the confederated government” and “the intermediate governments.” Upholding such a “complicated system ... requires a more than common reverence for” the Constitution on the part of republican citizens, who “must be anxious to establish the efficacy of popular charters” (Madison 1999, 503). To uphold federalism, then, Americans need to appreciate the role of both the state and national governments and have a knowledgeable opinion of where the dividing line between them should be. Madison (1999, 503) traced the “the security of all rights” to “public opinion” as much as to the constitutional structure: even in “the most arbitrary government is controuled” by public opinion, whereas “The most systematic governments are turned by the slightest impulse from their regular path, when the public opinion no longer holds them in it.” Regarding

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<sup>29</sup> The classic case for the anti-democratic intentions of the founders comes from Charles Beard (1913) and his followers.

federalism, Madison stated elsewhere that violations of states' rights could proceed only if the majority approved them (1999, 772-77), and that public opinion has kept the Court in line, for example during the controversy over the Alien and Sedition Acts (1999, 846-47). Although these statements should be balanced by Madison's support for structural safeguards, it is striking how much he expected of Americans, both in terms of knowledge and active participation.

While its relationship with popular sovereignty is indeed complicated, the contestation model does not reject popular sovereignty altogether. In fact, it even incorporates the people into the protection of federalism to some degree. Popular elections, the heart and soul of republican government, play an important, though subordinate, role in contestational federalism. As the founders recognized, the people can use their votes to balance the state and federal governments or to defend their rights. Additionally, elections help to reign in the excesses of constitutional contestation. In order to obtain the votes of the people, politicians must limit blatantly self-interested assertions of institutional power and frame their constitutional arguments in ways that have broad appeal. If the voters are the ultimately determiner of who gets elected, there must be a tangible link between an institution's power and the people's welfare. While popular appeals may induce pandering and lower the sights of constitutional argumentation, they also temper the rise of overly-aggressive contestation between self-interested, agonistic institutions. James Madison understood this point well. In *Federalist* #46, he complains:

The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and assigned for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen ... must be told that the ultimate authority ... resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments .... (*FP* 46: 233).

Because popular vigilance is needed as an auxiliary protection for liberty, it is important that contestational federalism occur within a democratic constitutional system.<sup>30</sup> Elections may serve this role even if they are indirect. Originally U.S. Presidents and senators were chosen through indirect election, but this fact did not negate their ultimate dependence upon the people (cf. Madison's argument in *The Federalist* #38).

Yet despite its reliance on aspects of popular sovereignty, the contestation model entertains a good deal of skepticism regarding the viability of the popular safeguards of federalism. For one thing, supporters of popular sovereignty overemphasize the populist side of the founding. The founders—especially the Federalists—did not want a merely populist interpretation of the Constitution, even if they wanted popular involvement. James Madison praised the “*total exclusion of the people in their collective capacity*” from the ordinary operation of the government (*FP* 63:341), and warned against “frequent appeals” to the people to determine constitutional meaning, in large part because the people would probably be biased in favor of the legislative branch (*FP* 49: 274-75). The Federalists' political project consisted largely in defeating populist projects such as debtor relief legislation, to which purpose they favored large election districts and measures to ensure elite dominance in the government. While the founders perhaps expected too much vigilance of the people, they recognized that the people faced informational limitations that government bodies do not. Americanus wrote:

The different powers ... form mutual checks on each other. The State Legislatures form a check on [Congress], infinitely more effectual than that of the people themselves on their State Legislatures. The people, so far from entertaining a jealousy of, in fact place the highest confidence in, *their* Representatives; who, by giving false colorings to bad measures, are too often enabled to abuse the trust reposed in them. But widely different is the situation in which the Federal Representatives stand, in respect to the State Legislatures. Here the mutual

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<sup>30</sup> My theory of federalism defended thus obviates Feeley and Rubin's (2008, 33-37) objection that federalism is compatible with a variety of democratic and non-democratic regimes. Needless to say, a republican polity is fundamental to this theory of federalism.

apprehensions of encroachments, must forever keep awake a jealous, watchful spirit, which will not suffer the smallest abuse to pass unnoticed. (Bailyn 1993, 1:230)

Likewise, Hamilton wrote that “in our political system” the “state governments will ... afford complete security against invasion of the public liberty” because “Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance .... They can readily communicate with each other in the different states; and unite their common forces” (*FP* 28:150-51). For the founders, the state governments offered the best chance to safeguard the rights of the states and people.

Theorists need not appeal to old authorities on this point. Modern scholarship gives two substantive reasons to doubt that a typical populace, on its own, can monitor federalism adequately. First, the people are not interested or informed enough to make policing federalism a top priority. Given that voters are notoriously uninformed (Delli Carpini and Keeter 1997), especially about federalism (McGinnis and Somin 2004), they are unlikely to expend the energy necessary to study the effects of laws on federalism or to vet representatives on their allegiance to their state. While the people can be expected to pay attention to select issues of vital importance, few conflicts regarding federalism are as explosive as the Alien and Sedition Acts. Modern cooperative federalism, in which state and national authority is muddled and intertwined only exacerbate this information problem. The people cannot punish jurisdictional violations if they cannot assign responsibility for specific policies. The Court has used accountability to the people as a justification for the theory of “dual federalism” which favors distinct and separate spheres (Ryan 2012, 44-50), but contestation offers a better solution. The national and state



governments are well-suited to keep each other accountable in part because are informed enough to correctly assign responsibility for political outcomes.

Second, the people lack the personal motives to oppose encroachments which are crucial to healthy separation of powers. Whereas state officials possess the correct (i.e. self-interested) motives to uphold their institutional prerogatives, citizens of federal republics generally are attached to *both* their state *and* the nation and thus may not favor any systematic division of power between them. As Devins (2004, 131) baldly declares, “*even if the American people were well informed about the benefits of federalism, they would still trade off those benefits in order to secure other policy objectives*” which they value more highly. Federalism appears to be a “secondary political preference that has always received less consideration than first-order substantive issues such as civil rights, gun control, abortion, or the environment” (Ryan 2012, 35). If any area can be suitably protected by popular vigilance, it would be individual rights, not structural mechanisms like federalism or separation of powers.

Therefore, while the contestation model incorporates aspects of popular sovereignty, ultimately it relies less heavily on popular safeguards than on other structural or constitutional mechanisms. In line with Madisonian constitutionalism, the contestation model is based on profound doubt as to the ability of the people to monitor federalism independently. Given the problems associated with popular safeguards, contestation aligns better with the genius of American constitutionalism. To be effectual, contestation must be led by elites interested in the institutional power of their government.

Nevertheless, we must not overstate the deficiencies of popular safeguards. Pro-federalism arguments are alive and well in scholarly political discourse, especially among economists and political scientists, and these elite views sometimes filter down to mass opinion.

Moreover, the people can identify and support good government when they see it, so both levels of government must court the people's support by appealing to their record of governance.<sup>31</sup> In this way, the structural value of federalism (or nationalism) can be connected to substantive public policies, thus alerting the people to the value of federalism (or nationalism) through indirect means. True, as we will see in chapter four, these contests no longer automatically favor the states given that ordinary voters no longer have a default preference for state power, and most people are not paying as much attention as the original theory anticipated. But I can see no compelling reasons why this (admittedly weakened) version of electoral safeguards would not be enough to sustain federalism, at least if it were supplemented by constitutional contestation.

### **The Limits of Contestation**

There are limits to the scope of contestation. To be more precise, actions that are inappropriate for any level of government should not be subject to contestation. As McConnell notes, federalism makes sense only for issues "appropriate to democratic decision making at some level, be it state or federal. Some issues are so fundamental to basic justice that they must be taken out of majoritarian control altogether. ... These issues are thus subject to a single national rule; the reason, however, has nothing to do with federalism. ... For those few but important matters on which democracy itself cannot be trusted, ... [no] argument for state autonomy can hold sway" (McConnell 1987, 1506-07). Specifically, contestational federalism allows for protections of individual rights that go beyond the paradigm of contestation. The contestation model neither prohibits federal enforcement of individual rights nor permits

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<sup>31</sup> For an argument that the state and federal government compete in a "federalism marketplace" for the "affection" of the people, see Pettys (2003). Two of the preconditions for this marketplace are that "each sovereign must be assured of an opportunity to demonstrate its competence; [and] each sovereign must enjoy a significant measure of autonomy from the other" (Pettys 2003, 329). Pettys believes the marketplace is not itself sufficient to sustain these preconditions, arguably supporting my contention that contestational federalism is necessary to supplement popular safeguards.

defending discrimination by appealing to “states’ rights.” Examples of issues which should be off-limits to either level of government are not hard to find. The Constitution prohibits the states from violating contractual obligations and Congress from passing ex post facto laws (U.S. Const., art. 1, sec. 9-10), and the Bill of Rights and the Fourteenth Amendment protect other values fundamental to our national creed. In these areas, the claim to moral rightness overpowers appeals to local diversity.

In areas that are off-limits to contestation, the federal government may take a more active role. Congress or the Supreme Court may to enforce certain real though limited normative commitments that the nation deems too important to commit to local majorities (or even national majorities). The post-Civil War Amendments, for instance, specifically empowered the federal government to enforce racial equality due to persistent violations by states. Admittedly, the judicial solution is more difficult in American federalism because the Supreme Court is a part of the national government and thus is likely biased on federalism questions. Still, it may be the best that we can do.

In the end, federalism can only work if some areas exist in which people can legitimately disagree and differ. Arguments about federalism and rights must be tempered by the recognition that, in many cases, legitimate disputes exist over the nature and definition of a right. As McConnell notes:

“Obviously, different people will assign wider or narrower latitude to majoritarian institutions. The alternative to democracy in our system is not utopia but judicial rule, which is not immune to abuse and which unavoidably conflicts with the ideals of republicanism .... The conclusion that states should retain a high degree of decision making autonomy is stronger on the humble assumption that most governmental decisions are fairly debatable—that is, that there is no single compelling just answer to many questions of government” (McConnell 1987, 1507).

Often rights will exist in tension with one another, as modern debates over the scope of religious liberty reveal. Is a baker who refuses to bake a cake for a same-sex wedding legitimately exercising her First Amendment right to freely exercise her religion, or discriminating against a discreet minority (or both)? It is not easy to say. Even the Federalists' original case against the depredations of the states is questionable. When states passed debtor-relief legislation in the 1780s, were they violating the sacred rights of property or compassionately alleviating crushing poverty (or both)? Permitting diversity may sometimes be the best response to deeply-held disagreements. In particular, it seems clear that the federal balance is safely susceptible to contestation in a way that certain individual rights are not (cf. Filippov et al. 2004, 155-156).

The idea that two levels of government can check unjust abuses by contesting each other inherently requires tension and ambiguity. If either level was given power to control the other unilaterally, then federalism would be null and contestation impossible. Yet the Fourteenth Amendment is clear that Congress has the power to enforce its terms. To reconcile this position with federalism, federal authority to interfere with alleged violations of equal rights must be limited, and not involve total authority to legislate for the states. It should be more akin to what Zuckert (1996) has called "corrective federalism," which permits the federal government to veto oppressive state laws in certain areas but not to pass laws for the states. As with the limits to judicial supremacy, determining when Congress or the Court has overreached is tricky and nearly impossible in practice. In our current constitutional system, the viability of contestational federalism depends partly on judicial deference to the political process combined with discretion regarding when to protect fundamental rights.

## The Courts and Contestational Federalism

The role of the courts in contestational federalism is complex. Contestation and judicial supremacy are incompatible with each other as federalism-enforcement mechanisms, but the judiciary is a member of our separation of powers system. This section argues that judicial supremacy is inconsistent with the basic principles underlying American constitutionalism, primarily because it violates the impartiality that ought to characterize the adjudication of federalism. Moreover, contestation excels judicial supremacy as an enforcement mechanism because it is uniquely able to facilitate the fluid evolution of the federal boundary over time. The rejection of judicial supremacy naturally raises the question of the status of judicial review in contestational federalism. The practice of courts ruling on the constitutionality of laws has been a part of American politics ever since *Marbury v. Madison* (1803), in which the Marshall Court declared a section of the Judiciary Act of 1789 unconstitutional. This section concludes that the contestational model of separation of powers can accommodate a modest form of judicial review.

### **Judicial Supremacy and Madisonian Constitutionalism**

The contestation model of constitutionalism rejects judicial supremacy, the linchpin of judicial safeguards. This position both builds upon and reinforces scholarly support for the claim that the American founders never intended the Supreme Court exclusively to police the boundaries of the branches or levels of government. In *The Federalist*, James Madison wrote that “a mere demarkation on parchment ... is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands” (*FP* 48:272). During ratification, in the first major debate over constitutional interpretation, Madison famously stated that

I acknowledge, in the ordinary course of government, that the exposition of the laws and constitution devolves upon the judicial. But, I beg to know, upon what

principle it can be contended, that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. ... There is not one government on the face of the earth, so far as I recollect ... in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent (Madison 1999, 464).

In other words, courts may decide cases that come before them, but cannot make definitive pronouncements on larger questions of constitutional meaning. Elsewhere Madison denied that any of the “several departments” could “pretend to an exclusive or superior right of settling the boundaries between their respective powers” (*FP* 49:273). Even two key foundational supports of judicial supremacy, Alexander Hamilton’s *Federalist* essays on the judiciary and Marshall’s majority opinion in *Marbury v. Madison* (1803), have been interpreted plausibly as less forceful statements of the judiciary’s role in constitutional interpretation than has typically been the case (Thomas 2008, 28-38; Kramer 2005).

The contestation model also draws on the growing modern scholarship which rejects judicial supremacy as a normative good. Judicial supremacy has been criticized by advocates of both popular constitutionalism (Kramer 2005; Tushnet 2000) and the contestation model (Thomas 2008; Tulis 1980, 1988). Despite many differences, these scholars agree that entrusting the Supreme Court exclusively with boundary enforcement clashes with the original constitutional design, constitutes the very “parchment barriers” that separation of powers is designed to avoid, and likely will fail to maintain a proper balance of power. While this literature addresses horizontal separation of powers, most of their arguments are equally applicable to vertical separation of powers (i.e. federalism).

Judicial supremacy is inappropriate above all because it conflicts with the view, common in American political thought, that constitutional interpretation should not be placed in the hands

of a single institution. Judicial supremacy exists in tension with separation of powers, which assumes the coordinate construction of constitutional limits by all the separated powers.

Constitutional documents are not automatically self-enforcing, and entrusting any one institution with enforcement undermines the balance of power between the separated powers. By making the constitutional views of one branch supreme, it precludes contestation and places the Court “outside the separation of powers, if not above it” (Thomas 2008, 36). As Thomas argues, “this move threatens to subvert the constitutional framework .... By making constitutional questions into legal questions and therefore the peculiar province of courts, the Court is placed above the Constitution rather than within it” (2008, 15-16). By contrast, providing mechanisms for federal-state conflict over fluid jurisdictional boundaries coheres with the logic behind the separation of powers.

Judicial supremacy is especially dangerous because, as one of the participants in the separation of powers, the judiciary is especially unsuited to arbitrate impartially the division of power between the levels of government. It might be appropriate for the Court to adopt a supervisory role if it was capable of judging disinterestedly with a view to the common good, but this is not the case. As a branch of the national government, the Court lacks the motive or ability to police federalism—if anything, it has incentives to favor the expansion of federal power, which enlarges its own power accordingly (Frohn 1999, 448-454; Woods 2010, 5–7; Baker and Young 2001, 102). The fact that the political branches partially control the Court only further undermines its independence. Congress has substantial power to “punish” the Court (see Rossum 2001, 110), and there is evidence that Congressional preferences constrain the Court (Harvey and Friedman 2006; Clark 2009). In this case, horizontal separation of powers, which cannot function unless the political branches possess some check on the judicial branch, itself

undermines the judiciary's ability to make independence judgments regarding federalism. This downside is evident in Australia, where throughout the twentieth century the high court neglected to oppose the federal government's centralizing actions (Fillippov et al. 2004, 200-201). In short, authorizing the Court to determine the powers of each level of government improperly places federalism under the control of the federal government, precluding contestation and shifting the balance of power decisively away from the states.

The American founders acknowledged the danger of biased judges in controversies over federalism. In arguing for the necessity of the Supreme Court, Hamilton feared that judges in state courts would be influenced by "the deference with which men in office naturally look up to that authority to which they owe their official existence" (*FP* 22:112). He discreetly neglected to mention that federal judges presumably would be biased in the opposite direction. Likewise, in a letter to Spencer Roane in 1821, Madison lamented the Court's "apparent disposition to amplify the authorities of the Union at the expense of the States," despite the "indispensable obligation, that the constitutional boundary between them should be impartially maintained" (1999, 773). Madison wondered whether the Court was "as prompt and as careful in citing and following [the evidence from the founding], when agst. The federal Authority as when agst. that of the States?" (Madison 1999, 775). In a later letter to Jefferson, Madison wrote that "the Judiciary career has not corresponded with what was anticipated. ... And latterly the Court ... has manifested a propensity to enlarge the general authority in derogation of the local, and to amplify its own jurisdiction" (1999, 802).<sup>32</sup>

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<sup>32</sup> In this letter, Madison defends the right of the court to determine the boundaries between state and federal power. He was writing long after the failure of contestation (the subject of chapter four), as evidenced in the controversy of the Alien and Sedition Acts of 1798. Even here, he points to the "concurrence of the Senate chosen by the State Legislatures," and their ability to impeach judges, as safeguards "guarantying" the "impartiality" of federal judges, at least in the original design (1999, 801). These last statements may well be doubted.



## **Contestation and Fluid Federal Boundaries**

Another advantage of contestation is that it facilitates the gradual evolution of federal boundaries to a much greater extent than judicial review. The value of fluidity is widely recognized by theorists of federalism. “Stability is a virtue only up to a point. ... Well-ordered societies need ways to adapt to changing circumstances and to escape a stable but bad equilibrium” (Greve 2012, 40). Federal boundaries must be capable of changing in order to maximize utility (Bednar 2009). In a globalized world, Kramer (2000, 292) argues, social, political, and technological changes will call for greater or lesser levels of decentralization at different times, and a good federal system will respond to these changes. Filippov et al. (2004, 156) note that “Technology may change the economies of scale that pertain to the provision of some public service or the extent of the externalities associated with unregulated markets in ways that alter the level of government best equipped to oversee the provision of that service or the regulation of that externality.” In short, the constitutions of federal states must permit “authority to be allocated and reallocated” (Kramer 1994, 1500).

Unfortunately, the nature and structure of the judicial branch induce courts to adopt behavior and procedures at odds with flexible federal boundaries. As a legal body of judges, the Supreme Court’s structure induces a “legalistic” mindset which, “because elements of the Constitution cannot be reduced to legalities, ... ends up narrowing and distorting the constitutional mindset” (Thomas 2008, 36). The static and legalistic character of dual federalism resembles judicial reasoning and therefore invites judicial adjudication, and judicial rulings are most easily seen as unbreakable rules. For this reason, judicial supremacy arguably coheres best with a model of “dual federalism,” according to which the federal boundary is inflexible and unchanging. The Court operates by discerning and applying doctrines purportedly derived from

the Constitution. The legal rules resulting from this process, being abstract entities, are ill-suited to provide for the necessary flexibility over time, since they may create problems when applied in different contexts. Two cases settled according to the same rule may be evaluated very differently from a normative perspective, and may have very different effects. Even if judges can be impartial, then, the judiciary is simply not structured so as to render appropriate decisions on separation of powers questions.

Judges also face an information problem. Larry Kramer (1994, 1500) argues that “courts are poorly situated to make (or second guess) the difficult judgments about where power [between the national and state governments] should be settled or when it can be shifted advantageously. Judges lack the resources and institutional capacity to gather and evaluate the data needed for such decisions. They also lack the democratic pedigree to legitimize what they do if it turns out to be controversial.” He concludes that “courts lack the flexibility to change or modify their course easily, an essential quality in today’s rapidly evolving world” (Kramer 1994, 1500). Even if the Court can “replace rigid lines that establish a fixed domain of exclusive state jurisdiction with more fluid tests that turn on some notion of functionality,” it remains the case that “governing a modern society is much too complicated for the Court’s preferences about where or how to draw the line to inspire much confidence” (Kramer 2000, 289). Actual politicians dealing with actual problems on the ground are better suited to make these kinds of decisions.

The contestation model satisfies the flexibility criterion, permitting a fluid, evolving division of power. It avoids the common “mistake of assuming an underlying ideal, permanent division of authority between the national government and the states: a substantive allocation that stands apart from and independent of the process by which this division is to be

implemented” (Kramer 2000, 292). Whereas judicial supremacy favors dual federalism, the contestation model coheres better with a “cooperative federalism” of collaborative and intertwined authority, since it emphasizes the elastic and contestable nature of federalism. This compatibility is an advantage, as the cooperationist paradigm is current orthodoxy. “The specific limits of federal power envisaged by the Founders in 1789 are gone, and any effort to roll back federal power to what it meant at the Founding would be foolish as well as utterly impractical. Even the harshest critics of New Deal jurisprudence acknowledge that changes in society, culture, and the economy require a different kind of national authority today, both practically and as an interpretive matter” (Kramer 2000, 291). Larry Kramer appeals to political safeguards as a solution, but contestation is even more appropriate. Contestation takes place on a case by case basis rather than articulating or assuming an abstract set of rules. No sacrifice of power is permanent, and even settled compromises can be renegotiated in light of new circumstances. Checks and balances remain ever available to be wielded afresh.

Yet the contestation model can accommodate modern realities by avoiding static federal boundaries without bowing to judicial supremacy or abandoning the idea of protecting state power. So long as the mutual ability of the two levels to check and contest each other is unimpaired, jurisdictional overlap and mutual interaction are not a problem. In fact, contestation strengthens limits on governmental power by preserving the ability of the states to check federal overreach and vice versa. Unlike most models of cooperative federalism, the contestation model does not leave the jurisdiction of the states to the whims of Congress or the Supreme Court. To admit a changeable division of power is not to entrust this division exclusively to self-interested federal politicians or judges attempting to discern cultural or political trends. Instead, contestation empowers state politicians to put forth normative claims on behalf of state power,

and to defend those claims with formal constitutional checks. Both sides involved in contestation will have informed, experiential preferences as to where and why to divide power. Ideally, this process will promote the best of both worlds: real limits on federal power, but with the possibility for alteration as circumstances dictate.

### **Judicial Review in Contestational Federalism**

While rejecting judicial supremacy and acknowledging the limitations of courts, the contestation model nevertheless accommodates a limited conception of judicial review. The judiciary certainly has been constructed with a view toward judging, and constitutions are law-like. Far from rejecting judicial review, proponents of the contestation model admit that many questions brought before the Court are legal, not political, in nature, and so fall under the jurisdiction of the Court. Thus, the Court has a distinct role to play in maintaining the federal balance of power.<sup>33</sup>

The role of the judiciary, however, is not unlimited. while judicial review “might be called forth by Madison’s institutional forms,” George Thomas (2008, 29) writes, it “is only one dimension of maintaining the written Constitution and exists within the contours of countervailing power.” The Court may settle the cases that come before it using its own understanding of the Constitution, but may not settle the “broader constitutional question” or bind the other departments (Thomas 2008, 31). While the Court is the “primary expositor of ordinary law,” it has only “an equal role in interpreting the Constitution” (Thomas 2008, 35-36). It is especially crucial that the Court’s view not be supreme on political or institutional questions in which the Court is an interested party and thus unfit to render authoritative judgment. But, as

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<sup>33</sup> Hamilton (2001) rightly showed the illogicality of “procedural theorists” who wish to preclude the Court from addressing federalism issues but still allow it to address separation of powers and separation of church and state. There is nothing “special” about federalism that differentiates it from these other areas.

we saw earlier, judicial review is more appropriate when ruling on questions of individual rights which must not be violated by either level of government. A healthy self-restraint on the part of judges would go a long way toward making contestational federalism viable.

In the end, there remains some inescapable tension between judicial review and separation of powers. Even Madison worried “that judicial interpretation might inexorably lead to judicial supremacy” (Thomas 2008, 28). He wrote that “In the State Constitutions & indeed in the Fedl. one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making their decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended, and can never be proper” (1999, 417). The very structure of the judicial branch makes it seem more authoritative on questions of interpretation, because interpretation is its only task. It is natural, then, that people will come to see the Court as the definitive interpreter of the Constitution. This type of thinking counters the very essence of the contestation model, which neglects to settle abstractly the question of which party should have the final word when interpretative disputes arise. Given that outcomes cannot be determined in advance, scholars describing contestation typically resort to drawn-out descriptions of how constitutional conflict has played itself out in political history (ex. Tulis 2003; Thomas 2008; Whittington 2001b). Thus, the contestation model cannot avoid a fair amount of this kind of tension and unsettledness regarding both separation of powers and federalism.

### Contestational Federalism and National Supremacy

One remaining issue needs to be discussed: the relationship between the contestation model and the legal supremacy of federal laws. This section discusses the relationship between

federalism, constitutionalism, and sovereignty. Federalism certainly has a foundation in the United States Constitution. The states are not merely ad hoc bodies subject to revision or removal, and conflict between Ohio and Washington is different than conflict between Toledo and Ohio. However, this constitutional foundation of power is contested, resulting in debates over the powers of each level of government. In the case of federalism, often the question is whether the federal government or the state governments are “sovereign.”

The contestation model is based on the principle that neither the states nor the federal government is sovereign. According to traditional American constitutional theory, sovereignty lies with “the people” of the United States, a doctrine known as “popular sovereignty.” At the founding, the Federalists argued that the Constitution could mix national and federal elements because, in a republic, all authority comes “directly or indirectly from the great body of the people” (*FP* 39: 241). The doctrine of popular sovereignty holds that the people may divide powers between governments without giving up sovereignty to any particular one (ex. Sheehan and McDowell 1998, 233-35), a view which entails a rejection of the formerly dominant notion of sovereignty as “indivisible” (Hobbes 1994, 116; c.f. Blackstone 1893, Bk. 1, Chap. 2). By grounding federalism in popular sovereignty, the founders avoided the creation of an *imperium in imperio* (a contradictory “dominion within dominion”) because the people continually possessed all sovereign power and could resume it or rearrange it at any time. The powers of government could be allocated to multiple locations without removing sovereignty itself from the people.

The Constitution, as the expression of the sovereign people’s will, is what confers power of the federal or state governments. Thus, in theory, the identity and status of both levels is protected from incursions the other. Neither level of government is a creation of the other, and

neither can add to or subtract from its own power or the power of the other level. To this extent, there is parity between the state and federal governments. However, as reviewed in chapter one, the Constitution establishes several principles to define and govern the federal division of power. The federal government controls all powers delegated to it, as enumerated in the Constitution—the doctrine of “enumerated powers”—but the states retain control of all powers not delegated to the federal government. Within the sphere of delegated federal powers, however, the national government takes precedence, as stated in the “Supremacy Clause,” which declares that “judges in every state” shall be “bound” by the “Constitution, and the Laws of the United States which shall be made in pursuance thereof,” regardless of conflicting state constitutions or laws (U.S. Const. art. 6, sec. 2). The Fourteenth Amendment, which empowers Congress to protect certain fundamental rights against the states, also affects the federal division of power.

The Supremacy Clause and the Fourteenth Amendment represent a challenge to federalism which is absent from horizontal separation of powers. They serve to weaken the analogy between federalism and horizontal separation of powers, raising the question of whether the states are somehow subordinate to the federalism government. Contestational federalism must account for the fact that in most if not all federal systems, including the United States, there is an asymmetrical relationship between the lower units of government and the federal government. While admittedly these clauses do not explicitly declare the Supreme Court—or even the federal government—to be the sole interpreter of the Constitution’s meaning, the federal government cannot successfully unite the states and coordinate the power of the nation without some ability to make its own understanding of the Constitution supreme. Even Justice John Gibson, the author of the dissent in *Eakin v. Raub* (1825) which attacked John Marshall’s arguments for judicial supremacy, admitted that federal courts have the power to strike down

state laws, since, “by becoming parties to the federal constitution, the states have agreed to several limitations on their individual sovereignty,” which “it was thought to be absolutely necessary” to enforce via federal courts in order to prevent the union from disintegrating (Kutler 1984, 35). Empowering states to ignore or nullify federal laws is likely to be more destabilizing than contestation over inter-branch separation of powers.

This challenge to contestation is made more difficult by the fact that the expansion of national power has rendered conflict between state and federal laws more common than the founders anticipated. Whereas originally the restrictions on the states were fairly minimal and the scope of national power seemed both distinct and limited, today there is hardly an area where the federal government cannot pass laws. Moreover, as Madison noted (1999, 508-09), “forming and maintaining a division of power between different governments” is more difficult than maintaining inter-branch separation of powers because in the former both governments are exercising “kindred” powers whose boundaries are “more obscure and run more into each other,” whereas in the latter the tasks of each department are (theoretically) distinct and different. In other words, the task is to distinguish between two different kinds of legislative power (i.e. local and national) rather than between legislative and executive power. Though “difficult, however, it must by no means be abandoned,” Madison adds, as the only two alternatives are “schism, or consolidation” (1999, 509).

Still, in my view it is possible to carve out space for contestation over federalism which can harness its advantages while avoiding its drawbacks. Contestation can incorporate national supremacy without acquiescing to centralization. Above all, it is important to remember that contestation is over the legitimate scope of federal powers, not over the exercise or use of a legitimate power. The federal government is supreme within its jurisdiction, to be sure, but it



should not be allowed to unilaterally define the scope of that jurisdiction. The contestation model does not deny federal supremacy, but merely urges that the process of determining which powers have been delegated to the federal government must involve both levels of government on a more or less equal basis. The states, after all, are constitutionally recognized entities in control of all powers not delegated to the federal government.

Permitting contestation without destabilizing American politics no doubt is tricky and requires certain conditions, but there are reasons to think that such a goal is achievable. First, the expansion of federal power does not imply that it is equally necessary for the federal government to act unimpeded in all areas of policy. It is quite possible to draw distinctions between areas where contestation is appropriate and areas where federal supremacy is imperative. Because of the asymmetrical relationship between the two levels of government, however, there is no infallible method to determine whether the Court should intrude in a dispute between the states and Congress. Creating space for contestation over federalism requires discretion, discernment, and restraint by the Supreme Court. When disputes do arise, careful adherence to the values and purposes undergirding federalism provides substantial guidance as to when the Court should intervene. In areas that are not proper subjects of contestation, the Courts can and should pronounce improper state laws to be void, and state attempts to oppose such decisions should be disallowed. Three such areas seem particularly important: cases regarding powers absolutely essential to the national government and to union, such as national security or the treaty-making power; cases involving individual rights; and cases involving powers explicitly denied to the states by the Constitution. However, in cases where there is legitimate debate over which level of government should exercise a disputed power, it is both permissible and salutary for the Court to allow the process of constitutional construction via mutual contestation to proceed unimpeded.

Most of the policy areas embraced by the federal government since the founding would fall under this category, unless conditions have changed to render federal oversight of these areas necessary. That such decision-making inevitably involves ambiguity and the balancing of values and interests makes it no different than other types of judgments made by the Court.

Another reason contestation and national supremacy may be reconciled is that originally the states were given means to influence, not veto, federal actions. It is important to recall the distinction made earlier between two types of means of contestation: “influence” means and “veto” means. As chapter three describes in more detail, the American founders gave the states “influence” means of contestation over the national government. Such means were designed primarily to work invisibly, behind the scenes, in the form of influence both before and during the passage of federal laws. Ideally, state influence entails that state interests are protected organically in the very wording of federal laws. In this case the supremacy of such laws is unobjectionable to the states from the start, and the sticky problem of judicial review is obviated altogether. The states collectively can influence and check the actions of the federal government without directly ignoring or invalidating federal laws, either individually or in a group.

Finally, even in the case of confrontational means of contestation, there are good reasons to doubt that contestation over federalism would destabilize the constitutional system or lead to a massive diminution of federal power. Just as contestation between the branches of the national government, which has been a part of America’s constitutional system since the founding, has not produced many ill effects, neither will federalist contestation. Admittedly, some inter-branch conflicts have occurred, but they have not produced permanent or overly deleterious effects. Despite widespread belief to the contrary, the absence of judicial supremacy does not necessarily lead to deadlock (Tulis 2003, 90-91). For instance, presidents have occasionally ignored the

Supreme Court, but this action has not hamstrung the judiciary or become a consistent occurrence. Regarding federalism, it is highly unlikely that the states greatly want to exercise the powers most essential to the federal government, such as national security and diplomacy. Feeley and Rubin (2008, 125) admit that even “the most passionate devotees of American federalism would agree that the federal government can exercise plenary authority in organizing its armed forces and controlling the money supply.” Remember that on any particular method of contestation, at least a majority of all states (if not a supermajority) must agree to check the federal government. Almost certainly, contestation will involve only issues central to states’ concerns, and pragmatic compromise and experimentation over time will produce positive distributions of power.

### Conclusion

This chapter has advanced a novel and comprehensive theory of federalism. It answers the two structural questions related to federalism: how to divide power between two levels of government and how to maintain that division over time. This theory is based on an analogy between federalism and inter-branch separation of powers. Specifically, both structures share two core characteristics: functional differentiation and contestation. According to functional differentiation, power is divided between powers on the basis of a specialization in function designed to promote efficient and vigorous government. Contestation refers to the mechanism by which the separated powers patrol each other using formal checks and balances. Contestation might involve a cross-level veto, the systematic effect of popular elections, or state selection of federal officeholders.

This chapter has argued that contestation as a federalism enforcement mechanism enjoys several advantages over rival mechanisms such as judicial supremacy. It is fluid where judicial

safeguards are static. It is impartial, whereas the Supreme Court favors federal powers. It incorporates popular oversight without having to overcome the apathy and ignorance of the voters. In light of the inadequacies of other safeguards discussed in chapter one, contestation arguably provides the most coherent and reliable mechanism to check the concentration of power and preserve a healthy federalism. Though other safeguards may play a supplementary role in enforcing federal boundaries, they should be of secondary importance. It is high time for scholars to pay renewed attention to the structural or constitutional safeguards of federalism.

## CHAPTER THREE: FEDERALISM AND THE DIVISION OF MILITARY POWER

This chapter explicates the debate over military power at ratification, showing its close connection to federalism and contestation. The use of force, backed ultimately by weapons and armies, is implicit in any government, whether legitimate or illegitimate. Thus contestation, in its fullest form, must involve the division of military power in addition to other governmental powers. Constitutional checks and balances are useless in the face of intractable and violent conflict between two levels of government. While the founders doubtless wanted federal-state conflict to be resolved peacefully, they understood that in extreme situations this might prove impossible, and thus chose to divide military power between the two levels of government. Understanding the debate over the centralization of military power not only illuminates an interesting and important chapter in American history but also reveals theoretical issues relevant to contestational federalism generally. What is the relationship between military power, contestation, and federalism? Does the longevity of federalism require martial parity between the two levels of government?

The founders strongly disagreed whether military power should be controlled by the national government, the states, or some combination of the two. Wielding military force is the most important power of government, so logically debates over federalism focused on the issue. Despite the creation of a powerful national government in the new Constitution, many founders, particularly Anti-Federalists, viewed centralization as fatal to state power and individual liberty and wanted states to retain some autonomous control over their own military forces. In their view, relying on the “parchment barriers” of the Constitution—or even formal, constitutional checks—would be inadequate if control of military power was placed solely in the hands of the

central government. Federalists generally supported greater nationalization for military reasons, but many endorsed a system of mutual checking whereby blatantly unconstitutional or oppressive actions by one level of government could be counteracted by the other. Thus, while other issues were in play, the debate over military power was primarily about centralization vs. decentralization and whether federalism must include a division of military power alongside division of governmental power more generally. The passage of the Second Amendment answered this question in the affirmative, engrafting into the Constitutional text a compromise designed to ensure that both levels of government retained independent access to military power.

The original meaning of the Second Amendment is hotly contested. Two (or three) main positions exist (see Cornell and Kozuskanich 2013, 1-20; Bogus 2000, 1-15). The “individual rights” interpretation asserts that “The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home,” subject to minimal regulation from either federal or state governments (*District of Columbia v. Heller* 2008; also Halbrook 2008; Amar 1998). Contrariwise, the “collective rights” or “states’ rights” interpretation holds that the Second Amendment merely “grants the people a collective right to an armed militia” (Bogus 2000, 1). On this view, the federal and state governments have broad authority to define and regulate the composition of the militia, and firearm regulation outside the militia is permissible (see Bogus 2000; *Heller* 2008, Stevens J. dissenting). A variation of this position, the “civic rights” interpretation, emphasizes the traditional view of arms-bearing as both a right and duty to secure the common defense (Cornell 2006a; Konig 2004). It views “the right to bear arms as a right of citizens to keep and bear those arms needed to meet their civic obligation to participate in a well-regulated militia,” classifying it variously as a “limited individual right,” a “sophisticated”

or “expansive collective right, or even a civic right” (Cornell and Kozuskanich 2013, 9).

Moreover, because founding-era Americans believed government regulation to be indispensable to a competent militia, gun regulations are consistent with the Second Amendment, even though the right to bear arms is an individual right. The civic interpretation differs from the collective view only in the details of historical context, coming to identical conclusions regarding the legal implications of the amendment.

Yet, as this chapter argues, scholars have not produced an entirely satisfactory interpretation of the Second Amendment’s original meaning. Despite sometimes acknowledging federalism’s significance, the scholarship has not sufficiently appreciated federalism’s centrality to the amendment’s meaning. This oversight has produced an impoverished understanding of federalism and a defective understanding of the Second Amendment. In explicating the relationship between military power and federalism, this chapter contributes to scholarship on the Second Amendment by emphasizing its true original context: the debate over federalism and centralization during ratification.

This article revisits the debate on the original meaning of the Second Amendment in order to synthesize existing scholarship. It incorporates ideas of federalism and “auxiliary rights” to provide a unified interpretation that explains the amendment’s context, text, and history. It advances two core claims. First, following William Blackstone, the founders viewed the right to keep and bear arms as an “auxiliary right,” a right of citizens enabling them to protect more fundamental rights from governmental tyranny. Auxiliary rights resemble individual and civic rights, but are distinct from both. Second, it places the debate over federalism and centralization during ratification at the center of the Second Amendment’s original meaning, showing that it was an attempt by the supporters of the Constitution, the Federalists, to defuse objections from

Anti-Federalist opponents regarding the centralization of military power. The Second Amendment, in order to protect the states' ability to preserve liberty and check federal tyranny, secured their authority to arm and organize their citizen militias without federal intrusion. Consequently, it prohibited all firearm regulations at the federal level, while leaving state regulations untouched. I argue that "incorporation" of the amendment against the states contradicts its original purpose of protecting state power.

By uncovering the connection between the Second Amendment and federalism, this chapter augments the latter area of inquiry as well. Discussions of the history, purpose, and structure of American federalism rarely, if ever, mention the role of militias or the right to keep and bear arms. Federalism scholarship would benefit in several ways by reinvestigating the founders' debate about the division of military power. First, the constitutional settlement regarding military power represents one possible system of distributing force in a federal republic. The ratification debates generated forceful arguments that divided control of military power supports liberty by facilitating mutual checking between the state and federal governments. This model deserves to be taken seriously, although its current applicability is highly contestable given technological and political changes of the last two centuries. Second, this paper challenges the view that the Bill of Rights was co-opted and rendered toothless by Federalists, revealing that (here at least) Antifederalists secured meaningful concessions limiting federal power. Finally, the compromise over military power is an important but neglected manifestation of the "neither wholly national nor wholly federal" solution the founders produced regarding federalism. Instead of instituting either a centralized army alone or a collection of decentralized state forces, the founders empowered the federal government to raise its own army and direct the militia, yet concurrent and primary control of the militia remained with the states,



providing a counterweight to federal tyranny which many (at the time) believed could overpower a professional army. However, the relative weakness of the force left to the states, especially in light of technological transformations, highlights the divergence between American federalism and more decentralized arrangements.

### The Right to Bear Arms as an Auxiliary Right

The first core claim of this article is that eighteenth-century Americans conceived of the right to keep and bear arms as an “auxiliary” right. The concept of auxiliary rights originated with William Blackstone, who wrote that, to secure freedom with more than just the “dead letter of the law,” the constitution has “established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property” (1765-69/1884, 1:92). Auxiliary rights are personal or individual rights which enable the people collectively to protect their other, more fundamental rights and thus are valuable instrumentally, rather than intrinsically. They primarily serve the purpose of protecting the people against governmental oppression or tyrannical usurpation of power, and are ideally exercised in a political or communal context. Blackstone’s list of auxiliary rights included the right of “having arms,” described as “a public allowance, under due restrictions, of the natural right of self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression” (1765-69/1884, 1:93). An auxiliary right to keep and bear arms does not confer a right to insurrection directly, but rather protects the necessary precondition for what one might call “legitimate” revolution: “having arms.” It protects the right of citizens to be armed *individually* for the purpose of *collectively* resisting tyrannical government, and therefore finds expression primarily in a collective body, the militia. While the concept of an “auxiliary right”

may appear novel, it is best understood as a distinct species of what Amar (1998, 216-17) calls a “political” (as opposed to “civil”) right, akin to voting or jury service.

Although the concept of auxiliary rights was articulated by Blackstone, English classical republicans also influenced the American conception on the right to keep and bear arms. While these writers did not agree on all points—Blackstone tended to be less radical—they described the right to keep and bear arms in remarkably similar terms. Like Blackstone, English republican writers supported popular militias composed of “the people” (typically meaning propertied adult men) as a safeguard against both tyrannical government and foreign enemies. Trenchard and Moyle (1697, 7) argued at the end of the seventeenth century that “general Exercise” of the citizens “in the use of Arms, was the only Bulwark of their Liberties; ... as well against the Domestick Affronts of any of their own Citizens, as against the Foreign Invasions of ambitious and unruly Neighbors.” Likewise, Andrew Fletcher (1997, 3-4) asserted that nothing is “so essential to the liberties of the people” as placing “the sword in the hands of the people,” because a popular militia provides “a sufficient security against the arbitrary power of the prince.” Concomitant with support for popular militias was a deep distrust of permanent (i.e. “standing”) armies composed of paid, professional soldiers. Standing armies were deficient, on this view, because professional soldiers had no stake in the nation they were pledged to defend and thus were primed to support the tyrannical usurpations of an ambitious general on promises of financial reward. Although Blackstone was not in a position to oppose standing armies given that they existed in the England of his day, he nevertheless argued that “in a free state ... the military power” should not be “a body too distinct from the people,” recommending short terms of enlistment, frequent rotation of enlisted men, and substantial contact between military and civilian life (1765-69/1884, 1:260). Classical republicans frequently denounced standing armies

in harsher terms (ex. Fletcher 1997, 3-4). Andrew Fletcher stated that even if militias were less reliable than standing armies for national defense, they were still preferable given the prospect of domestic tyrants (1997, 18-19). In sum, support for popular militias (as a protection against tyranny) and opposition to standing armies (as favorable to tyranny) were common to both Blackstone and English republicans (See Shalhope 1982). These writers were enormously influential in America, and a crucial early commentator, St. George Tucker, explicitly equated the Second Amendment right with Blackstone's fifth auxiliary right, albeit subject to fewer limitations (Tucker 1803/1996, 1:143).

An auxiliary right to keep and bear arms is distinct from an individual, collective, or civic right, although it partially resembles each. It is claimable by individual citizens and immune from governmental infringement, but finds expression primarily in a collective body, the militia. It protects the right of citizens to be armed *individually* for the purpose of *collectively* resisting tyrannical government. In the debates surrounding the amendment, "self defence" referred overwhelmingly to collective defense against governmental tyranny or foreign enemies, not the natural right of private self-defense (ex. Young 1995, 221, 754, 767; Tucker 1803/1999, 238).<sup>34</sup> Moreover, Despite a few counterexamples (see *Heller*, 584-89), the phrase "bear arms" was closely connected to militia service (Kozuskanich 2013). These facts undermine much of the evidence allegedly favoring an individual right.

Additionally, viewing the right to bear arms as an auxiliary right expands upon the civic interpretation without directly challenging it. Civic rights proponents get it only half right. They

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<sup>34</sup> In fact, it "would have been anathema to Anti-Federalists to demand an amendment to protect a private right of self-defense since doing so would have meant conceding that the federal government had general police powers," thereby dramatically augmenting its power (Cornell 2009, 1114). Justice Scalia argues that the prefatory clause "announces a purpose" but "does not limit or expand the scope of the" operative clause (*Heller*, 570). In my view, the prefatory clause confirms that the protected right is an auxiliary right instituted for a specific purpose: enabling collective resistance to governmental oppression. The intent and purpose behind a right is always relevant legally, and the inclusion of the amendment's purpose in the text certainly heightens that application.

correctly point out that bearing arms was seen as a communal right and duty of virtuous citizens to defend the nation, but they downplay the voluminous evidence that it also included the right to be armed in order to combat governmental tyranny.<sup>35</sup> The pro-revolutionary strand of thought was linked inextricably to the other republican aspects of arms-bearing identified by civic rights scholars. This fact entails meaningful legal implications: because the right to keep and bear arms was intended to protect the people from their (potentially oppressive) government, some governmental regulations must be off-limits or the right is effectively emasculated. Defending oneself against domestic tyrants as well as foreign enemies requires the right to possess arms that the government cannot confiscate. As we will see, these ideas emerged clearly during the American founding.

A federalism-focused interpretation of the Second Amendment transcends a mere auxiliary right to keep and bear arms, yet it is instructive to elaborate the legal implications of such a right. Such a right would certainly protect rights essential to permitting armed resistance to tyranny, such as purchasing weapons, keeping them in the home, and training with them (e.g. at shooting ranges). By contrast, some regulation of gun use not associated with the militia, such as hunting or carrying concealed weapons, would be permissible. It would protect all weapons in common use among infantry soldiers (such as M-16s today), but not artillery, tanks, and other specialized weapons.<sup>36</sup> Finally, it would apply only to citizens capable of serving in the militia, excluding the mentally handicapped, criminals, children, and the like.

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<sup>35</sup> For instance, Uviller and Merkel's (2003, 37-69) chapter on the English republican theory of arms-bearing does not cite any statements supporting armed resistance to governmental oppression.

<sup>36</sup> One of the weakest arguments in *Heller* is its response to the objection that "if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause." Scalia responds merely that "modern developments have limited the degree of fit between the prefatory clause and the protected right" (*Heller*, 627-28). By contrast, I agree with Siegel (2013, 88), who finds it "remarkable" that the majority believes the amendment "exclude[s] from its protection the kinds of weapons necessary to resist tyranny—the republican purpose the text of the Second Amendment discusses." An

## Federalism and Military Power in the Constitutional Convention

*“[Congress shall have the power] To provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.”* –Militia Clauses of the U.S. Constitution—Article 1, Section 8, Clauses 15-16

The debate over federalism and military power began in the Constitutional Convention. By empowering Congress to control armies and militias independently, the Constitution dramatically shifted the balance of military power, prompting vigorous opposition from delegates who supported decentralization. The debate over control of the military (a fundamental aspect of sovereignty) “shows how radical was the shift from the states’ total control of their militias to the sharing of that authority under the Constitution (Higginbotham 1998, 40). These debates revolved around the dangers of concentrating military power in one government, rather than the relative value of militias versus professional troops or personal self-defense. As such, they prefigured a fuller discussion of these topics in the ratification debates.

During the Convention, two rival positions emerged regarding military power. Eager to invigorate the new government, Federalists advocated strengthening national control of the defense system at the expense of state power.<sup>37</sup> While not advocates of total federal control, they wanted to empower the national government to meet unforeseen emergencies, enforce the laws, and defend the nation. Under the Articles of Confederation, Congress had been powerless to improve the quality of the state militias, and the states largely unwilling, causing many to doubt their military efficacy (Higginbotham 1998). In the wake of Shays’ Rebellion, which exposed the

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interpretation thus detached from its context (and, indeed, text) does not accurately reflect the original public meaning.

<sup>37</sup> The terms “Federalist” and “Antifederalist” originated during ratification. To avoid confusion, I have anachronistically imposed them on individuals in the Convention.

debility of the Congress and militias, Federalists stressed the need for a permanent (i.e. “standing”) army under federal control (ex. Madison 1985 [hereafter *Notes*], 29). As Jonathan Dayton argued, “preparations for war are generally made in time of peace” and may “become unavoidable” (*Notes*, 482). James Madison urged that “the regulation of the Militia naturally appertained to the authority charged with the public defense,” adding that such a power “did not seem in its nature to be divisible between two distinct bodies” (*Notes*, 484). Federalists generally “had but a scanty faith in the militia” and believed that only “a real military force” (i.e. a permanent, professional army) could “effectually answer the purpose” of national defense (*Notes*, 484).

In contrast, the Antifederalists opposed standing armies and supported limited federal oversight of the state militias. Echoing a long-standing and influential body of thought, they warned that standing armies threatened liberty and invited tyranny because they gave the government the means to squash opposition by brute force. By contrast, a militia—since it theoretically was composed of the entire male citizen body (excluding slaves)—could be trusted to promote the public good by refusing to enforce tyrannical or unconstitutional laws (c.f. Shalhope 1982). Although necessary, Elbridge Gerry warned, armies were “dangerous in time of peace” and should be kept as small as possible; “if there be no restriction, a few states may establish a military government” (*Notes*, 482). Similarly, Antifederalists opposed significant national regulation of the militia, agreeing with Oliver Ellsworth that the “consequence” of the states “would pine away to nothing after such a sacrifice of power” (*Notes*, 483). While even moderate Federalists such as John Dickinson agreed that “the States never would nor ought to give up all authority over the Militia” (*Notes*, 483), Antifederalists went further in believing that a nationalized militia, like a standing army, posed a clear danger to state power and individual

liberty (which they viewed as interconnected).<sup>38</sup> Because the federal government (unlike the states) could not be trusted to represent the people's interests, they feared that the militia clauses "might be so expounded as to include all power on the subject," vitiating the power of the states and leading to a "system of Despotism" (*Notes*, 513).<sup>39</sup> Gerry summarized the Antifederalist position in an offhand comment about a federal veto power over state laws: "the proposed negative [would] extend to the regulations of the militia, a matter on which the existence of a State might depend. The National Legislature with such a power may enslave the states" (*Notes*, 89). Even giving the federal government partial control over the selection of militia officers, Gerry later said, was "inconsistent with [the states'] existence" (*Notes*, 516). Antifederalists subordinated military effectiveness to the preservation of liberty, which they believed depended on the existence of strong states wielding their own military forces.

Federalists took pains to rebut the suggestion that creating a standing army or nationalizing the militia aided the acquisition of unconstitutional or tyrannical powers by the federal government (ex. *Notes*, 484). Many asserted that the republican nature of the American government would prevent oppression by giving citizens a choice over their representatives (*Notes*, 482, 484, 514), and that the militia could not be used to destroy popular liberty because it was composed of all citizens (*Notes*, 515). James Madison also insisted that national regulation would strengthen the militias, heretofore neglected by states, rendering a standing army unnecessary (*Notes*, 514-16; Higginbotham 1998, 46). Nevertheless, despite rejecting the likelihood of tyranny, Federalists took pains to clarify that the federal government would not have unlimited control over the militia. Asserting that their "object ... was to refer the plan for

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<sup>38</sup> For the purported connection between liberty and state power, see Amar (1998, 3-7). C.f. *AF*, 354.

<sup>39</sup> On the Antifederalists' support for localism and predictions of federal despotism, see Cornell (199, 68-74) and Storing (1981a, 15-37).

the Militia to the [Federal] Govt but leave the execution of it to the State Govts,” they assured objectors that the latter would retain the power to arm and train militiamen, although the federal government would regularize the arms, ammunition, and training regimen across the states to ensure effective fighting power (*Notes*, 513-14). The federal government would not be responsible for arming or training the militias directly, except during combat (when led by state-appointed officers).

Issues of federalism and centralization inarguably dominated this debate. Discussions of self-defense, hunting, and the like are nonexistent. Moreover, the question was not whether citizens would have a right to participate in a citizen militia—which all assumed—but rather which level of government would primarily control the militia. Anticipating a natural antagonism between the two levels of government, Antifederalists sought explicit protections of states’ control over their militias. These same concerns dominated debates over military power during ratification.

### Federalism and Military Power: The Anti-Federalist Critique

The evidence from the ratification debates confirms that the debate over military power leading to the Second Amendment centered on federalism and centralization. After the Convention sent their proposed Constitution to the states for ratification, a debate ensued which unlocks the Constitution’s original meaning. Antifederalists feared that centralized control of military power would lead to oppressive government and the destruction of the states, while Federalists argued that it was harmless and beneficial. Once again, the debate involved the question of which level of government would control the military, not personal, collective, or civic rights.



Antifederalists denounced standing armies as dangerous to liberty and upheld the militia as the best defense of a free state. Standing armies encouraged a false view of government privileging the glory of war over the execution of justice, where monarchs slaughtered thousands to revenge private quarrels (Frohn 1999, 425). They might enforce unjust laws, “however grievous or improper they may be,” on an unwilling populace (Frohn 1999, 39). At their worst, since they were “a body of men distinct from the body of the people” and accustomed to “blind obedience,” they had been used “very often to the total destruction of the government” by enslaving the people under usurpers (Frohn 1999, 432-33). In short, the danger to liberty from a permanent professional force outweighed any potential gains in security. By contrast, unlike professional soldiers—who come from “the dregs of the people” and are “exempt from the common occupations of social life”—the militia is literally a cross-section of the entire population “whose interests are uniformly the same with those of the whole community,” thus lacking any motive to disregard the public good (Frohn 1999, 650-51). Pointing to Switzerland, Antifederalists held that “a well regulated militia” is “sufficient for every purpose on internal defense” and could even “repel” invasions (Young 1995, 48).

While such views are consistent with the civic rights interpretation, federalism also dominated the debate. The Antifederalists’ central claim was that the Constitution would facilitate the consolidation of all power in the central government, resulting in the destruction of the state governments. They tirelessly declaimed that “no extensive empire can be governed upon republican principles, and that such a government will degenerate to a despotism, unless it be made up of a confederacy of smaller states” (Bailyn 1993, 1:448; see also Storing 1981a, 15-23; Cornell 1999, 68-74). Truly democratic governments must be close to the people and represent the diversity of local interests—a test the new Congress would surely fail. Though

supportive of union, Antifederalists opposed the creation of a distant capital filled with aristocratic and autonomous politicians, instead preferring a decentralized confederation in which the states retained most political powers. Federalists, they accused, advocated “consolidation” of “the all-prevailing power of taxation” and “extensive legislative and judicial powers” in an unrestrained government, which would “necessarily absorb the state legislatures and judicatories” (Frohnen 1999, 40). Despite Melancton Smith’s plea that “The State constitutions should be the guardian of our domestic rights and interests; and should be both the support and the check of the federal government” (Storing 1981b, 6:172), Antifederalists believed that consolidation was virtually inevitable because the Constitution authorized the federal government to enforce the law with its own officers and military, eliminating the ability of states to prevent it. For them, this setup contrasted poorly with the safe (but cumbersome) system under the Articles of Confederation, in which state participation was necessary to enforce federal laws (ex. Frohnen 1999, 708-09).

The Antifederalists’ views on military power sprang from their desire to protect the states’ power and independence. In fact, “few if any structures symbolized state sovereignty more than the militia” (Higginbotham 1998, 41-42). Antifederalists desired an equilibrium wherein the central government could deal effectively with truly national concerns, but in which the states could also exist independently if necessary—reserving, according to A [Pennsylvania] Farmer, “such a portion of sovereignty in the state as would enable them to exist alone, if the general government should fail either by violence or with the common consent of the confederates; the states should respectively have laws, courts, force, and revenues of their own” (Storing 1981b, 3.14.8). To be able to reassert their independence, the states needed to control their own military “force.” Accordingly, protecting this equilibrium was “the true reason ... for the Anti-Federalist

commitment to the system of requisitions, to state military power, and to constitutional checks by the states on the general government” (Storing 1981a, 36). The states’ inability to check consolidation raised the prospect that, *in extremis*, they must resort to the natural right of revolution. The Federal Farmer stated that because “the state governments ... possess no kind of power ... to stop in their passage, the laws of congress injurious to the people,” they, “in extreme cases, may resist, on the principle of self-defense” (Frohnen 1999, 301). Concerns about centralization plainly underlay the debate over the military.

Antifederalists argued that giving control over military power to the federal governments prevented state efforts to check unconstitutional actions of the federal government, paving the way for centralization. The Federal Farmer wrote that the powers of the proposed federal government, especially collecting taxes and forming the militia, “comprehend all the essential powers in the community” and “will probably soon defeat the operations of the state laws and governments” (Frohnen 1999, 164). Likewise, with “unlimited authority and controul over all the wealth and all the force of the union” given to Congress, Brutus asked, “what kind of freedom or independency is left to the state governments, when they cannot command any part of the property or of the force of the country” (Frohnen 1999, 431). Because the national government could “enact or execute” laws without state cooperation, “there is no way, therefore, of avoiding the destruction of the state governments, whenever the Congress please to do it, unless the people rise up, and ... resist and prevent the execution of constitutional laws.” However, he predicted, Congress would soon have “a revenue, and force, at their command, which will place them above any apprehensions on that score” (Frohnen 1999, 416).

The new Constitution, Antifederalists believed, gutted the ability of the state militias to check tyranny by facilitating their perversion into “select militias” not composed

indiscriminately of all free adult males. As a politically chosen and impoverished force, a select militia would share the corruptibility of a standing army and likely would be unwilling to protect the public welfare or state jurisdiction. While acknowledging that “the yeomanry ... possess arms, and are too strong a body of men to be openly offended,” the Federal Farmer held that “they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength” if Congress created a “select militia” of one-fifth or one-eighth of the population, composed of “the young and ardent part of the community, possessed of but little or no property,” while putting the rest of the universal militia “upon a plan that will render them of no importance.” The select militia would “answer all the purposes of an army, while the latter will be defenceless.” Because “the states must train the militia ... according to such systems and rules as congress shall prescribe,” Congress has full power to call out “the militia in general, or any select part of it ... to enforce an execution of federal laws” (Frohnen 1999, 167-68).

Likewise, Patrick Henry complained: “[T]his government ... does not leave us the means of defending our rights; or, of waging war against tyrants: It is urged by some gentlemen that this new plan will bring us an acquisition of strength, an army, and the militia of the States: This is an idea extremely ridiculous: ... Have we the means of resisting disciplined armies, when our only defense, the militia is put into the hand of Congress?” (Frohnen 1999, 680). Mocking a Federalist counterargument, the Deliberator warned that Congress “shall have power to declare what description of persons shall compose the militia ... . Where then is that boasted security against the annihilation of the state governments, arising from ‘the powerful military support’ they will have from their militia?” (Young 1995, 277). Similar statements abound (ex. Young 1995, 464; Bailyn 1993, 2:817-819; Frohnen 1999, 547-48). For Antifederalists, the Constitution

undermined state control of the militia, a check on national power essential to maintaining the federal system.

After creating a select militia, Antifederalists feared, the federal government could disarm the rest of the militia, further undermining resistance to centralization. Patrick Henry inveighed:

What resistance could be made [to national oppression] ... Your militia is given up to Congress ... as arms are here to be provided by Congress, they may or may not furnish them ... By this, Sir, you see that their controul over our last and best defense, is unlimited. If they neglect or refuse to discipline or arm, our militia, they will be useless: The States can do neither, this power being given to Congress ... this pretended little remains of power left to the States, may, at the pleasure of Congress, be rendered nugatory (Frohn 1999, 684-85).

John Smilie charged that “Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there shall be no militia at all. When a select militia is formed; the people in general may be disarmed” (Young 1995, 146). George Mason objected that Congress could, “under Colour of regulating,” instead “disarm, or render useless the Militia, the more easily to govern by a standing Army” (Young 1995, 366). In short, far from retaining sufficient force to check the national government or subsist independently, the states would exist at its mercy.

An essay by Luther Martin merits close examination because it succinctly illustrates Antifederalist doctrine regarding military power. Martin complained that “the *militia*, the *only defence and protection* which the *States* can have for the security of *their rights* against arbitrary encroachments of the general government, is taken entirely out of the power of their respective States, and placed under the *power of Congress*.” Denying that uniform regulations across the states would be advantageous or possible, he asserted that under the Constitution federal regulation of the militia would be even less necessary than before, since “the States would now have an *additional* motive to keep their militia well disciplined, and fit for service, as it would be their *only chance* to preserve their *existence* against a general government, armed with power

*sufficient* to destroy them.” Martin claimed that opponents wanted to federalize the militia so as to disallow states to “*thwart and oppose* the general government,” rendering them “at the mercy” of it. Given that the Constitution also empowered Congress to raise troops “*without limitation*,” removing state control of the militia “ought to be considered as the *last coup de grace* to the *State governments*,” since “if the general government should attempt to oppress or enslave them, they could not have any possible means of self defence.” By ratifying the Constitution, the people “*invite*” the federal government to suppress “the *first attempt* made by a *State* to put the militia in a situation to counteract the arbitrary measures of the general government,” and “enable it to leave the militia *totally unorganized, undisciplined, and even to disarm them*” (Young 1995, 219-21). Martin’s essay encapsulates Antifederalist critiques: states could not preserve their independence or protect their citizens’ liberties without sufficient jurisdiction to arm, train, and organize their militias apart from federal oversight.

### Federalism and Military Power: The Federalist Response

Federalists categorically rejected Antifederalist claims as farfetched and unfounded. They insisted that the United States needed a powerful military force to defend the nation and prevent civil war or insurrection. Standing armies, James Wilson asserted, were necessary to “maintain the appearance of strength” and the element of secrecy and surprise (Bailyn 1993, 1:65). Noah Webster remarked that the states separately “cannot provide for the *common* defence,” leaving “no room to controvert the propriety of constituting a power over the whole United States, adequate to these general purposes” (Bailyn 1993, 1:150). Existing fears must be cast aside, they argued, lest the nation disintegrate or succumb to conquest.

Federalists maintained that the Constitution contained several checks against abuse of power. Enlisting the concept of popular sovereignty, they expressed perplexity that the

Antifederalists trusted the state governments but not the national government, since the people controlled both through elections (Bailyn 1993, 1:301; Hamilton, Madison, and Jay 2005 [hereafter *FP*], 28:150). Noah Webster asked: “Why should we choose the best men in the state to represent us in Congress” only to “arm ourselves against them as against tyrants and robbers? ... I believe life, liberty, and property is as safe in the hands of a federal legislature ... as in the hands of any [state] legislature” (Bailyn 1993, 1:149). Other constitutional checks were the prohibition of expenditures without a lawful appropriation and regular record, and the prohibition of military expenditures for more than two years (ex. Sheehan and McDowell 1998, 50-51, 394). Since all nations must have a military, Federalists concluded, it was illogical to deny control over armies and militias to the federal government.

Federalists’ claimed that the universal militia of the people provided another reliable check against oppression. Tench Coxe declared: “THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, when compared with any possible army, must be *tremendous and irresistible* ... the unlimited power of the sword is not in the hands of either the *federal or state governments*, but ... *in the hands of the people*” (Young 1995, 275-76). Webster declared that ultimate governmental power remains in the hands of “the states,” and “cannot be alienated, till they create a body independent of themselves, with a force at their command, superior to the whole yeomanry of the country” (Sheehan and McDowell 1998, 393). The Republican wrote that, while tyrants “never feel secure, until they have disarmed the people” and raised mercenary troops, “it is a capital circumstance in favor of liberty, that the people themselves are the military power of our country ... [one] which encreases the power and consequence of the people; and enables them to defend their rights and priveleges” (Bailyn 1993, 1:712). Others Federalists

echoed this sentiment (*FP* 29:156; Young 1995, 11, 26). As long as the (universal) militia remained strong, the nation need not fear losing its liberties to either level of government.

Furthermore, Federalists clarified that the new military arrangements would not undermine states' ability to defend their jurisdiction. They specifically acknowledged state authority to raise, train, employ, and officer their militias ordinarily, leaving federal officials merely the power to summon and direct them during emergencies (Bailyn 1993, 1:112; 1:151; 2:703-04). Consequently, states would retain the loyalty of their militias, making "the state governments ... a part of, and a balance in the system" (Frohen 1999, 204). Coxe argued that, it would be "a powerful military support attached to, and even part of [the state]," and therefore loyal to it (Sheehan and McDowell 1998, 93). State control over their militias, in short, guaranteed that they could not be used to destroy state power.

Alexander Hamilton and James Madison offered the most sophisticated exposition of the militia's role in preserving liberty and federalism. Hamilton noted that, although militias would normally suffice, extreme circumstances require professional troops, rendering governmental oppression a perennial possibility even in republics (*FP* 28:149-50). However, Hamilton argued that the Constitution better protected liberty than a more decentralized system: "In a single state, if the persons intrusted with supreme power become usurpers, the different ... districts of which it consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource ... the usurpers, clothed with the forms of legal power, can too often crush the opposition in embryo" (*FP* 28: 150). In a federal system, by contrast, "the people" are "entirely the masters of their own fate" because "the general government will ... check the usurpations of the state governments, and these will have the same disposition towards the general government." The



people can, “by throwing themselves into either scale,” ensure the triumph of their favored side. Hamilton trusted that “if their rights are invaded by either, they can make use of the other as the instrument of redress.” It is “an axiom” that “the State governments will ... afford complete security against invasions of the public liberty by the national authority.” Using “all the organs of civil power,” the states could “adopt a regular plan of opposition,” “combine all the resources of the community,” and “unite their common forces.” In short, because of America’s federal constitutional arrangement, the “body of the people ... through the medium of their state governments” could “take measures for their own defense, with all the celerity, regularity, and system of independent nations” (*FP*, 28:150-51).

James Madison also argued that the states’ power over the militia ensured their ability to check federal tyranny. If a federal army attempted oppression, he wrote, “the state governments with the people on their side would be able to repel the danger” with “a militia amounting to near half a million of citizens ... officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments [the states] possessing their affections and confidence.” In addition to “the advantage of being armed,” Madison continued, “the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.” The separate state governments would “collect the national will, and direct the national force,” making opposition more effective. Consequently, Madison declared that “alarms” warning of the “annihilation of the state governments” or the usurpation of powers “reserved to the individual states” to be nothing but “chimerical fears” (*FP*, 46:259-60). For both Hamilton and Madison, federalism uniquely curbed tyranny by enabling both levels of government to check each other.

Significantly, both sides presupposed that the “militia” encompassed the body of adult male citizens. To dispel the misperception that they were anti-militia, Federalists often endorsed the universal right to keep and bear arms in the militia (ex. Bailyn 1993, 1:712). Never acknowledging lawful congressional disarmament, Madison assumed that Americans would be armed and organized by the states—in contrast to the “kingdoms of Europe” in which “the governments are afraid to trust the people with arms” (*FP* 46:259). Likewise, Tench Coxe asked: “Who are these militia? *are they not ourselves* ... Congress have no power to disarm the militia. ... What clause in the state or federal constitution hath *given away* that important right” (Young 1995, 276). Philodemus simply stated that “every free man has *a right to the use of the press*, so he has to *the use of his arms*” (Young 1995, 296). In fact, the entire Federalist defense assumed Congress’s inability to disarm the people, even when regulating the militia, for how else could the militia check a standing army? For their part, Antifederalists clearly valued a universally-armed citizen body, but their doubts impelled them to seek an explicit prohibition of disarmament, leading to the Second Amendment.

Federalism clearly dominated the debate over military power during ratification. Antifederalists balked not because they feared for the right to hunt or defend oneself, but because they predicted the states would be unable to protect their jurisdiction from a grasping central government. Moreover, the issue was not simply whether male citizens would be allowed to bear arms in a militia; of greater importance was the question of who would control the militia. Universal militias would be worthless if the states could not arm, train, or govern them.

### Drafting and Ratifying the Second Amendment

After reviewing and revising proposals from the states, a committee of eleven (including James Madison) drafted a set of amendments and sent them to Congress. A preliminary text of

the Second Amendment read: “A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms” (Young 1995, 680). This text was shortened by Congress. The final version read: “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed” (Young 1995, 712).

The committee based the amendment’s language on similar state-level provisions and proposals from Antifederalists. Virginia’s Declaration of Rights stated: “That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state” (Young 1995, 748). Both Pennsylvania and Vermont had Declarations of Rights declaring “That the people have a right to bear arms for the defence of themselves and the state (Young 1995, 754, 767). The Massachusetts Constitution of 1780 stated: “The People have a right to keep and bear arms for the common defence” (Young 1995, 773). During ratification, the Federal Farmer proposed that “the militia ought always to be armed and disciplined, and the usual defense of the country” (Frohnén 1999, 195). Both he and Brutus proposed a supermajority requirement for raising troops and an explicit prohibition on standing armies (Frohnén 1999, 307, 445-46). The Pennsylvania Antifederalists suggested several amendments. The seventh article stated: “That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them ... ; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up ...” (Frohnén 1999, 530).<sup>40</sup> The eleventh article

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<sup>40</sup> This article is a cornerstone of the individual rights interpretation. Although, since it mentions hunting, one can read an individual right into this provision, Antifederalists were not concerned primarily with safeguarding individual rights. Even here, checking the federal government was primary, as seen in the reference to people defending “their own state,” the clause about standing armies, and the eleventh article, which explicitly connected

read: “That the power of organizing, arming and disciplining the militia ... remain with the individual states ... That the sovereignty, freedom and independency of the several states shall be retained, and every power, jurisdiction and right which is not by this constitution expressly delegated to the United States in Congress assembled” (Frohn 1999, 531). Sam Adams proposed: “that the said Constitution be never construed to authorize Congress ... to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defense of the United States” (Young 1995, 702). Finally, the New Hampshire Convention proposed that “Congress shall never disarm any citizen, unless such as are or have been in actual rebellion” (Young 1995, 446).

These proposals can be used conjointly to clarify the Second Amendment’s meaning.<sup>41</sup> Taken together, they reiterate key Antifederalist objectives during ratification: restrictions on standing armies, greater state control of the militia, and a prohibition of congressional disarmament of “the body of the people.” They overwhelmingly located the right to keep and bear arms within the context of the fear of national oppression represented by a standing army. While most are compatible with the civic rights view—including, naturally, those penned at the state level—when seen in conjunction with the debate over military power during ratification, the connection between federalism and the Second Amendment is undeniable.

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militias to federalism. If the national government cannot disarm the militia, it follows that people can hunt, but killing game was not the underlying motive. Even if so, federalism and centralization were the paramount concerns of Antifederalists generally.

<sup>41</sup> Given the homogeneity of Antifederalist thought, it is most reasonable to believe that these proposals reflected identical concerns in somewhat different language. It is false to assume, as many collective rights proponents do (Rakove et al. 2013, 65-66), that proposals banning disarmament, or otherwise limiting the government’s regulatory power, diverge wildly from the final text. While Madison’s formulations mimicked proposals from his home state of Virginia, he sought to consolidate all the proposals into a concise declaration of rights, later writing that the modified bill of rights “does not differ much from the original propositions offered on that subject” (Young 1995, 704). Moreover, Jeremy Belknap summarized Samuel Adams’ proposals as preventing the infringement of “the right of peaceable citizens to bear arms,” and a 1789 newspaper article stated that Adams’ proposal was embodied in the Second Amendment (Halbrook 2008, 206-09).

The sparse record of the congressional debate over the amendment supports this interpretation. Elbridge Gerry remark that the amendment was intended “to secure the people against the mal-administration of their governors” received no debate, presumably indicating agreement. However, Gerry worried that the clause about conscientious objectors “would give an opportunity to the people in power to destroy the constitution” by defining those who are religiously scrupulous “and prevent[ing] them from bearing arms.” By suggesting an absurd and comical scenario—the government telling people their own religious beliefs—Gerry revived the fear of a select or disarmed militia, which would “make a standing army necessary,” adding that tyrannical governments “always attempt to destroy the militia” and raise a standing army (Young 1995, 695-96). Although Gerry never explicitly mentioned federalism—other than by citing Great Britain’s attempt to disarm the colonies—Roger Sherman understood the subtext and responded that “We do not live under an arbitrary government ... and the States, respectively, will have the government of the militia, unless when called into actual service” (Young 1995, 696-97). The remainder of the debate focused narrowly on conscientious objection. Our records from the Senate are even less revealing. Most importantly, among other minor revisions and shortenings of the amendments, it removed the conscientious objector clause and the reference to the militia as “composed of the body of the people” (Young 1995, 710).

### The Original Meaning of the Second Amendment

With this background in mind, we may turn to the original meaning of the Second Amendment. This article advocates a new interpretation in this regard, called the “federalist interpretation” given its emphasis on federalism.<sup>42</sup> The federalist interpretation advances two core claims. First, as discussed above, the right to keep and bear arms was viewed as an auxiliary

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<sup>42</sup> The term “states’ rights interpretation” is better, but it is already used of the collective rights view.

right intended to preserve liberty enabling the people to maintain an ultimate military check on tyrannical government. Second, the Second Amendment was intended to protect states' power by confirming their right to arm, train, and organize their (universal) militias for the purpose of resisting oppression from the national government. It arose because "the 'military check of federalism' built into the original constitution did not quiet Antifederalist fears" (Amar 1998, 50). For example, the Federal Farmer stated that "There would be less danger in this power to raise troops, could the state governments keep a proper controul over the purse and over the militia;" but, while "the separate states have ever been in possession of the power" to make "militia laws," "whether they and the union will have concurrent jurisdiction or not, must be determined by inference" (Frohnen 1999, 306-08). It solidified the Federalist claim that "the states could train their militias above and beyond whatever regulation the central government imposed" without federal interference (Higginbotham 1998, 56).

By confirming state authority over the militias, Federalists hoped to persuade doubters that the states would possess the necessary tools to resist potential attacks on the liberties of the states or people. They insisted that the federal system created a two-way check on abuse of power. The federal government could mobilize national resources to oppose state-level insurrections or dictatorships. Likewise, the state governments could "organize and mobilize their citizens into an effective fighting force capable of besting even a large standing army" (Amar 1998, 50), preventing an undemocratic coup by the national government. The Antifederalists failed to curb standing armies, but did obtain preemptive prevention of federal disarmament, ensuring that the states remained forearmed to resist future oppression.

The Second Amendment's primary features—auxiliary rights and federalism—are complementary rather than contradictory. Although individual rights scholars incorrectly assume

that a “right of the people” must be an individual right—and thus discount federalism—many Americans believed individual rights and state power were linked and saw the state governments as crucial to preserving individual liberty.<sup>43</sup> As Amar notes, “the militia system was carefully designed to protect liberty through localism. Here ... freedom and federalism pulled together” (1998, 55-56). Antifederalists feared an unrepresentative and aristocratic federal government unfit to protect popular liberty, and even Federalists acknowledged the value of militias in defending individual rights and state power. While militias were necessary to avoid standing armies, state control was necessary to prevent oppressive centralization of power. Combining these two principles generates what might be called an “auxiliary right of federalism:” the amendment protects the states’ control over (some) military force so that they can preserve both their jurisdiction and their citizens’ individual rights from potential federal oppression.

The legal implications of the Second Amendment follow logically from the foregoing interpretation. Since, as an auxiliary right, it was intended to protect state jurisdiction from federal tyranny, it originally prohibited any federal restrictions on gun ownership or use, but did not restrict the states in any way. Congress may provide a general plan for arming and training the militia, arm it, and mobilize it when necessary, but cannot interfere with the ownership and use of firearms under any pretext.<sup>44</sup> Even if the original Constitution could be construed to authorize congressional selection of militia membership—and the disarmament of others—the Second Amendment placed this interpretation out of bounds. For example, St. George Tucker (1803/1999, 228-29) wrote that Congress constitutionally cannot pass “a law prohibiting any

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<sup>43</sup> One exception is Akhil Reed Amar (ex. 1998), who often mentions federalism’s relevance to the Second Amendment. Although some differences remain, his view closely resembles mine and I am indebted to him.

<sup>44</sup> The debate centered on the militia clauses because, at the time, nobody imagined any other clause could authorize disarmament (cf. Rakove et al. 2013, 61, 70-71). Regardless, the amendment’s broad language prohibits regulations based on other clauses (such as the commerce or general welfare clauses).

person from having arms, as a means of preventing insurrections.” Likewise, the necessary and proper clause cannot authorize congressional regulation of arms, because “if congress may use any means, which they choose to adopt, the [Second Amendment] is a mere nullity.” It is nonsensical that disarmament could ever be “necessary and proper” for strengthening the militia or national defense. Only the states, which alone have police power, have compelling reasons to enact firearms legislation (e.g. public safety).

Additionally, the federalist interpretation undermines support for “incorporation” of the Second Amendment under the Fourteenth Amendment. Although auxiliary rights apply to individuals, a provision designed to protect state power should not become the means for limiting it, and early Court rulings—*United States V. Cruikshank* (1875) and *Presser V. Illinois* (1886)—affirmed that the Second Amendment limits only the federal government, not the states. In his dissent in *McDonald v. Chicago* (2010), Justice Stevens endorsed this view, stating that the amendment, as a “federalism provision,” “is directed at preserving the autonomy of the sovereign States, and its logic therefore ‘resists’ incorporation” (3111). The majority opinion charges Stevens with applying this “federalism argument” selectively and asks why other provisions of the Bill of Rights are not treated similarly (*McDonald*, 3056), but this paper clearly shows that the Second Amendment, like the Tenth, is a special case. On the other hand, incorporation need not appeal to the original meaning. Halbrook (2010) and Amar (1998, 182-86) powerfully argue that the framers of the Fourteenth Amendment intended to protect an individual right to bear arms. If true, “the notion that incorporation follow logically from *Heller* is hard to dispute as a matter of existing legal doctrine,” especially given that most of the Bill of Rights has been incorporated (Cornell and Kozuskanich 2013, 19). While a full examination is beyond the scope of this paper, it is clear at least that the case for incorporation in *McDonald v.*



*Chicago* (2010) is incorrect to the extent that it appeals to the Second Amendment's original meaning.

Interpreted in this way, the Second Amendment offers several unique advantages. First, it is easy to apply in that the Court need not navigate complex standards of review or apply the amendment to concealed carry laws, gun permits, assault weapons, or grenade launchers. Ironically, it might even best protect gun ownership: by forbidding all federal regulations, it eliminates justifications for creating exceptions to the amendment's limitations, preventing the incremental expansion of federal authority. Second, it does not necessarily legalize widespread ownership of dangerous weapons. If a unitary state gave its citizens and auxiliary right to bear arms, its citizens could own military rifles, which could pose problems given the greatly increased lethality of modern rifles (another reason not to incorporate!). However, the federalist interpretation permits the states to regulate weapons subject only to restrictions from their own constitutions.<sup>45</sup> Third, the federalist interpretation maintains the advantages of federalism by permitting experimentation with a variety of innovative policies and accommodating diverse local opinions and contexts, free from federal intrusion (Wilkinson III 2013). By contrast, even the individual rights interpretation threatens state power. Since every right has limitations, allowing the Supreme Court to determine limitations on the Second Amendment right gives the federal government enormous discretion over state jurisdiction, allows the congressional supersession of state firearms regulations, and potentially facilitates the very undermining of state military power the amendment was designed to prevent (cf. Cornell and Kozuskanich 2013, 15).

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<sup>45</sup> It is unclear whether American states contain provisions granting an auxiliary right to arms. While a full examination exceeds my purpose, most state-level provisions appear individualistic in nature.

Moreover, in the founders' theory, federalism plays a crucial role in rendering an auxiliary right to keep and bear arms safe and effective. The fact that auxiliary rights are intended to protect citizens against the government produces the so-called "paradox of auxiliary rights:" if the government cannot regulate auxiliary rights, anarchy is inevitable; but if it can regulate them, then governmental power is unlimited (Green 2002). Federalism resolves this paradox: if the states can "organize and mobilize their citizens into an effective fighting force capable of besting even a large standing army," and the federal government can raise armies and coordinate the militia, then mutual checking can forestall tyranny without creating anarchy (Amar 1998, 50). Contrary to other insurrectionist models of the Second Amendment, which generally ignore federalism's role in taming political violence in the founders' political thought (ex. Levinson 1989; Williams 2003), the founders never intended to legalize a general right to insurrection, preferring instead to rely on an equilibrium between two levels of government armed with well-regulated military forces. The founders' model resembles other structural checks and balances in the Constitution as much as the populism of the civic republicans. In this scheme, autonomous state power is necessary so that the states can (1) alert the people to tyranny and coordinate resistance to it using well-ordered militias (see *FP* # 28 and #46), and (2) regulate access to dangerous weapons. Conversely, if a unitary state gave its citizens an auxiliary right to arms, misguided extremists wielding military rifles could wreak havoc, but legitimate revolution would be difficult, since the people would have to fight spontaneously and without organization. While Americans reconsidered the value of popular uprisings after the Shay's and Whiskey Rebellions demonstrated their ineffectiveness and dangers, the possibility of state-led revolutions obviated those objections.

Although, as we will see, historical transformations have weakened the applicability of their model, the founders' stumbled onto a creative and fruitful solution to the problem of divided power in a federal republic that (ideally) prevents both tyranny from the top and uprisings from below. The Second Amendment (theoretically) enables extra-constitutional contestation between the two levels of government, facilitating the preservation of liberty in a compound republic. Ideally, if the states have strong militias and the federal government can raise armies and coordinate the states' militias, tyranny from any government can be successfully resisted. In short, the founders' model of allocating military power arguably fosters local self-government, reasonable gun regulation, and individual liberty, without empowering judicial activism.

### Early Commentary on the Second Amendment

Post-ratification commentary corroborates the federalist interpretation. In 1789, Federalist Tench Coxe wrote: "As civil rulers ... may attempt to tyrannize, and as the military forces ... might pervert their power to the injury of their fellow-citizens, the people are confirmed ... in their right to keep and bear their private arms" (Young 1995, 671). Coxe clearly viewed the right as an auxiliary right to protect against governmental tyranny. Around the same time, a newspaper article boasted that Congress had vindicated Samuel Adams much-maligned proposed amendments, including his proposal forbidding Congress "to prevent the people of the United States, who are peaceable citizens, from keeping their own arms" (Halbrook 2008, 209).

The most relevant commentator is the judge and law professor St. George Tucker, because he was conversant with the congressional debates on the Bill of Rights and reflected the moderate Federalist viewpoint responsible for ratification. "Tucker's views on the Second Amendment are important and merit close attention" because he "was one of the leading legal

thinkers of the Founding Era” whose “magisterial” and “influential” study of Blackstone’s *Commentaries* “helped shape the terms of constitutional discourse in the early republic” (Cornell 2006a, 1124). In notes he wrote in preparation for a series of law lectures, which were “composed almost contemporaneously with ... the Second Amendment” and “provide the first systematic effort to describe the meaning of the Second Amendment and its role in American constitutionalism” (Cornell 2006a, 1125), Tucker perfectly encapsulated the federalist interpretation:

If a State chooses to incur the expence of putting arms into the Hands of its own Citizens for their defense, it would require no small ingenuity to prove that they have no right to do it, or that it could by any means contravene the Authority of the federal Govt. It may be alledged indeed that this might be done for the purpose of resisting the Laws of the federal Government, or of shaking off the Union: to which the plainest Answer seems to be, that whenever the States think proper to adopt either of these measures, they will not be with-held by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above-mentioned would be subversive of every principle of Freedom in our Government; of which the first Congress appears to have been sensible by proposing [the Second Amendment]. ... this power of arming the militia, is not one of those prohibited to the States by the Constitution, and, consequently, is reserved to them under the twelfth Article of the ratified Amendment.<sup>46</sup>

For Tucker, the Second Amendment, to help check federal tyranny, protected state control of the militias, thus prohibiting the federal government from regulating gun ownership or preventing states from arming or regulating their militias. Tellingly, Tucker associated the Second with the federalism-oriented Tenth Amendment.

Tucker’s published works likewise substantiate the federalist interpretation. In his *View of the Constitution of the United States*, he praised the Second Amendment “as the true palladium of liberty ... The right of self defense is the first law of nature: in most governments it has been

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<sup>46</sup> “Ten Notebooks of William and Mary Law Lectures,” Special Collections Research Center, Tucke-Coleman Papers, Earl Gregg Swem Library, College of William and Mary, 127-28.

the study of rulers to confine this right within the narrowest limits possible. Whenever standing armies are kept up, and the right of the people to keep and bear arms is under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction” (1803/1999, 238-39). Tucker cited the disarmament of English citizens under the pretense of game hunting regulations, thus equating “disarmament” with restrictions on private ownership of weapons (1803/1999, 239). In his edition of Blackstone’s *Commentaries*, Tucker explicitly equated the Second Amendment with the English auxiliary right to “have arms,” noting that in America it was “without any qualification as to [the people’s] condition or degree” (Blackstone and Tucker 1803/1996, 1:143). While disarmament rendered the English “at the mercy of the government,” he later wrote, “in America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty” (Blackstone and Tucker 1803/1996, 2: 413). Collective self-defense from governmental oppression, rather than private self-defense from criminals, animated Tucker’s discussion. Elsewhere, he wrote that, while the militia clauses “were thought to be dangerous to the state governments” initially, “all room for doubt” regarding the states’ authority to organize, arm, and discipline their militias was “completely removed” by the Second Amendment (1803/1999, 214-16). Tucker considered it unconstitutional to prevent states from organizing and arming their universal militias, because under the Tenth Amendment the states retain concurrent jurisdiction over them.

Tucker argued that federalism uniquely discouraged disarmament. His list of the safeguards of liberty included the distribution of power between the state and national governments, “by which each is in some degree made a check upon the excesses of the other,” facilitating resistance by states to attempts by the national government to exceed its enumerated

constitutional powers. Tucker then illustrated how federalism prevented infringement of popular rights: “In England ... the greatest political object may be attained, by laws, apparently of little importance ... game-laws ... have been converted into the means of disarming the body of the people ... . The congress of the United States possess no power to regulate, or interfere with the domestic concerns, or police of any state ... nor will the constitution permit any prohibition of arms to the people, or of peaceable assemblies by them, for any purposes whatsoever” (Tucker 1803/1999, 252-53). Here, Tucker mentioned the right to have arms alongside other Blackstonian “auxiliary rights,” assembly and petition, again suggesting that the Second Amendment protected an auxiliary right. The Constitution’s structural framework limited the central government’s regulatory and police powers, Tucker believed, leaving states exclusive jurisdiction over local concerns, including public safety and firearm regulations. Post-Second Amendment, no pretext exists for federal disarmament via either the militia clauses or (non-existent) police powers.

Joseph Story also corroborates the federalist interpretation. As a staunch Federalist, he represented the views of Federalists generally. Declaring that “the militia is the natural defence of a free country” against invasions, insurrections, and “domestic usurpations of power,” he wrote that the “right of the citizens to keep and bear arms” is “the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will ... enable the people to resist and triumph over them” (1833, §746). Later he wrote that, during ratification, “some suggested” that “the control and discipline of the militia” was “indispensible to the states,” since if “congress should refuse to provide for organizing or arming them ... the states would be utterly without the means of defence, and prostrate at the feet of the national government,” lacking “effectual means of resistance” (1833, § 1201). While viewing such apprehensions as unfounded, “Story shared Tucker’s view that the Second Amendment had

been adopted to assuage Anti-Federalists' fears about the potential disarmament of the state militias" (Cornell 2006b, 1131), explicitly endorsing the right of the states to arm and discipline their militias concurrently with the federal government (1833, § 1202). Like the federalist interpretation, he anchored the Second Amendment in the debate over centralization and viewed the right to bear arms as an auxiliary right enabling opposition to tyranny.

### The Second Amendment: An Anti-Federalist (and Federalist) Victory

To further substantiate the federalist interpretation, it is necessary to interact with the arguments in support of the collective rights interpretation. Despite often acknowledging the Second Amendment's close connection to federalism, collective rights scholars wrongly reject any limits on governmental power. Virtually all endorse unlimited gun regulations at both the state and federal levels—including, probably, Justice Stevens.<sup>47</sup> While Bogus (2000, 7-8) ignores the Second Amendment altogether when making this claim, other scholars deploy two primary justifications. First, some argue that Anti-Federalist views are irrelevant because the Federalists allegedly co-opted the Bill of Rights and did not "modify the Constitution to meet [opponents'] substantive criticisms" (Rakove 2000, 81). Since "Congress wanted to affirm a general principle without compromising its own capacity ... to decide what form the militia should take," the amendment is a practically meaningless expression of "vague generalities" (Rakove 2000, 110-111), "heavy in emotional content but thin in substance" (Higginbotham, 1998, 50). Similarly, Cornell identifies a "states' rights conception" (identical to the federalist interpretation) in the

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<sup>47</sup> Steven's dissent in *Heller* states that "Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms" or in enshrining "the common-law right of self-defense" (637). While I agree that the right of self-defense was irrelevant, I do not conclude, as he appears to, that "any" legislature has plenary authority to regulate firearms. Since the Second Amendment was a "response to concerns ... that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several states" (*Heller*, 637), it is more reasonable to conclude that the amendment protected state jurisdiction and limited federal jurisdiction.

ratification debates and early commentary (2006a; 2006b, 1127-1133), but disregards it as the discredited position of the Antifederalist losers (2006a, 5; 2009, 1121).<sup>48</sup> Second, in a petition to the Supreme Court, a long list of scholars argue that, while drafting the amendment, the Senate deleted the House's description of the militia as "composed as the body of the people" in order to preserve "a discretionary congressional authority over the composition of the militia" (Rakove et al. 2013; also Cornell 2006a, 61; Rakove 2000, 86; Konig 2004, 158; c.f. Young 1995, 710).<sup>49</sup> Thus, they conclude, the founders intended that "the line between national and state authority would be a matter for political determination" (Rakove et al. 2013).

On the contrary, however, there is ample justification for viewing the Second Amendment as a meaningful limitation on federal power. Civic rights proponents correctly characterize the right as both a right and a duty to defend the nation, but ignore the fact that it also includes the (auxiliary) right of citizens to combat governmental tyranny, which renders certain gun regulations unconstitutional. Otherwise, it is difficult to explain why several state constitutions included a right of the people to bear arms "in defense of themselves and the state" (see Young 1995, 747-80)—raising the possibility of the people (collectively) defending themselves *against* the state—or why the Second Amendment protects a right of "the people," not "the state governments." If national defense is paramount, a professional army is unrivaled, but the founders believed that citizens must defend themselves against domestic tyrants as well

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<sup>48</sup> This move is puzzling since one of the commentators he cites in support of the states' rights view is arch-Federalist Joseph Story (Cornell 2006b, 1130-1132). Cornell also argues that Tucker's view "fits with" his own because Tucker "appended a civic conception of arms bearing to the earlier states' rights conception" (2006b, 1139)—but then seemingly proceeds to nullify the earlier view. But far from being mutually contradictory, federalism and the civic conception of arms-bearing are both essential to an understanding of the Second Amendment's meaning. The amendment protects state control of the militias, but arms-bearing was still a right and duty at the state level. Cornell's move is frustrating because his analysis is otherwise very good.

<sup>49</sup> Additionally, Rosenthal (2009) asserts that the inclusion of "well-regulated" confers regulatory authority on the federal government. However, the debate was not about whether regulations would exist but about *which level of government* would enact them.



as foreign enemies. Cutting the right in half is especially unjustified because the revolutionary implications of the right (alongside federalism) figured most prominently in the ratification debates.<sup>50</sup>

More fundamentally, there is no reason to believe that Federalists even objected to the Anti-Federalist understanding of the amendment. It is quite compatible to say both that the Federalists refused to compromise their essential goals *and* that the Second Amendment addressed Anti-Federalist concerns. Because it never touched the Federalist's core concern—federal power to raise armies and navies—there is no reason to doubt that it (partially) mollified Anti-Federalists. As we have seen, all early commentators assumed that states constitutionally could arm their citizens free from national interference, and there is no evidence that Federalists wanted to disarm citizens or gut state militias (which they viewed as largely incompetent and therefore irrelevant). While these public arguments were not meaningless, the Second Amendment further enshrined them and, crucially, diffused most opposition to the Constitution. Federalists' views presumably did not differ between the Senate and House, and both formulations reflected the original proposals. Most likely, the Senate “stylistically shortened” the amendment to avoid redundancy (Amar 1998, 51-52), especially since the phrase “the people” occurs twice in the original formulation (Halbrook 2008, 88). Throughout, the Senate consolidated and condensed the proposals, implying that a revision did not signify a redefinition

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<sup>50</sup> Some criticize the individual rights position for allegedly endorsing a constitutional right of insurrection whereby “disgruntled citizens take up arms ... against the elected government” (Bogus 2000, 6; also Rakove et al. 2013, 71). On the contrary, the military check of federalism was connected to a natural (not constitutional) right to resist oppression. Rather than enshrine a debilitating *constitutional* right to rebel, the Second Amendment tacitly endorsed a *natural* right of revolution, exercisable only in dire circumstances. It was also part of the ultimate checks and balances between the two levels of government, as Publius recognized. Despite inviting conflicting understandings of “tyranny,” the right of revolution remains a commonplace in American constitutionalism, and was certainly part of the amendment's original meaning.

(Labunski 2006, 237-39). Ambiguous pieces of circumstantial evidence should not trump the bulk of the historical data.

Regardless, the Federalists compromises with Anti-Federalists embodied in the Second Amendment deserve to be respected. The Federalists' repeatedly and publically disavowed disarmament or select militias, endorsed the universal militia, and promised a bill of rights dealing with objections. Surely these public arguments must count for something. We cannot write a provision out of the Constitution simply because some founders may have wished it did not exist, especially since other compromises, such as those over slavery, carried meaning despite the objections of many Americans. Some arch-Federalists quietly may have spurned any limitations on federal power, but most were willing to let the states retain a remarkable degree of independent power. Ironically, many collective rights supporters presuppose an originalism based on private intent that they often skewer elsewhere. It is unlikely that the general public would have understood the amendment as the Federalist Senators allegedly did. As Amar notes: "the notion that congressional power in [the militia clauses] logically implied the power to disarm the militia entirely is the very heresy that the Second Amendment was designed to deny" (1998, 52).<sup>51</sup> They certainly knew nothing of the Senate's proceedings, and, in the absence of explicit evidence to the contrary, would have assumed the prevailing definition of the militia as the "body of the people."

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<sup>51</sup> Cf. Scalia in *Heller*: if "the *organized* militia is the sole institutional beneficiary of the Second Amendment's guarantee," "it does not assure the existence of a 'citizens' militia' as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force. Thus, "the Second Amendment protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them" (600).

## Conclusion

This chapter advances a novel interpretation of the ratification-era debate over military power that prioritizes its context of federalism. The founders faced a difficult task reconciling union with state sovereignty. While there was an intense push toward greater centralization in the wake of the disastrous performance of the state militias during the War of Independence, many founders wanted the states to retain access to a core attribute of sovereignty, military power, so that they could prevent tyrannical encroachments on their jurisdiction if other safeguards failed.<sup>52</sup> The Federalists responded with the Second Amendment, which protects the states' concurrent jurisdiction over their militias and prohibits federal disarmament or circumscription of them, leaving the states free to arm and train their citizens. Thus, the founders' views on military power align with the model of constitutionalism and separation of powers that prioritizes mutual checking, contestation, and a coordinate construction of constitutional meaning. Military checks existed alongside more mundane constitutional checks and balances.

Nevertheless, serious difficulties attend a commitment to the founders' model of allocating military power. Augmenting state power would likely prove impractical, expensive, and unpopular. State militias have been insignificant at least since the massive growth of America's armies in the early twentieth century, and the sheer size of state forces necessary to balance the vast national army is staggering. Also, militia service was never popular, presenting political obstacles expanding it. Very likely none of the partisans of the current debate over gun regulation want to return to the founders' model since "to do so would mean both greater militarization of American society and greater levels of regulation" (Cornell and Kozuskanich

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<sup>52</sup> Because of the ultimate nature of the check brought about by military power, this chapter is somewhat disconnected from the other chapters in this dissertation. The only time states have attempted to check the central government using military power was the Civil War, and in that struggle the point of contention was secession, not revolution. Still, armed resistance to the national government remains a theoretical possibility.

2013, 7). Most importantly, technological advances have rendered maintaining an army vastly more difficult. Aircraft and armored tanks—to say nothing of nuclear bombs—would be necessary to check the federal government sufficiently (c.f. *Heller*, 627-28). Quite likely, technological changes have rendered a centralized army inescapable. Given these political and logistical obstacles, I am not suggesting we can—or should—establish military parity between the state and national governments. Whether the original meaning of the Second Amendment has any applicability or desirability today remains an open question.

The very impracticability of the founders' model reveals much about the nature of federalism. A robust federation may require a division of military power alongside a division of political power. Many of the founders certainly thought so. If this possibility seems far-fetched in today's world, it only serves to remind us of how far we have come from the eighteenth century. Federalism may be an inherently unstable concept, and a gradual movement towards greater centralization or decentralization may be inevitable in any federal polity. This paper, if nothing else, challenges us to consider what we want from federalism, and what it would take to obtain these benefits. Theorists of federalism may wish to establish military parity between the two levels of government—or they may not. Alternatively, they may wish to establish parity but be unable to do so without creating larger problems. In any case, a clear insight into the advantages and disadvantages of dividing military power is a necessary first step in this analysis, no matter what conclusion is reached.

In addition to its lasting relevance to theories of federalism, this chapter informs several scholarly debates about the founding. It undermines claims that Federalists made no concessions to their opponents, demonstrating that Antifederalists scored a major victory which explicitly protected state jurisdiction by legally documenting Federalist assurances that state military

power was not threatened. Alongside Phillip Vincent Muñoz's (2006) federalism/jurisdictional interpretation of the establishment clause, my interpretation of the Second Amendment should temper extreme pro-Federalist accounts of the Bill of Rights. Moreover, this paper informs accounts of the origin and nature of federalism by elucidating a neglected dimension of the balance struck between centralization and confederation at the founding. While Americans authorized Congress to raise professional armies, they did not leave this power unrestrained. Ratification provoked opposition not only because it allegedly created a consolidated government, but also because it weakened the states' ability to defend their share of sovereignty. The Second Amendment reveals the impressive depth of support for state military power. Like the Constitution itself, this solution was, in Madison's words (*FP* 39:211), "neither wholly national nor wholly federal," both unprecedented and imaginative. In sum, the Second Amendment is not only legally relevant but, as a seminal part of the history and theory of American federalism, deserves greater attention than it has hitherto received.

## CHAPTER FOUR: THE ORIGIN AND DECLINE OF THE CONSTITUTIONAL SAFEGUARDS OF FEDERALISM

Despite the best efforts of American statesmen, in the 1790s the United States could not entirely ignore the war in Europe between Revolutionary France and a coalition of monarchies. In 1794, at the height of the revolutionary Terror in France, the United States ceased paying debt to France on the grounds that the debt was owed to the old monarchy and not to the Revolutionary government inaugurated by the revolution. French violation of American neutrality, along with fears of “Jacobin” or pro-French spies and conspirators on American soil, induced a state of panic and rumors of war. Particularly noxious was the so-called XYZ Affair, in which French agents threatened and insulted American diplomats sent to broker a peace treaty. The pro-British Federalist Congress, along with president John Adams, inaugurated a “Quasi-War” by placing an embargo on trade with France, rescinding all treaties with the French, and making provisions for building an army and navy. Crucially, they also passed the Alien and Sedition Acts, which tightened requirements for the naturalization of immigrants, gave the president the power to expel aliens during peacetime without a hearing if he deemed them dangerous to the peace and safety of the nation, and prohibited “false, scandalous, and malicious writing” against the president or Congress. Severe sanctions, including fines and imprisonment, accompanied violation of the laws. Hundreds of French citizens left the country in anticipation of deportation—though no one was actually deported under the law—and many newspaper editors were fined and jailed.

The Alien and Sedition Acts prompted fierce political debate across the nation. Drawing on inherited beliefs about the necessity of social hierarchy and the importance of respect for public officials as necessary props of society, Federalists saw their actions as curbing the

anarchical and levelling tendencies springing up across the nation. As one writer said: “Whatever tends to create in the minds of the people, a contempt of the person who hold the highest offices in the state ... tends directly to destroy” the “essential part of government” (in Wood 2009, 257). Republicans, who took the side of the “common man” and thus tended to sympathize with France, thought the Acts were an unnecessary seizure of power from state laws and courts and gave the president tyrannical powers. To many, Anti-Federalist fears of consolidation and monarchy seemed to be coming true.

James Madison and Thomas Jefferson, the foremost leaders of the Republican Party, decided that aggressive action was need to oppose the tyranny brought on by the Alien and Sedition Acts. Though the controversy involved both federal-state relations and the status and future of republican government as opposed to monarchy, they chose to frame their response largely in terms of federalism.<sup>53</sup> “With the Congress under the control of the Federalists, [many Republicans] thought the federal government had become in effect a ‘foreign jurisdiction,’ and they began to look to the states as the best means of resisting Federalist tyranny” (Wood 2009, 268). On December of 1798, the legislatures of Virginia and Kentucky published resolutions, penned respectively by Madison and Jefferson, designed to coordinate resistance by the states to the federal government. Virginia’s resolution proclaimed it the “duty” of the state governments to “watch over and oppose every infraction of” America’s constitutional principles. In the case of “deliberate, palpable and dangerous exercise of other powers not granted by” the Constitution, the states are “duty bound, to interpose for arresting the progress of the evil, and maintaining, within their respective limits, the authorities, rights and liberties appertaining to them.” The federal government, it continued, was working “to consolidate the states by degrees into one

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<sup>53</sup> It should be kept in mind that the issue of republicanism versus monarchy, of democratic equality versus deference, is not directly related to federalism. Still, clear issues of the extent of federal power were at stake.

sovereignty,” which would transform America into an “absolute, or at best a mixed monarchy.” The resolution ends by appealing “to the like dispositions of the other States, in confidence that they will concur with this Commonwealth,” and expressing the desire that “necessary and proper measures will be taken by each, for cooperating with this State in maintaining unimpaired the authorities, rights, and liberties, reserved to the states respectively, or to the people” (Madison 1999, 589-91). The Kentucky Resolution asserted that “the government created by this compact [i.e. the Constitution] was not made the exclusive or final judge of the extent of the powers delegated to itself” but that each state as a party to the compact “has an equal right to judge for itself, as well of infractions as of the mode and measure of redress” (Jefferson 1984, 449).

In the end, despite the unpopularity of the Alien and Sedition Acts, the Virginia and Kentucky Resolutions fell on deaf ears. Four southern states did nothing, and nine northern states categorically rejected the plea for cooperation. The primary reason for this non-response was that most of the state legislatures were controlled by members of the Federalist Party loyal to John Adams, who had been elected after the Republican Party had been embarrassed and weakened by the XYZ Affair. Also, the British defeat of the French navy in the Battle of the Nile in October 1798 ended any immediate danger of French invasion, and subsequent events served to dampen the feeling of crisis. The Alien and Sedition Acts soon became obsolete and their long-term effect turned out to be minimal.

The non-response by the state legislatures was unexpected. The founders did not anticipate that, on a question about the powers of the federal government, systematic divisions would exist between some states and others. Madison had written just ten years earlier that “ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single state, or of a few states only. ... Every government



would espouse the common cause. ... One spirit would animate and conduct the whole” (*FP* 46:258). In fact, the loyalist Federalists state officials frustrated the attempts of Madison and Jefferson to coordinate the states, since they were unwilling to uphold state power at the expense of their friends in the federal government.

The story of the Virginia and Kentucky Resolutions sheds light on the means by which federalism is protected in the American constitutional system. Jefferson and Madison assumed that the states would be primed and ready to oppose any increase in power on the part of the federal government, and that they would work together to check the designs of their common enemy. The people, for their part, could align themselves with either side to ensure the protection of their rights. As it turned out, many state legislators were unwilling to betray their ideological bedfellows, even if it meant the assumption of greater power by the federal government. The episode revealed the paucity of constitutional safeguards for federalism, opening the way to future debates about nullification and the role of the Supreme Court in defining constitutional interpretation.

This chapter deals with the “safeguards of federalism,” or the best means to maintain an appropriate balance of power between the state and federal governments, in the American federal system. Whereas chapter two set forth a general theory of federalism, this chapter applies that theory to a particular prominent case. It shows that the American founders’ views on the safeguards of federalism align fairly well with the contestational model. They intended the federal balance to be protected by constitutional checks and balances akin to those between the executive, legislative, and judicial branches of government. This contestation would produce a fluid and healthy division of power and would prevent the concentration of power in one side.

Specifically, they argued that the Electoral College, Senate, and electoral system would protecting the states from federal encroachment and vice versa.

The founders' vision, however, failed to work as anticipated. For several reasons, the safeguards are no longer operational. First, the original constitutional settlement reflected confusion and compromise between competing design principles for the Senate, one of the main proposed safeguards of federalism. Second, the rise of political parties frustrated the original design for separation of powers in ways detrimental to contestation. Third, the passage of the Seventeenth Amendment eroded whatever value the Senate had for constitutional contestation. Finally, transformations since the early republic have weakened the people's attachment to their state and local governments, undermining electoral safeguards. This chapter concludes that the failure of contestation complicates the revival of contestation as a safeguard of federalism.

### Contestational Federalism at the Founding

There is ample evidence that the American founders endorsed basic elements of the contestational model of federalism. As with separation of powers, most founders intended federalism to be protected by the mechanism of contestation. Ideally, they believed that the division between state and federal power should be maintained by the mutual rivalry of self-seeking political actors, each using constitutional mechanisms to resist jurisdictional encroachments from the other. For this reason, they constructed the constitutional architecture in ways beneficial to federalist contestation.

### **Contestational Federalism and the Founders**

James Madison was the foremost defender of contestation over federalism. During ratification, Madison asserted that, following the new Constitution's transfer of power to the federal government, the states "will be continually sensible of the abridgement of their power,

and be stimulated by ambition to resume the surrendered portion of it” (1999, 148). In *The Federalist*, he explicitly equated horizontal and vertical separation of powers: “In the compound republic of America, the power surrendered by the people is first subdivided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself” (*FP* 51: 323). He clarified his “double security” argument in a later newspaper article:

The power delegated by the people is first divided between the general government and the state governments; each of which is then subdivided into legislative, executive, and judiciary departments. And as in a single government these departments are to be kept separate and safe, by a defensive armour for each; so, it is to be hoped, do the two governments possess each the means of preventing or correcting unconstitutional encroachments of the other. ... If a security against power lies in the division of it into parts mutually controuling each other, the security must increase with the increase of the parts into which the whole can conveniently be formed. (1999, 508)

The article concluded that mutual contestation was the only alternative to “schism, or consolidation, both of them bad, but the latter the worst” (1999, 509).

Other voices echoed Madison’s defense of contestation. During the Convention, George Mason stressed that “The state legislators also ought to have some means of defending themselves [against] encroachments of the Nat’l Gov’t. In every other department we have studiously endeavored to provide for its self-defense. Shall we leave the states alone unprovided with the means for this purpose?” (Madison 1985, 87). Most Federalists believed that this goal had been successfully achieved. “Americanus” asserted that in the proposed Constitution the “different powers are so modified and distributed, as to form mutual checks upon each other. The State Legislatures form a check on the Senate and House of Representatives, infinitely more effectual than that of the people themselves on their State Legislatures” (Bailyn 1993, 1:230).

Fisher Ames declared the state governments to be “the safeguard” of the people’s “liberties” against “the abuse of power,” and the “avengers of our violated rights” (in Storing 1981a, 11). The Supreme Court has even endorsed this view: “Just as the separation and independence of the coordinate branches of the federal government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front” (*Gregory vs. Ashcroft*, 458). In short, the founders expected the components of the federal system to defend their own rights and to mutually check each other, rather than rely on an outside arbitrator (c.f. Purcell 2007, 54–55).

During the ratification debates, Federalists argued that the very existence of state governments affords a locus point for alerting the people and organizing resistance. Madison wrote: “ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm” (*FP* 46:258; also Hamilton, *FP* 28). The very structure of federalism establishes self-interested sentinels against oppression, in the form of state officeholders, poised to guard the rights of the states and people. Knowledgeable and well-placed state politicians provide an antidote for the ignorance and apathy of most citizen. Federalists believed that even in the unlikely event of tyranny the states and people need not fear losing their rights. The retention of the states, however, did little to dampen Anti-Federalist fears that the new Constitution would lead to the consolidation of all power in federal hands. In response, the Federalists took pains to identify specific means by which states would safeguard their power.

For one thing, both Federalists and Anti-Federalists agreed that the presence and powers of the states posed an ultimate check on the national government by facilitating armed resistance

against violations of the rights of the people or states. By giving the states concurrent power over the militia and—through the Second Amendment—preventing disarmament by the federal government, the Constitution established a “military check of federalism” by which states could maintain their independence during extraordinary emergencies (Amar 1987, 1991; Walker 2016). Yet both sides understood that armed resistance, as an extra-constitutional mechanism, cannot play a part in the constitutional contestation the founders intended to maintain separation of powers ordinarily. Because such checks lie dormant in all but the most extreme situations, they are rare, uncertain, and unreliable. If states must choose between acquiescence and civil war, true contestation is lacking. Military resistance to the Constitution is not a constitutional but a natural right, available only when civil society has been upended. Declaring that “[c]hecks ought to act silently, and without public commotion,” Melancton Smith aptly stressed that a military check “would be pernicious; and certainly ought to be prevented. . . . [O]ne or the other of the parties must finally be destroyed in the contest” (Bailyn 1993, 2:807).

Anti-Federalists declaimed that the lack of ordinary constitutional mechanisms to protect state power risked provoking internecine violence. The national government, they warned, would inexorably pursue the consolidation of power in national hands and the decline or annihilation of the state governments. Alleged checks, such as the doctrine of enumerated powers, were insufficient because the Constitution’s “broad grants of power, taken together with the ‘supremacy’ and ‘necessary and proper’ clauses, amounted . . . to an unlimited grant of power to the general government to do whatever it might choose to do” (Storing 1981, 28). Brutus declared that “the destruction of the state governments” at the pleasure of Congress could not be avoided “unless the people rise up, and, with a strong hand, resist and prevent the execution of constitutional laws” (Frohnen 1999, 416). The Federal Farmer likewise lamented that, should

Congress usurp illegal powers, “the constitution will provide . . . no remedy for the people or states—the people must bear them, or have recourse, not to any constitutional checks or remedies, but to that resistance which is the last resort, and founded in self-defence” (Frohnen 1999, 219). Resisting the laws entails appealing to extra-constitutional rights and abandoning constitutional argumentation (and contestation) for civil war. Brutus warned that the state legislatures cannot “hold a check over the general legislature, in a constitutional way” since they cannot, “by law, resolution, or otherwise, of right, prevent or impede the general government, from enacting any law, or executing it, which this constitution authorizes them to enact or execute”. They could only check the central government “by exciting the people to resist constitutional laws. In this way, every individual, or every body of men, may check any government . . . . But such kinds of checks as these, though they sometimes correct the abuses of government, oftner destroy all government” (Frohnen 1999, 447). Anti-Federalists favored a check built into the constitutional structure to one as destructive and tenuous as armed resistance.

For Anti-Federalists, the lack of explicit constitutional mechanisms to protect states’ rights compared poorly with the indispensable role of state governments under the Articles of Confederation. Because under the Articles the states raised taxes and enforced laws for the national government, the latter could not continue operating without their cooperation. Faced with tyrannical or unconstitutional federal laws, states could refuse to enforce or fund them, rendering usurpation impossible. The new Constitution, however, empowered the national government to collect its own taxes, raise its own army, and enforce its own laws, a fact Anti-Federalists were quick to highlight. Patrick Henry praised requisitions (whereby states collected tax money and transferred it to Congress) because they “secure to the States the benefit of correcting oppressive errors” (Frohnen 1999, 708-09). The Federal Farmer asked how the states

could continue to be the “guardians of the people . . . if the state governments . . . possess no kind of power by the forms of the social contract, to stop in their passage, the laws of congress injurious to the people” (Frohn 1999, 301). True, because congressional districts did not cross state lines and state governments were necessary for the selection of federal officers, the states were “constituent and essential parts of the federal government” (*FP* 45:291; c.f. Wechsler 1954, 546). But this fact only guarantees the bare existence of the states, not the continuation of their authority or autonomy. The crucial issue for Anti-Federalists was state involvement in the ordinary operation of the national government (Storing 1981a, 35; c.f. Riker 1955, 453), to which Federalists could only plead that dependence on state cooperation had nearly destroyed the federal government (e.g. *FP* 15-16:74-86).

To mollify the Anti-Federalists with more than just appeals to necessity, the Federalists specified two types of constitutional safeguards of state power: popular and institutional. First, they expected popular sovereignty, especially the democratic election of rulers, to function as an “electoral safeguard” that sufficiently checked tyranny and consolidation.<sup>54</sup> Federalists often held up popular vigilance, expressed through elections, as an important safeguard of constitutional liberty (Sheehan and McDowell 1998, 218, 392; Bailyn 1993, 1:301). They envisioned popular sovereignty and democratic elections working as an active force in constitutional contestation, with the people defending their rights and interests through the agency of whichever government would best secure them. Regarding a hypothetical conflict over the “rights” of the state and national governments, Hamilton stated:

“[I]t is by far the safest course . . . to confine our attention wholly to the nature and extent of the powers as they are delineated in the Constitution. Everything beyond this must be left to the prudence and firmness of the people; who, as they

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<sup>54</sup> I consider the reliance on popular sovereignty to be a constitutional safeguard because it is expressed through constitutionally-ordained elections, which must be distinguished from non-constitutional popular safeguards such as the right of revolution and mob demonstrations, which had a place in early American constitutionalism (Fritz 2007).

will hold the scales in their own hands . . . will always take care to preserve the constitutional equilibrium between the general and the State governments” (*FP* 31: 197).

Madison likewise argued that because liberty did not depend “merely on the comparative ambition . . . of the different government” but on the people’s vigilance, “the people ought not surely to be precluded from giving most of the confidence where they may discover it to be most due” (Madison 1999, 266-67). However, “the first and most natural attachment of the people will be to the governments of their respective states” because they will be closer to the people and will fund more “offices and emoluments,” and “because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered” (Madison 1999 266; c.f. Greene 1994, 59-60). Hamilton agreed:

“Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each state would be apt to feel a stronger bias toward their local governments than toward the government of the union; *unless the force of that union should be destroyed by a much better administration of the latter*” (*FP* 17: 119; see also Hamilton, *FP* 27: 74–75; and Madison, *FP* 46: 294–296).

Madison also wrote to Thomas Jefferson that there was a natural tendency for federal office-holders to sacrifice “the aggregate interest” in favor of “the local views of their Constituents,” solidifying even further the states’ natural advantage in contests over authority (Madison 1999, 148). In sum, Federalists conceived of federalism as under popular control, capable of adjustment to maintain liberty and effective governance, but with a built-in bias favoring state power.

Second, Federalists argued that institutional safeguards, specifically the states’ role in the selection of federal office-holders, would give the states direct influence on the operation of the federal government, thereby preventing federal encroachments. The Senate served as the primary



bulwark of state power because it equally represented the states and, more importantly, provided for direct representation of the state governments in that they appointed the senators. Equal representation, wrote Madison, was “an instrument for preserving” the “portion of sovereignty remaining in the individual States,” and appointment of senators by the state governments gives them “such an agency in the formation of the federal government as must secure [their] authority” (*FP* 62:377–388). Madison maintained that “the Constitution has relied on” state control over the Senate and other national offices, and popular control of the House, for the “security of the rights & powers of the States in their individual capacity” (1999, 846). In essence “direct representation in the Senate” made the states “constituent parts of the national sovereignty” (*FP* 9:45–46), providing them an “absolute safe-guard” of their interests (*FP* 59:321). Since the national legislature is “controuled ... by its responsibility to the” states, laws weakening state power are unlikely to arise from “the love of Power in the Body itself” (Madison 1999, 774). According to Hamilton, “whatever may be their private sentiments of politics,” senators “will constantly look up to the state governments, which an eye of dependence and affection,” and will maintain “a uniform attachment to the interests of their several states,” especially if “they are ambitious to continue in office” (Bailyn 1993, 2:800; also *FP* 45:252). As “A Freeman” noted:

The state legislatures ... being the powerful creators of the senators, it cannot be apprehended ... that they will chuse men who are unfriendly to them; nor is it at all probable that a senator would hazard the displeasure of the people, or the vengeance of so potent a body as a state legislature, by sacrificing their interests or powers. Rather may it be expected ... that he may neglect general concerns, from a desire to please a legislature or a people, who will be to him *the source of honors, emolument and power*” (Sheehan and McDowell 1998, 99).

“A Freeman” also pointed out that, “by their delegates to the Senate,” the states not only may “give [their] dissent to foederal bills” but also exercise a check “on the appointment of *all*

*foederal officers*”—a check which “will exceedingly favor the preservation of the state governments” (Sheehan and McDowell 1998, 95, 100). Similar statements exist from John Dickinson (Madison 1985, 84-85), James Wilson (Bailyn 1993, 1:796),<sup>55</sup> Fisher Ames (Sheehan and McDowell 1998, 200), Tench Coxe (Sheehan and McDowell 1998, 466), John Stevens, Jr. (Bailyn 1993, 1:230), and others (see Kramer 2000, 256). As late as 1821, Madison (1999, 774) asserted that “the responsibility of one branch to the people, and of the other branch to the Legislatures, of the States” provided an “adequate barrier” against “*durable* violations of the rights & authorities of the States.”

Anti-Federalists also desired state influence on the national government through the Senate, although they doubted the efficacy of this arrangement. In addition to George Mason’s statement in the Convention cited above (Madison 1985, 87), the Federal Farmer wrote that because senators “represent the states,” it is “the interest and duty of the senators to preserve distinct, and to perpetuate the respective sovereignties they shall represent” (Frohnen 1999, 229). He directly attributed the presumed tendency of senators to “support the state governments” to “the mode of its appointment” (Frohnen 1999, 231). Melancton Smith expressed similar statements during the New York ratifying convention (Bailyn 1993, 2:805-06). However, some Anti-Federalists, such as the Federal Farmer, worried that the terms of senators were too long to keep them accountable, and advocated instituting shorter terms and giving state governments to the power to recall senators (ex. Frohnen 1999, 231-233).

Federalists occasionally mentioned the Electoral College as a supplementary means by which states could influence the selection of national officeholders. Since the state governments

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<sup>55</sup> Wilson, it should be noted, in the Convention favored the selection of senators by the people at large (Madison 1985, 82-83). His reversal may have been an attempt to defend a Constitution he considered imperfect by using arguments designed to appeal to his adversaries.

chose the electors, they would presumably choose a president loyal to their own power (ex. Bailyn 1993, 2:811). If so, the electoral college would reject overly nationalistic presidential candidates in favor of ones appreciative of state's rights. James Madison wrote to Thomas Jefferson that, just as "The Senate will represent the States in their political capacity," so "The President also derives his appointment from the States and is periodically accountable to them. This dependence of the General, on the local authorities, seems effectually to guard the latter against any dangerous encroachments of the former" (Madison 1999, 147-48). Similarly, Fabius exultantly wondered "where was there ever ... a government so diversified and attempered" by "the strongest cautions against excess." Not only will "the sovereignty of the several states" be "equally represented" in the Senate, but "in the president, and federal independent judges ... the sovereignties of the several states and the people of the whole union" are "conjointly represented" (Sheehan and McDowell 1998, 219).

Most founders defended a Constitution whose structure gave state and federal governments influence and checks on each other. On the one hand, the Constitution gives the national government a broad jurisdiction, declares federal laws to be supreme, and establishes that the Supreme Court is to be chosen by the national government. On the other hand, no action could be taken without the concurrence of an officeholder, whether president or senator, chosen (at least in part) by the state governments. By giving the states indirect influence in the federal government, proponents of the Constitution argued that it would sufficiently protect state interests. Ideally, contestation would ensure a durable balance of power between the two levels of government.

### **Mixed Motivations and the Institutional Safeguards of Federalism**

While most of the founders voiced support for contestational federalism at some point during ratification, it was not the first choice of many. Unfortunately for the strength of constitutional safeguards, the protection of federalism competed with other goals in the creation of both the Electoral College and Senate, weakening the link between them and the state governments. Despite the attempt during the ratification debates to highlight the protection of state power, the discussion of how to adjudicate federalism was controversial and confused. Many delegates at the Convention favored less (or no) influence for the states, and the final arrangement reflected compromise on a variety of issues. The following paragraphs outline the debate over the Senate during the Convention and ratification, with special emphasis on federalism and contestation.

The basic confusion was that both the Electoral College and the Senate were formed to be both representatives of the states and counter-majoritarian institutions which would ensure good and stable government by tempering the excesses of democracy. The Electoral College was a compromise between a purely national popular ballot and selection by the state legislatures (Diamond 1992, 189; Kramer 2000, 225), and was designed to ensure the election of a candidate who transcended localism (Ackerman 2005, 27-30). The Senate was intended to mirror the English House of Lords and check the evils of excessive “democracy.” The mixed motives underlying the Senate show through clearly in our records of the Constitutional Convention. “At the start of the Convention, delegates envisioned the Senate as a political levee that would restrain the flood of democratic passions expected to swamp the House of Representatives,” which required making the Senate “a bastion of elite wisdom or propertied privilege” (Robertson 2013, 94). Edmund Randolph defended his motion that senators be elected by the state

legislatures by arguing that “a good Senate seemed most likely” to provide a “check” against the “turbulence and follies of democracy” (*Notes*, 42). Edmund Randolph later stated that the “object of this 2d branch is to controul the democratic branch of the nat’l legislature,” preventing the “democratic licentiousness” natural to the popularly-elected House (*Notes*, 110). Gouverneur Morris wanted senators to have an “aristocratic spirit” and represent the wealthy (*Notes*, 233). John Dickenson even wanted the Senate to resemble the English House of Lords (*Notes*, 77), and supported introducing “family weight” and other aristocratic influences into the Senate (*Notes*, 85). Arguing against a proposal that senators be paid by their states, Madison declaimed that the “motion would make the Senate like Congress, the mere Agents & Advocates of State interests & views, instead of being impartial umpires & Guardians of justice and general Good” (*Notes*, 199). Similar statements abound (see Robertson 2013, 94-95; cf. *Notes*, 193).

The view of the Senate as a counter-majoritarian institution coexisted alongside statements about giving states a means to influence the federal government. George Mason was the most vigorous proponent of the idea that the state needed a means to check and contest the federal government. “The state legislators,” Mason argued, “also ought to have some means of defending themselves [against] encroachments of the Nat’l Gov’t. In every other department we have studiously endeavored to provide for its self-defense. Shall we leave the states alone unprovided with the means for this purpose?” (*Notes*, 87). William Johnson likewise argued that those who consider “the States as districts of people composing one political Society” and those “considering them as so many political societies” are both right (*Notes*, 211). He wrote:

The fact is that the States do exist as political Societies, and a Govt is to be formed for them in their political capacity, as well as for the individuals composing them. Does it not seem to follow, that if the States as such are to exist they must be armed with some power of self-defence. ... Besides the aristocratic and other interests, which ought to have the means of defending themselves, the States have their interests as such, and are equally entitled to like means. On the

whole he thought that as in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, ... in *one* branch the *people*, ought to be represented; in the *other* the *States*. (*Notes*, 211)

Some delegates held to both positions simultaneously. Alongside his pro-aristocratic views, Dickinson supported state selection of senators because “preservation of the States in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other” (*Notes*, 84).

The delegates’ also divided over the method of appointing or selecting Senators, and for much the same reasons. As the best (or only) means to promote a localist orientation in the Senate, state selection of senators is the linchpin of contestational federalism. Yet alongside state selection, delegates proposed that senators be chosen by popular election, by the House from among its own members, and by the president from among people nominated by the state legislatures (see *Notes*, 84). A variety of motives entered in to the discussion. Still, there was a basic division between those wanted state selection because it would give the state governments influence, and those who opposed it for the same reason.

Much of the debate centered on what mode of selection would produce the “best” senators, as opposed to which mode would give the states influence in the federal government. Many seemed to agree with Madison that the “true question was in what mode the best choice [would] be made. If an election by the people, or thro’ any other channel than the states legislatures promised as uncorrupt & impartial a preference of merit, there could surely be no necessity of an appointment by those Legislatures” (*Notes*, 86). Elbridge Gerry proposed a hybrid mode of election by both the people and the state legislatures on the grounds that it would “secure more effectually a just preference for merit,” in sharp contrast to some of the states, in which “the worst men get into the Legislature” (*Notes*, 73-74). John Dickinson thought that state

selection would serve as a “refining process” which would “assimilate it as near as may be to the House of Lords in England” (*Notes*, 77). By contrast, James Wilson and George Mason defended popular election as more congruent with democratic government (*Notes*, 74-75). Charles Cotesworth Pinckney supported state selection because he thought it “would be a better guard agst bad measures,” without mentioning federalism (*Notes*, 78). Elbridge Gerry, a strong supporter of federalism, claimed that state selection would provide a check for the “commercial” interests, including “stockholders,” against the “landed interest” favored by popular election (*Notes*, 84).

However, federalism was also mentioned in debates on the selection of senators. Roger Sherman argued for state selection on the grounds that it would create “a due harmony between the two Governments,” which “ought to have a mutual interest in supporting one another” (*Notes*, 82). John Dickenson supported state selection both because it would be a better way to collect “the sense of the States” than direct election, and because “distinguished characters ... [are] more likely to be selected by the State Legislatures, than in any other mode” (*Notes*, 82). On the other side, Madison opposed state selection (*Notes*, 75, 86, 199). During a later discussion on June 25, James Wilson likewise opposed state selection on the grounds that it would “introduce & cherish local interests and local prejudices,” which he sought to avoid (*Notes*, 189). He asserted that the federal government “is not as assemblage of States, but of individuals ...; the *individuals* therefore and not the *States*, ought to be represented in it” (*Notes*, 189). In response, Oliver Ellsworth “urged the necessity of maintaining the existence & agency of the States” by preserving state selection of senators, arguing that the mutual cooperation of the state and federal governments was necessary to make politics work (*Notes*, 189-90). William Samuel Johnson “urged the necessity of preserving the State [Governments] which would be at the

mercy of the [General Government] on Mr. Wilson's plan," and Hugh Williamson agreed with this statement (*Notes*, 190). George Mason argued that to make a government "efficient" it was necessary to provide "its different branches" with the "power of self defence." He expressed surprise "that there should be any disagreement about the necessity of allowing the State [Governments] the same self defence. If they are to be preserved as he conceived to be essential, they certainly ought to have this power, and only mode left of giving it to them, was by allowing them to appoint the 2d branch of the [National] Legislature" (*Notes*, 190-91). When the subject was broached later, on June 30, William R. Davie supported "referring the appointment to the Legislatures, whose agency in the general System did not appear to him objectionable as it did to some others" (*Notes*, 226). In the end, despite Madison's complaint that "[t]he plan in its present shape makes the Senate absolutely dependent on the States" (*Notes*, 228), the Convention affirmed state selection of senators.<sup>56</sup>

The debate over representation in the Senate also involved both federalism as well as competing issues. State equality in the Senate (as opposed to proportional representation) was desired primarily to protect the interests of the small states, which is not identical to protecting state power as such, even if it leans in that direction (see Robertson 2013, 97-102). Proportional versus equal representation in the Senate only matters for issues on which states have systematic differences of interest, such as economic policy. Both large and small state governments have an equal interest in the institutional rights of state governments as such (cf. *Notes*, 296). While Roger Sherman "urged the equality of votes not so much as a security for the small States, as for

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<sup>56</sup> The consistency of Madison's thought, especially regarding federalism, has been subject to extensive scholarly debate. This chapter will provide an argument that Madison's thought was generally consistent, but it cannot deal adequately with the secondary literature on this topic. Alan Gibson (2002) provides a skilled overview of the relevant literature. He shows that the dominant view in the twentieth century was that Madison was inconsistent: he started out a fervent nationalist who changed course dramatically in the 1790s. Others hold that he remained stable on the ends of government but changed his mind on the constitutional structures necessary to achieve these ends. Zuckert (1986) and Banning (1998) present compelling accounts that emphasize consistencies in Madison.



the State Govts which could not be preserved unless they were represented & had a negative in the Genl Government” (*Notes*, 291), this line of thought was at best an afterthought for most delegates.

This summary shows that the delegates to the Convention were divided in a number of ways. Delegates from large states supported proportional representation in the Senate, while those from small states favored equality of representation. Some delegates believed that state selection would ensure the right type of senator, whereas others disagreed. Even those who favored state selection were divided as to whether that mechanism would promote state power, property rights, commercial interests, or some other goal. In the midst of all of these disagreements, a number of delegates favored giving the states a check over the actions of the federal government, while others wanted to subordinate the states or keep the two levels separate. Delegates in the former camp include William Johnson (*Notes*, 190, 211), Luther Martin, George Mason (*Notes*, 87, 190-91), Charles Cotesworth Pinckney; Gunning Bedford Jr. (*Notes*, 229-230); Roger Sherman (ex. *Notes*, 291); William Davie (ex. *Notes*, 226), and Hugh Williamson (*Notes*, 190). Prominent among the larger nationalist group were Wilson, Hamilton, Madison, Read (*Notes*, 213), Nathaniel Gorham (*Notes*, 212), and Rufus King (*Notes*, 227-28). This divide on federalism coexisted with and complicated the other disputes related to the Senate. In the end, it is impossible to determine whether the Convention adopted state selection of senators in order to protect the influence of the states, or the influence of the aristocratic portion of society, or to ensure better representatives, or for some combination of these. Each delegate doubtless supported state selection for his own idiosyncratic reasons.

Support for the Senate as the representatives of the states and a check on federal power comes to sight as a product of compromises made in the Convention. With the possible exception

of George Mason, who drew an analogy between separation of powers and federalism and sought to preserve a defensive check for the states on federalism grounds, perhaps no delegate favored the compromise on its merits. Statements of the value of the Senate as a safeguard of state power are much more frequent in the ratification debates than in the Convention, indicating that many Federalists supported contestational federalism opportunistically and for pragmatic reasons. In particular, James Wilson, Alexander Hamilton, and James Madison, all staunch nationalists, defended state selection on federalism grounds during ratification despite opposing it in the Convention. Such nationalistic skeptics of the Convention's work were forced to defend the Constitution as the best that could be hoped for given the circumstances, rather than the best possible. Their disingenuous arguments were perfectly calculated to mollify the opposition of the Anti-Federalists by proving that states would still be important and that the federal government would be subject to checks.

Despite its accidental origin as the product of compromises which satisfied no one, contestational federalism is still a defensible theory in its own right. As with other aspects of American federalism, contestation represents a departure from both the confederal and national forms of government which were most familiar to the founders, and it took time and imagination to perceive the benefits that could be reaped from this kind of arrangement. During the ratification debates, this realization seems to have set in. Just because contestational federalism did not represent anyone's original position does not make it wrong. It ought to be considered as a legitimate political theory in its own right, a component of the "partly national, partly federal" nature of the American system of separation of powers.

## How Mixed Motives Undermined Contestational Federalism

While the anti-democratic goals for the Senate were never realized, the inclusion of aims unrelated to federalism in its design undermined their effectiveness as a federalism-protecting institution. The twin roles outlined for senators—anti-democratic checkers of popular passion and faithful representatives of the states—are in tension with each other. The new national government itself was in large part a response to the supposed democratic excesses of the state government, and many Federalists wanted it to curb unjust state legislation. Clearly, giving the state governments agency in the national government threatened to defeat that aim. Several delegates resorted to defending state selection on the grounds that localist prejudices would pervade the Senate no matter which selection method was used (ex. *Notes*, 226). What is especially confusing is that most delegates who favored state power also favored an aristocratic Senate. Many delegates likely had not considered the issue fully, and changed their views over the course of the Convention.<sup>57</sup>

The desire to make the Senate quasi-aristocratic led the founders to bypass measures that could have strengthened the connection between the state legislatures and senators. Such measures included giving state legislatures the ability to “instruct” senators on how to vote, and giving them the power to recall and replace their senators. Although states could recall representatives under the Articles of Confederation, recall and instruction were not instituted in the Constitution of 1789 because they conflicted with the ideal of the Senate as an elite body freed from popular pressures (cf. Bybee 1997, 515-535). As Schiller and Stewart (2015, 27) note, the founders wanted senators to be “insulated ... from popular passions” so that the Senate could

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<sup>57</sup> Note that Mason changed from supporting popular election to supporting state selection (*Notes*, 75, 190-91). This change may have resulted from the fact that the structure and purpose of the Senate was constantly in flux throughout the debate.

be an “elite body that would sometimes take unpopular action, and the right of instruction would limit that flexibility.” In the minds of many founders, instruction improperly “infringed the representatives’ independent judgment,” and the right to recall “would have undermined the Senate as a repository of wisdom and stability” by permitting each new state legislature to select a new senator (Bybee 1997, 522, 530). Instituting these mechanisms would have given states greater influence and control over their senators, strengthening federalist contestation.

Long senatorial terms of six years further prevented the states from holding a senator accountable. Short terms would have given state legislatures greater influence over their senators by allowing them to refuse to reappoint senators more frequently. Senators who wished to stay in office would need to placate their state’s government. However, long terms were instituted in order to give the Senate dignity and independence, facilitating its use as a counter-majoritarian institution. In the Convention, John Dickenson even argued that, while he favored state selection because it gave the states “considerable agency in the System” of government, he also supported long terms to avoid making the federal government “dependent on” the states (*Notes*, 77-78). The independence-producing effect of long terms was especially powerful prior to the twentieth century, when the vast majority of state legislators served only one or two terms, entailing that senators up for reelection faced an almost entirely different body (Schiller and Stewart 2015, 46; Filippov et al. 2004, 125-26). While the states could initially choose their favored candidate and could refuse to reelect a wayward senator, their inability to recall or instruct senators largely undermined senatorial accountability (Riker 1955, 455–63; Schiller and Stewart 2015, 27).<sup>58</sup>

Although some senators felt bound to follow instructions from their states and others resigned or

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<sup>58</sup> Based on the founders’ rejection of instruction and recall, Schiller and Stewart (2015, 26-27) conclude that protecting federalism was not a widespread goal of the Senate. However, as they admit, there are “practical explanations for these omissions as well” (2015, 27), and at any rate this evidence only implies that there were multiple motivations behind the Senate, not that protecting federalism was not a motive.

chose not to run for reelection because of differences with their state legislature (Bybee 1997 526-27), the lack of a constitutional basis and an effective enforcement mechanism limited the impact of instruction.

The ambivalent commitment to the Senate as a representative of the states came out clearly in debates during ratification over the power of instruction and recall. Anti-Federalists generally doubted the effectiveness of the Senate as a protector of federalism (Storing 1981a, 35, and note 31), especially because the Constitution did not provide for recall (Bybee 1997, 528-530). Luther Martin argued that “the Senate *as constituted* could not be a *security* for the *protection* and *preservation* of the *State governments*, and that the *senators* could not be justly considered the *representatives* of the *States as States*” *on the grounds that*:

for *six years* the *senators* are rendered totally and absolutely *independent* of their *States*, of *whom* they ought to be the *representatives*, without any *bond* or *tie* between them: During that time they may join in measures *ruinous* and *destructive* to their *States*, even such as should *totally annihilate* their *State governments*, and their *States cannot recall them*, nor *exercise any controul over them* (Storing 1981b, 2:46).

The New York Convention debated but ultimately rejected an amendment to term limit senators and make them subject to recall. In support, John Lansing argued that, since the Senate was intended to represent “the sovereignties of the states” and check “encroachments of the general government” senators should be “peculiarly under the control, and in strict subordination to the state who delegated them” (Elliot 1827/1901, 2:289). Robert Livingston objected because recall would produce “endless confusion” given that the state legislatures were governed by “factious and irregular passions,” and because it would “bind the senators too strongly to the interests of respective states,” preventing them from making necessary sacrifices for the good of the union (Elliot 1827/1901, 2:291, 296). Senators, he stated, represent both their own states and the nation, and thus “are not to consult the interest of any one state alone, but that of the union”

(Elliot 1827/1901, 2:282). Others agreed for much the same reasons (Elliot 1827/1901, 2:289ff). Arch-nationalist Alexander Hamilton, who harbored little appreciation of federalism, urged the propriety of making the Senate a “select body” that could “regulate the fluctuations of a popular assembly,” for which purpose the senators should have long terms and be divested “as much as possible of local prejudices” (Elliot 1827/1901, 2:301-02). He added that recall would place senators in “a state of vassalage and dependence” to the state governments, which were dominated by populist forces (Elliot 1827/1901, 2:303). Lansing responded by lamenting that if the states could not control their senators, they “would soon be found unnecessary and useless, and would be gradually extinguished” (Elliot 1827/1901, 2:308). Melancton Smith supported recall on the grounds that “as the senators are the representatives of the *state legislatures*, it is reasonable that they should be under their control” (Elliot 1827/1901, 2:299). Smith deftly pointed out the inconsistency between Hamilton’s desire that the Senate be purged of local prejudices and the typical Federalist argument—mouthed by Hamilton at times—that the Senate would serve as a bulwark against centralization (Elliot 1827/1901, 2:312). Likewise, in the Virginia ratifying convention, when Patrick Henry lamented that senators could ignore instructions without fear of being recalled, George Nicholas responded that recall would “impair their independence and firmness” (Elliot 1827/1901, 3:360).

In conclusion, these debates show that competing principles—independence from popular pressure and dependence on the states—both played a role in the formation of the Senate’s constitutional structure. The anti-populist motive appears to have preexisted and, to some extent, dominated the pro-federalism motive. Defenses of the Senate as a safeguard of federalism are much more common in the ratification debates—where the Federalists needed to defend the Constitution against fiercely pro-local Anti-Federalist doubters—than in the nationalist

Convention. These mixed motives rendered the Senate a hybrid institution that did not embody either principle adequately, and had long-term implications for the success of contestation over federalism. The founders rejected measures, such as recall and instruction, that would have bound senators more tightly to the state governments. The rejection of these measures, combined with senators' long terms, weakened the ability of states to influence their senators, such that Senate only imperfectly represented the interests of the states as states in the federal government.

### **Defending the Sincerity of the Federalists' Support for State Power**

Despite their attempts to placate Anti-Federalists, the Federalists' commitment to state power is debatable. Federalists clearly believed substantial centralization was necessary, pulled no punches describing the weaknesses of past confederations (*FP* 9: 71–72; 58: 360), and altered the meaning of “federal republic” to accommodate a mixture of national and confederal elements (Storing 1981a, 32–33). Some scholars even argue the Federalists harbored a subtle preference for unitary government and the elimination of the states (Diamond 1962, 21–64; Peterson 1985). Moreover, the Constitution incontestably provided fewer means of contestation to the states than to the three branches of the federal government. In comparison with the complicated system of checks and balances between the branches, the states have no direct influence over Congress or the President. For instance, the states have no veto power, and in fact James Madison even (unsuccessfully) proposed enabling Congress to veto any state law it deemed unconstitutional.

While such facts imply a lesser commitment to federalism among some Federalists, there is evidence that most Federalists sincerely desired to establish equilibrium between the state and national governments. For one thing, the views of a few high Federalists did not accurately

represent the views of most Americans or even most supporters of ratification.<sup>59</sup> Still, the diversity of views present at the nationalist-dominated Convention reveals much about the Federalists' commitment to Federalism. While passionate nationalists opposed any agency for the states in the national government, most delegates expressed a desire to safeguard state power. Madison's proposed national veto of state laws proved too radical even for the Convention, to say nothing of the state ratifying conventions (Yarbrough 1987, 89), and James Wilson ultimately lost his bid to deny the states any influence on the Senate. The average voter was presumably even more inclined to favor state power, considering the relative absence of Anti-Federalists in the Convention.

The need to achieve ratification forced nationalists of the Hamiltonian persuasion to temper their views—in both the Constitution itself and in their interpretation of it during the ratification debates. As Storing (1981a, 11) observes, “expressions of rather strict federal principles were not uncommon” among Federalists, many of whom repeatedly defended state power and denounced consolidation.<sup>60</sup> By accommodating Anti-Federalist objections (sincerely or insincerely), the Federalists narrowed the range of possible interpretations of the Constitution. Given that they themselves grounded the Constitution on popular sovereignty, it makes sense to privilege what the people thought it meant—a position endorsed by Madison (see Yarbrough 1987, 97). Whether we should prioritize the private views of certain elite founders over their own

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<sup>59</sup> As an example, see the exchange on the Senate between Hamilton and Melancton Smith in the New York ratifying convention (Bailyn 1993, 2:795ff). Hamilton argues that, while it “is proper that the influence of the states should prevail to a certain extent” (Bailyn 1993, 2:813), local/state prejudices do not need to be augmented because they are more than strong enough to protect state power, that in fact they will undermine the national government and weaken the union, and that the Senate should be purified of local prejudices. Smith treats this claim as an outlier, entirely opposed to the typical Federalist argument, which lauded a close connection between states and their senators (Bailyn 1993, 2:806).

<sup>60</sup> For a balanced argument opposing the view that Madison was a radical centralizer, see Greene (1994). For a detailed study of the many federalisms in the founding, which stresses that Madison was more nationalistic than others at the Convention, see Zuckert (1986).



publically stated positions is, of course, an open question that depends largely on one's philosophy of constitutional interpretation. Still, it makes little sense to say that Americans understood themselves to be ratifying a wholly nationalist document.

If most Federalists genuinely desired to create an equilibrium between state and federal power, then what can explain their failure to provide robust safeguards for the states? I argue that the unique political circumstances of the 1780s led them to believe that protecting state power should take second place to establishing a powerful central government. Contestation works both ways, and there is abundant evidence that most founders believed curbing the power of the states to be of paramount importance in 1787-1788. They thought that states would have so many natural advantages that the federal government would be hard pressed to defend its power, much less usurp power from the states. Consequently, Federalists by and large sought measures to allow the federal government to check the states, rather than the reverse. But, if and when it became clear that the primary danger to the federal system was the national government, many founders supported strengthening the ability of states to defend their jurisdiction. I argue that Federalists, most especially James Madison, shifted their views on contestation in response to which level of government they perceived to be too powerful. Such shifts obscure a long-term commitment to an equilibrium of power between the two levels of government.

There is some evidence from the Convention that delegates feared that the states would encroach on federal power rather than the reverse. Wilson opposed state influence on the national government in part because, he claimed, "In all confederated Systems ancient & modern" the national government had been "destroyed gradually by the usurpation" of the states, not the reverse (*Notes*, 79). Later, Wilson stated that he feared the destruction of the federal government by the states much more than the reverse, claiming that he had no desire to destroy the states,

despite his opposition to state selection of senators (*Notes*, 85). Nathaniel Gorham stated that no matter how the federal government was “modified ... there would be a constant tendency in the State Governments to encroach upon it: it was of importance therefore that the extent of the States shd be reduced as much & as fast as possible” (*Notes*, 246). During ratification, Hamilton opposed giving the states the power to recall their Senators (a decentralizing mechanism), and feared that the union would be “weakened and dissolved,” on the grounds that the states had powerful checks already and thus were more likely to “make encroachments on the national authority” than vice versa (Bailyn 1993, 2:795-800). In short, many founders anticipated that even the newly strengthened federal government would be unable to resist the decentralizing pull of the states. They did not appreciate fully George Mason’s warning that the “State Legislatures also ought to have some means of defending themselves against encroachments” because “There is danger on both sides no doubt . . . we have only seen the evils arising on the side of the State Govts. Those on the other side remain to be displayed” (*Notes*, 87).<sup>61</sup>

The foremost proponent of this thesis was James Madison. In April 1787, in his document called “Vices of the Political System of the United States,” Madison listed “Encroachments by the States on the federal authority” second in his list, writing that “Examples of this are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation” (1999, 69). Accordingly, in the Convention, Madison stated that he regarded “an indefinite power [in Congress] to negative legislative acts of the states as absolutely necessary to a perfect system” because of “a constant tendency in the states to encroach on the federal authority” (*Notes*, 88). “A negative,” he continued, “was the mildest

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<sup>61</sup> Although, it is remarkable that disintegration of the union remained the primary threat for several generations, until at least the Civil War. Certainly sectionalism played a role in this phenomenon, but the power of attachment to the states remained strong for decades.

expedient” for “preventing these mischiefs,” for without “such a check” the “only remedy” would be “coercion” (*Notes*, 88). Far from wanting to destroy the states by proposing a national veto, Madison believed it was essential to ensuring the very existence of the federal government: “This prerogative of government is the great principle which must control the centrifugal tendency of the states; which, without it, would continually fly out of their orbits and destroy the order and harmony of the political system” (*Notes*, 89).

In the aftermath of ratification, given his failure to obtain the negative of state laws, Madison remained pessimistic about the possibility of sustaining federal power adequately. In a letter to Thomas Jefferson, dated October 24, 1787, he expressed his belief that the safeguards of state power in the Constitution would be more than adequate to protect the states, and could very well prove fatal to the longevity of the union. Citing “the predominance of the local over the federal authority” as the primary cause of the destruction of former confederations, he wrote that although “It may be said that the new Constitution is founded on different principles . . . I admit the difference to be material” (Madison 1999, 147). Because of the states’ role in the selection of Senators, Representatives, Presidents, “the danger of encroachments is much greater from the [states’] side” (Madison 1999, 147-48). In another letter to Jefferson (October 17, 1788), he wrote that he saw “no tendency in our government” toward the “subversion of liberty,” adding that when a government does not attain to “a certain degree of energy and independence” there is a “direct tendency to further degrees of relaxation,” prompting a “sudden transition” to absolute government (Madison 1999, 422). While liberty can be endangered “whether the government have too much or too little power,” only the latter condition applied to the governments of America (Madison 1999, 422).

Over time, Madison developed an appreciation for giving states constitutional means to protect their interests. His general principle, enunciated in the Constitutional Convention, was that “wherever there is a danger of attack, there ought to be given a constitutional power of defense” (*Notes*, 224).<sup>62</sup> In the coming years, he came to believe that, while encroachments from both sides were unconstitutional, the national government was the primary danger. In a letter penned in 1821, Madison recounted the history of the conflict between the state and national governments. He noted that “On some occasions,” the national government received an “impetus” from “favorable circumstances” which “seemed to threaten subversive encroachments on the rights & authorities of the States,” while at other times the states attempted to usurp the “necessary & legitimate functions” of the federal government (1999, 773). Lately, however, “theoretical innovations at least are putting new weights into the scale of federal sovereignty” (Madison 1999, 773), shifting the balance from what it had been before the ratification of the Constitution. Madison doubtless expressed the sentiment of many in an 1828 letter declaring that “It will be fortunate if the struggle [between the state and national governments] should end in a permanent equilibrium of powers” (Madison 1884, 625). Madison ultimately renounced his “ultranationalist position” during the 1790s and for the rest of his life “defended the states as bulwarks of liberty in an extended republic” (Yarbrough 1987, 85).

While such a reversal could be interpreted as an ideological change of heart, it most likely represents the consistent application of an enduring principle in light of new circumstances. A letter by Madison supports this interpretation. In a letter to J.G. Jackson on December 27, 1821, Madison wrote:

That most of us carried into the Convention a profound impression produced by the experienced inadequacy of the old Confederation, and the monitory examples

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<sup>62</sup> In the immediate context, he was applying this principle to slavery, arguing that both the slave and free states should have a means to protect their interests.

all similar ones ancient & modern, as to the necessity of binding the States together by a strong Constitution is certain. ... This view of the crisis made it natural for many in the Convention to lean more than was perhaps in strictness warranted by a proper distinction between causes temporary as some of them doubtless were, and causes permanently inherent in popular frames of government. ... For myself, having from the first moment of maturing a political opinion, down to the present one, never ceased to be a votary of self Govt, I was among those most anxious to rescue it from the danger which seemed to threaten it; and with that view was willing to give a Govt resting on that foundation, as much energy as would ensure the requisite stability and efficacy. It is possible that in some instances this consideration may have been allowed a weight greater than subsequent reflection within the Convention, or the actual operation of the Govt, would sanction. (Farrand 1911, 3:449)

This letter bolsters the view that Madison's long-term commitment to federalism was sincere, although it modulated depending on the circumstances and needs of the moment. Of course, because this was a late letter, it may reflect some wishful thinking on Madison's part. His experiences as a supporter of states' rights in the intervening decades may have induced him to exaggerate his commitment to state power during the Convention. Still, there is no particular reason to doubt the veracity of his reflections.

Madison was far from alone. The fact that, in the early years of the republic, many Americans mirrored Madison's swift transition to defend state power indicates a widespread desire for equilibrium and mutual contestation. During the 1790s, many former Federalists adopted a position much more wary of national power and appreciative of the states as a check on the federal government. Many Convention delegates later became Democratic-Republicans.<sup>63</sup> Many other prominent citizens, such as Jefferson and St. George Tucker, joined the Democratic-Republicans, along with a mass of ordinary voters. The concern for mutual checking manifested

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<sup>63</sup> My conservative estimate, which is derived primarily from Bradford's (1984) lives of the members of the convention, includes James Madison, John Langdon, Nicholas Gilman, Elbridge Gerry, John Lansing, Robert Yates, Luther Martin, John Francis Mercer, Edmund Jennings Randolph, William Blount, Alexander Martin, Richard Dobbs Spaight, Pierce Butler, Abraham Baldwin, and (probably) William Few. This list is significant given that it excludes both moderate and apolitical members as well as the many delegates who died prior to 1800 (for instance George Mason, a prime candidate for switching, died in 1792). Since parties were not clearly defined, determining affiliation is difficult at times.

itself as early as 1798 in the furor over the Alien & Sedition Acts, and further accelerated following the dominance of the Jeffersonian Republicans after the election of 1800.

In light of this evidence, even statements and proposals which seem to imply hostility toward the independence of the states actually display a concern for mutual contestation and equilibrium. Hyper-nationalist proposals—such as an unlimited congressional veto of state laws—reflected primarily the unique concerns underpinning the new constitution and do not represent settled opinions about the proper relationship between the two levels of government. Because many founders believed the states were out of control, this concern expressed itself as support for a strong national government. But as times changed, the responses of Americans changed as well. The rapidity and intensity of this transformation suggests that most Americans had desired a balance of power between the state and national governments from the beginning, but shifted their focus based on which level they perceived to be the most dangerous to liberty and good government.

### Political Parties and the Decline of the Safeguards of Federalism

Despite the efforts of the founders, the safeguards of federalism established in 1787 have not held up over time. In addition to the mixed motivations outlined in the previous sections, another key reason for this failure was the unexpected emergence of modern political parties following the ratification of the Constitution. This section explains how and why parties altered and ultimately undercut the original expected functioning of separation of powers and federalism. This analysis ought to inform debates about contestation and federalism. Too often, scholars simply rehash Madison's analysis of separation of powers in *Federalist* #51 without taking into account how parties have frustrated Madison's assumptions and aims (Levinson and Pildes 2006, 2313-14). Likewise, some attempts to revitalize contestation over federalism ignore

the effects of parties (ex. Rossum 2001). This is unhelpful: inasmuch as political parties are an indelible feature of modern democratic government, their impact must be accounted for when assessing the health of our constitutional system.

### **The Effect of Political Parties on Separation of Powers**

In the absence of modern political parties, the American founders assumed that separation of powers would work as it had in England. Eighteenth Century English politics was characterized by a division between “Whig” supporters of the parliamentary power and “Tory” supporters of the rights of the monarch. As Montesquieu observed in *The Spirit of the Laws* (1989, 19.27), parties in Britain organized to support the power of a particular institution mainly to further their own private gain, not to enact normative ideologies. Support for Parliament or the king, he wrote, because it often was motivated by pure self-interest such as the expectation of patronage, could lead to frequent transfers of loyalty. The system would remain balanced because the people would fear giving all the power to one side. In the American context, the lessons of history generated an expectation of similar conflict between the executive branch and the legislature and their supporters. “Within [the founders’] Whiggish understanding of history, the chief executive, aka THE KING, was the great enemy of the People. If the people mobilized to assert their rights, they did so through their representative assemblies” (Ackerman 2005, 11). Although Madison worried that in a representative republic the legislature would have a natural advantage in these conflicts (*FP* #49), they attempted to create a structure in which the three branches of government checked and balanced each other. After all, the people stood ready to support any branch willing to uphold their liberties. The states were supposed to play a similar role in the federal system. The founders “expected Congress to be kept in check through the

direct political agency of the states, using the same techniques that had been successfully employed against Parliament and the Continental Congress” (Kramer 2000, 286).

Despite the opposition of the founders, political parties arose rapidly following the ratification of the Constitution. This development was both unanticipated and opposed by the founding generation, who thought political parties were best shunned. “The great republican writers of the past—Aristotle and Cicero and Machiavelli and Harrington—equated party division with factional strife” (Ackerman 2005, 18). Madison’s treatment of faction in *Federalist* #10 involves transcending factional politics by increasing the size of the republic, thus multiplying, dividing, and neutralizing factions. The goal was to elevate leaders who put the “public good” ahead of personal or factional self-interest. Despite this opposition, the rise of political parties was aided and abetted by the founders themselves and in retrospect appears inevitable (cf. Levinson and Pildes 2006, 2319-20). Parties give “public debate on a continental scale the structure and coherence necessary to create tolerable consensus on an agenda” (Kramer 2000, 274), help overcome the problem of passing legislation, and facilitate the mobilization of voters (Aldrich 2011). As foundations of modern democratic politics, they are hardly going anywhere.

The existence of political parties transformed how separation of powers operates within governments, undercutting the proper functioning of inter-branch rivalry. Levinson and Pildes (2006) offer the most detailed explication of this idea, arguing that separation of powers is no longer self-sustaining because political parties have eroded the self-interested commitment of officeholders to their own branch’s institutional powers, leading them to apathetically accept, or even collude with, encroachments from other branches. They write:

The success of American democracy overwhelmed the Madisonian conception of separation of powers almost from the outset, preempting the political dynamics



that were supposed to provide each branch with a ‘will of its own’ that would propel departmental ‘[a]mbition . . . to counteract ambition.’ ... Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties. As competition between the legislative and executive branches was displaced by competition between two major parties, the machine that was supposed to go of itself stopped running. (Levinson and Pildes 2006, 2313)<sup>64</sup>

In other words, rivalry between separate institutions has been displaced by rivalry between different parties. This alteration has even been recognized by a Supreme Court justice. In his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), Justice Jackson wrote: “[The] rise of the party system has made a significant extraconstitutional supplement to real executive power. ... Party loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution” (343 U.S. 579, at 654, Jackson J., concurring). It is difficult to object to the claim that “[f]ew aspects of the founding generation’s political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers” (Levinson and Pildes 2006, 2313).

In short, the necessary condition for Madison’s theory to work—the supposition that the interests of the officeholders are best served by protecting the institutional rights of their office—has proven false. Levinson and Pildes (2006, 2318) note that democratic politics are unlikely to produce “government officials who care more about the intrinsic interests of their departments than their personal interests or the interests of the citizens they represent.” Even assuming that politicians seek personal aggrandizement, they “gain and exercise power by winning competitive elections and effectuating political or ideological goals,” objectives which do not correlate “with

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<sup>64</sup> This observation does not mean that parties are never divided internally between a “legislative” and “executive” wing. It is just that such divisions are of secondary importance and impact.

the interests or power of branches of government as such” (Levinson and Pildes 2006, 2318). Levinson and Pildes (2006, 2318-19) attribute the founders’ oversight both to their relatively apolitical view of political representation, whereby aristocratic and virtuous statesmen—elected not in competitive contests but by acclamation—remain relatively free from popular or partisan pressures, and to their fear that officeholders might not even try to represent their constituents but would attempt to seize tyrannical power. But by tying “the power and political fortunes of government officials to issues and elections,” America’s “robust system of democratic politics” has “rendered these officials largely indifferent to the powers and interests of the branches *per se*” (Levinson and Pildes 2006, 2323).

The result of this process is that the division between the parties has taken the place of the division based on branch, leading to contestation being contingent on divided government. Mutual opposition induces a heightened version of contestation when different parties control different branches. However, checks and balances and oversight are weakened significantly under unified party government, when the relationship between the executive and legislative branch becomes more cooperative than confrontational. When a political party controls two or more of the branches of government, self-interest requires “cooperation and facilitation,” not checking (Purcell 2007, 58). Purcell (2007, 58) cites a number of historical examples to show that periods of unified government have produced “expansive exercises of national power.” The “separation of parties” is not able, it seems, to adequately replace the “separation of powers.”

### **The Effect of Political Parties on Federalism**

In a similar fashion, political parties severely weaken the constitutional rivalry between the state and national governments, effectively undermining the self-adjudicating mechanism fundamental to the original understanding of federalism. The emergence of political parties

shifted the dynamics of American politics away from federal-state contestation and towards party-based conflict, weakening the attachment of state politicians to the institutional rights of their governments. The founders anticipated that political conflicts would take place between partisans of the national and state governments and expected ordinary citizens to support whichever government best promoted their rights and interests.<sup>65</sup> However, “Party politics swiftly displaced republican politics and complicated what the Founders had erroneously assumed would be a permanent and natural antagonism between state and national politicians. Within less than a decade, cross-system connections established through the incipient parties rendered the state governments unreliable watchdogs over federal activity” (Kramer 2000, 219; also Purcell 2007, 86). “Making state and national leaders accountable to the same constituents transformed politics by making it politically advantageous to build alliances across formal institutional boundaries” (Kramer 2000, 269). If politicians display greater loyalty to an ideology or personal career advancement, they are likely to accept diminutions in their institution’s power in order to achieve legislative victory for a favored ideological cause or to promote their party’s legislative record at another level. In sum, partisan political objectives, which are not linked to the institutional interests of any level of government, incentivize state officials to support federal legislation preempting or overriding state laws (c.f. McGinnis and Somin 2004).

Party politics transformed the electoral college in such a way as to destroy any value it may have had as a federalism safeguard. The founders believed the electors would be relatively free to select whoever they wanted as president. Although designed to ensure the election of the

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<sup>65</sup> For instance, Madison argues that “ambitious encroachments of the federal government, on the authority of the state governments, would not excite the opposition of a single state or of a few states only. They would signal of a general alarm. Every government would espouse the common cause. ... One spirit would animate and conduct the whole” (*FP* 46:258). He assumed that partisan divisions would not cause some states to support the national government, and others to oppose it. The furor over the Alien and Sedition Acts, only about a decade later, would prove him wrong.

best and wisest person from across the country—not necessarily the most popular—“the onset of party competition undermined its basic premises” (Ackerman 2005, 5). With the rise of the party system, electors selected candidates for their party affiliation as well as their personal merits. Inevitably, the two candidates with the most votes would belong to rival parties, undermining the functioning of the executive department. Just such a scenario happened from 1796-1800, where the Republican Jefferson served as Vice President to Federalist John Adams. The passage of the Twelfth Amendment in 1804 altered the method of presidential selection to accommodate the demands of the party system. Moreover, states eventually turned the selection of electors over the people, removing any independent influence the state legislatures may have had over the president (Schiller and Stewart 2015, 29; Levinson and Pildes 2006, 2323). Kramer (2000, 225) concludes that “the emergence of the popular canvass and winner-take-all rule have deprived the College of most of its significance” such that it “does nothing to help state governments fend off preemptive federal legislation.”

Parties also weakened the Senate’s ability to safeguard federalism. Although no one has examined empirically whether indirect election helped maintain states’ rights, Schiller and Stewart (2015, 3) provide compelling arguments that U.S. senator elections were the “focal point of partisan power struggles” such that “partisanship overwhelmed the notion of *state interest* as the chief consideration in the choice of U.S. senators under this system.” They write that “the partisan network that was the genius of the Second Party System fundamentally troubled the system of checks and balances at the core of the constitutional structure. The original structure, in which ‘ambition must be made to counteract ambition,’ as stated in ‘Federalist #51,’ supposed that members of Congress would on the whole regard the political interests of the institution *per se* as imposing a higher priority than any other consideration. The ‘party principle’ put an end to

that” (2015, 28-29). That they dismiss a popular alternative argument that the Senate did not protect federalism prior to the Seventeenth Amendment—Riker’s (1955) claim that states established quasi-popular elections for U.S. senators well before 1913—only emphasizes even more strongly the role of partisanship in this transformation. Rather than representing the single unified interests of a state, U.S. senators emerged from fierce competition, stalemate and compromise between different parties and between intraparty factions (Schiller and Stewart 2015, 202).<sup>66</sup> Often legislatures were forced to accept compromise dark horse candidates. This partisan conflict was dominated by national, as opposed to local, concerns for several reasons: (1) the “parties had long ago formed along *national* issues, not state ones;” (2) the “nominating bodies were organs that existed to do battle with each other on state and national stages, not to fight against Washington D.C.,” (3) the “division within the party caucuses tended to be extensions of existing struggles over state or national politics—in other words, they were generally not animated by debates about the proper balance of power between Albany (or Springfield, or Tallahassee) and Washington;” and (4) state legislators relied on their senators to secure money and pork projects for their states (Schiller and Stewart 2015, 119). Moreover, the high turnover in state legislators in the period between the Civil War and the passage of the Seventeenth Amendment weakened the ability of state legislatures to hold senators accountable—although that would be less of a problem today (cf. Schiller and Stewart 2015, 208). All of this meant that “disputes between state legislators and U.S. senators over the latter’s behavior could only be understood as an extension of national partisan politics” (Schiller and

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<sup>66</sup> Schiller and Stewart (ex. 2015, 202) view state interests as being connected to particular economic or regional policies, not to state power as such, as I hold. This difference might weaken their critique: it may be easier to choose a candidate who is committed to protecting state jurisdiction in the abstract (whatever policies the state legislators prefer), although national (and perhaps state) party organizations may push back exceptionally strongly against this kind of non-ideological deference. This is why an empirical examination of this question is needed.

Stewart 2015, 30). In sum, despite some evidence that the pre-Seventeenth Amendment Senate helped protect states' rights (Zywicki 1997, 174; Rossum 2001, 125-156), it is questionable whether senators were ever attached strongly enough to their states to protect their sovereignty wholeheartedly (Kramer 2000, 224).

In any case, the problems associated with the Senate, particularly widespread corruption and vote-buying, led to the passage of the 17<sup>th</sup> Amendment, which neutralized any possibility that the Senate might protect state power. By transferring the selection of senators from the state legislatures to the voters, the amendment erased all meaningful connection between the Senate and the state governments (Bybee 1997; Rossum 2001). It is still true that, because of equal representation in the Senate, no legislation can pass which does not have wide geographical support (*FP*, 62: 378 [Madison]). But, those with the strongest “personal motives” to “resist encroachments” by the national government—the state governments—are no longer represented in Congress. Wechsler (1954, 548) argued that “the Senate cannot fail to function as the guardian of state interests as such, when they are real enough to have political support.” But, given the ignorance and apathy of voters, the last clause is a devastating qualification, since ordinary citizens will not understand sufficiently the advantages of federalism or which laws threaten it. Additionally, given the primacy of incumbency and partisanship, voters will not often punish senators for diminishing state power.

Political parties have similarly affected the Australian Senate. The Australian founders hoped that this body would discourage centralization, since it featured equal representation of the states and extensive legislative powers (being modeled on the U.S. Senate). However, since it was also popularly elected, “the Australian Senate was soon dominated by political parties,” such that “neither the House nor the Senate” was an “effective protector of states’ rights” (Filippov et

al. 2004, 201). Just as in the United States, the loyalty of the senators lay with the parties, not the states, and conflict was structured by partisan considerations (Filippov et al. 2004, 202). The effect of parties appears to be independent of specific historical circumstances.

Finally, political parties also exacerbated the problems associated with popular safeguards, or the people's ability to police violations of the federal division of power. Much like officeholders, ordinary voters seek to protect their interests by supporting a particular party rather than a level of government. Because parties exist at both the national and state level, partisan attachments will detach citizens from loyalty to a particular level of government. Since political parties are overwhelmingly involved in organizing and informing the electorate, their failure to incorporate federalism into their discourse will lead to a neglect of federalism by voters more generally. Also, by inducing cooperation across governmental levels, parties erode accountability, leaving it difficult to tell which level of government is to blame for undesirable policies. Empirical evidence shows that when deciding whether to hold the governor or president responsible for bad policies, they tend to choose the one who does not share their party affiliation (Brown 2010). In sum, parties erode the popular safeguards of federalism at both the informational and motivational level. Given the importance the founders placed on popular vigilance as a safeguard of liberty, and their corresponding doubt that institutional mechanisms would work properly without popular participation, this development foretells an unwelcome outcome.

### Alexis de Tocqueville's Analysis of the Patriotic Preconditions of Divided Sovereignty

Federalism involves the division of sovereignty between two levels of government. As such, citizens in a federal republic engage in political activity in two senses: as a member of their

province or state, and as a member of the union. A theoretical tension thus lies at the heart of popular sovereignty in a federal state. Moreover, in a popular or republican government, the government must rest on the consent of the governed. The people make the law, even or especially the fundamental (constitutional) law. In a federal republic, this means that the people must endorse the division of sovereignty between the states and the national government. Failure to obtain popular consent imperils the division of sovereignty in a federal union. But, the two levels may not always work in tandem. The nation as a whole may support a policy that the people of a particular state do not. As a result, the attachments of the people, no less than their attentions, often are divided. The success of a federal republic depends, then, on maintaining in the people a simultaneous appreciation for both the continued existence of their own state and for the continued union between their state and other states.

A dual appreciation of this type is not contradictory, but it is somewhat unnatural, difficult to inculcate, complex, and unstable. In fact, throughout history, nearly all federal or confederal republics have slid gradually toward either greater centralization or greater disharmony between the states. The former case produces a unitary state, while the latter case results in greater decentralization, continual clashing, disintegration of the union, or civil war. Historically speaking, pre-modern federal republics tended to break apart due to internal collisions far more often than they centralized, while varying degrees of centralization have occurred over time in modern federations such as Germany (Burkhart 2009), Austria (Erk 2004), Brazil (Arretche 2012), Mexico (Rodríguez 1998), Australia (Filippov et al. 2004, 199-202), and the United States.

This section explores the dynamics of the internal tensions within divided sovereignty and the forces that bind citizens to their state and nation through an analysis of Alexis de



Tocqueville's incisive writings on federalism in *Democracy in America*. By distilling Tocqueville's scattered thoughts on federalism, it reconstructs a coherent and systematic theory of patriotism's relationship to federalism. For Tocqueville, the longevity of a federal republic depends on the predominance of local patriotism—one's attachment to one's state—over national patriotism in the hearts of its citizens. In the absence of local patriotism, centralization is inevitable. This section also critiques Tocqueville's account of the patriotic preconditions for federalism. If federalism is to remain stable, the preconditions necessary to cause public opinion to favor a division of power must be met. Tocqueville himself was well aware that the central government in a federal state particularly "needs the free cooperation of the governed in order to subsist" (DA, 424). If the preconditions fail, then federalism is an incoherent concept, and either centralization or dismemberment of the union looms on the horizon.

This section demonstrates that Tocqueville's argument rests on assumptions that have turned out to be incorrect. In particular, he believes that support for the state and local governments will always be stronger than support for the national government, because people will not identify emotionally with the nation as a whole and will not perceive the actions of the national government as integral to their day to day happiness. Tocqueville makes these assumptions, in turn, because he incorrectly assumed that the U.S. Constitution narrowly restricts the power of the federal government to areas that do not have much relation to everyday life, such as war and diplomacy. But, people have come to identify as Americans rather than as citizens of their state, and the federal government now faces few constitutional restrictions on its legislative power. Thus, people have transferred their loyalties to the nation and away from the states. When this occurs, the complicated patriotic balance upholding federalism is torn down, threatening the survival of a meaningful federalism.

At the outset, it should be stressed that Tocqueville values federalism and seeks to strengthen it. For him, the distribution of power in a federal system checks tyranny in a society by “dividing the use of its forces among several hands,” each of which possess only a small portion of power (DA, 79). “Since the sovereignty of the Union is hobbled and incomplete, the exercise of that sovereignty poses no danger to liberty” (DA, 184). Federalism combines the advantages of large nations and small nations, and is the only method of preserving freedom in a large republic (DA, 180). In short, he concludes, “the advantages of the federal system” render it “one of the most potent arrangements there is for making men prosperous and free” (DA, 193). Because he sees federalism as both complicated and valuable, Tocqueville is eager to discover ways to make it healthier and more stable. If contemporary theorists also do not wish to discard federalism, they must face the same challenge. Is there a reliable way to divide people’s allegiances such that power does not gravitate to one side or the other?

### **The Complexity of American Federalism**

Alexis de Tocqueville sees American federalism as an inherently complex and unstable political system. The founding resulted in an unplanned combination of confederal and national elements that “bent” the “rules of logic” in order to reconcile “two theoretically unreconciled systems” (Tocqueville 2004 [hereafter DA], 133). This compromise occurred because white Americans at the founding had two “diametrically opposed” interests: “each state had an interest in preserving its individuality, while the people as a whole had an interest in forming a union” (DA, 134). Thus, he writes, the founders “were obliged” to craft a political system “in which the exercise of sovereignty would be shared” (DA, 420). Because “the federal system rests on a complicated theory, the application of which requires citizens to rely daily on the light of reason,” an informed and vigilant citizens is necessary to forestall destructive conflict and

maintain the optimal functioning of federalism (DA, 186). “[I]t is frightening,” he writes, “to discover the range of diverse knowledge and discernment that [the U.S. Constitution] assumes in the people it is supposed to govern. ... The Union is an ideal nation that exists only in the mind, as it were” (DA, 186). Thus, the U.S. Constitution is only possible for a free people, such as the Americans, “among whom political science has filtered down to the lowest ranks of society” (DA, 187).

The complexity of federalism is seen in the division of the population into distinct bodies of people along state lines. Although he sometimes equivocates on this point, Tocqueville apparently holds that the United States is a union of many distinct peoples, each of which comprises the citizens of each state.<sup>67</sup> He describes the new nation as an “association of several peoples” as opposed to “a single people,” and asserts that the people of each state “did not forfeit their nationality” or “merge into a single people” when forming the union (DA, 420, 425-26). Later, he reiterates that “the Union is a confederation of different peoples” rather than “only one people” (DA, 443). Nevertheless, Tocqueville stresses that Americans are simultaneously both one people and many peoples, albeit in different ways. He describes federalism in the United States as “a new form of society” in which “several peoples actually merge to form a single people, united with respect to certain common interests while remaining in all other respects separate, mere confederacies” (DA, 178). Thus, Americans are one people in relation to “national” objects of legislation, as enumerated in the Constitution, yet are many peoples in relations to the “local” objects of legislation reserved to the states. “In all the cases foreseen by the Constitution, the Americans of the United States constitute a single and unique people,” and

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<sup>67</sup> Although he writes later that, despite being “divided among twenty-four distinct sovereignties, [Americans] nevertheless constitute a single people,” this remark appears to refer to cultural similarity rather than political consolidation (DA, 431).

the “national will” must prevail over dissenting people or states (DA, 450). By implication, in areas where the Constitution has not given a power to the federal government, the “local will” of the people of each state governs. This question is crucial for democratic political theory, because “the people” are the location of popular sovereignty and give legitimacy to the laws.

For Tocqueville, divided sovereignty in a federal republic manifests itself in practical political terms. He distinguishes between three “different acts of sovereignty” (DA, 420). Some issues, such as “war and diplomacy,” are “national by their very nature” because they “pertain exclusively to the nation as a whole,” whereas others are “provincial in nature” and must be undertaken locally, such as town budgets (DA, 420-21). However, alongside these categories “lie any number of issues that are of general but not national interest, which I am calling mixed. Since these issues are neither exclusively national nor entirely provincial, responsibility for them may be assigned to either” level (DA, 421). “Mixed” objects of legislation comprise issues that could be uniform across the nation, in the way that a town budget cannot, but that do not require uniformity. Examples include drinking ages, marriage laws, tax rates, and emissions regulations.

Due to this complex division of sovereignty, federal systems exhibit an inherent instability resulting from competition over jurisdiction. Federalism’s “most visible” is “the complexity of the system’s operation,” which by bringing “two sovereign powers together,” inevitably produces “clashes on certain issues” (DA, 186). It turns out that whichever level of government controls the “mixed” issues has a natural impulsion to acquire total sovereignty. When the national government obtains jurisdiction over “mixed issues of sovereignty, it becomes the predominant power” and may even “deprive local governments of their natural and necessary prerogatives” (DA, 422). Similarly, when provincial governments control mixed issues, “the opposite tendency prevails,” threatening the survival of the national government and the union

(DA, 422). Control over mixed objects of legislation depends, in turn, on the preexistence of subnational political entities at a republic's founding. Whenever an "act of association" brings into union "previously organized political bodies," he argues, provincial governments typically retain "some or all of the mixed issues" of legislation, refusing to cede more power than is strictly necessary for union (DA, 421-22). By contrast, whenever "ordinary individuals," not already divided between existing political bodies, "join together to constitute the sovereign," it is "most natural" for the general government to deal with mixed objects (DA, 421). "Unified peoples are therefore naturally inclined toward centralization," Tocqueville concludes, "and confederations toward dismemberment" (DA, 422).

### **Contradictory Trends in American Federalism**

Given its complexity and instability, federalism requires that citizens, in addition to being knowledgeable, endorse the division of sovereignty between two levels of government. Absent such support, a federal republic tends toward either the dissolution of the union or the complete centralization of power. Tocqueville believes that Americans support just such a division of power in their own political system. He attempts to identify the reasons why Americans support both the union and their own state, and to gauge the prospects of the future survival of the union thus constituted. From this analysis, he distills a sophisticated theory according to which federal systems have a natural tendency towards decentralization.

In contrast with some theorists, Tocqueville believes that federalism not only is compatible with, but actually requires, a sense of common identity and homogeneity among the members of the union. Political scientists Malcolm M. Feeley and Edward Rubin (2008) assert that federalism must be based on radical cultural, religious, or ethnic differences in identity between the member states, in the absence of which the desirability of federalism wanes. Indeed,

from Quebec to Catalan, we find examples in which secessionist sentiment is fueled by cultural, religious, or linguistic differences. Tocqueville rejects this explanation, instead grounding federalism on permanent characteristics of human nature unrelated to personal identity.

Tocqueville's belief that federalism can survive in the absence of large regional differences was derived from two contradictory trends in nineteenth-century American society. On the one hand, Tocqueville notes the marked increase in intellectual and cultural homogeneity since the founding. Given this trend, theorists such as Feeley and Rubin (2008) would expect federalism to fall out of favor, leading to the transformation of the United States into a unitary state. On the contrary, Tocqueville detects a simultaneous trend toward political decentralization. Because of this divergence, he concludes that homogeneity is not an impediment to federalism.

Tocqueville considers shared interests and cultural homogeneity to be important prerequisites of harmony in a federal republic. In addition to common "material interests," federations require a certain commonality of "ideas and feelings" (DA, 190). Mere necessity cannot sustain a federation: a "homogeneity of civilization is no less necessary than a homogeneity of needs" (DA, 190). Tocqueville stresses that the union is held together "much less" by "rational determination to remain united than the instinctive and in some sense involuntary accord that results from similarity of feeling and likeness of opinion" (DA, 430-31). A union based on mere need will dissipate as soon as the need is gone, and the force of the laws will be impotent without something greater than enlightened self-interest.

America, Tocqueville believes, easily exhibits the intellectual and cultural homogeneity necessary for healthy federalism. Unlike Europeans—even those from different regions of the same nation—Americans "share almost the same interests, origin, and language" and are "civilized to the same degree" (DA, 190). They agree on the general principles and methodology

in religion, politics, philosophy, and morals, despite disagreements over specific applications of those principles (DA, 431-32). Americans also share a sense of pride in the success and exceptionalism of their “democratic institutions,” viewing themselves as almost “a distinct species within the human race” (DA, 432). Trade and travel, moreover, have created powerful “intellectual bonds” from Maine to Mississippi (DA, 444). Growing commercial ties, he notes, reinforce cultural homogeneity by enmeshing the states in webs of economic interconnection, since “commerce makes neighbors of all the peoples with whom they trade” (DA, 427). In fact, the diverse economic characteristics and needs of the different states are better fulfilled by union, because disunion would turn the Americans from different states into “foreigners,” resulting in devastating trade barriers (DA, 427, 429). In sum, Tocqueville argues that since the founding, “time has refuted a host of provincial prejudices,” the “patriotic sentiment binding each American to his state has become less exclusive,” and the sections of the nation have “grown closer” (DA, 443-44). The states increasingly resemble each other in “their mores, ideas, and needs” (DA, 134).<sup>68</sup>

Despite this growing uniformity, Tocqueville believes that political decentralization is also taking place. Paradoxically, the power of the national government is smaller, not greater, than that of the states (DA, 422). More ominously, “careful study” proves “that federal power is decreasing” (DA, 445). In his day, a national debate over states’ rights and the powers of the federal government was taking place, one which the states appeared to be winning. The popular

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<sup>68</sup> It should be noted that Tocqueville recognized, but discounted, the differences between the North and South and failed to anticipate a Civil War. The existence of Southern slavery, he believes, did not create inherently conflicting interests, but it did introduce different customs, habits, and mores in the separate regions (DA, 432-33). Northerners have the “qualities and flaws of the middle-class” whereas the “tastes” and “prejudices” of Southerners are aristocratic (DA, 434). However, he holds that even these muted differences “created by climate, origin, and institution” are being eroded as Americans “mingle” and “assimilate” (DA, 444). “[C]onstant immigration from North to South” will lead to the “fusion of all provincial characters into one national character” which will resemble the “civilization of the North” (DA, 444).

President, Andrew Jackson and his Democratic Party generally advocated limiting the powers of the national government. Jackson vetoed a bill re-authorizing the Second Bank of the United States on the grounds that it favored wealthy elites over the common man. Democrats also opposed using federal money to fund “internal improvements” such as roads and canals, arguing that the Constitution relegated such matters to the states, and also opposed a high tariff to fund federal programs supported by nationalists. The Indian Removal Act of 1830, which authorized the removal of Indian tribes from the southeastern states, likewise represented a concession to the demands of Georgia and other states to regulate affairs with the tribes. In most conflicts of this kind, Tocqueville notes, the national government had been “forced to retreat” (DA, 446).<sup>69</sup> Moreover, this trend is quasi-voluntary: the president “is the first to doubt his own powers,” and the national government “is withdrawing from one affair after another and steadily narrowing its sphere of action” (DA 453).

Given these trends, Tocqueville remains deeply unsettled about the fate of the union. Given recent history, he predicts that “[i]f conflict were to erupt today between the sovereignty of the Union and the sovereignty of the states, it is easy to see that the former would succumb” (DA, 425). He warns that “the government of the Union will grow weaker every day” unless and until the people “recognize that the weakness of the federal government is compromising the existence of the Union,” in which case a “reaction” likely will “promptly restore the vigor it needs” (DA, 455). Such a realization may never occur, however, because “the present union is useful ... but not essential” to the states, such that “there is no state prepared to make major sacrifices to save it” (DA, 426). Thus, Tocqueville predicts that future attempts at secession would be unopposed and that “the present union will survive only as long as all of its member

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<sup>69</sup> One exception to this states’ rights trend was the Nullification Crisis of 1832. Most Democrats, including Jackson, vigorously opposed the idea that a state could unilaterally “nullify” or cancel a federal law within its borders.



states continue to want to be a part of it” (DA, 427). While he expects the union to hold together for some time, he judges its long-term survival to be “no more than a lucky accident” (DA, 435-36).<sup>70</sup>

### **The Patriotic Foundations of Federalism in America**

Tocqueville’s belief that homogeneous beliefs and habits form the glue binding the American union together complicates his account of federalism. What, it might be asked, can possibly undergird the attachment to the states so evident in American society, if not a sense of regional distinctiveness? Tocqueville’s task was to identify the factors underpinning allegiance to the state or provincial governments despite the lack of linguistic, cultural, ethnic, or religious differences between them. This section describes his attempt to provide such an account through an analysis of human psychology.

At its most basic level, Tocqueville notes, the trend toward decentralization rests on public opinion. Politicians who champion states’ rights are simply giving the people what they want: centralization is unpopular and consolidation greatly feared (DA, 443). Americans want the federal government to act “as little as possible” (DA, 446). They still “want the Union, but reduced to a shadow,” strong during war but feeble otherwise (DA, 454). The support for state power, then, must lie somewhere in the hearts and minds of the people, not in the machinations of elites or in technical legal principles. But this realization merely raises the further question: What explains the unpopularity of centralization?

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<sup>70</sup> Tocqueville identifies additional threats to the union: the increasing number of states, which necessarily produces divergent and contradictory interests; the wildness of the western states; the growing strength of many states, which makes them less dependent on the union; the “rapid and disproportionate growth” and general “prosperity” of some states, which fosters “intoxication” in the growing state along with “envy, suspicion, and regret” in the others (DA, 429, 434-442). In short, in such a huge nation it would be almost impossible “to avoid rivalries, dampen ambitions, and eliminate conflict among” the states (DA, 436).

Historical influences, Tocqueville avers, partly explain public support for states' rights. Habits and ideas change slowly, and the past affects the present. "When a consolidated nation divides its sovereignty and transforms itself into a confederation, memories, customs, and habits continue for a long time to vie with laws, bestowing upon the central government a force that the law denies. When confederate peoples unite under a single sovereignty, the same causes work in the opposite direction" (DA, 423). Because the colonies preceded the union, the American colonists "found themselves divided into a large number of small, distinct societies not linked to any common center (DA, 458). The circumstances of the founding and the resultant "habits of the earliest immigrants all conspired to develop local and provincial liberties to an extraordinary degree" (DA, 458). Consequently, "the patriotic spirit ... and provincial prejudices still tend to" weaken federal power and "create centers of resistance to its wishes" (DA, 177).

But, history alone, Tocqueville asserts, cannot account for the survival of localist sentiment. The persistence and strength of local patriotism indicates that it is natural and spontaneous, while national patriotism is derivative and manufactured. "The sovereignty of the Union is the work of art. The sovereignty of the states is natural; it exists by itself, without effort" (DA, 189). "The public spirit of the Union itself," in fact, is "simply a concentrated form of provincial patriotism. Each citizen of the United States [takes] the interest aroused by his little republic and [carries] it over into love of the common fatherland" (DA, 184). In short, there are limits to the expansion of national patriotism in federal republics. The reason for the supremacy of the states in the hearts of the citizens, then, emerges as a question of theoretical interest.

Before unpacking the causes for the dominance of localism, it is necessary to understand more fully what Tocqueville means by patriotism, or the "love of country," and how he thinks it can be cultivated. "Patriotism," he writes, "is usually only an extension of individual selfishness"

(DA, 424). Patriotic people connect and confound their own welfare with that of the community: they “care about their country’s interests as though they were their own. ... In its successes they see their own work and are exalted by it. They rejoice in the general prosperity, from which they profit” (DA, 107). In this way, along with non-rational factors such as a natural love of one’s own, “a kind of egoism also contributes to their interest in the state” (DA, 107). Still, patriotism transcends rational calculation, being rather a subtle fusion of “interests, habits, and feelings” (DA, 424). Although patriotism must be judged to be beneficial, in the truly patriotic person self-interest is dimly felt and is replaced by motives of habit or passion. Tocquevillian patriotism appears to be a settled interest in the prosperity of the whole political community as well as an emotional attachment to it. The Americans provide an instructive example here: they are so patriotic because they perceive an intimate connection between their own welfare and that of society as a whole (DA, 107).

The identification of self-interest with the public interest, while natural, is far from spontaneous: citizens must be reminded often of the connection between personal and collective welfare. Although even the passive, degraded subjects of a despotic state retain “an ineffable patriotic instinct,” an “unthinking pride” in the glory of their country, this patriotism is weak because it is “not connected with anything in particular” (DA, 105). The task of nurturing patriotism is for Tocqueville one of the great tasks of legislators in democracies. He encourages lawmakers “to awaken and guide the vague patriotic instinct that dwells permanently in the heart of man, by linking that instinct to everyday thoughts, habits, and passions” (DA, 106). The best means to this end is encouraging substantial participation by citizens in public affairs, especially at the local level. Tocqueville writes that “love of country is a form of religion to which people become attached through practicing it,” especially “by fulfilling some duty or exercising some

right” (DA, 76). “Local institutions” are like schools of liberty, without which a nation cannot have that “free spirit” necessary to retain liberty (DA, 68). By participating in local institutions—such as schools, churches, juries, local governments, militias, and social clubs—citizens “are constantly made aware of the life of the community” (DA, 76). Habitual public service clearly requires decentralization of some kind.

Applying this analysis to federalism, we find that Tocqueville’s argument for the priority of local patriotism over national patriotism reflects the multidimensional character of patriotism as such. The full spectrum of forces—emotional, habitual, and rational—serve to bind Americans more tightly to their states than to the nation. “Americans therefore have far more to expect, and to fear, from states than from the Union and, given the natural penchants of the human heart, are bound to feel more warmly attached to the former than to the latter. In this, habits and sentiments accord with interests” (DA, 423). The result, as he reiterates later, is that “interests, habits, and feelings conspire to” favor decentralization (DA, 424).

At an emotional level, Tocqueville writes, states have greater appeal than the nation. The “memories, customs, and habits” of the people reinforce local patriotism (DA, 423). Each state has “well-defined boundaries” and “represents” things “that its inhabitants know and cherish:” the “land itself,” property, family, “memories of the past, labors of the present, and dreams of the future” (DA, 424). By contrast, the “Union is an immense body—a vague object for patriotism to embrace” (DA, 424). Inasmuch as it “represents a vast, remote fatherland, a vague and indefinite sentiment,” the union is less susceptible than the states to imaginative representation or emotional identification (DA, 189). In short, it is “an abstraction whose external referents are few in number,” whereas the “sovereignty of the states is readily apparent to all the senses” (DA, 189).

Participation in public affairs is also impossible at the federal level. Other than voting, no national institutions exist to facilitate self-government. Admittedly, it is unclear whether Tocqueville thinks that the states are also too large to accommodate meaningful public participation. However, he describes state-level and local-level political participation in very similar terms, and even claims that “the mores and habits of a free people” arose “in the towns and provincial assemblies” (DA, 183). Undoubtedly much would depend on the size of the state (his favorite examples are the small New England states). In any case, the state governments are certainly much closer to the people than Washington (cf. DA, 423), and thus presumably allow for greater public participation.

Finally, Tocqueville argues that the states contribute more than the national government to the citizens’ rational self-interest. Provincial patriotism is connected to the province’s ability to better the citizens materially, a source of attachment which “sway[s] the hearts of men” more than the motives underpinning national patriotism, “the general interest of the country and the glory of the nation” (DA, 184). This is because the federal government has authority over a small set of purely national objects, such as war and international trade, and “the general interests of a people have at best a debatable influence on individual happiness” (DA, 423). The states, by contrast, have authority over the mass of social, economic, and criminal legislation. In short, the power of the union, although greater on paper, is indirect and “rarely apparent,” whereas the relevance of state power to individual well-being is “evident at every moment” (DA, 189). “The sovereignty of the states in a sense envelopes each citizen and affects every detail of his daily life. It is responsible for safeguarding his property, his liberty, and his life. Its influence on his well-being or misery is never-ending” (DA, 189).

Although national patriotism is no less real than local patriotism, their internal characteristics or constituent parts differ. Whereas emotional and habitual factors predominate in local patriotism, rational interests predominate in national patriotism. “Americans need to be strong, and they can be strong only if they remain united. ... Americans therefore have an immense interest in remaining united” (DA, 427). Americans value the union, in other words, primarily because they realize that it is necessary to defeat enemies in war and to secure respect for their commerce. But, such calculated attachment to the union cannot replace the emotional, instinctive love of one’s own hometown or state. Despite frequent proclamations by Americans of “their intention to preserve the federal system,” Tocqueville distrusts “this calculated patriotism, which is based on interest and which interest, by attaching to a different object, may destroy” (DA, 430). State patriotism, by contrast, is natural, spontaneous, and permanent.

Tocqueville points to the gradual decline in federal power since the revolution as the perfect illustration of the weakness inherent in national patriotism. Support for the union at the founding, he writes, was “the expression of a great need,” not a natural passion, and although the federal government triumphed at first, the states continue to “harbor a secret instinct that impels them toward independence” (DA, 445). It is no surprise, then, that as soon as the original emergency ended and “a strong government no longer seemed necessary,” Americans “reverted easily to old habits” and began to think of the union “as a hindrance” (DA, 446). Absent an ongoing crisis, he concludes, the “principle of confederation”—the appreciation of both levels of government—will be “readily accepted in theory and less applied in practice” (DA, 446).

If national patriotism appeals primarily to rational self-interest, it follows that, in order for it to survive, there must be a clear and continuing need for union. Because the national government cannot expect to receive the love of its citizens, Tocqueville writes, the “particular

interest” of the people of the states “must be intimately associated with the existence of the union” (DA, 426; cf. 442). A state will only make “major sacrifices” to preserve the union if they have a “great interest in maintaining, for the sake of its own ambition, the confederation as it exists,” or if they are “wholly dependent on” it (DA, 427).<sup>71</sup> For this reason, the utility of continued union must be demonstrated constantly (cf. DA, 454-55). Yet Americans, Tocqueville believes, had not been sufficiently impressed with the necessity of the union, a mistake which threatened the continued existence of the federal republic. He faults Americans for pretending that during war the federal government “can gather all the nation’s forces ..., yet in time of peace it can cease, as it were, to exist—as if this alternation of debility and vigor existed in nature” (DA, 454). The drive to hollow out national power during peacetime is a dangerous fallacy: the Americans are playing with fire.

### **The Centralizing Tendencies of Democracy: Soft Despotism**

It is true that Tocqueville presents a forceful exposition of the dominance of local patriotism and the danger of disunion. Yet the position just described does not represent Tocqueville’s final, considered view of the subject. Although he saw both centralizing and decentralizing forces at work in America, Tocqueville came to believe that centralization was the dominant tendency in democratic societies because democracy inculcates habits of the heart and mind favorable to political centralization. Unless checked, these tendencies lead to a stultifying society of uniform rules in which uniformity is desired for its own sake (DA, 102). The end result, which has been called “soft despotism,” infantilizes rather than oppresses people.

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<sup>71</sup> This account of the rational basis of federalism is probably derives partly from the *Federalist Papers*, which Tocqueville read. The Federalists urged union on the grounds that the states would be endangered if the Constitution was not ratified, and attempted to downplay the threat posed by the national government to state sovereignty (ex. FP #17). These arguments are rational, not emotional.

Tocqueville's entire intellectual project may be seen as an attempt to check democracy's progress toward this appalling fate (see DA, 830, 834).

Although these ideas remained inchoate in the first volume of *Democracy in America*,<sup>72</sup> in volume two, the impetus toward centralization comes to the fore. Concentrating on the way in which an egalitarian social state affects democratic society, volume two reveals homogeneity to be the chief goal of democracy itself. Democratic political ideas "naturally favor the concentration of power," Tocqueville argues (DA, 789). In a democracy, "subsidiary powers," which could include multiple levels of government, "can be introduced only artificially and retained only with difficulty, whereas the idea of an unrivaled central power that leads all citizens by itself" arises effortlessly and spontaneously (DA, 789).

Centralization is so likely in democracies because both the people and government favor it. Democratic people find "complicated systems repellent" and prefer that "all conform to a single model" through "uniform legislation" (DA, 789). These intellectual "penchants ... ultimately become instincts so blind and habits so invincible" that they are insensible to countervailing facts (DA, 789-90). Even if diverse laws would better fit diverse peoples, democrats prefer uniformity. This tendency bodes poorly for the popularity of federalism, which permits divergent laws in different states (cf. DA, 186-87). True, federalism does require uniform laws *within each state*, and does not permit treating different classes of people *within the same*

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<sup>72</sup> The prospect of centralization is hinted at in volume one. For example, Tocqueville declares that "local independence is a rare and fragile thing," hard to create and easy to destroy," and "A very civilized society finds it relatively difficult to tolerate experiments with local independence" (DA, 67). He also points to a centralizing tendency in the states: "Each day [the state] legislatures swallow up a little more of the debris of governmental power" from the towns (DA, 100). Finally, he explicitly notes that "no nation is more likely to succumb to the yoke of administrative centralization than one whose social state is democratic" (DA, 109). Moreover, once a common power is created, "it is difficult for that power to refrain from entering into the details of administration," because democratic people see themselves as "only equal individuals merged indistinctly into a common mass" and thus cannot tolerate special privileges outside the control of the majority (DA, 109). Tocqueville's discussion is muddled by his claim that Americans overwhelmingly favor local liberties and see them as necessary for liberty (DA, 110).



*state* differently (as aristocracy does). Still, to the extent that citizens consider themselves members of the same country, federalism will grate against their mental inclinations.

Governments likewise favor centralization. In a government with majority rule, “the government loves what the citizens love,” which in democracies is uniformity (DA, 795). Additionally, for public officials, “subjecting all men indiscriminately to the same rule” is far easier than examining “an endless host of details” in order to adapt legislation to local circumstances (DA, 795). This “community of feeling” in favor of uniformity creates a “permanent sympathy” between citizens and the sovereign which serves to diffuse opposition to the failures of centralized governments (DA, 795-96). Even if centralization is subpar, as Tocqueville thinks it often is, democratic citizens and officeholders will not notice.

Despite his expectation that centralization would prevail, Tocqueville acknowledged that circumstances could either aid or hinder it. A tradition of freedom prior to the onset of equality helps to check centralization, especially certain specific liberties—juries, freedom of speech and the press, and the rule of law (DA, 797). Class war hastens centralization, because it induces both sides to rely on governmental power to gain victory, whereas a gradual transition to equality slows it (DA, 798). Enlightenment helps a people to craft a complex government with subsidiary powers, whereas ignorance favors concentrated power because the people are less able to govern themselves (DA, 799-800). War requires the rapid and concentrated application of force made possible by centralization (800-801). Democratic societies ruled by a monarch reminiscent of the old aristocratic regime will have less popular support, whereas rulers who come from the people will gain their trust easily (DA, 801-02). All of these factors give democratic lawmakers room to oppose centralization before its full effects are realized.

The full flowering of centralization, Tocqueville predicts, will produce what is commonly termed “soft despotism.” Because equality both “facilitates” and “tempers” despotism, this “despotism” would be both “more expansive” and “more mild” than previous ones, and governmental regulation would be “absolute, regular, meticulous, provident, and mild” (DA, 817-18). It would both provide for people’s needs and control the details of social life to an unparalleled extent. Such a state features an all-powerful sovereign government that suffocates the citizens by imprisoning them within a system of minute rules and regulations. While not technically coercive, democratic societies tend toward conformism enforced by public opinion. Tocqueville imagined “an innumerable host of men, all alike and equal, endlessly hastening after petty and vulgar pleasures” (DA, 818). In this society, people would be isolated, disconnected, and strangers to everyone except “children and personal friends” (DA, 818). Tocqueville argues that soft despotism would end up infantilizing people by progressively robbing “each citizen of the use of his own faculties,” particularly free will, and keeping them “in childhood irrevocably” (DA, 818). In such a situation, even the “most original minds and most vigorous souls” are unable to “poke their heads above the crowd” and assert their individuality and autonomy, such that eventually the people are “nothing but a flock of timid and industrious animals, with the government as its shepherd” (DA, 819). Such a state is the mirror opposite of New Englanders happily tending to their common affairs through service in communal bodies such as juries and town hall meetings.

In light of his growing fear of soft despotism, Tocqueville’s analysis of federalism is more complex than it originally appears. What was his final position on the question of centralization versus decentralization? He seems to have expected centralization to win out, though he was sensitive to both centrifugal and centripetal tendencies in federal republics. As in

other areas, such as religion, Tocqueville wanted democratic leaders to strive against the natural tendencies of democracy, while recognizing that success is far from assured.

### **Assessing Tocqueville's Argument**

Tocqueville's complicated account of federalism is difficult to evaluate. Many of his predictions were wrong: civil war was occasioned not by race war but by the effort to protect slavery, and secession was vigorously opposed by committed unionists. However, other insights, such as growing homogeneity between the states and the likelihood of centralization, have fared better (although the infantilizing effect of centralization remains an open question). Most importantly, it is now clear that Tocqueville's argument that local patriotism will predominate over national patriotism rested upon faulty assumptions. Tocqueville was writing during a transitional period that did not represent the final trajectory of patriotism in a federal republic. The breakdown of this building block, in turn, undermines the entire edifice of his argument.

Arguably, Tocqueville underestimates both the emotional and rational appeal of the national government. While love for the states is by no means gone, Americans identify most fundamentally, on an emotional and imaginative level, with the nation (ex. Riker 1964, 105; Volden 2004, 101; Greve 1999, 1-2; Feeley and Rubin 2008, 117-123). In addition, in a culturally and intellectually homogeneous society such as the United States, people most likely sooner or later see themselves as belonging to one nation and act accordingly. Very likely the hostility to centralization observed by Tocqueville was merely a product of residual attachment to the states which wore off only gradually over American history.

Several explanations for the growth of national patriotism can be identified. First, Tocqueville apparently downplayed the long-term influence of technological changes on American sentiments, despite recognizing their importance. He believed that the important

technological innovations in his day—the telegraph, canals, and railroads—would merely foster greater goodwill among the American people without fundamentally transforming their localist sentiments. But, by facilitating greater linkages between local economies and providing more avenues for interpersonal communication, such innovations have linked individual well-being to the well-being of a much larger group of people, expanding the citizens’ imaginative landscape and allowing them to identify with a larger entity. As the world has shrunk, patriotism has broadened.

Even more significant is Tocqueville’s blindness to the way in which the concept of America as a nation takes on a moral purpose capable of inspiring national patriotism. Throughout American history, the United States has been seen as the champion of cherished values. Thomas Jefferson described the United States as an “empire of liberty” tasked with spreading republican government to the four corners of the globe. The desire to rid the nation of slavery enflamed the hearts of the party of “union” during the Civil War. World War I had the declared purpose of “making the world safe for democracy.” The cold war was portrayed as a civilizational struggle against godless opponents of freedom and morality. Once the nation is linked to universalist moral causes, the intense passions and longings inspired by morality morph into patriotic feelings. The national government is the particular beneficiary of such passions, inasmuch as warfare and diplomacy are national concerns and the union is a precondition for a strong military. The states, who lack control of war or diplomacy, cannot possibly inspire a similar level of moral fervor. This “moralistic patriotism” of nationalism is more than a match for the emotional ties binding people to their state or city.

As the emotional appeal of the nation has grown, the rational or self-interested foundations of state patriotism have collapsed as well. The predominance of national patriotism

derives in no small part from the fact that the federal government has displaced the states as the greatest source of the people's material well-being. Simply put, the states no longer have exclusive, or even primary, control over legislation that affects the economic prosperity of the country. From education to welfare and beyond, Congress call the shots. Even in areas of concurrent jurisdiction, states typically are dependent on federal dollars to fund popular programs. This power difference may explain why turnout is highest in presidential elections and lowest in local elections. Tocqueville's failure to clearly predict this shift is baffling. After all, he recognizes that democratic people naturally entrust the general government with the vast majority of powers, and that "unified peoples are therefore naturally inclined toward centralization" even in things that properly belong to local governments (DA, 421-22). Why then does he deny that the national government can attempt to make the citizens wealthier and happier?<sup>73</sup>

Tocqueville thinks that allegiance follows political power. "It must be granted that men generally bestow their affections where there is strength. Love of country will not endure for long in a conquered nation. The New Englander is attached to his town not so much because he is born there as because he sees the town as a free and powerful corporation of which he is a part and which it is worth his trouble to seek to direct" (DA, 75). By contrast, Europeans cannot generate the "community spirit" necessary to invigorate "community institutions" because they are afraid to give their towns independent power (DA, 75). Fond memories cannot sustain local patriotism once political power is gone. If this claim is accurate, then the growth of the national government must have led to a transfer of loyalties rather than vice versa. As people came to link

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<sup>73</sup> At the founding, many Federalists actually anticipated that people would grow more attached to federal power over time (ex. *FP* 17:85; *Notes*, 74). Because of a lack of desire to offend Anti-Federalists, such statements were eschewed or merely hinted at in public debates.

their self-interest directly to the activity of the federal government, they transferred their allegiances accordingly.

It appears that Tocqueville underestimated the likelihood of centralization because he overestimated the restrictions placed on the expansion of national power by the Constitution. Tocqueville thought that Americans permanently constituted both one people and many peoples because he believed—incorrectly it turns out—that the Constitution clearly restricted federal power to a narrow sphere that did not affect most citizens’ daily lives. In modern scholarly jargon, Tocqueville embraced a “dual federalism” of static boundaries as opposed to a “cooperative federalism” of fluid boundaries. In his words, “the United States has a complex constitution” that establishes “two distinct, interlocked societies” governed by “two completely separate and almost independent governments” (DA, 66). The “exceptional and circumscribed” power of the national government “deals exclusively with certain general interests,” whereas state power is “the common rule” (DA, 66). His distinction between “governmental” and “administrative” centralization” likewise presumes that some interests “are common to all parts of the nation” while others “are special to certain parts of the nation” (DA, 97). Moreover, these categories, while sometimes “blurred,” are relatively discrete and easily distinguishable (DA, 98). “Because the sovereignty of the federal government is limited,” he concludes, “it cannot be as powerful as a government with full sovereignty” (177). For Tocqueville, the presence of these constitutional barriers could be expected to check the accumulation of power in the federal government. After all, if allegiance follows political power, and if the Constitution prevents the national government from expanding its power over the daily lives of the citizens, then the dominance of national patriotism is unlikely. Even after he came to fear soft despotism, he may have thought that administrative centralization would occur only at the state level.

However, constitutional developments have undercut Tocqueville's argument, replacing dual federalism with a "cooperative federalism" that places few restrictions on federal power. While his position is understandable historically—dualism was unchallenged throughout the nineteenth century—the federal division of power has been notoriously difficult to pin down. "National" and "local" interests appear to exist on a spectrum rather than a dichotomy. As we saw in chapter one, the Supreme Court's attempts to pinpoint the limits of federal power have proved unable to preserve a clear space for exclusive state power (cf. Greve 2012). The modern Supreme Court accordingly places few restrictions on Congress in the name of federalism.

Given that Tocqueville's argument requires that the powers of the federal and state governments be static and clear, the breakdown of dual federalism devastates his position. If the Constitution, the Court, or some other mechanism can successfully limit the power of the federal government to objects that do not embrace the everyday welfare of citizens, then the people will view the states as their primary benefactors and bestow their affection accordingly. If, however, the power of the national government is capable of expansion, then the people will begin to look to the federal government to secure their welfare. Viewing themselves increasingly as a single, national "We, the people," they will downplay the existence of separate "peoples" along state lines. The people's prosperity will naturally become more and more dependent on the federal government as its power expands, and their allegiance to their state will decline.

Once the nation becomes the focal point of citizens' identity and loyalty, the mutual interdependence of local and national attachment is destroyed, and there is little to uphold the power of the states. When local patriotism is paramount, union is still necessary for provincial happiness because it is the only antidote to the dangers threatening small republics, particularly invasion and conquest. While national patriotism will be weaker since it is based primarily on

rational calculation rather than spontaneous feeling, it nevertheless will exist. But, the states' existence is not as well supported by utilitarian or pragmatic reasons. Once national patriotism takes precedence, provincial independence is not obviously necessary to sustain the national government or to promote the citizens' welfare. Tocqueville held out hope that waning public support for federal power might rebound if an "extraordinary circumstance" such as a war demonstrated the necessity of union (DA, 454-55). By contrast, it is very unlikely that an analogous crisis could resuscitate state power, as there is no state-level equivalent of the threat of invasion to show citizens the necessity of local autonomy. However beneficial federalism may be in theory, the deficiencies of centralization are difficult to see and hardly "compromis[e] the existence of the Union," a prerequisite Tocqueville thinks necessary to prompt a pro-nationalist change of heart (DA, 455).<sup>74</sup> The love of uniformity characteristic of democratic peoples will blind them to the drawbacks of centralization, or the sheer strength and nation-wide scope of national power will count more than its inefficiencies (cf. DA, 789-90). Tocqueville himself feared that administrative centralization would be almost irreversible once initiated (Schleifer 1980, 137-138).

Moreover, the asymmetry between state and federal power is greater when the federal government is dominant than the reverse. When local attachment is paramount, the states themselves cannot dictate to the national government. Their influence is limited to the "safeguards of federalism" described earlier, such as popular support or the selection of national officeholders. These tools sometimes may prevent the federal government from doing too much, but as we have seen, there are reasons to doubt their effectiveness, and in any case they do not

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<sup>74</sup> It should be noted that some Latin American and ex-Soviet countries (along with a few others) have engaged in moderate decentralization over the last several decades, often in response to long-term brutality from the central government (Falleti 2010). It appears then that it is possible for a crisis to prompt a revival of federalism, but only after the worst possible circumstances have intervened.



amount to direct control. But the federal government can dictate to states, especially if public opinion supports it. Federal law is supreme, and whatever is deemed to be constitutional can be enforced against the wishes of the states. Thus, even if states will always be necessary, they will never be autonomous, since their actions are subject to approval by Congress.

It should be noted that this new national patriotism, while genuine, will be shallower and weaker than the old local patriotism. Given the enormous size of the United States, it is less connected to something that is easily seen or imagined, and it cannot be reinforced as easily through habits of public service—although military service serves as a partial step in this direction. Modern patriotism resembles in many ways the “vague patriotic instinct” or “unthinking pride,” which is “not connected with anything in particular,” that Tocqueville finds in despotisms (DA, 105-106). Certainly, many citizens are capable of extraordinary service, as America’s volunteer army demonstrates. On the other hand, even voting is becoming rarer, and people seem to be increasingly disconnected from the political process. Tocqueville would surely say that American society today resembles soft despotism far too much, albeit with an admixture of authentic patriotism and love of liberty.

The strengths and weaknesses of Tocqueville’s account reveal the tensions inherent in federalism. Federalism will always be vulnerable to decay unless it enjoys a solid basis in the emotions or self-interest of ordinary citizens, yet its tolerance for complex and non-uniform sets of laws makes it unpalatable to the democratic mindset. It is no surprise that federal systems have had a tendency toward centralization, and centralization in turn reinforces national patriotism by involving the federal government in the everyday lives of the citizens. As a corollary, the weakening of local attachment undermines the popular safeguards of federalism, according to which the unpopularity of centralization would ensure that officials favorable to

state and local power are elected to federal offices. Public opinion no longer favors one level of government above another, a trend which, combined with the supremacy of federal laws, has contributed to our more centralized modern version of federalism.<sup>75</sup> The federal structure comes to light as either an historical accident or a rationally-constructed improvisation designed to artificially prop up separation of powers.

### **The Future of the Patriotic Preconditions of Federalism**

Given the double danger of centralization and disunion, it is worth considering what might be done, on Tocquevillian principles, to protect and strengthen the people's commitment to divided sovereignty. If Tocqueville is right, the survival of federalism depends on the balancing of national patriotism with local patriotism. Each must be propped up where it is weak. Since national patriotism has a stronger basis in necessity, and is currently the stronger of the two, it is more necessary at this time to prop up state patriotism.

I am not prepared to give a detailed account of how to revive local patriotism, if one is even available. It is clear, however, that we cannot rely on popular or electoral safeguards, since people no longer have a natural propensity to desire local power. Like Tocqueville himself, my project relies on somewhat elitist assumptions, in that it declares that what is good for people will not be obvious to them. Just as Tocqueville calls for favored traits, such as religion and patriotism, to be cultivated by wise lawmakers, I argue that in the future safeguarding federalism must be the job of state politicians, since the people are no longer able to do so. Of course, this realization complicates the prospects of reviving contestation, inasmuch as a populace that does not appreciate federalism will be unlikely to back any proposals designed to reform it.

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<sup>75</sup> Despite the weaknesses of popular safeguards, I do believe that the people can sustain federalism when their oversight is supplemented by contestation, as the discussion of popular safeguards in chapter two elaborates.

One possible way to revive local attachment is to link the love of liberty to decentralization. Appreciation for liberty, not merely at a rational level but also at an emotional level, is still powerful in American culture. This libertarian strain could become a strong prop for federalist goals. While federalism is not tied to any particular partisan agenda, the fragmentation of power as a means to control abusive government ought to be appealing to the libertarian cast of mind. The desire for equality natural to democracies, Tocqueville feared, would encourage the growth of a centralized state, whereas liberty leads to greater inequality. Federalism—state “liberty” if you will—also produces diversity as states pursue different policies. These divergent policies will grate against those strongly committed to a particular set of policy outcomes. In good Tocquevillian spirit, lawmakers who value federalism must counteract the natural tendencies of democracy by favoring the liberty side of the equality-liberty divide. It is possible to create allies for federalism by stressing that opposing a strong national government goes hand in hand with forestalling soft despotism.

State patriotism would also benefit from reviving participation at the state and local level. As Tocqueville notes, administrative centralization “steadily weakens the public spirit” (DA, 98). This option would imitate the 1830s American towns, in which “[m]uch artful care” was used to “*disperse* power in order to interest as many people as possible in public affairs” (DA, 76). Such measures could take a variety of forms, and a detailed discussion of them is beyond the scope of this chapter. Still, partisans of federalism should make common cause with those interested in reviving local democracy.

In the end though, reviving state patriotism first and foremost requires propping up the constitutional safeguards of federalism. If Tocqueville is correct, it is necessary to empower the states before expecting a revival of local attachment. Local patriotism is endangered whenever

the state and local governments are not powerful enough to appeal to the rational self-interest of their citizens. If “men generally bestow their affections where there is strength,” as Tocqueville writes, towns and states must possess real power in order to gain the loyalty and participation of their inhabitants (DA, 75). In particular, if they are to foster patriotic public service, localities require substantive and independent power to govern local affairs. Inasmuch as state patriotism is likewise linked to state power, they stand or fall together. Those who value the civic skills nurtured by participation in local affairs, then, should also favor political decentralization. This dissertation argues that decentralization will be benefitted by the renewal of contestational federalism. In that sense, Tocqueville’s project is not unrelated to contestational federalism.

## Conclusion

This chapter provides several insights into the structure and functioning of the federal system in the United States. First, the founders thought that federalism, as a species of separation of powers, should be protected in the same fashion as the separated branches of the national government. Thus, rather than relying on parchment barriers or judicial enforcement, they put in place “constitutional safeguards” to maintain the federal boundary: the electoral system and the means of selecting federal officeholders. They assumed that ordinary voters would favor states’ rights and that the state politicians would want to protect their own jurisdiction. The goal was for federalism to be self-enforcing by means of rivalrous contestation between the two levels of government.

Second, no clear and consistent doctrine of the safeguards of federalism emerged during ratification. Two reasons explain this absence. First, the proffered guardians of state interests—the Senate and Electoral College—were also intended, contradictorily, to check the democratic passions of the people, which requires independence from electoral pressures. Many Federalists

did not want the Senate to be captured by the state legislatures, the alleged hotbeds of populist demagoguery. Second, many Federalists expected the states to continue to dominate the federal rivalry; if anything, they feared that the central government would be endangered by the continued dominance of the states. In the face of what they took to be economic, social, and political collapse, protecting the states took second place to establishing an effective national government. Thus, while certain institutions were claimed as federalism safeguards, their effectiveness was undermined by other characteristics given to them.

Third, transformations since the founding have undercut the effectiveness of the original constitutional safeguards of federalism. Chief among these is the rise of political parties. The founders erroneously assumed that political conflict would take place primarily between the two levels of government, with the officeholders competing to increase their jurisdiction and the people supporting either side as it suited their interests. Instead, political parties caused the dynamic of political competition instead to revolve around partisan struggles for control of both levels of government. The partisan system encouraged cooperation between state and national officials to secure partisan and ideological goals, weakening the commitment of politicians to their institution's formal powers. Likewise, the electoral or popular safeguards of federalism have been undermined by the rise of national patriotism. Both the founders and Alexis de Tocqueville expected the people to have an automatic presumption in favor of state power, which would give states a natural advantage in electoral competition for the people's affection. But, instead of naturally supporting the jurisdictional claims of states, the people are usually neutral or pro-national—if not apathetic—in conflicts over federalism. All told, contestational federalism lies dormant in the absence of reliable constitutional safeguards.

These considerations should temper expectations that we can reinstate the original version of separation of powers or federalism. The founders' model rested on eighteenth century expectations of political behavior. They did not anticipate that officeholders have tightly defined normative goals other than increasing the power of their institution. Modern politics is a partisan chess-match pitting ideological opponents seeking to dominate both levels of government. Those wishing to revive means of contestation today ought to take seriously the unintended partisan consequences of that attempt. Chapter six makes just such an attempt.

## CHAPTER FIVE: A NORMATIVE DEFENSE OF CONTESTATIONAL FEDERALISM

It is not enough merely to describe the theory of contestational federalism; it is equally necessary to justify its value over other arrangements. On the one hand, federalism is alleged to supply a number of positive social and political benefits. Still, federalism is not unassailable. Critics charge that strengthening the states will lead to deleterious consequences, such as undermining the rights of minorities and leading to the under-provision of public goods. These objections apply equally well to the contestation model as to other federalism arrangements. In fact, by strengthening the otherwise ambiguous powers of the states, contestational federalism heightens whatever problems, if any, are associated with excessive state power. If this dissertation's argument is going to work, then, it must clear away any objections to the expansion of state power.

This chapter evaluates the normative value of contestational federalism. It evaluates the arguments for and against federalism in a number of areas. This analysis lays to rest the claim that federalism, as an "institutional arrangement," is "neither reducible to nor essential to any substantive good" (Barber 2013, 146). No objection presents an compelling argument against federalism, and, far from being a "tragic compromise" (Feeley and Rubin 2011), it produces a number of positive benefits. Because "[s]ome goals are best realized through nationalization of policy, while for others, decentralization is best" (Bednar 2009, 25), federal states combine the benefits of both large and small states.

Throughout, this chapter draws attention to the unique benefits deriving only from contestation as opposed to other versions of federalism. The value of a federal system is contingent on its specific structural characteristics, and the task of the political theorist is to

design a system that maximizes its advantages and minimizes its disadvantages. As Jenna Bednar points out, “it is not the federal system itself but the way that authority is distributed between the independent governments that determines how well” federalism accomplishes its goals (2009, 25). Feeley and Rubin (2008) are right that federalism can take a variety of forms, and is too often conflated with decentralization and other arrangements. The task of this chapter is to identify and defend the normative goods that require the formal constitutional division of power between two independent powers. In doing so, I hope not only to improve our conceptual clarity regarding federalism, but also to revitalize arguments for federalism’s value. By identifying unique benefits unavailable on similar arrangements such as decentralization or consociation, this analysis enhances the overall value of federalism as such. These benefits in turn show that Madisonian constitutionalism is not simply an pragmatic compromise but a beneficial good that promotes the aspirations of effective democratic government and popular liberty.

### Federalism and Democratic Government

This section discusses the ways in which federalism improves the quality of democratic governance. It performs this function by increasing political participation, allowing for the satisfaction of a greater amount and variety of citizens’ preferences, and encouraging higher quality officeholders. However, these virtues are unconnected to contestation. They may even be satisfied, at least in theory, by arrangements that fall short of federalism, such as administrative decentralization. Still, inasmuch as contestation protects federalism in general, by extension it facilitates its democratic benefits. Contestation also improves democracy by encouraging the elevation of constitutional discourse.



## **Decentralization and Democratic Government**

Many scholars argue that decentralization heightens civic participation and dialogue. There is some evidence that it increases political participation (Inman and Rubenfield 1997; Borck 2002). However, as Bednar notes, the greater salience of national elections counteracts this effect, so “distribution of authority to the states must be preserved to keep the electoral stakes high enough to encourage participation” (Bednar 2009, 45). Modern research shows that federalism can increase the diversity of those involved in decision-making and dissent (Bednar 2009, 44). There is evidence that large states give greater voice to the rich and powerful, whereas smaller governments create a more equal playing field (Borck 2002). Heather K. Gerken (2014, 1895) argues that federalism gives “political outliers an opportunity to force engagement, set the national agenda, dissent from within rather than complain from without, and offer a real-life instantiation of their views.” Conceived in this way, federalism is a form of free speech acted out; it provides for better conflict resolution. Federalism also enhances political affiliation by giving those supporting the minority party in the national government meaningful avenues for policy formation and political connection (Gerken 2014). Gerken (2014, 1903): When states administer federal law, “federalism turns dissenters into decisionmakers, not just lobbyists or supplicants. They can help set policy rather than merely complain about it.” There is empirical evidence showing that political participation increases with decentralization (Hankla 2009, 635)

Perhaps the most obvious advantage of decentralization is that it protects diversity. Since a primary value of democracy is to enact the people’s will, federalism leads to enhanced democratic representation. Scholars have argued that uniform national laws lead to less perfect representation of the needs and desires of the population. By increasing the number of governments passing laws, federalism introduces a wider range of policies and outcomes,

thereby accommodating a wider range of preferences in the electorate (Ryan 2012, 51-53). States and localities can tailor their policies to attract certain types of people: think of the contrast between business-friendly Texas and environmentally-friendly California. Likewise, some local governments might favor school-oriented policies, while others may target policies at young singles (cf. Bednar 2009, 35). Inter-state movement increases the diversity value of federalism because people can move to a state that caters to their preferences. Someone who values public parks may live in one state, whereas someone who values lower taxes may live in another. Moreover, federalism can satisfy both conservative and liberals because a variety of local policies is better than a single policy at the national level, regardless of whether the latter ideologically extreme or moderate.

The benefits of allowing local diversity are greater if geographical differences in preferences exist that are difficult to satisfy with a national law. This was certainly true in 1787. At the founding, the typical American was ferociously parochial, proud of his state, concerned to protect its unique interests, and viewed regional diversity as both necessary and inherently good. The Anti-Federalists in particular argued that no central government in a nation as large as the United States could govern justly or make uniform laws suitable for states with diverse cultures, demographics, and needs (ex. Frohnen 1999, 381). Even in our relatively homogenous modern world, there is a divide between “red states” and “blue states,” in addition to divisions based on climactic, demographic, or economic factors. “Federalism may help us to manage diversity’s detrimental effects so we can harness its benefits” (Bednar 2009, 45). In many countries around the world, ethnicity divides populations along geographical lines, leading to compromises where greater control is granted to local areas. The “reassertion of ethnic or regional identities” is driving federalism all around the world” (Elazar 1987, 8-9). In many countries, union would be

impossible without giving some autonomy to different ethnic groups. Federalism can reduce tensions within nations by defusing political conflict, but sometimes facilitates conflict based on ethnicity or long-standing rivalries (Bednar 2009, 47).

Decentralization can also enhance the quality and accountability of representative government. Two levels of government “can work together, each insufficient, but when combined presenting a solution” (Bednar 2009, 51). Anti-Federalists insisted that only representatives voted on at the local level would truly represent their constituents, whereas the federal government would be populated by wealthy elites with little in common with ordinary Americans (ex. Frohnen 1999, 381, 395-98). Even Madison admits that enlarging the electorate too much will “render the representative too little acquainted with all [the people’s] local circumstances,” concluding that the “federal constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular, to the state legislatures” (*FP* 10:53). Modern scholars agree that electing officeholders on a smaller scale creates representatives who are more interested and invested in local prosperity, more knowledgeable about local needs and conditions, and more easily held more accountable for success or failure (Bednar 2009, 45-51; Hankla 2009, 635). In local areas “citizens can better oversee the behavior of public officials” than at the national level, particularly the poor (Hankla 2009, 635). Additionally, local elections provide opportunities for politicians to gain valuable experience at the local level, and permit citizens to screen candidates for quality before sending them to higher office (Bednar 2009, 51).

By contrast, arguments that a large republic improves the quality of officeholders are not as strong as their pedigree. According to James Madison (*FP* 10:48-54), a key failing of democracies is their tendency toward unjust factions, which tend to be based on local interests or

opinions. For Madison, extending the size of electoral districts would improve representatives because: (1) more qualified candidates could be drawn from the larger pool; (2) the “vicious arts” and intrigues found in local elections would be rarer; and (3) fewer factions would enjoy the support of a majority of the citizens. The “enlightened views and virtuous sentiments” of federal officeholders would “render them superior to local prejudices, and to schemes of injustice” (*FP* 10:53). However, new pathologies associated with special interests should temper optimism on this point. Public choice theorists have found that “competition among rent-seeking factions usually produces pathologies rather than public benefits and political stability (Greve 2012, 41). Logrolling ensures that many interest groups can get their way by mutually supporting each other’s handouts, many of which are packed into the same bill. Moreover, political parties and interest groups have “nationalized” factions, allowing like-minded people to combine over a vast area.

### **Federalism, Contestation, and Democratic Government**

It should be noted that these benefits can be obtained with or without federalism as such. These benefits apply to any form of decentralized government regardless of its constitutional structure, and could be achieved by a lenient central government willing to permit a substantial degree of autonomy, however unlikely such an occurrence would be (Feeley and Rubin 2011, 17-37). True, it is almost preposterous to imagine the federal government conducting some sort of nationwide laboratory experiment with the states as test subjects, as Feeley and Rubin (2008, 26-29) conjure up.<sup>76</sup> But, they can exist with or without federalism, and so to craft a defense of federalism we must be aware of its distinctive benefits. This focus led Martin Diamond (1973) to classify modern federalism as a species of decentralization that does not detract from the

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<sup>76</sup> For a fuller refutation of many of Feeley and Rubin’s (2008) core accusations against federalism, see Beer et al. (2008).

overarching sovereignty of the national government. In fact, a growing number of scholars support federalism for nationalist reasons (see Gerken 2014).

Still, federalism and contestation do enhance the benefits of federalism to democracy. It is hard to imagine how local democracy or local participation can be truly meaningful when state and local power is a gift of the central government that can be taken away at any time. Such participation will be more meaningful if the states have constitutionally protected power, and contestation further augments the value of federalism for democratic governance. If state officials are empowered to check and balance the federal government, as contestational federalism asserts, then elections for those positions become even more impactful. Also, contestation protects state power, which is a prerequisite for reaping the benefits of decentralization. States have less need to fear a sudden reversal of decentralization if state power is properly safeguarded. For these reasons, partisans of local democracy should value contestational federalism as a secondary and instrumental good.

Additionally, in contrast with decentralization or other forms of federalism, contestational federalism empowers the people while avoiding populism. Although stopping far short of an undiluted system of popular sovereignty, contestation gives the people a voice in constitutional deliberation. In this, it differs radically from both judicial supremacy, which is anti-populist, and popular constitutionalism, which embraces maximal popular participation in the construction of constitutional meaning. Contestational federalism incorporates the positive elements of both of these alternatives while excluding their downsides.

Contestational federalism facilitates popular involvement by channeling the people's voice through competing institutional bodies, namely the two levels of government. Nothing is taking place "outside" the political process, and the government is not immune from popular

pressure. Federalism doubles the institutional expression of the popular will, and federalist contestation provides a secondary mechanism for popular influence. It follows that the people do not merely elect officeholders: they can play off two sets of officeholders against each other. Federalism creates a “multilevel electoral system” in which citizens view both levels of government instrumentally as “tools” (Bednar 2009, 110). Hamilton (*FP* 28, 150) writes that “a confederacy” excels unitary states when it comes to the protection of liberty: “Power being almost always the rival of power; the general government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.” By turning the electoral process itself into a platform for competition and contestation, federalism institutionalizes popular oversight of the Constitution, thereby enhancing republican governance.

### Federalism and the Provision of Public Goods

The advantages and disadvantages of federalism in economic areas are also controversial. Many scholars charge that federalism leads to the under-provision of public goods, because competition between states produces a “race to the bottom” (RTB) in which states compete to provide the lowest level of public goods. RTB theory presents a severe challenge to claims that federalism qualifies as a beneficial constitutional mechanism. However, many academics reject RTB theory, and some argue that federalism actually promotes the efficient and salutary provision of public goods. Advocates of so-called “competitive federalism” maintain that certain constitutional arrangements produce beneficial competition between the states, leading to healthier, more efficient government. This section discusses how federalism impacts the optimal

delivery of public goods. After outlining the arguments of the rival theories, it summarizes the vast literature attempting to determine which topics of legislation are best provided by the states and which by the national government. It turns out that worries about the under-provision of public goods have been exaggerated. There is little evidence of a race to the bottom, and some evidence supports competitive federalism.

### **The Case for Competitive Federalism**

Supporters of “competitive federalism” argue that economic competition between states leads to an efficient and salutary provision of public goods. Competitive federalism occurs when (1) labor and capital can move unimpeded across sub-unit (i.e. state) lines; (2) sub-unit government have the freedom to pass independent laws across a wide variety of domestic policies, particularly taxation and welfare policy; (3) the central government is limited in its ability to pass uniform laws in these same areas; and (4) debt by the sub-units is controlled, either by outright restrictions or a credible commitment by the central government not to bailout profligate borrowers. In theory, the resultant “[c]ompetition for capital leads to optimal growth policies, outperforming the unitary system without such competition” (Bednar 2009, 35). Greve (2012) argues that competition for mobile people and businesses checks overly generous or inefficient welfare policies and promotes efficient, limited government in line with the preferences of citizens, not politicians.

The ability of people to move between states is another facet of competitive federalism. Greve (1999, 3) claims that “citizens ability to vote with their feet and to take their talents and assets elsewhere will discipline government in the same way in which consumer choice, in nonmonopolistic markets, disciplines producers.” Bednar (2009, 36) argues that decentralization and competition over mobile populations leads to “beneficial diversity and reduces waste and

corruption.” If one state raises excessive taxes or tries to confiscate property, people or companies may relocate to another state with better laws. Because of such exit options, “only those restrictions that citizens are willing to pay for will survive,” and governments are prevented from extracting excessive taxation, cartelizing an industry, or confiscating the wealth of an industry (Weingast 1995, 5).

Empirical evidence supports claims that competitive federalism produces positive economic benefits. Its benefits must be weighed against any defects, but these studies indicate that competitive federalism has value. Evidence from China shows that economic competition between regions prevents monopolization of the economy by any government, discourages rent-seeking and patronage, fosters a pro-business climate by inducing state to fund infrastructure and protect property rights, and checks excessive government spending (Montinola et al. 1995). Qian and Roland (1998) likewise point to China to validate their formal model showing that decentralization of monetary and fiscal policy induces monetary restraint among governments and discourages subsidies and bailouts for inefficient enterprises. Weingast (1995) shows that inter-regional competition boosted historical economic growth in England and the U.S. by preventing rent-seeking interests from passing trade-restricting legislation. Freitag and Vatter (2008) find that, during a recession, administrative decentralization was associated with lower levels of debt accumulation during recessions. They conclude that decentralization provides better incentives for politicians to handle the public finances responsibly, writing that in Switzerland “competition between the sub-national units for mobile resources ... favors low levels of debt” (2008, 286-87).

By giving states the freedom to pass divergent laws in the same policy area, federalism also enables experimentation, leading to better results system-wide. According to Louis



Brandeis's famous statement in *New State Ice Co. Vs. Liebmann* (1932), the states serve as "laboratories of democracy," testing new or different policies, thus fostering policy innovation and efficiency: "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. ...It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (285 U.S. 262, at 311). Empirical studies back up this intuitive theory (see Ryan 2012, 56-57). Successful state-level children's health insurance policies are more likely to be copied than failing policies, suggesting that federalism encourages beneficial innovation (Volden 2006b), and competition-induced experimentation has led to better policies in China (Montinola et al. 1995, 73-76). Jenna Bednar (2009, 30-35) summarizes the research supporting policy innovation at the state level.

Reaping the benefits of competitive federalism requires a stable distribution of power and clear limits to government authority. "Central to the success of market-preserving [i.e. competitive] federalism is the element of political durability built into the arrangements, meaning that the decentralization of power is not merely at the discretion of the central political authorities" (Montinola et al. 1995, 53). Economic planning requires consistency and reliability. Economic actors must not fear that a rapacious state will seize their gains, nor should they expect government to bail out their bad decisions. In either case, inefficiency is heightened. It is no surprise, then, that proponents of "market-preserving" or competitive federalism try so hard to identify reliable safeguards against the abuse of power (Weingast 1995; Qian and Weingast 1997). "Political institutions" are needed to achieve a "credible commitment" to economic competition "because, in the appropriate form, they provide for a balance of power that can make

commitment credible” (Montinola et al. 1995, 54). By giving new tools with which state may resist federal overreach, then, contestation protects and augments competitive federalism.

### **Competitive Federalism Versus Race to the Bottom Theory**

The value of economic competition is far from universally recognized. Many scholars claim that, even if it produces some economic efficiency, competitive federalism causes a “race to the bottom” which leads to the underprovision of public welfare relative to citizen preferences. According to RTB theory, interstate competition induces states to weaken antipoverty policies and lower taxes lest high-income residents or businesses leave (ex. Musgrave 1997). State lawmakers fear that their state will become a “magnet” for welfare recipients if its welfare generosity exceeds that of its neighbors, and thus have an incentive to lower welfare benefits to be at or lower than those of neighboring states. Since all states engage in this activity simultaneously, the theory goes, there will be an inexorable trend toward lower welfare benefits across the states, leaving poor residents without necessary resources. In the same way, RTB theory predicts that states will attempt to attract economic development and industrial jobs to their state by offering tax breaks to manufacturing companies and avoiding tough environmental regulations. Competition to lower taxes may undermine state budgets and place even greater budgetary pressure on social welfare and other important programs. These scholars propose uniform federal regulations as the antidote to the dangers of inter-state competition.

The debate over competition and federalism is driven by ideological differences between the two camps. Generally speaking, supporters of competitive federalism hail from the right, and eagerly embrace the idea of competition-induced checks on governmental activity that resemble market-based checks on businesses. Those who fear a race to the bottom are by and large progressives whose normative standards of justice lead them to be wary of the market, if not

hostile to it. To some extent, one's ideological blinders will color how one interprets the evidence. One person's RTB is another's efficiency-maximizing mechanism. The following analysis, it must be stressed, is not an attempt to bypass the legitimate debate over how much people deserve to receive in a just society, and how that provision should be made.

Furthermore, ideology assumptions about government affect not only the definition of key terms but also one's hypotheses and predictions. Theoretical models diverge based on whether they that assume that politicians are benevolent maximizers of their constituents' utility or power-hungry self-aggrandizers (Hange and Wellisch 1998, 315). In the first case, competition frustrates the ability of good-hearted public servants to deliver optimal benefits, while in the latter case competition restrains the destructive tendencies of self-interested leaders. Fiscal competition looks more attractive if one assumes that politicians innately want to increase the public sector—not to pursue their constituents' welfare, as many assume—in which case devolution and competition produce “a needed fiscal discipline that is absent at the central government level” (Oates 2001, 509). Normative questions like these obviously cannot be answered by empirical studies, but they stress the need to test theories empirically rather than trust to theoretical models based on presuppositions.

### **Testing Race to the Bottom Theory Empirically**

Thankfully, the claims of competitive federalism and Race to the Bottom theory have undergone extensive empirical testing, so we need not rely primarily on theory or ideology. The following section summarizes the empirical literature on the effects of economic competition in three areas that typically lie at the center of the debate: environmental regulation, tax policy, and welfare provision. Although other policy areas might have been included, taken together these three areas permit a reasonably comprehensive test of the RTB hypothesis. If a race to the bottom

is not found here, it is unlikely to be found elsewhere. As we will see, the results are complicated, but overall do not find substantial negative effects of interstate or international competition. In most cases, whatever negative effects do exist can be mitigated by means of constitutional or political policies. In short, contestational federalism can survive the challenge of the RTB hypothesis more or less unscathed.

Empirical studies of U.S. environmental policy largely contradict the RTB hypothesis, which holds that states will reduce the stringency of their environmental regulations in the face of competitive pressure to attract mobile capital. First off, in areas of environment regulation that do not relate to attracting mobile capital, competition may lead to higher standards (Vogel 1995). Vogel (1995) even finds, paradoxically, that free trade actually promotes environmental regulations. List and Gerking (2000) show that neither environmental protection nor environmental quality declined when environmental policy in the U.S. was devolved to the states in the 1980s. In fact, U.S. states have enacted environmental regulations in numerous areas that are stricter than federal standards (Potoski 2001; Oates 2001), and Potoski (2001) finds that states do not weaken regulations because of competition. Fredriksson and Millimet (2002) found evidence of a “race to the top:” U.S. states increase their own regulatory stringency when competitors’ regulations are more stringent, but do not lessen their stringency in response to less stringent competitors. By contrast, Woods (2006, 174) finds that, with regard to surface-mining regulation, U.S. states “adjust their enforcement in response to competitor states when their enforcement stringency exceeds that of their competitors,” but not when “competitors’ enforcement is more stringent,” implying a race to the bottom. However, Konisky (2007) rebutted the claim of asymmetric response. Rather, states responded to their economic rivals regardless of whether the latter’s regulatory behavior was stricter or more lenient. Even after

restricting his calculations to economically vulnerable states, Konisky (2009) found no evidence that these states are more likely than other states to respond to less stringent environmental regulations in competitor states. In sum, the evidence indicates that interstate economic competition does not undermine environmental protection. An RTB is not inevitable, even if capital is mobile, because states may not wish to attract polluting industries to their state or may otherwise value environmental protection.

There is also little evidence for RTB theory in the area of economic regulation and taxation. The theory states that the threat of losing mobile capital will induce governments to progressively lower their rate of taxation on businesses and keep their labor laws weak. However, Oates' (2001) survey of the literature found little evidence to support a race to the bottom in fiscal competition. Studying corporate taxes across OECD countries, Stewart et al. (2006), find that taxes have not systematically declined, nor have tax rates converged. In fact, most of the decline and harmonization occurred prior to 1980, before substantial international competition emerged. In some cases, low tax rates can lead to higher revenues since they bring in capital from abroad (Plümper, Troeger, and Winner 2009, 764-65). Likewise, Scott J. Basinger and Mark Hallerberg note that "capital tax burdens have *increased* even as capital became more mobile" from 1975 to 1996 (2004, 261). "Conventional stories of a 'race to the bottom,'" they write, "would not expect such a large spread, nor would they anticipate that the effective tax rate on capital in aggregate has not changed appreciatively over the period" (Basinger and Hallerberg 2004, 269). Urpelainen (2010) simply takes it as given that "economic globalization has not put downward pressure on regulations in industrialized countries," and that some "developing countries have slowly adopted more stringent regulations." Likewise, new studies disconfirm the

theory that millionaires flee high-tax states in favor of states with lower taxes (Young and Varner 2011; Young et al. 2016).

Scholars have formulated more sophisticated theories of political behavior to explain these potentially surprising results. Basinger and Hallerberg (2004) argue that political costs (such as domestic politics and uncertainty) often counteract the drive to lower taxes. They conclude that “countries are *conditionally* sensitive to changes in competitors’ rates” depending on a variety of factors (2004, 275). Likewise, Thomas Plümper, Vera E. Troeger, and Hannes Winner, citing numerous studies refuting the prediction of zero taxation on mobile capital, defend a reformulated theory of mobile capital taxation which argues that nations are unwilling to lower taxation to zero. Their theory allows both a country’s “budget constraints” and “fairness norms” impact capital taxation (Plümper, Troeger, and Winner 2009, 763). Governments cannot tax immobile labor too heavily relative to mobile capital or defund popular programs without triggering a backlash. “The more severe budget constraints and the more prevalent societal fairness norms are, the lower the government’s ability to reduce taxes on mobile capital in the presence of international competitive pressures” (Plümper, Troeger, and Winner 2009, 781). They find empirical evidence to back up their model and predict that nations’ tax policies will continue to differ even in the presence of mobile capital, undermining a race to the bottom.

Historical evidence regarding child labor laws echoes this conclusion. In *Hammer v. Dagenhart* (1918), the U.S. Supreme Court invalidated a federal law preventing the interstate shipment of products made with child labor. Supporters of the law held that in the absence of federal standards economic competition would dissuade the states from passing their own legislation. However, every state already had a child labor law in place in 1918—albeit of varying stringency. In fact, due to increasing prosperity and state regulations, “child labor had

already been cut in half at the time of *Hammer* and effectively disappeared by 1930” (Greve 2012, 187-88). Evidence of the need for a uniform federal standard is wanting in this case.

In a third issue area, redistribution policies, empirical evidence largely debunks worries of a race to the bottom. According to RTB theory, poorer citizens will move from state to state in order to receive greater welfare payouts, and states therefore will decrease the generosity of their welfare benefits competitively. These claims are largely false. While some earlier work (see Brueckner 2000) supported the idea that poor residents cross state lines to receive higher welfare payouts, Allard and Danzinger (2000, 350) found that “relatively few single-parent households make interstate moves and that welfare benefits are not a significant determinant of them.” Berry, Fording, and Hanson (2003) find that “economic considerations” are much more significant determiners of behavior among the poor than “welfare benefit levels,” concluding that politicians’ fears “that generous welfare policies attract large numbers of poor persons to their states” are “unfounded” (344-45). This should not be surprising. The personal and financial costs of moving are large, and people generally have limited information about the minutiae of welfare policy in other states.

Some scholarship paints a more complicated picture. Michael A. Bailey (2005) incorporates a variable for welfare recipients’ birth state into a model of interstate movement. Once movement to one’s birthplace is accounted for, he finds evidence that impoverished people move to states with more generous welfare programs. However, the substantive impact of welfare generosity is relatively small, and is so dwarfed by the effects of family ties that Bailey attributes previous null findings to their absence from past models. Summarizing a number of articles, Edmark (2009, 512) states that “more recent, and methodologically more credible, studies, suggest that welfare generosity does affect migration, but that the effect is rather small.”

Her own study (Edmark 2009) concludes that the implementation of stricter requirements for collecting welfare did not induce migration among impoverished Swedes. It is fair to say that the decision to move is complicated, involving a wide variety of considerations, including not only welfare generosity but family ties, economic prospects, weather, and other factors.

Regardless of whether people relocate to receive higher welfare benefits, politicians may still behave under the assumption that they do, leading to a race to the bottom nonetheless. Here, the evidence is mixed, but does not provide strong support for the RTB thesis. Berry, Fording, and Hanson (2003) incorporated into their model the hypothesis that poor people may move for economic reasons (such as better employment opportunities), finding a substantially smaller effect of competition over benefits than previous studies. Craig Volden (2002) rejects traditional RTB models, instead hypothesizing a slower race to the top. That is, he found that states do not lower their welfare generosity competitively—high benefit states are actually *more* likely than others to increase payments—but they are reluctant to make upward adjustments for inflation until neighboring states do so.

Other studies support RTB theory, although even here the evidence is mixed. Bailey and Rom (2004) compare state-level data from state-controlled programs (such as Medicaid) with federal-controlled programs (such as Medicare) regarding benefits, access, and overall spending. They find evidence for a race to the bottom in some, but not all, state-controlled programs, particularly the most politically controversial, but not for Medicare. Despite concluding that “a state’s welfare generosity is only modestly influenced by its neighbor’s generosity,” they argue that “over time” even these “modest” effects can add up (Bailey and Rom 2004, 339). Still, given the modest magnitude of the observed RTB, together with the fact that not all state programs experienced one, we should be cautious in our conclusions. Later, Bailey (2007) advances a



more modest theoretical model predicting that federalism “will indeed constrain redistributive spending even as it will not necessarily induce a literal ‘race-to-the- bottom.’” Albert and Catlin (2002) partially reinforce these findings. Analyzing data on welfare spending from 1977-2000, they discovered that nearly all states had decreased welfare generosity over the period, and that many states engaged in “interstate welfare competition,” although states varied widely as to the extent of competition (Albert and Catlin 2002, 214). However, they found that states who began the period with more generous policies relative to neighbor states remained more generous, whereas states beginning at the bottom stayed there. Also, competition did not increase following the welfare reform of 1996, as predicted by RTB theory.

One of the most comprehensive and recent studies, De Jong et al. (2006), rebuts extreme forms of the RTB thesis. Using factor analysis to analyze TANF data, they find that from 1996-2003 there was a uniform trend in the states towards more lenient eligibility requirements for immigrant, refugee, and two-parent family groups, as well as more lenient definitions of “work” and looser asset limitations. However, states became more stringent on behavior requirements such as alcohol screening and child immunization (although movement in both directions occurred). Finally, states became more stringent regarding time limits and exemptions for welfare, although “the response by states was not uniformly a more stringent change” and states “varied considerably” (De Jong et al. 2006, 770). In sum, “nearly the same number of policy dimensions became more lenient (40 percent) as became more stringent,” while some showed no change (De Jong et al. 2006, 778). The authors conclude that their study “does not support a unilateral ‘race to the bottom’ hypothesis. Rather, it is more consistent with a ‘tough-love’ metaphor—permitting access to benefits in exchange for fulfilling expected pro-social behaviors” (De Jong et al. 2006, 779). In short, the empirical evidence for an across-the-board

RTB is underwhelming. Moreover, as Volden (2006a, 796) points out, most of the literature has omitted a number of politically significant variables—such as “political, demographic, and budgetary characteristics”—whose inclusion might weaken RTB theory.

Skeptics of competitive federalism also point to empirical literature indicating that decentralization promotes the unequal implementation of welfare policy along racial lines. Soss et al. (2001) found a positive relationship between the percentage of black and Latino residents and the adoption of some stringent welfare policies: time limits and “family caps” restricting benefits for children conceived while the mother was receiving welfare. Fellowes and Rowe (2004) find that a state’s percentage of African-American residents is positively associated with welfare generosity, eligibility strictness, and work requirement flexibility.<sup>77</sup> However, they also find that a number of other factors impact welfare policies, and the effect of race is modest when other variables are taken into account. Fording, Soss, and Schram (2011) find that there is an interaction between local levels of conservatism and race, in that black (but not Latino) individuals are more likely to be sanctioned, relative to whites, as local communities become more conservative. However, this effect is limited to the fourteen states that have engaged in “second order devolution” of implementation of welfare policies to local communities; states with welfare policies centralized at the state level show no such correlation. But, a state’s decision to enact second-order devolution is positively correlated with its percentage of black residents (Soss, Fording, and Schram, 2008).

However, these data do not prove that federalism promotes racism. It appears that the effect of race applies only to certain policies, political circumstances (i.e. devolution of power to local areas), and minorities groups (blacks but not Hispanics). Only fourteen states have chosen

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<sup>77</sup> The percentage of Hispanics exerted a statistically significant effect only on welfare generosity.

second-order devolution. Moreover, the size of the effect is relatively small. It should be noted that claims that devolution leads to discriminatory welfare policies depends on the claim that the laws in question—for instance, time limits on receiving welfare—are unjustifiable on the merits, a claim that proponents of such laws would no doubt dispute. That some people may have supported these laws due to racial animus does not refute their merit. Thus, while it remains a significant concern, states can manage welfare without compromising racial equality. It is to be hoped that the increase in interracial marriage, the reduction of the non-Hispanic white percentage of the U.S. population, and the decline of racial antagonism will render race-based concerns about competitive federalism even less problematic.

It should be noted that, even if RTB theory is partially true, “bottom” does not imply the total absence of policies or regulations. For example, if RTB truly led to a continuous decline in welfare generosity, we would expect to see no welfare policies (or policies set at the federal minimum). But, a cursory examination reveals that all states have such policies, and many are more generous than the federal minimum. As of June 2016, for instance, twenty-six states maintained an Earned Income Tax Credit on top of the federal EITC. Apparently, even in a race to the bottom, “bottom” does not imply “rock bottom.” The same reasoning holds true for environmental regulation. Such observations are not sufficient to dismiss RTB fears, because economic competition may have prevented even more states from passing stricter regulations (cf. Konisky 2007, 856). Still, it should temper more extreme predictions.

### Federalism and Individual Rights

The ability of federalism to satisfy the preferences of local or regional majorities may be as much a curse as a blessing. It is sometimes argued that federalism makes the protection of individual rights more difficult. In a liberal democracy based on “inalienable” rights, this

question is vital. If federalism undermines individual rights, then its utility evaporates. In the end, I believe that federalism can overcome this challenge, although it is a serious question. This section reviews the evidence that federalism undermines rights, tracing both the debate over federalism and rights throughout American history as well as contemporary arguments. It concludes that federalism's relationship to the protections of individual rights is complicated. Sometimes a tension may exist between federalism and minority rights, but the same tension is inherent in majoritarian forms of government simply, and does not apply explicitly to federalism. Either level of government may threaten or protect rights, and in any particular situation the value of federalism will depend on where the greater danger lies.

The apparent tension between federalism and rights arises from the fact that permitting diversity on salient moral issues inevitably means tolerating policies that many people consider morally deficient. Feeley and Rubin (2008) refer to this phenomenon as the "tragic" aspect of federalism. "[F]ederalism countenances particularism and diversity, while the protection of rights seems to require universal standards and uniform treatment" (Tarr and Katz 1996, x). Following in Madison's footsteps, Howard (1996, 22) notes that "[l]ocal constituencies are often more homogeneous and cohesive than is the country at large," allowing "some powerful local majority" to ignore or oppress minorities. How can a region be allowed to violate a universal right without giving up the ideal of human rights? Assuming, as most people do, that there is only one correct answer to moral questions, federalism demands that people check the human impulse to make justice reign everywhere. Even if federalism is defensible, it will no doubt be uncomfortable.

## **The Debate over Federalism and Rights in American History**

The issue of federalism's relationship to rights has fluctuated throughout American history. A dichotomy has always existed between those who argue that federalism protects rights, and those who claim that it hinders them. Perhaps surprisingly given later trends, at the founding many Americans were afraid that the federal government, not the states, would threaten rights. "The American Revolution had featured local colonies fighting an imperial center in the name of both freedom and federalism. In light of their experience with imperial arrogance and oppression on the one hand, and the heroic roles played by local governments in resisting oppression on the other, many Americans in the 1780's associated a strong central government with tyranny and a strong state government with freedom" (Amar 1992, 1214). This experience convinced many Americans to fear a distant central government. To them, protecting local power was important because they "were understandably concerned that the new national government not recapitulate the tyrannical exercise of unchecked authority that the colonists had rejected" in the Revolution (Ryan 2012, 40). This view came to dominate among the Anti-Federalists, those Americans who opposed the ratification of the Constitution in 1789. "The Anti-Federalists defense of federalism ... rested on their belief that there was an inherent connection between the states and the preservation of individual liberty" (Storing 1981a, 15).

The Anti-Federalist view depended on a view of liberty that saw structures and rights as interdependent. The best or only way to preserve rights, on their view, is to institute structures that empower the true views of the majority. Amar (1992, 1215) notes that "in the 1780's, 'liberty' was still centrally understood as public liberty of democratic self-government—majoritarian liberty rather than liberty against popular majorities." For Anti-Federalists, "public or political liberty" was "equivalent to democracy or government by the people themselves"

(Wood 1969, 24). Accordingly, they downplayed the threat of majority tyranny (cf. Jacobsohn 1996, 43ff). A few denied the possibility of majority faction, others ignored it, and those who acknowledged it tended to give it short shrift compared to Federalist treatments (Storing 1981a, 39-40). Rather, they emphasized majoritarian mechanisms such as large legislatures, small legislative districts, jury trials, and the militia.

The Anti-Federalist position depended on the assumption that only in relatively small political societies like the states could truly democratic government flourish. For them, liberty—that is, genuine public participation—can only exist in small, homogeneous states: the greater the homogeneity among citizens, the less the chance that divisive sub-groups would undermine the nation (see Storing 1981a, 19-20). They tended to believe that a great deal of solidarity needed to exist between all members of a virtuous republic (ex. Frohnen 1999, 381). Small republics were considered necessary to secure good representation and governance because representatives needed to be close to the people physically, socially, and ideologically, lest the necessary link between government and people be broken. Anti-Federalists feared that only the small state governments would be truly representative of the American population, and that consequently the federal government would be out of touch with the needs and rights of the people (ex. Frohnen 1999, 151; cf. Storing 1981a, 17). Because the large and distant central government would not be connected to the people in any meaningful way, Anti-Federalists warned, the new Constitution risked creating a Leviathan willing and able to oppress the people. A “government consisting of but a few members, ... and far removed from the observation of the people,” wrote the Federal Farmer, very often becomes “inattentive to the public good, callous, selfish, and the fountain of corruption” (Frohnen 1999, 234). This process, they reasoned, would end in tyranny.

Federalists challenged the argument that local governments best protected rights. The states had passed a number of laws, particularly debtor-relief legislation, that they considered oppression. Worried about such violations of individual rights at the state level, Federalists looked to the national government to prevent the perversion of justice that the state government had been unwilling or unable to stop. It was not enough that representatives enforce their constituents' views if a majority supported violating the rights of minorities. Madison believed that the great object of politics was "so to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society to controul one part from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the entire Society" (1999, 152). A national government seemed a necessary means to correct the abuses of the state governments.

Madison's famous solution to majority tyranny and unjust state laws, as outlined in *Federalist* #10, is the extended republic. Far from demanding homogeneity, like the Anti-Federalists, Madison takes a diversity of interests to be a characteristic feature of modern societies (*FP* #10). Thus, republican government, while necessary to control governmental abuse, is susceptible to majority tyranny (*FP* #10). As a solution, a large representative republic is superior to a small direct democracy because it will "refine and enlarge the public views, by passing them through" wise federal representatives whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations" (*FP* 10:52). Moreover, extending the size of a republic produces better officeholders, because the greater "proportion of fit characters" ensures "a greater probability of a fit choice" and because greater size curbs the efficacy of demagogic arts by which inferior candidates secure office (*FP* 10:52-53).

Additionally, in an extended republic, the greater number and dispersion of factions makes it likely that no particular faction will command a majority.

Because of his belief in the superiority of national officeholders, Madison attempted to establish a national veto of state laws. In this scheme, which failed to pass at the Constitutional Convention, Congress would not be authorized to legislate for the states, but its veto would enable it to check unjust or unconstitutional laws. Michael Zuckert (1996) has shown that Madison patterned this system, which he labels “corrective federalism,” on the English system of limited monarchy, in which the king, who was impartial and disinterested in comparison to the elected members of Parliament, could veto acts of Parliament. This scheme involves not the replacement of a small republic with a large republic, but the combination of a small and large republic that enabled a just and republican government to hold sway (Zuckert 1996, 83). Congress serves as the impartial umpire instead of the king. While compatible with federalism, corrective federalism betrays a substantial distrust of the state governments.

Around the time of the Civil War, Americans in the North increasingly came to believe that states were more likely to violate rights than the federal government, largely due to the invocation of “states’ rights” to support slavery in the South. Following the Civil War, Northerners grafted their view of racial equality into the Constitution through the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. These amendments abolished slavery and involuntary servitude, protected equal rights for all citizens, and forbade states from restricting voting rights on the basis of race. They treated the states as the primary violators of rights and dramatically expanded federal power to interfere with state laws, shifting the federal balance of power in a noticeably pro-federal direction. All three included some variation of the following clause: “The Congress shall have power to enforce this article by appropriate legislation” (U.S.



Const., amend. 15). Michael Zuckert (1996) argues that the Civil War amendments “completed the Constitution” by finally establishing the “corrective federalism” that Madison wanted all along, complete with a veto of state laws. Stubborn resistance to them by Southerners insistent on preserving a system of racial hierarchy reignited the debate over federalism and rights.

However, due to minimalist interpretations of the Civil War Amendments, this shift was not apparent for some time. For decades following their enactment, the Supreme Court adopted a narrow view of their impact. “The sequence of cases from *Slaughterhouse* to *Plessy* was a carefully designed demolition of corrective federalism” that narrowed the ability of the federal government to protect rights in the states under the Fourteenth Amendment (Zuckert 1996, 93). The *Slaughterhouse Cases* (1873) limited the rights protected by the Fourteenth Amendment to those few rights incident to national citizenship, not state citizenship, such as the right to travel from state to state and the right to use navigable rivers. Likewise, the *Civil Rights Cases* (1883) held that Congress could only remedy racial discrimination by state governments or their agents, not private individuals. *Plessy v. Ferguson* (1896) permitted “separate but equal” accommodations for whites and blacks in a variety of settings. On the other hand, during the *Lochner* era, the Court overturned a number of state (and federal) regulations in the name of rights, namely “substantive due process” rights derived from the Fifth and Fourteenth Amendments. “Under the aegis of the due process clause the Court intervened numerous times to counteract state legislative efforts allegedly incompatible with rights” (Zuckert 1996, 93). Zuckert interprets substantive due process as a type of corrective federalism in which the courts, not Congress, oversee state laws. Moreover, given that the Court also overturned federal regulations, the *Lochner*-era Court does not seem to have viewed the states as particularly prone to injustice. The debate over federalism and rights subsided until well into the twentieth century.

The Civil Rights Movement of the 1950s and 60s, which sought to overturn deeply entrenched racial inequalities, led to a resurgence of the view that localism hinders the protection of minority rights. Segregationists supported their position by appealing to states' rights and localism, while their opponents viewed such claims as a cover for unconstitutional discrimination. Michael Zuckert (1996, 75) notes that the "received wisdom" in the 1960s among both conservative and liberal scholars was that "federalism is an enemy of rights" and therefore bad because "appeals to federalism or states' rights appeared to be nothing but thinly veiled attempts to maintain ... morally suspect social practices." William H. Riker's famous comment that if "one disapproves of racism, one should disapprove of federalism" illustrates this sentiment (1964, 155). In the end, the Civil Rights Movement prevailed. *Brown v. Board of Education* (1954) outlawed racial segregation of the type endorsed in *Plessy v. Ferguson*, and various civil rights legislation succeeded in Congress in the coming decades.

### **Federalism and Individual Rights in Contemporary Perspective**

In contemporary scholarship the issue of race has receded, leading to a less negative assessment of federalism's relationship to rights. Race remains important, but its prominence is fading as support for segregation has collapsed, interracial marriage has skyrocketed, and views on race have become more homogeneous across the nation. There is a growing sense that neither the federal nor the state governments pose a unique threat to individual rights, and that in particularly situations either level can be problematic (ex. Ryan 2012; Bednar 2009; Yarbrough 1996; Zuckert 1996). In this vein, federalism offers the possibility of mobilizing either level of government against the other, reminiscent of Madison's "double security" argument. In short, federalism appears to be at least neutral, if not advantageous, with respect to rights protection.

When evaluating federalism, it is important to recognize that the problem of preventing majoritarian oppression is shared by unitary governments. Controlling the power of the majority without creating an unlimited and unaccountable enforcer of rights is a universal problem in democratic constitutionalism. James Madison underestimated the ability of factions in a mass democracy to extend their reach nationwide. Political experience confirms that “special interests” exercise decisive control over democratic governments. Recourse to a nondemocratic source of protection for rights—such as the unelected judges serving life terms—poses challenges of its own, since unaccountable institutions are also likely to disregard the public good.

There is little reason to assume that national majorities are always more enlightened than national ones. With the race issue fading in relevance to federalism, scholars increasingly recognize that “assaults on individual liberties are as likely to come from either side of the divide. Just as the states harbored entrenched racial and gender oppression (via slavery, Jim Crow laws, and legalized race and sex discrimination in employment), the federal government has given us McCarthyism, the World War II era anti-sedition laws, and alleged excesses under the Patriot Act” (Ryan 2012, 40). Ryan argues that “federal and state governments have alternatively championed individual rights and regulatory obligations against neglect by the other side. These range from the federal assertion of rights for African Americans and women during the civil rights movement to state protection for rights beyond those afforded at the federal level, from gay rights to property rights” (2012, 41-42). The evolution of rights can work in both directions.

Federalism permits rights to be extended in some states well before a national majority backs it. For instance, a number of states permitted women to vote prior to the Nineteenth Amendment’s enactment of universal suffrage. Also, until the Supreme Court mandated same-

sex marriage nationwide (*Obergefell v. Hodges* 2015), federalism benefitted same-sex marriage by allowing states to adopt their own marriage policies. As in other areas such as the minimum wage, federalism permits variance both above and below the national average. Innovations at the state level can reveal the advantages and disadvantages of a specific expansion or restriction of rights without involving the entire nation. But federalism's value is not merely instrumental: it rests on the idea that the people of each state have the right (within limits) to develop their own moral views and enshrine them in law.

Moreover, state constitutions often protect rights to a greater degree than the federal Constitution, even when using similar language. William Brennan's (1977) influential article drew attention to the fact that those whose bid for rights are denied at the federal level may succeed by appealing to the state constitutions. State courts have extended rights in areas such as privacy, freedom of speech, self-incrimination, and elsewhere (Beasley 1996; Shepard 1996). Although Brennan's motivation was to achieve liberal outcomes in response to an increasingly conservative Supreme Court (Shepard 1996, 422-423), "judicial federalism" has a long history and is based on the doctrine of "constitutional federalism: The idea that state courts are legitimately the final arbiters of the meaning of their own constitutions and need not defer to federal decisions when interpreting them" (Fitzpatrick 2004, 1841). Although the federal Bill of Rights was based on provisions in state bills of right, the two can differ, and even when the language of a state and federal provision is identical, state courts may interpret the former differently (Beasley 1996, 104-05). The federal Supreme Court has acknowledged these principles (*City of Mesquite vs. Aladdin's Castle, Inc.*). This view fits well with the assumption underlying American federalism: that states should be free to develop and protect their own understands of justice and the good.

A number of normative benefits are claimed for state judicial protection of individual rights. Fitzpatrick (2004) argues that judicial federalism allows the people to overrule court decisions through amendment—because it is much easier to amend the state constitutions than the federal Constitution—thus overcoming the “countermajoritarian difficulty” posed by allowing an unelected cadre of judges to interpret the Constitution. Beasley (1996) praises judicial federalism for accommodating the history and diversity among the states, for permitting experimentation, for bringing greater wisdom to bear on rights questions, for increasing popular participation due to the relative ease of amending state constitutions to increase rights or oppose an unpopular ruling, and for protecting the constitutional position of the states. Skeptics challenge divided sovereignty and criticize the often poor or patchy quality of state constitutional law (see Fitzpatrick 2004; Shepard 1996), but the former position is a minority view and the latter is being ameliorated over time. Although they are limited by federal supremacy, state courts can play a role in protecting rights.

Additionally, the issue of civil rights for racial minorities, while clearly important, was a unique problem that does not reflect how federalism works in most instances. Sectional divisions over slavery and segregation arose from unique historical circumstances. The U.S. Constitution accommodated, even protected, slavery, and union would not have occurred if slaveholders did not expect slavery to be protected (Klarman 2016, 257-264). It was the breakdown of that supposed comity that led to stark regional differences in rights-protection. If slaveholders had known from the outset that slavery would be opposed unrelentingly by non-slaveholders, then federalism would not be implicated with racism because union would never have occurred. As it is, as the South increasingly mirrors the nation on racial issues, race is increasingly a national issue rather than “a federalism issue” (Elazar 1996, 7). Few federations can survive such a

massive sectional disparity in moral opinion without breaking under the strain—as indeed the U.S. did during the Civil War.

Given the dual threat to liberty, the costs and benefits of federalism must be weighed with attention to its likely effects in each situation. The failure of federalism with respect to race in the United States does not necessarily entail that every instance of federalism will have such a negative outcome for rights. As Yarbrough (1996, 71) argues, “extensions of national power that were justified in the context of racial discrimination may be serious constitutional mistakes in other contexts” because “the extraordinary difficulties in achieving racial justice must not be allowed to distort the entire constitutional order.” After all, other rights-related debates may be resolved appropriately by the democratic process. Many such disputes are less easily resolved than racial equality, with decent and reasonable people taking both sides.

In light of the intractability of many debates over rights, federalism arguably promotes a model of democratic decision-making that often excels unitary governments by providing space for debate and dissent. Daniel Elazar praises the structure of federalism for promoting “discussion and deliberation” and “constitutionalized pluralism and power-sharing as the basis of truly democratic government,” in contrast to “Jacobin democracy” based on simple majoritarianism (Elazar 1996, 2). After all, majorities can be wrong, and a national majority may not side with justice. Federalism shelters and protects this diversity, and creates a platform from which minorities can make claims to the larger polity. Heather Gerken (2014) elaborates the way in which federalism promotes nationalist goals by protecting the voice of dissenters and providing space for working out normative debates. Resolving moral shifts on a state by state basis may be less divisive than turning every moral disagreement into a question about national policy. By setting up two levels of majoritarian government, each with different characteristics,

federalism produces a “dual majority” which “affords more opportunities to secure rights” (Tarr and Katz 1996, xi). A national majority may be sensitive when a local majority is insensitive, and vice versa.

A final way in which federalism promotes rights is its ability to accommodate group rights, or rights based on membership with a specified group, such as a religious, linguistic, or ethnic community. In fact, the original motive prompting the formation of most federal states is the protection of ethnic or religious rights (Tarr and Katz 1996, xxi). However, there are reasons to be skeptical about aspects of this argument. For federalism to benefit sub-groups, those groups must be geographically concentrated so as to form a majority in one the sub-national units of government. In many federal systems, minorities are not geographically concentrated so as to create local majorities at a sub-national level. In the U.S., for instance, blacks do not constitute a majority in any state.

In the end, one’s assessment of federalism largely turns on what one believes to be the primary danger to rights. The discussion so far has assumed that the protection of insular minorities from majority tyranny is the danger to rights, yet, as the Anti-Federalists saw, the need to protect the majority from tyrannical government arguably is equally important, if not more so. Federalism arguably protects majoritarian self-government by checking the accumulation of government power in any one hands. If unchecked government, rather than a failure to achieve an ideal standard of justice, is the primary threat to rights, then federalism protects the precondition for good government. On the contrary, if governmental oppression is a minor concern compared to securing rights and equality, then federalism loses some of its luster. The value of contestational federalism depends to some degree on the claim that limited government is a more important goal than eliminating every perceived instance of injustice. Given the

comprehensive nature of federal laws, along with the fact that there is no guarantee that the federal government will be right on every issue, such a view seems warranted to me. However, this debate is not easily resolved, and there are few, if any, clear principles to settle the question.

### Contestational Federalism and Limited Government

Above all, contestational federalism is designed to safeguard liberty by checking the consolidation of governmental power. Madison (*FP* 51:282) praised the “double security” for “the rights of the people” obtained by federalism: “The different governments will control each other, at the same time that each will be controlled by itself.” Several of the American founders argued that the states are uniquely able to monitor federal activity and sound the alarm when the people’s rights are threatened, while the central government can use the nation’s force to prevent tyranny from taking root in any state (*FP* 28 and 46; Madison 1999, 148; Bailyn 1993, 1:230). The claim that governmental bodies are more reliable watchdogs than private citizens is no less true today, and the concept of federalism as a safeguard of liberty abounds in the literature (ex. Ryan 2012; Myerson 2006; McConnell 1987, 1504; Boix 2003).<sup>78</sup> The U.S. Supreme Court has endorsed this view: “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power” (*Bond v. United States* 2011, 131 S. Ct. 2355, 2364). Bednar (2009, 44) refers to curbing government expropriation as “one of the clearest examples of a potential benefit of federalism that mere decentralization cannot offer.” This check can work both ways.<sup>79</sup> Throughout American history,

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<sup>78</sup> In fact, federalism may be the only way to establish the “intermediate bodies” between the people and the government that Tocqueville (2004, 364, 791) and Montesquieu (1989, bk. 2. chap. 4) valued so highly. Tocqueville argues that democratic people cannot stand the intermediary bodies of the aristocratic past, such as towns, state churches, and aristocrats, because they involve giving special privileges that conflict with equality. Under federalism, both levels of government are controlled by popular sovereignty and do not have special rights, so they are more acceptable to democratic public opinion.

<sup>79</sup> Feeley and Rubin (2008, 57-59) assume that the idea that federalism protects individual liberty depends on the belief that the national government is the only threat. This is simply untrue if contestation works in two directions.



both “the federal and state governments have alternatively championed individual rights and regulatory obligations against neglect by the other side” (Ryan 2012, 42).

However, while claims that federalism checks excessive government are commonplace, accounts of how this check works are unclear and, arguably, implausible. Dual federalism is said to limit government by demarcating clear and precise boundaries for federal and state power, without which federalism, along with the possibility of checks on government, allegedly threatens to collapse (Ryan 2012, 41). But to maintain this separation, dual federalism—indeed, any theory, other than contestational federalism, in which federalism safeguards liberty—must posit an arbiter, such as the Supreme Court, knowledgeable enough to delineate federal boundaries and powerful enough to enforce them. In such cases, however, it is really the arbiter itself, and not federalism, that protects liberty, effacing or obscuring federalism’s unique contribution. Federalism may even be redundant. A court powerful enough to define and enforce federal boundaries presumably is willing and able to check governmental overreach even in unitary states. One is left wondering how, if at all, federalism actually protects liberty.

The problem comes to sight in the case *Gregory v. Ashcroft* (1991). While the details of the case are irrelevant here, *Gregory* is one of the most effusive celebrations of federalism in the Court’s history. Writing for the majority, Justice O’Connor acknowledges that the U.S. Constitution establishes a system of dual sovereignty (501 U.S. 452, at 457). Then she outlines the “numerous advantages” accruing from the federal system: a decentralized government “more sensitive to the diverse needs of a heterogeneous society;” increased opportunities for “citizen involvement in democratic processes;” greater “innovation and experimentation” in governmental policy; and greater responsiveness to public opinion due to the “competition for a mobile citizenry” between the states (501 U.S. 452, at 458). Then, Justice O’Connor, copiously

citing the *Federalist Papers*, asserts that federalism protects the liberties of the people: “Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front” (501. U.S. 452, at 458). But, she warns, “If this ‘double security’ is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty” (501 U.S. 452, at 459). Noting the “decided advantage in this delicate balance” enjoyed by the federal government, O’Connor casts the Court’s ruling as an attempt to counteract an unjustified intrusion by Congress on the jurisdiction of the states. Without the Court to come to the rescue, it is implied, the states would be powerless at the mercy of a relentless federal government armed with the Supremacy Clause. *Gregory v. Ashcroft* exposes the extent to which traditional theories of federalism, despite their references to “tension” or “checking” between the two levels of government, ultimately rely on a supposedly “neutral” umpire lying somewhat outside of, or detached from, the federal scheme. On this view, it is not the states who check the federal government, and vice versa, but the Court.

Even if governmental power could be divided successfully between the two levels of government, it is not clear why or how this would help to check unjust government. Suppose there are ten policy areas to be allocated in a particular federal system, and that the federal government takes areas 1-5 while the states take areas 6-10. Unless the governments in this system are controlled by some other mechanism—such as electoral pressure or the inherent virtue of the officeholders—what is there to prevent oppression by either side? (If they are being controlled by some other mechanism, naturally, then federalism has not contributed anything.) If,

for instance, the federal government has exclusive authority to regulate wage limits and working conditions, it may regulate these properly or improperly, and may favor any set of interests it pleases. That some other jurisdictional area—environmental regulations, say—is controlled by the states does not lessen the federal government’s authority over wages and working conditions. While, in such cases, the other level of government can informally appeal to or attempt to influence the other side, threaten to secede, or start a war, the fact remains that the mere division of power does not prevent its misuse or ensure limited government.

Contemporary scholars grasp the difficulty of reliably preventing infringement by the national government. Noting that “national governments” enforce “ownership rights in a federal system,” Breton (2000, 14) acknowledges that “Decimus Juvenal’s famous question as to who shall guard the guardians must be addressed.” He suggests independent (federal) judiciaries and the “presence of the ... states... in the decision-making of national governments” (2000, 14), which could be interpreted as a form of contestational federalism. By themselves, Weingast’s (1995) checks on overbearing government—a written constitution and citizen punishment of infractions—are woefully inadequate, as Qian and Weingast (1997) admit.<sup>80</sup> Some theorists even advocate secession in lieu of better alternatives (Buchanan 1991; 1995; Scott 2011).

Michael Greve presents a similar argument. Failing to grasp the import of contestation, Greve (2012, 50-51) argues that Madison’s “‘double security’ argument in *Federalist* 51” does not apply to normal modern federalism, defined as the “regular operation of federal and state politics, partially autonomous and side by side.” The branches of the national government, he reasons, have (in Madison’s words from *Federalist* #51) the “constitutional means” to “resist encroachments” from the other branches, “institutional trumps” that can impede the actions of

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<sup>80</sup> Indeed, although their analysis is cursory, their suggestions sound much like contestation.

rivals (Greve 2012, 53-54). But this situation does not apply to federalism: “Grant states the natural motives to resist federal aggression: what constitutional means are they given? The states can and will be ornery. ... But at the end of the day, the federal government can do what it is empowered to do without the states and against their will” (Greve 2012, 54). It is no surprise, then, that he concludes that the “double security applies only in the extreme case of armed rebellion” and cannot explain “what partially autonomous states might be good for in ordinary politics” (2012, 51). The ability of federalism to check government looks forlorn indeed.

A division of power can constrain governmental overreach only if the governments have the ability to check the other side. The contestation model solves the enforcement issue by identifying the same mechanism—contestation—as responsible both for maintaining the federal balance of power and for restraining tyrannical government. Breton (2000) identifies the ownership of constitutional powers which cannot be taken away as the hallmark of federalism. The contestation model goes one step further by requiring that subnational units be given formal means to defend their constitutional powers. Bednar is right that, since a “tyrant consolidates power,” federalism’s “inherent fragmentation is well-suited to block tyranny” (2009, 49), but this check only functions if the states have both constitutional independence and formal checks to resist consolidation. Administrative decentralization by itself is unable to ensure proper safeguards. After all, Madison’s famous statement does not say merely that federalism will control power by dividing it, but that “the different governments will control each other” directly (*FP* 51:282). The states must have constitutional means of resistance in order to accrue the full benefits of federalism. Restoring contestation might even preempt appeals to more extreme checks such as secession or nullification (ex. Woods 2010; Scott 2011).

Finally, contestation protects liberty by making it safe to empower a vigorous and strong government. Only if both levels of government have independent, formal power can the central government be strong enough to carry out its assigned role without threatening the liberties of the people or states. At the founding, the Federalists were adamant that “the vigour of government is essential to the security of liberty” because a weak government cannot defend the nation against external enemies or domestic tyrants (*FP* 1:3; also Bednar 2009, 49-50). Throughout history, governments have centralized and strengthened as a result of wars, but a strong state is necessary to win wars. So how can a strong state be prevented from infringing on the liberties of the people? Contestational federalism argues that liberty can be secured without sacrificing energetic government only by allowing two (strong) levels of government to control each other. The American founders rightly noted, somewhat paradoxically, that contestation enables vigorous government rather than impedes it. The Federal Farmer summed up this view during the ratification debates: “Where ... the house, the senate, the executive, and judiciary, are strong and complete, each in itself, the balance is naturally produced, each party may take the powers congenial to it, and we have less need to be anxious about checks, and the subdivision of powers” (Frohnen 1999, 259). If a government cannot check itself, the only safe alternative is to tightly constrain the entire government. In order to prevent tyranny, one must either weaken all governmental power or establish rival centers of power. This logic applies no less to federalism. Instead of hamstringing the government, the Constitution checks tyranny precisely by allowing “ambition” to “counteract ambition,” thus ensuring efficient administration and curbing the misuse of power.<sup>81</sup> The government is then freed to defend the people’s rights against foreign invaders or internal usurpers.

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<sup>81</sup> Hamilton, for instance, defended the Senate’s power to approve or reject executive appointments on the grounds that it improves their quality and fair-mindedness (*FP* 76:457).

## Elevating Constitutional Discourse

One benefit unique to contestation, as opposed to federalism more generally, is that it elevates constitutional discourse. Whereas most political argumentation panders to partisan loyalties or public opinion, contestation induces political actors to provide constitutional arguments for their claims to power. The constitutional arrangement of offices creates “a vocabulary and a set of standards with which to apprehend politics,” and “by tying the interests of the officeholders to the constitutional responsibilities and rights of the place, political actors are forced to find reasons to cover or justify their motives” (Tulis 2010, 121). A president cannot simply state that the presidency deserves to have greater jurisdiction because he wants more power or prestige; rather, presidents must frame their claims for power in terms of the public good and the constitutional text. By encouraging such a strategy, the Madisonian constitutional arrangement promotes reason above self-interest in constitutional interpretation.

The contestation model embraces a good deal of hypocrisy. While a politician’s publically stated reasons for action often are not the true motive, this “constitutionally induced hypocrisy” is a “virtue” in that it forces political actors to rationalize their behavior with constitutional argument, such that “politics trades on the plane of reason” rather than partisanship or naked self-interest (Tulis 2010, 121).<sup>82</sup> This “virtue” of hypocrisy applies to federalism no less than to separation of powers. Feeley and Rubin (2011, 74) criticize the “strategic” use of federalism as a “rhetorical weapon,” but the founders would hardly have been surprised by such tactics, which support rather than challenge the contestation model. Such moves merely illustrate

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<sup>82</sup> Of course, this mechanism works best when an officeholder’s incentives are closely aligned with his government’s formal powers. Where this is undermined, contestation fails.

how the constitutional structure can motivate self-interested political actors to use constitutional language when supporting their claims.

The goal of promoting high-level constitutional discourse has roots in Montesquieu, one of the foundational proponents of liberalism. Montesquieu argued that contestation between separate institutions, each offering competing claims to rule, would induce a “noble rivalry” conducive to popular participation and sophisticated argumentation. Referring to the tension between the patricians and plebeians following the expulsion of the kings in the ancient Roman Republic, he wrote: “States are often more flourishing during the imperceptible shift from one constitution to another than they are under either constitution. At that time all the springs of government are stretched; all the citizens have claims; one is attacked or flattered; and there is a noble rivalry between those who defend the declining constitution and those who put forward the one that prevails” (1989, 172-73). While the Roman example involved a transition between regimes, Montesquieu believed that separation of powers could artificially ensure a permanent tension between separated powers offering competing claims to rule. In this case, principled “claims” to rule become a permanent part of politics, elevating the plane of argumentation. In a discussion of the separation of powers between Parliament and the monarchy in England, he wrote that mutual accusations between departments, while usually it “would produce only empty clamors and insults,” would also “have the good effect of stretching all the springs of the government and making all the citizens attentive” (1989, 326). The people would be able to ensure that neither side would permanently win, but the competition for popular favor would induce all of the separated powers to continue to make principled appeals for support. In the federalism context, such noble rivalry manifests itself in competing claims for the superiority of “national” versus “local” power.

## Conclusion

This chapter has shown that decentralization and contestation has many advantages. Decentralization provides more opportunities for citizen participation in government and accommodating a greater diversity of citizen preferences. It raises the quality of officeholders because are more knowledgeable of local circumstances and can be monitored more easily. Contestation incorporates popular sovereignty by enabling the people to play the two levels of government off of each other. Contestation also elevates constitutional discourse where normal politics encourages backroom maneuvering. By forcing political actors to make principled, constitutional arguments to advance the interest of their institution, contestation introduces reason into the discussion, which can serve to reign in political actors. Moreover, the “noble rivalry” between institutions educates citizens and involves them more in the political process. In short, federalism improves the quality of republican government.

With regard to individual rights, the evidence is mixed. Modern theorists generally acknowledge that attacks on rights can come from both levels of government. The unique problem of race in American history resulted from the unlikely union of two widely divergent regions of the country. While serious, it does not imply that federalism always produces rights violations of that severity. In fact, state constitutions can protect individual rights in excess of the federal Constitution, and state legislatures can secure rights unacknowledged at the federal level. A more realistic view is that federalism can provide a “double security” for rights, especially if both levels of government can check each other.

The empirical evidence largely undermines the view that federalism leads to the under-provision of public goods. With regard to “pure public goods” that benefit or harm all residents equally, such as environmental regulations and taxation, competition does not produce a race to



undersupply public goods, but rather increases governmental efficiency. There is mixed evidence from redistributive programs, which force states to make zero-sum decisions to favor some residents over others. While there appears to be modest competitive pressure to reduce one's welfare generosity in response to less generous neighbors, such competition falls short of a full-blown race to the bottom. Furthermore, there is empirical evidence that competitive federalism, which depends on real independent power for the state governments, promotes the efficiency of both government and business, checks governmental expropriation, and preserves property rights. The very terms of this debate are contested. Whether one believes that federalism undermines the provision of welfare or helpfully disciplines states' budgets, for instance, depends greatly on one's ideological leanings.

The most important advantage of federalism is that it provides a coherent, reliable mechanism to prevent the concentration of power. Other theories are vague or silent as to how divided power checks excessive or tyrannical government, and must ultimately posit a neutral arbiter wholly disconnected from the federal system itself. Contestation brings federalism back into the protection of liberty by empowering both levels of government to check each other directly. By allowing for strong but self-limiting government, contestational federalism promotes effective government without sacrificing the liberties of the people.

This chapter has presented a normative defense of contestational federalism. This case is hardly comprehensive. Only some of these arguments are novel, and this analysis relies heavily on other scholars. On many issues, the debates will continue for some time, perhaps indefinitely. Yet hopefully this analysis shows that the subject of this dissertation is far from esoteric or outdated. Contestational federalism is worthy of consideration because it is related to the ends of

republican self-government. If the arguments presented here are persuasive, they ought to inspire interest in the suggestions for reviving contestational federalism presented in the final chapter.

## CHAPTER SIX: THE REVIVAL OF CONTESTATIONAL FEDERALISM

This dissertation has defended a theory of contestational federalism, according to which both levels of government sustain the federal balance of power using formal constitutional checks and balances. Yet it has also shown that contestational federalism is currently absent in the United States, and has revealed a number of obstacles blocking the path to its revival. The emergence of political parties has upset the supposedly natural rivalry between the two levels of government with a new rivalry between ideologically distinct parties, whose programs transcend state and federal jurisdictional boundaries. A genuine—if often shallow—national patriotism founded on a distinct American identity and a sense of national purpose has replaced the “natural” love for local government observed by the founders and Tocqueville. The voters are not necessarily primed to favor state power or to select federal officeholders who will limit the power of the federal government. Furthermore, due to voter ignorance and apathy, appeals for support to the people by either level of government are likely to be met with confusion, unconcern, or rejection. In the legal realm, the difficulty of finding coherent legal doctrines has induced the Supreme Court to abandon, for the most part, any serious attempt to restrict federal power in the name of federalism or the doctrine of enumerated powers. In short, despite its strong roots in American political thought, contestational federalism does not find expression in modern practice. It is thus no surprise that we have reached a situation where the states, although still vital constituent parts of the American federal system, operate increasingly under federal control in a broad range of policy areas.

But if contestational federalism were truly dead, it would be of historical interest only. This chapter explores the possibility of replacing the judicial oversight of federalism with a

revived form of contestational federalism. This task requires the establishment of adequate means of contestation as well as the alleviation of obstacles to contestation. To this end, this chapter suggests a range of reform proposals, most of which necessitate a constitutional amendment, designed to resurrect or facilitate a system in which the state and federal governments will check each other using formal checks and balances.

The project of restoring contestational federalism must avoid aiming too high or taking an overly rosy view of its advantages. One cannot turn back the clock or erase the historical forces which have transformed federalism. Political parties not only are here to stay but also have a vital role to play in making democratic governance possible. National patriotism, for all its impact on federalism, is salutary, natural, and seemingly permanent. My vision for reform seeks to work within the restraints imposed by the modern political system. It seeks neither the restoration of a vigorous state patriotism nor the destruction of the party system. Much as Tocqueville attempted to guide and moderate what he saw as the irresistibly ascendant wave of democracy, I seek to mitigate the worst pathologies of modern American federalism without thereby seeking to overturn the system. In this vein, I devote some time to addressing the anxieties which these proposals are likely to induce. Contestational federalism is not without its downsides, and specific reforms may lead to bad consequences. The analysis presented here does not ignore the cost-benefit tradeoffs which reform would entail, and is aware of the need for limits. On balance, though, it concludes that contestation may be implemented with a minimum of negative side-effects.

The reforms proposed in this chapter are designed to practically implement the theory of contestational federalism by resurrecting contestation in a modest but real form. In keeping with my modest pretensions, I have tried to keep these proposals realistic and doable. In most cases

they build upon actual practices in place in federations worldwide, and several of these will be investigated in depth as useful models of contestation in practice. Institutions derived from idealistic or utopian theories do not automatically lend themselves to successful practical application. Radical changes to existing American institutions have been avoided wherever possible. The proposals fall into three categories: (1) reforms to reinstate means of contestation; (2) reforms to mitigate the negative effects of political parties on contestation; and (3) reforms to the constitutional text to enable contestation and provide space for the courts. American republicanism, I conclude, would benefit from this project.

### Reviving the Means of Contestation

With regard to federalism, the most obvious and pressing need is to give the state governments means of contestation by which they may check the federal government. Although contestation works in both directions, this chapter focuses exclusively on augmenting the constitutional power of the states. For reasons that this analysis has made quite clear, the two sides currently are not entering the fight on the same level, and consequently any attempt to restore equilibrium must seek first to give the states mechanisms by which they may contest federal supremacy. This section proffers two such means of contestation. First, the U.S. Senate should be reformed to give state governments influence over the selection and retention of senators. This may be done by repealing the Seventeenth Amendment, shortening the term lengths of senators, and possibly giving state legislatures the power to instruct or recall senators. Second, a process should be established whereby a federal law is repealed if a certain percentage of state legislatures vote to veto it.

## **Reform the United States Senate**

A first step to enabling contestation is to repeal the Seventeenth Amendment, which transferred the power to elect U.S. senators from the state legislature to the entire citizen body of each state. The logic here is that only state officials have true incentives to protect state power. Ideally, the states would use their selection power to choose senators favorable to state jurisdiction, whereas the people are unable or unwilling to police federal boundaries and rarely vote with an eye toward which candidate will better protect the constitutional rights of states as states. Repealing the Seventeenth Amendment would render state elections more important and thus might persuade more prominent politicians to pursue state office, especially if this reform was paired with term limits for members of the House of Representatives (which will be discussed later). Several scholars already advocate repeal for federalism reasons (Bybee 1997; Rossum 2001; Zywicki and Somin 2011). In short, repealing the Seventeenth Amendment would initiate a return to the original constitutional design whereby the states exerted indirect influence in the national councils.

Giving state governments the power to appoint senators would have secondary effects beyond just the legislative branch. It likely would promote a more pro-localist judiciary, because judges must be confirmed in the Senate. “Senators more attuned to state interests might change the confirmation process for federal judges (and thereby the nomination process as well) toward the selection of judges that are more aware of federalism and other structural constitutional issues” (Zywicki and Somin 2011). Additionally, since Congress is the primary originator of constitutional amendments, Todd Zywicki argues that, if the Seventeenth Amendment was repealed, “state legislatures would be able to affirmatively propose amendments to the federal constitution via their influence over the Senate” (Zywicki and Somin 2011, 90). The only

alternative to congressional amendment is for three-fourths of the states to call a convention for proposing amendments, which has never been done. The amendment process as currently constituted is biased in favor of federal power, since Congress is unlikely to ratify amendments weakening its own jurisdiction.

Repeal of the Seventeenth Amendment very likely is not enough, however. Other scholars who favor repeal (Bybee 1997; Rossum 2001; Zywicki and Somin 2011) grasp the basic thrust of the contestational model, but they do not situate their discussion within a comprehensive theory of constitutionalism, examine the ways in which historical trends such as partisanship have affected the founders' theory, or explore a variety of alternatives in light of these trends. The history of the Senate shows that without supplementary measures, merely repealing the Seventeenth Amendment likely would provide little protection for federalism (Zywicki and Somin 2011; Riker 1955; Filippov et al. 2004, 125-128). Even prior to 1913, states found it difficult to retain control of their highly independent senators. The only real sanction the states had was to refuse to reappoint a senator to additional terms. "In fact, state legislatures abandoned attempts to control senators long before ratification of the Seventeenth Amendment, which merely formalized the Senate's removal from the ineffectual 'clutches' of the state governments" (Filippov et al. 2004, 126). To supply a deeper grounding for contestation, then, it is necessary to consider additional options for reviving constitutional safeguards to complement the repeal of the Seventeenth Amendment.

Two specific supplementary measures should be appended to repeal of the Seventeenth Amendment in order to revive contestation. First, the terms of senators might be shortened. As we saw in chapter four, Senators were supposed to be representatives of the states, but were also given long terms so that, insulated from popular pressure, they could provide an aristocratic

bulwark for the federal government. But the long six-year term undermined the ability of states to control their senators. As Schiller and Stewart (2015) observe, the fact that in the 19<sup>th</sup> century state legislators typically served one term limited their institutional attachment to states' rights and their ability to police the performance of their senators. In most cases, U.S. senators outlasted most of the state legislators who voted for them. And, as Riker (1955, 457) observes, "new majorities in state legislatures could not threaten a senator who, chosen by the old majority, knew he would not be re-elected anyway, or who, with a longer term than theirs, might hope to re-election and vindication from their successors." Of course, contemporary state politicians serve longer than their nineteenth-century counterparts, but the fact remains that short term limits are the primary way to ensure accountability to the electorate. Providing for shorter terms for U.S. senators enhances contestation by giving senators a stronger reason to abide by the opinions of the state legislature. In the modern world, four-year term likely should be sufficient to allow states legislatures to hold senators accountable, although a two or three year term is also possible.

Second, a constitutional amendment could give state officials the power to recall and/or to "instruct" senators. Recall allows state legislatures to remove and replace senators in the middle of their term. Instruction empowers state legislatures to give their Senators instructions as to how to vote on specific bills, rejection of which constitutes grounds for removal and replacement. Instruction and recall were debated at the founding and occasionally attempted in the early national period, but ultimately failed (Bybee 1997, 517-530). This reform is a bolder option than shortened term lengths. It obviates the need for shorter terms altogether by giving state governments powerful tools to influence senators directly.



Although both of these options are theoretically sound, the recall power may have more unintended side-effects than shortening term lengths. The recall option might induce a high level of instability which would compromise the workings the Senate, especially if the six-year term is retained. A mid-term change in partisan control of a state government naturally would induce a change in senator (cf. Schiller and Stewart 2015, 27), and other circumstances may prompt recall as well. While nothing prevents both options from being implemented simultaneously, shortening Senators terms to four years appears to offer the maximum payout while disrupting the operation of the federal government as little as possible.

Both of these reforms link senators more strongly to the interests of the state government, at least as expressed in the vote of a majority of its members, by giving it more control over senators. Filippov et al. (2004, 128) confirm the importance of such a link: “If delegated representation is to be sustained in the long run, it would appear that other provisions such as the presence or absence of the right of recall and the timing of elections need to be considered, along with allowing or even requiring representatives to hold dual national and regional office.”<sup>83</sup> The founders contradictorily wanted senators both to represent their states and to provide an aristocratic bulwark against excessive “democracy.” To enable contestation fully, it is necessary to undo this tension and bind senators more closely to the state legislatures.<sup>84</sup>

However, it must be remembered that partisanship has obscured the founders’ vision, such that state selection of senators can no longer work in precisely the way they envisioned. As

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<sup>83</sup> This last proposal introduces the possibility that some state officials might serve a dual function as U.S. senators. In Russia, provincial governors served directly in the upper house until 2000 (cf. Filippov et al. 2004, 128).

<sup>84</sup> There are alternatives which would strengthen state control over the Senate without revoking the popular election of Senators. State legislatures could be given “the opportunity to nominate a candidate for U.S. Senate to include on the statewide ballot alongside the candidates chosen in direct primaries” (Schiller and Stewart 2015, 13, n24). The American Legislative Exchange Council endorsed this idea in 2013 in a model legislative proposal called the “Equal State’s Enfranchisement Act.” Or, the party caucuses in state legislatures could be allowed to determine their party’s senatorial primary results, thereby nominating the candidates on which the people vote in the general election.

we saw in chapter four, party ties weaken the attachment both between senators and their state's government and between state politicians and the institutional rights of their office. Thus, even if the Seventeenth Amendment were repealed, and even if supplementary measures were adopted, partisanship would impair the operation of contestation. If party control of the state legislature changes during a senator's term, for instance, it will boot out the senator no matter how much he or she has served the institutional interests of the state. Once senators anticipate being turned out of office automatically, accountability is weakened considerably. Likewise, instruction would be used for partisan purposes as well as to protect a state's jurisdiction. These problems are not reasons to abandon contestation, but do caution against overly optimistic expectations for reviving it.

### **State Veto of Federal Laws**

In addition to modifying the Senate, the states should be given an explicit veto power over actions of the national government. Given the weakness of judicial checks, “[w]hat is needed is a structural check on federal power residing not in the judiciary but elsewhere” (Barnett 2011, 816). Along these lines, some have suggested a “repeal amendment” according to which any federal law could be repealed by a vote of a certain percentage (such as a majority or two-thirds) of the state legislatures (Barnett 2011; Zywicki and Somin 2011; Woods 2010, 128).<sup>85</sup> To be valid, votes by states to repeal a law must all be taken within a one year time period, or else the vetoes must be reaffirmed. This option empowers the state governments themselves to contest the federal government directly. Theoretically, they will veto federal laws that encroach excessively or inappropriately on local authority, while leaving legitimate national

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<sup>85</sup> Barnett's (2011) proposed “repeal amendment” contains the feature that Congress may re-enact the vetoed legislation by a simple majority vote. So the amendment would simply force Congress to look at legislation a second time. He does not specify whether the state may veto the legislation a second time. My proposed repeal amendment would not permit reenactment by simple majority, but is open to reenactment by some kind of supermajority.

concerns alone. A state veto represents the starkest proposal on the table: contestation at its most contestational. It fits well within Madisonian separation of powers, mirroring the quintessential check at the federal level: the president's veto power over congressional legislation.

While some may fear that a state veto would hamstring the federal government, in reality repealing a law under the repeal amendment would be quite difficult. Coordinating a large number of state legislatures is no easy task, making the process of repeal cumbersome and time-consuming. "Getting two-thirds of state legislatures to agree on repealing a federal law will not be easy, and repeal will only happen if a law is highly unpopular" (Barnett 2011, 817). For this reason, a lower threshold of sixth-tenths is preferable to a two-thirds threshold, because the former would prevent rash or overly partisan vetoes while remaining low enough to make some action possible. It is important to avoid making it too easy or too difficult to veto a federal law. Naturally, the exact threshold could be modified based on experience with the operation of the repeal amendment.

A state veto can be combined with popular sovereignty, so that both state governments and the people concurrently police federalism. Kyle Scott (2011, 116–133) proposes an amendment whereby if the citizens (by popular referendum) and a majority of state legislatures veto a bill, it must be re-passed by a two-thirds majority in each house of Congress. This option reduces the likelihood of successful vetoes by increasing the requirements for passage, but also enhances legitimacy of vetoes that do succeed. It must be stressed that, because the people no longer support the institutional rights of either level of government, ordinary citizens should not have independent power to propose referenda, but should only reject or confirm vetoes undertaken by the state governments.

The state veto and the repeal of the Seventeenth Amendment are complementary methods that prop up each other's weaknesses. A state veto provides an unambiguous link between state interests and contestation, because the state governments themselves are the ones engaging in contestation. The state legislatures, more than anyone else, know and value the needs of states as states. By contrast, senators are, after all, federal officeholders, and thus using the Senate as a representation of state interests requires establishing incentives to compel senators' attention to the interests of states as states. On the other hand, a veto can only work post hoc to repair damage already done, whereas a pro-state Senate can impact the creation of laws from start to finish. Moreover, a state veto cannot replace the influence of the Senate over judicial confirmations, treaties, and constitutional amendments (Zywicki and Somin 2011, 90). Together, these reforms would give states influence both before and after the enactment of a law, providing mutually reinforcing checks on federal power.

One potential problem applies uniquely to the state veto option. Unlike "influence" means of contestation, such as state selection of senators, a veto involves direct opposition rather than indirect influence. As such, a veto presents the possibility (however unlikely) that it may be abused to gut the essential powers of the national government—the very problem the Supremacy Clause was intended to prevent. Hampering federal attempts to enact treaties or carry out wars might have disastrous consequences, given that national unity in these areas is necessary for the survival of the union. For this reason, Congress should be authorized to re-pass a vetoed law if at least four-fifths of representatives support it. Assuming the power in question is truly necessary to national unity, even members of Congress who originally opposed the vetoed law on ideological grounds presumably will vote for its re-passage, since any federal law is preferable to anarchy. In any case, as we saw in chapter two, state and federal lawmakers would be very

unlikely to do anything that would put the well-being of the nation at serious risk. It is, of course, impossible to know the full range of federal laws which might fall to a state veto. Still, it is justifiable to presume that the negative effects of a veto would be minimal.

In this reform as in others, the rise of political parties has problematized the traditional system of checks and balances. Of course, differences in constitutional interpretation correlate with party identification, so a partisan division does not necessarily indicate the absence of constitutional argumentation. And relative parity between the parties and coordination costs should moderate blatantly partisan repeals, especially if a supermajority is required to veto. It is unlikely that one party will control the federal government while another party controls a supermajority of state governments. Still, partisanship weakens the ability of a state veto to enable federalist contestation, because politicians may support or oppose a veto for ideological or partisan reasons. If a majority of states are controlled by liberal politicians, for instance, they are likely to veto a tax cut, even if it does nothing to undermine state jurisdiction.

While the influence of partisanship certainly must be kept in mind when considering potential means of contestation, the ability of states to veto a federal law for partisan reasons would be as much a blessing as a curse. After all, state politicians are popularly elected and may claim to represent the popular will as least as much as their federal counterparts. If a majority, or especially a supermajority, of state legislatures are controlled by members of one party, it is likely that the American people support their views, or at least sympathize with them. A state veto often may be a means of checking a president or Congress which has lost a popular mandate. Due to the relatively long terms of presidents and senators, as well as the bias in favor of incumbents, a particular viewpoint may be dominant at the federal level even though it no longer carries widespread popular support. At the very least, we cannot assume that a state veto,

even an ideologically motivated one, necessarily represents an illegitimate democratic failure. Thus, the fact of partisanship does not pose a meaningful objection to the institution of a state veto, especially if the veto is otherwise defensible as a federalism-enhancing measure.

### Reforming Political Parties and Partisanship

Unfortunately, reviving the safeguards of federalism is not as simple as recreating a previous golden age, such as the original constitutional settlement on federalism. It would be a mistake to transfer the founders' political theory straightforwardly to our current situation. After all, even this arrangement was muddled, as we saw in chapter four, and the political situation today is much different than it was in 1787. In particular, political parties not only have contributed to the decline of contestation, but continue to pose serious obstacles to its return. Parties incentivize elected officials to weaken the power of their office in pursuit of larger ideological goals. To correct the distortion that political parties introduce in the federal system, therefore, it is necessary to depart from the pure theory of contestation as conceived in the seventeenth century.

By reforming the partisan structure, we may, with care, minimize the influence of party, or even turn it to the advantage of contestation. This section advocates three reforms: (1) changing the rules for how political parties nominate congressional candidates in order to give local party organizations more control; (2) checking the movement of candidates between levels of government by establishing restrictions on eligibility for some federal offices and instituting term limits on members of Congress; and (3) welcoming rather than dreading divided government. These proposals represent concessions to partisanship which serve to tame its negative effects on the separation of powers. In most cases they mirror customs or rules previously in place in the United States or currently established in other federations.

While none of these proposals would eliminate the problem partisanship poses for contestational federalism, they ought to mitigate the negative effects of partisanship enough to allow contestation to flourish. Partisans of contestational federalism must face the fact that political parties will sometimes grate against the safeguarding of federalism. Still, writing with respect to the damage to the separation of powers caused by unified party government across the branches, Levinson and Pildes (2006, 2379) encourage scholars and politicians to “think about measures designed to prevent strongly unified government from emerging in the first place—for example, by fragmenting or moderating political parties. We cannot return to the Framers’ premodern vision of self-government without parties, but we might use legal rules and institutions to prevent strong parties from unifying government so thoroughly as to threaten Madisonian values.” Their insight applies equally well to countering the effects of unified party government across the levels of government. Arguably, it is possible to structure the Constitution in order to buttress the institutional loyalties which have crumbled under the weight of partisan politics.

### **Change Party Rules for Nominating Candidates**

The first set of reforms is designed to promote the decentralization of political parties. This represents an attempt to revitalize the “political safeguards” of federalism outlined by Larry Kramer (2000). Decentralized political parties create links between federal and state politicians that can induce federal officeholders to respect the interests of their state-level counterparts. As we saw in chapter four, however, the centralized and nationalist orientation of the current party system has eviscerated the political safeguards of federalism. By putting local politicians in the driver’s seat, it may be possible to reverse this trend.

The primary way to decentralize the party system is to change the rules for the nomination of congressional candidates within political parties. If candidates are chosen by local politicians or party members, then they can be expected to reflect a localist perspective, in the same way that state selection of senators encourages a localist perspective in the Senate. Eliza Willis, Christopher Garman, and Stephan Haggard (1999, 18) ably summarize the theory behind this reform: “the ability of national executive or subnational politicians to shape decentralization is determined by the structure of political parties. The bargaining power held by national executive and subnational politicians over decentralization equals their respective influence over national legislators who enact reforms. Such influence derives from whether party leaders preside at the national or subnational level.” Although reforming nomination rules could be implemented by the parties themselves, it would be more advantageous to cement it by means of a constitutional amendment acknowledging the existence of parties and specifying the terms by which they must nominate congressional candidates—namely, by selection from state and local party leaders. This reform would entail ending primary elections, but popular primaries were not the norm for most American history, and in most countries party leaders vet and select candidates for inclusion on the party ticket.

In fact, the comparative federalism literature supplies evidence for the effects of party nomination rules. An analysis of several Latin American federal states revealed that the structure of political parties affects the share of tax revenue allocated to states as well as the discretion given to states in spending that money (Willis et al. 1999). The authors ask whether “party leaders” reside at the national or subnational level, concluding that “[i]f party leaders are organized at the subnational level and occupy positions in subnational governments, then national legislators often act as ‘delegates’ representing subnational interests. Alternatively, if



party leaders preside within a national party organization ..., then legislative interests over decentralization will coincide more with executive or ‘national interests’” (Willis et al. 1999, 18). In Brazil, “[s]ubnational influence over national legislators” was established by a “party law stipulating that candidate nominations must occur at local and state levels,” giving mayors a major role in choosing candidates. Willis et al. (1999, 19) find that these rules led to “extensive and rapid decentralization” and “large unconditional revenue transfers to state and municipal governments” (Willis et al. 1999, 19). By contrast, executive power over the nomination and advancement of politicians in Argentina allowed its central government to prevent excessive decentralization (Willis et al. 1999, 25).

In a detailed survey of political parties in federal states, Filippov et al. (2004) report similar results for other federations. The ability of Canadian provincial parties to gain money and influence in the early twentieth century was a direct cause of decentralization during this period (Filippov et al. 2004, 205-06). German state and local parties also control candidate nomination, with beneficial effects for federalism (Filippov et al. 2004, 212-13). In India, for various reasons, state party organizations of the long-dominant Congress Party enjoyed “significant autonomy,” including the ability in most cases to nominate candidates for the state and national legislatures, endowing the party for several decades “with a well-defined federal structure that was supportive of state autonomy” (Filippov et al. 2004, 221). For instance, the state party organizations were responsible for persuading the national government to reorganize the boundaries of the states along linguistic lines (Filippov et al. 2004, 221).

It is important to remember that the American party system already exhibits one decentralizing feature: frequent elections at the state and local level. In many states, a startling variety of positions are filled by direct election in the United States. Filippov et al. (2004, 237-

240) argue that state and local elections keep parties strong locally by increasing the salience of local party involvement and investing more people in local activities. However, they also conceive of local elections as facilitating integration of local and national parties and allowing for starting positions from which people can “move up the ladder” to higher offices, so the benefit to local parties may not translate into clear or consistent benefits for federalism. Still, to sustain decentralized parties it is important to avoid tampering with local elections.

### **Check Upward Movement of Politicians**

Another way to check the influence of political parties is to prevent cross-movement by politicians from the state to national level. The theory here is that politicians who cannot expect to advance to the national level will be more interested in preserving their own level's institutional advantages. By extension, movement from the federal to the state level ought to be welcomed, as politicians who expect to move downward will be less likely to gut the power of their future post. There is no need for restrictions on cross-movement for presidents or senators.

The movement of politicians between levels can be checked in two ways. First, a constitutional amendment should be passed forbidding anyone who has served in the state legislatures for more than four years from running for the House of Representatives. This amendment would force politicians to “move up” after a few years or else stay put in their current position. Those who have passed the deadline could no longer aspire to federal office, and thus could be expected to be more reliable partisans of state power. They would probably serve longer careers at the state level as well. This option deprives candidates of the ability to gain extensive experience at the local level before moving up, but allowing politicians to serve for a few years in the state legislature would do much to overcome that objection.

Term limits are a complementary means of accomplishing the same goal. Some have advocated term limits for local politicians in order to force them to move up the ladder and serve a larger constituency or get out of politics altogether, with the goal of building an integrated party system (Filippov et al. 2004, 257). The opposite might work to prevent state politicians from advancing to federal service. Term limits for federal Congressmen might induce career politicians to serve long terms at the state level before moving up, or to seek election at the state level once their federal term of office is over. State politicians, of course, should not be term-limited, since this causes them to perceive their job as temporary, reducing their attachment to the state government and maybe prompting a premature advancement to federal service. U.S. Senators too should not face term limits, since, if the Seventeenth Amendment is repealed, the promise of being re-elected by their state government is the primary motivation for senators to promote their state's rights.

### **Encourage Divided Government**

Divided government is another powerful way to check cooperation between the levels of government. Parties ordinarily weaken the separation of powers, as we have seen. However, Levinson and Pildes (2006) point out that, in divided government, partisanship actually reinforces the natural incentives of politicians to support the institutional power of their office: “When control [of the branches] is divided between parties, we should expect party competition to be channeled through the branches, resulting in interbranch political competition resembling the Madisonian dynamic of rivalrous branches” (2327). Later they write that the “primary threat” to the “Madisonian perspective that undergirds much of constitutional law” comes from “party unification” rather than divided government. “Madisonians,” they conclude, “must count on party division to recreate a competitive dynamic between the branches. And far from

encouraging unified party control of the House, Senate, and presidency, Madisonians will view the prospect of unchecked and unbalanced governance by a cohesive majority party as cause for constitutional alarm” (2006, 2329). When considering this issue, of course, the benefits for contestation must be weighed against the downsides of divided government, such as increased gridlock and decreased accountability. A positive stance toward divided government in fact contravenes the conventional wisdom in political science in praise of unified government (Levinson and Pildes 2006).

The same logic applies to federalism. If the states were controlled by different parties than the national government, they would be more likely to check the federal government, and contestation would be enhanced. So just as proponents of Madisonian separation of powers might cheer the fact that the national government has been divided for most of the last half century, proponents of contestational federalism should welcome the fact that, for instance, Republicans have controlled a plurality of state legislatures for most of President Obama’s two terms. Partisans of federalism, then, should seek ways to encourage inter-level divided government.

Of course, divided government must work hand in hand with formal means of federalist contestation. Absent the reforms outlined earlier, inter-level divided government will produce opposition but not true contestation. By contrast, if the Seventeenth Amendment is repealed, the state governments can elect Senators who will share their ideological profile and pro-federalist orientation, and the institution of a repeal or veto amendment would give states a direct check on federal laws. Likewise, if the federal and states governments are controlled by the same party, the states may not make full use of contestation even if adequate means were provided.

Despite its theoretical attractiveness, it is much easier to welcome divided government than to formally institute it. Specific reforms to encourage divided government are hard to envision. From the perspective of Madisonian federalism, state/federal split-ticket voting is a positive phenomenon. This practice should be encouraged by preventing straight-ticket ballots or ballot options. Holding state-level elections on different years than federal elections encourages a different sort of split-ticket voting, since changing circumstances might persuade voters to choose different parties in the two elections. Elections held during presidential years are particularly susceptible to national partisan trends. Several states already hold governor or legislative elections on off-years.<sup>86</sup> These reform proposals are mirror opposites of those of Sundquist (1992), a strong supporter of unified government, who recommends encouraging or mandating straight-ticket balloting (for instance by allowing “team tickets” pairing congressional and presidential candidates) and lengthening terms of office to four years for the House and eight for the Senate (to eliminate midterm elections).

Another way to make divided government more likely is to increase the number of viable political parties in the states. This goal may be accomplished by changing the voting system for state legislative elections. Virtually all U.S. legislative seats are awarded on the basis of plurality (or “winner take all”) rules, which guarantee a two-party system. Alternative voting systems, such as run-off voting or proportional representation, encourage the proliferation of parties.<sup>87</sup> These system vary widely, but they are prevalent in parliamentary democracies and have many supporters at both the academic and popular level.<sup>88</sup> Some American cities already use versions

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<sup>86</sup> Kentucky, Louisiana, Mississippi, New Jersey, and Virginia hold gubernatorial elections on off-years. All of those states except Kentucky also hold legislative elections on off-years.

<sup>87</sup> A good introduction to the mechanics of non-plurality systems, which is beyond the scope of this chapter, can be found in Farrell (2011).

<sup>88</sup> For instance fairvote.org advocates a variety of alternative voting systems for the U.S. They have numerous links to research and scholars supporting their views.

of ranked choice voting. Under an alternative voting system, there would be more parties at the state level than at the federal level—since the two-party system would be preserved in presidential and congressional elections— especially regional parties not active at the federal level. If a state was controlled by a regional or non-national party, then its senators would not be of the president’s party (assuming the Seventeenth Amendment is repealed). This option may seem fanciful, but it has the advantage of having many supporters who do not otherwise care about federalism. Given the prevalence of alternative voting systems worldwide, it is likely that electoral reform eventually will occur in the United States, and it is important to make this reform serve the interests of contestational federalism.

### The Courts and the Constitution

The U.S. Constitution is not a reliable ally for anyone trying to determine federal boundaries. As one of the shorter written constitutions in the world, it makes no attempt to define in detail what “commerce” is, or what the regulation of “commerce among the states” entails. Nor does it provide a list of powers specifically reserved to the states. As we have seen, this ambiguity has hampered attempts to discern any limits on federal legislative power. By contrast, many federal constitutions list, in detail, the powers of the levels of government. These constitutions can provide a model for how to allocate power constitutionally in a federal state.

A constitutional amendment clarifying the federal division of power would do much to make the Constitution and the courts constructive players in a contestational framework. This amendment would list certain general rights and powers for each level of government, as well as concurrent powers shared by both. However, it should avoid being too specific about the allocation of powers, as this move would dampen rather than enhance contestation. Rather, a set of criteria for triggering national regulation should be specified. The amendment could adopt the

“collective action” federalism of Cooter and Siegel (2010), defining what constitutes a collective action and what powers the federal government has to control them. Or it might invoke the related principle of subsidiarity, according to which each power is allocated to the most local governmental level capable of dealing with it effectively. Whatever the specific text adopted, a statement of principles would help to shore up the necessary prerequisites for contestation.

The intention here is not to rely on “parchment barriers” but to provide rhetorical fodder for contestation, points of reference on which participants can stake their constitutional claims. Larry Kramer (2000, 292) argues rightly that “the substantive content of any normative theory of federalism can never be other than open-ended and contestable. All we have are a set of broadly-defined powers and a set of very general principles that, in any given context at any given time, can lead reasonable people to reach very different conclusions about the proper limits of federal authority.” Clarifying the constitutional text is only a precursor to truly sufficient means of contestation, without which textual changes serve little value. The constitutional text can only ignite high-level debate if it contains principles that can serve reasonably well as bases for principled positions.<sup>89</sup> In the current Constitution, the Tenth Amendment has served reasonably well as a rhetorical device, despite its status as a “truism,” but the Commerce Clause and other provisions are too vague to effectively limit federal power. General principles such as subsidiarity and “collective action problems” are more specific than the Tenth Amendment but also require renewed application in different specific contexts. Rather than foreclose contestation by creating detailed lists and regulations regarding federalism, they invite participants in jurisdictional

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<sup>89</sup> Tulis (2003) provides a wonderful account of how the interplay of constitutional arguments can work in practice.

struggles to proffer arguments as to why a particular power should be decentralized or centralized.<sup>90</sup>

This reform would make it easier for the Supreme Court to play a role in policing federalism. Judicial review is sometimes appropriate even in contestational federalism, and cases will arise when contestational safeguards fail to stop an inappropriate law. Perhaps, for instance, the states and their senators will fail to check a federal law due to partisan collaboration between most states and the federal governments. In such cases, the Court will need to point to the Constitution to justify its limitations on state or federal power. The principles of collective action and subsidiarity will allow it to articulate rational standards capable of being applied in a variety of situations. In short, a clarification of the constitutional status of federalism would get the Court off of the sidelines in federal disputes, yet without forcing it to advance incoherent or weak legal standards.

### Global Models of Contestational Federalism

This chapter has stressed the need for reforms that are workable, tangible, and that do not represent a massive departure from the norms of modern liberal democracy. For this reasons, many of the reforms proposed here, such as repealing the Seventeenth Amendment or giving local party organizations control over primary elections, harken back to previous practices in American federalism. Yet these reforms are also modeled after actual institutions and rules in federal states worldwide. Several federations—most prominently Germany—have similar rules

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<sup>90</sup> It is also possible to reinterpret existing constitutional texts as embodying the principles of subsidiarity and collective action federalism. Cooter and Siegel (2010) do a valiant job of exploring what just such an interpretation would look like with reference to the General Welfare Clause and the provisions in Article 1, Section 8. The Tenth Amendment too could be plausibly interpreted as embodying the principle of subsidiarity. However, these reconstructions are of doubtful doctrinal validity, especially given the history of federalism jurisprudence, and would be sharply contested. They cannot wholly replicate a constitutional amendment on the subject.



or practices in place. Reviewing these global models will not only help to flesh out my proposals but also highlight their feasibility.<sup>91</sup>

Giving sub-unit governments the power to select members of one branch of the national legislature is not uncommon in federal systems. Not only was it the practice in the United States prior to 1913, but a number of current federations employ this arrangement, including Germany, India, Russia, Pakistan, Ethiopia, Belgium, Austria, and Malaysia. These countries give witness to the viability of repealing the Seventeenth Amendment. It seems that modern federal states are capable of overcoming the problems, such as corruption, that led to the passage of the Seventeenth Amendment.

Several federal states boast indirectly elected senates with broad legislative powers. Germany's Bundesrat or "federal council," represents the *Länder* (federal states) in the national government. It has wide legislative jurisdiction over policies that affect the federal states, including constitutional amendments. Members of the Bundesrat are chosen by the governments of the *Länder*, and may be recalled at will (Filippov et al. 2004, 244). The effect of partisanship on the electoral college is evident in Germany's federalism. When opposition parties have a majority in the Bundesrat, they can frustrate the legislative agenda of the party dominant at the national level (Filippov et al. 2004, 244-45). Their veto power may be used to protect the power of the *Länder* or to advance an ideological agenda (cf. Burkhart 2009). Overall, though, the Bundesrat functions well as a federal upper house. They have even successfully opposed policies unfavorable to the *Länder*, such as unfunded mandates (Rodden 2006, 36).

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<sup>91</sup> It would be more beneficial to conduct an in-depth examination of how contestation operates in one or two primary federal states, say Germany and Canada. However, since contestation is not the focus of most federalism scholars, this analysis would be difficult to perform. I hope to provide just such an analysis in future iterations of this work.

In India, the vast majority of members in the Rajya Sabha (or “Council of States”) are indirectly elected by the state legislatures. Like the German Bundesrat, the Council has a good deal of legislative power. Although India’s “constitution makes the council’s approval unnecessary for the passage of any money bill,” its powers is nevertheless real, especially regarding constitutional amendments (Filippov et al. 2004, 251). Narendra Modi’s failure to enact his legislative agenda immediately following the landmark 2014 election stemmed largely from the fact that opposition parties still controlled the Rajya Sabha.

The Russian Upper chamber, the Federation Council, is also indirectly elected. The Council contains two members elected by the legislatures of each of the federal subjects of Russia, along with some members appointed by the President of Russia. Prior to 2000, the governors and leaders of provincial legislatures were themselves members of the Federation Council, but currently one senator is elected by the legislature, and one is nominated by the governor but can be overridden by two-thirds vote of lower chamber. The Federation Council is not the originator of most bills, but still plays a significant role in legislating.<sup>92</sup>

Many federal states also exhibit a party system that works with, rather than against, federalism to a greater degree than in the United States. In some federations, such as Canada and Germany, politicians do not cross levels, but typically serve for life at either the national or state level (Filippov et al. 2004, 209-212). In fact, “no prime minister of Canada has ever served as head of a provincial government” (Filippov et al. 2004, 210). Moreover, political parties in most

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<sup>92</sup> Most other examples of indirectly elected senates are less significant. For instance, many institutions of the European Union permits member nation governments to select representatives, but the EU’s status as a federal state is questionable. In Malaysia, some senators are elected by the sub-unit governments, but a majority are appointed by the king. Likewise, not all members of the Pakistan Senate are elected by the provincial governments. The Austrian and Belgian Senates have virtually no legislative power, although the Belgian Senate must approve certain laws related to constitutional revisions and the basic structure of the state. Argentine senators were elected indirectly only until 1994. And in Switzerland, while the cantons are permitted to choose how members of the Council of States are elected, all cantons currently employ popular vote. Still, the principle of indirect election of federal legislators by the state governments has a distinguished pedigree.

nations, both federal and unity, select candidates internally rather than having a primary election. Many of these cases do not involve single member districts, and many exhibit highly centralized party systems, but in any case they do show that primary elections are not an indelible feature of democratic government. As noted earlier, evidence from Latin American party systems shows the decentralizing effects of local party selection of candidates (Willis et al. 1999). Non-standardized or off-year elections also occur in various federations, such as India and Germany.

American federalism diverges most from other countries when it comes to the constitutional provisions delegating power between the two levels of government. Where the U.S. Constitution tends toward the vague when describing national and state powers, other constitutions tend toward the overly specific. This clarification has worked to preserve federalism in these countries. The evidence from highly-decentralized Switzerland, whose constitution defines in detail the powers lodged in the federal government and those reserved for the cantons (i.e. states), indicates that a more precise constitutional text restricts power-grabbing infractions from either side. Likewise, the German Constitution specifies, much like the Tenth Amendment, that the *Länder* are responsible for exercising all governmental powers not delegated to the federal government (Gunlicks 2003, 55-56). Prior to reforms in 1994, the German federal government could pass legislation in an area of concurrent jurisdiction as long as it judged there to be a “need” for federal legislation. The 1994 reforms reserved more areas of legislation exclusively to the *Länder*, and federal legislation in concurrent areas must be a “necessity,” a standard “which was later interpreted by the Federal Constitutional Court extremely restrictively” (Burkhart 2009, 349). Moreover, a provision was added returning power to the *Länder* as soon as the necessity of federal legislation ceased, although this provision is unlikely to be activated often (Gunlicks 2003, 59). If a more specific allocation of powers has

worked in these countries, there is little reason to doubt that it would work, at least to some extent, in the United States.

These observations should not be taken as an endorsement of the totality of these federal systems. In some federations, the powers of the subunit governments are more apparent than real. In Germany, “there are relatively few legislative power that have not been granted to the federal level by various means” (Gunlicks 2003, 56). Unlike in the United States, when the German federal government acts in an area of concurrent legislation, that action invalidates all *Land* legislation in the field, regardless of whether it conflicts with the federal legislation or not (Gunlicks 2003, 59, 61). Moreover, subunits in many federations, including Germany, do not have full independent power to set tax rates (Rodden 2006). Most Germans have a dislike of economic competition between the *Länder* that has aided federal power (ex. Gunlicks 2003, 59). Contestational federalism cannot work without a competitive mindset. There is no federation which embodies all aspects of the contestation model.

### Conclusion

American federalism is currently under severe strain. This dissertation has shown that the traditional protection of federalism, judicial review, has proven inadequate to the task of formulating convincing legal rules by which to limit the federal and state governments. In any case, such legal rules would be unable to evolve in light of changing circumstances. Moreover, popular alternatives, such as the political safeguards of federalism, are too weak to do what they promise. Unsurprisingly, over the course of the last century federal power has increased dramatically in the United States—as well as in federations worldwide. The future survival of meaningful federalism depends on our ability to craft a theory of federalism that avoids the dangers of both excessive centralization and excessive decentralization.

This dissertation has advanced a theory, called “contestational federalism,” which seeks to correct the insufficiencies evident in current American federalism. This model empowers efficient government by dividing power on the basis of which level of government can best perform that function. It also prioritizes contestation, or the mutual rivalry between governmental bodies wielding formal constitutional checks and balances. This dissertation has argued that a contestation model of federalism coheres better with the logic behind the separation of powers and provides a number of normative advantages. Contestation is the best means to check abusive government and maintain a healthy balance of power between the state and federal governments, facilitates the fluid evolution of the federal balance in response to changing factors, preserve beneficial economic competition, and elevates political discourse by placing the Constitution at the center of federalist debates. However, due to a variety of factors, federalist contestation is no longer possible in American federalism.

Yet contestational federalism need not be an obsolete historical peculiarity. This chapter advances reforms which, taken together, constitute an integrated agenda for transforming federalism in America. They reflect a common vision for what federalism is and how it should operate, one which builds on both the tradition of American political thought as well as the actual practice of federalism both in the United States and abroad. None of these proposals represent a substantial departure from the theory or practice of modern liberal democracy, and they are designed to mitigate the worst defects of modern federalism rather than to enact a utopian ideal of the “perfect” federal state. Yet collectively they entail meaningful change that will bring federalism more in line with the American theory of the separation of powers.

This approach to federalism has synthesized and expanded upon the work of a number of scholars. The basic thrust of the contestation model derives from Jeffrey Tulis (1980, 1988) and

Georgia Thomas (2008), who articulate better than anyone else the genius of Madisonian constitutionalism. However, I innovate in two ways. First, I apply their analysis to federalism, tracing the ways in which contestation over federalism differs from contestation between the branches of government. This task draws upon several scholars who have emphasized the role of the Senate in the founders' theory of federalism (Bybee 1997; Rossum 2001). However, unlike them, I provide an account of how political parties have affected contestation over federalism. This account applies the analysis of Levinson and Pildes (2006), which is also about inter-branch separation of powers, to federalism. The result is a full-bodied account of the purpose and safeguards of federalism.

Even a strong theory, however, is not enough on its own. The task of reviving federalism requires mobilizing political action in its behalf. The proposals presented here are but a starting point that require implementation by actual political actors. There is already some reason for optimism in this area. The general concept of federalism, along with checks and balances, is often praised a means of limiting government overreach. The concept of functional differentiation finds much support among economists, political scientists, and political theorists as a means to promote an efficient government and economy. Outside of academia, the political right has supported federalism particularly strongly. Many progressives support varieties of decentralization as well, particularly advocates of local democracy. Proponents of contestational federalism can appeal to a broad range of progressives, communitarians, conservatives, and libertarians. This task will prove challenging, however, since each group will be motivated by different ideological goals. It is important to make the case that federalism is neutral on specific policy questions in addition to emphasizing its positive benefits. Heather Gerken (2014) and

Lynn Baker (2002) have provided excellent arguments to this effect. In short, there is a significant potential constituency for sustaining and reforming federalism.

Finding political support for specific reforms may be even easier than building support for federalism in general, because many of them are advocated by others for reasons totally unrelated to contestation or federalism. There is widespread support for congressional term limits for Congress based on the desire to eliminate career politicians and improve representation. Some libertarians support divided government as a means to dampen government action across the board (Epstein 1990). Many conservatives support repealing the Seventeenth Amendment and/or instituting the veto amendment in the name of limited government (ex. Rossum 2001; Bybee 1997; Barnett 2011; Woods 2010). Also, alternative electoral systems are advocated for reasons that do not relate to federalism, such as representation and fairness. Additionally, changing the electoral system would go hand in hand with another reform: candidate selection by party elites. Eliminating primary elections is unpopular by itself, but primaries are very rare in many electoral systems, and so electoral reform might easily be accompanied by alterations to candidate selection. In short, the ability to piggy-back off of other reform movements may bolster support for contestational federalism.

Ultimately, it remains for the American people to determine whether, and in what way, we will fulfill the promise and avoid the perils of federalism. The problem of preserving the federal system has no easy answers. It will be said that these proposals, even if meritorious, are politically impossible. This pessimistic appraisal is far from obvious. But even if these suggestions seem visionary, the analysis presented in this dissertation is worthy of consideration as a necessary prerequisite for conceptual clarity. We must know what an ideal federal system looks like before deciding what to do with our own. If nothing else, the contestation model can

serve both as a model and as a prod for further reflection on the meaning and purpose of federalism.



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