

## THE RANDOLPH W. THROWER SYMPOSIUM<sup>†</sup>

### *INTERACTIVE FEDERALISM: FILLING THE GAPS?*

### FROM DUALIST FEDERALISM TO INTERACTIVE FEDERALISM

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The past two decades have witnessed an increasing interest in the topic of federalism. Federalism has become a significant focus of discussion in political, public policy, and academic debates. The growing importance of federalism represents an important shift from the preceding decades. In the United States, federalism had been one of the most central issues in constitutional law since the Founding. By the 1970s, however, federalism appeared to be primarily of historical interest. The Civil Rights movement, along with the Warren Court's invigoration of individual rights, shifted the focus of constitutional discussion away from the states and toward the federal government.

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The message of *Brown v. Board of Education*<sup>1</sup> and other landmark cases, such as *Gideon v. Wainwright*<sup>2</sup> and *Miranda v. Arizona*,<sup>3</sup> was that a strong national government was required to protect people from the states. The idea of allocating authority between the states and the national government, with the attendant limitation on federal authority, seemed odd, even perverse. A central mission of the national government was to protect individuals from their states. In this climate, federalism often seemed an obstacle to the achievement of important constitutional goals. Writing in 1964, political scientist William Riker exemplified this attitude when he declared that “if in the United States one disapproves of racism, one should disapprove of federalism.”<sup>4</sup>

Federalism, however, began to come back into the constitutional fold. In 1980, Ronald Reagan capitalized on the resentment against strong national government. His antigovernment message corresponded to federalism’s longstanding concerns with the oppressive potential of centralized power. The judges that he, and his Vice President and successor George H.W. Bush, placed on the federal courts developed a jurisprudence of federalism to counter the regnant, more nationalist jurisprudence of the Warren and Burger Courts. When the Reagan and Bush Justices finally attained a majority, they placed new limits on the power of the national government.

In a series of decisions, the Rehnquist Court overruled or narrowly interpreted recent cases so as to cabin the authority of the federal government. In *New York v. United States* in 1992, the Court struck down a federal statute on the grounds that it commandeered the legislative apparatus of the state.<sup>5</sup> This ruling created considerable tension with the 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>6</sup> which had seemed to end judicial enforcement of federalism-based limits on congressional authority. In 1995, in *United States v. Lopez*, the Court held for the first time since 1937 that Congress had exceeded its authority under the Commerce Clause.<sup>7</sup> In 1996, the Court held that the states enjoyed a constitutional immunity against suits for damages that could not be displaced by Congress. This case, *Seminole*

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> 372 U.S. 335 (1963).

<sup>3</sup> 384 U.S. 436 (1966).

<sup>4</sup> WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964).

<sup>5</sup> 505 U.S. 144 (1992).

<sup>6</sup> 469 U.S. 528 (1985).

<sup>7</sup> 514 U.S. 549 (1995).

*Tribe*, overruled a 1989 decision that had found that Congress did possess such authority.<sup>8</sup>

*New York v. United States*, *Lopez*, and *Seminole Tribe* presented clear, definitive landmarks in the federalism revival. In the name of federalism, these cases sought to place categorical limits on the power of the national government. These cases were indeed important deviations from the recent past. In various respects, however, this federalism trifecta gives a misleading picture of the nature of the contemporary federalism revival. While the Supreme Court was oscillating between a nationalist and a federalist position, states and the national government continued in their long-term relationship without the kinds of abrupt ruptures visible in the Court's jurisprudence. The most significant developments in federalism were occurring outside of the courts, as the states and the national government worked through various cooperative and competitive arrangements.

Moreover, the Court's attempt to draw constitutional boundaries by distinguishing between the "truly local" and the "truly national"<sup>9</sup> placed the Court's jurisprudence in tension with the actual operation of states and the national government. The Court's decisions entailed an effort to separate state and federal spheres, but this judicial project had little resonance in the world of actual regulation. As discussed in the following pages, religion, education, and the environment, as well as a host of other areas, present issues that are both truly local and truly national.

This Symposium turns to the more relevant question: given that the state and national governments exercise vast realms of concurrent authority, how can that regulatory overlap best be managed? By focusing on "interactive federalism," this Symposium moves beyond outmoded doctrinal categories, such as "truly local" and "truly national," and contributes to the vital project of developing the best relationship between the states and the national government. As the articles in this Symposium issue demonstrate, the promise of federalism lies in the creative interaction of federal and state authority, rather than in the doomed effort to divide the two.

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<sup>8</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), *overruling* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

<sup>9</sup> *See* *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local."); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)).

To explicate the foundations of this Symposium, Part I discusses the key characteristics of interactive federalism, and of the dual federalism it replaces. Part II outlines the way in which the articles that follow make important contributions to the study of interactive federalism. I conclude with some broader observations.

## I. FROM DUAL FEDERALISM TO INTERACTIVE FEDERALISM

To highlight the key features of interactive federalism, it is useful to emphasize what it is not. I thus begin with a brief sketch of dual federalism. A discussion of dual federalism provides a background to the most important characteristics of interactive federalism, which seeks to retain the benefits of federalism, while avoiding the problems of the dual federalist paradigm.

### A. *Dual Federalism*

In 1905, Supreme Court Justice David Brewer summarized the dual federalist understanding of the constitutional system:

We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control, and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere, is the peculiar duty of all courts, preeminently of this . . . .<sup>10</sup>

As is apparent from Justice Brewer's account, dual federalism entails the following three related principles: (1) the federal government and the state governments exercise exclusive and nonoverlapping authority; (2) the allocation of authority between the national government and the states rests on functional premises, with the national government regulating certain kinds of matters and the state governments regulating different matters; and (3) the courts play an important and distinctive role in maintaining the boundary between the states and the national government.<sup>11</sup>

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<sup>10</sup> *South Carolina v. United States*, 199 U.S. 437, 448 (1905).

<sup>11</sup> See Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1526–37 (2002) (discussing this conception of dual federalism).

Scholars debate the extent to which the allocation of authority between the national government and the states ever conformed to the dual federalist model.<sup>12</sup> However, it is clear that in certain periods, the U.S. Supreme Court operated on dual federalist assumptions. At these times, the Court spoke in dual federalist accents and struck down federal and state legislation that it claimed intruded into the sphere of authority preserved for the other. During the first third of the twentieth century, the Court proved especially willing to enforce dual federalist principles.<sup>13</sup>

After 1937, dual federalism lost all descriptive force. The Supreme Court acquiesced in a broad expansion of federal authority. The reach of the national government became so great that separating state from federal domains became impossible. Concurrent state and federal regulation became the accepted policy in many, perhaps most, areas. The Supreme Court largely stopped trying to enforce borders between state and national authority. Instead, the Court adopted a very deferential posture, allowing Congress broad authority to define the proper scope of federal power.<sup>14</sup>

In the move with the greatest significance, the Court embraced a broad reading of the Commerce Clause, holding that Congress could regulate any activity with a substantial effect on interstate commerce. Moreover, the Court understood the question whether an activity did have such an effect to be primarily committed to Congress. In a 1981 case, the Supreme Court stated explicitly the deferential standard that had characterized the Court's jurisprudence since 1937:

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<sup>12</sup> Professor Harry Scheiber has described dual federalism as ending with the Civil War, followed by a transitional period, with cooperative federalism beginning with the New Deal. See generally Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978). See also Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663, 679–83 (1980) (discussing periods of federalism). Professor Daniel Elazar describes dual federalism as the “regnant” theory until the 1930s. See Daniel J. Elazar, *Cooperative Federalism*, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 65, 67 (Daphne A. Kenyon & John Kincaid eds., 1991). Elazar, however, also asserts that “[t]he American pattern of federalism has been cooperative since its beginnings.” Daniel J. Elazar, *Theory of Federalism*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1003, 1006 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

<sup>13</sup> See, e.g., Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1209–16 (2003) (discussing the pre-1937 jurisprudence of the U.S. Supreme Court); Post, *supra* note 11, at 1526–634 (same).

<sup>14</sup> See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950) (discussing the U.S. Supreme Court's acceptance of expanded national power).

The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.<sup>15</sup>

The tenets of dual federalism thus lost their purchase. Much activity falls within the jurisdiction of both the states and the national government, and the courts have a limited role, at best, in enforcing principles of federalism.

### *B. Return to Dualism*

In the 1990s, the Rehnquist Court moved away from this deferential posture and developed a more aggressive role for the courts in policing the boundaries of federalism. The Justices on the Rehnquist Court recognized that an attempt to return to the original principles of dual federalism did not represent a credible project.<sup>16</sup> The state and federal governments both exercised regulatory authority over broad swaths of the economic and social life of the United States. An effort to separate the regulatory domains completely would be doomed to failure. The Rehnquist Court, however, did seek to reinvigorate judicial enforcement of federalism. Accordingly, the Court defined some areas as the exclusive domain of states and thus outside the reach of the national government. This Rehnquist Court brand of federalism differed in important respects from dual federalism. The Rehnquist Court did not seek to divide the world into two regulatory fields, one the exclusive preserve of the federal government, the other the exclusive domain of the states. Unlike dual federalism, the Rehnquist Court accepted substantial areas of concurrent state and federal authority.<sup>17</sup>

Like dual federalism, though, the Rehnquist Court attempted to draw some lines that the federal government could not cross. I have termed the Rehnquist Court federalism a “dualist” form of federalism, in recognition of its focus on creating some division between federal and state power, while not attempting

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<sup>15</sup> *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276 (1981).

<sup>16</sup> *See, e.g., United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring, joined by O’Connor, J.) (“[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.”). Justice Thomas, alone, has suggested a return to pre-New Deal conceptions of the limitations on federal power. *See id.* at 584–602 (Thomas, J., concurring).

<sup>17</sup> Even in the heyday of dual federalism, the Court did permit some concurrent state and federal regulation under the doctrine of *Cooley v. Board of Wardens*. 53 U.S. (12 How.) 299 (1852). The realm of acceptable overlap, however, vastly expanded after 1937. *See Corwin, supra* note 14, at 17.

to recapture the dual federalist notion that all areas must be exclusively state or exclusively federal.<sup>18</sup> In furtherance of this dualist project, the Rehnquist Court defined three zones as beyond the limits of federal authority. First, in *New York v. United States* and in *Printz*, the Court held that Congress could not “commandeer” the governmental operations of the state, forcing the states to regulate in accordance with federal directives or to enforce federal law.<sup>19</sup> Second, in *Lopez*, the Court held that Congress could not reach intrastate, noneconomic activity, unless the law was an essential part of a larger scheme of regulation.<sup>20</sup> Third, in *Seminole Tribe*, the Court held that Congress could not generally make the states subject to private lawsuits seeking monetary compensation for state conduct that violates federal law.<sup>21</sup>

While these three limitations on federal authority are significant and represent a historic shift in the Supreme Court’s jurisprudence, they do little to change the overall shape of federalism in the United States. In the vast majority of areas, the states and the federal government exercise concurrent authority without judicial supervision. Further, the Court has done nothing, so far, to limit the enormous leverage that Congress can wield under its spending authority.<sup>22</sup> With its vast taxing power, Congress can amass tremendous financial resources. Congress can then offer the states financial assistance, subject to the conditions that Congress wishes to impose. This use of conditional federal spending can allow the federal government to exert regulatory pressure in all areas, including in those domains that otherwise would be outside of federal control. Thus, while the federal government cannot simply order states to regulate in accordance with a federal plan, Congress can make funds contingent on states following federal orders.<sup>23</sup>

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<sup>18</sup> See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 250–51 (2005).

<sup>19</sup> *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel*, 452 U.S. at 288); *Printz v. United States*, 521 U.S. 898, 925–26 (1997).

<sup>20</sup> See *Lopez*, 514 U.S. at 561.

<sup>21</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

<sup>22</sup> In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court approved the broad use of conditional federal spending, and the Court has not retreated from this position.

<sup>23</sup> For example, in *New York v. United States*, the Court addressed a wide-ranging federal plan for encouraging states to regulate low-level radioactive wastes in accordance with a comprehensive, national program. 505 U.S. at 149–54. While striking down the “take title” provision, which was not tied to federal funds, the Court did not question the series of incentives and penalties that were connected to the receipt of federal money. *Id.* at 171–73.

Congress also can make states waive their immunity from suit as a condition of receiving federal funds.<sup>24</sup>

Because of the flexibility of the conditional spending doctrine, the dualist project of the Rehnquist Court places few real limits on national power. The true victims of the Rehnquist Court's dualist federalism are the states. The Court has employed the dormant Commerce Clause and preemption doctrines to strike down a variety of state regulations.<sup>25</sup> The Court's dualist outlook encompasses a robust role in determining whether the states have infringed on federal domains.

### C. *Interactive Federalism*

Interactive federalism strives to overcome the lingering dualism in the Court's federalism jurisprudence. Rather than focusing on how to separate state and federal jurisdiction, interactive federalism explores how the federal and state governments can work together to advance a variety of policy goals. Interactive federalism also eschews the judicial focus of dualist federalism. Once the goal is identified as theorizing the best interaction of the state and federal governments, the judicial role becomes minimal. Institutional competence counsels judicial deference. Whatever the ability of courts to draw lines between state and federal domains, courts clearly are not well suited to manage the overlap of state and federal power. The movement from dualist federalism to interactive federalism transfers the venue for federalism debates. The agents of interactive federalism are legislators or administrators, not judges. The role of the courts is to resist intervention.

Elsewhere, I have suggested that the important benefits accruing from the interaction of state and federal authority include plurality, dialogue, and redundancy.<sup>26</sup> Multiple regulators mean that different officials, with different institutional perspectives, will review a problem. This diversity of perspectives may produce a broader variety of potential solutions. The possibility for dialogue among the federal and state officials increases the

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<sup>24</sup> See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 141 n.683 (2004) (citing *Alden v. Maine*, 527 U.S. 706, 737 (1999)).

<sup>25</sup> See Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1594 (2003) (reviewing JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002)) (noting prominence of preemption and dormant Commerce Clause cases in the Rehnquist Court's jurisprudence).

<sup>26</sup> See Schapiro, *supra* note 18, at 288–90.

value of plural approaches. The various officials and institutions can inspire each other to adopt better solutions, as they learn from each other's experiences. The existence of concurrent state and federal regulation offers the related advantage of redundancy. If one level of government defaults in its task, the other remains available to come to the aid of the citizens.

On the other hand, interactive federalism may undermine the important values of uniformity, finality, and hierarchical accountability.<sup>27</sup> Interactive federalism contemplates a variety of federal and state laws, addressing similar topics, coexisting within a given jurisdiction and across jurisdictions. Sometimes, however, problems demand uniform solutions, either because of the national nature of the concern or because of collective action problems that might flow from the jurisdictional overlap. Divergent federal and state rules within a state may lead to confusion and inefficiency as people try to figure out which laws apply to them. The possibility for interstate variation may present other difficulties. National problems may demand uniform national solutions. State-by-state regulation of pollution, for example, may lead to externalities, as states share the burdens of pollution without sharing the benefits of industry. Moreover, some rights, such as freedom from racial discrimination, inhere in the notion of national citizenship and should be enjoyed equally throughout the United States. Finality presents a related concern. Sometimes it is more important that a problem be solved than that it be solved in the most elegant fashion. Overlapping state and federal jurisdiction may undermine finality, as a disgruntled party always can go to the other government for relief. As no realm of state prerogative is shielded from federal intrusion, any bargain negotiated at the state level can be undone through federal intervention.

Interactive federalism presents the potential to undermine accountability, as well. With the overlap in federal and state jurisdiction, regulators might blame any deficiencies on the other level of government. Regulators might shirk their tasks, with the expectation that disgruntled citizens will not discern the proper target for their ire. Along these lines, the U.S. Supreme Court has emphasized the potential threat to accountability posed by overlapping federal and state law.<sup>28</sup>

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<sup>27</sup> See *id.* at 290–93.

<sup>28</sup> See *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (“The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability . . . .”); *New York v. United States*, 505 U.S. 144, 168 (1992) (“[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”).

From the interactive perspective, the key question is how to enjoy the benefits of plurality, dialogue, and redundancy, without undermining important principles of uniformity, finality, and accountability. The critical research need is for scholars to explore how these benefits and burdens can be managed in different situations. Each of the main articles in this Symposium explores this framework of interactive federalism. Each of the articles constitutes an effort to understand federalism beyond the framework of dual federalism. All theorize the best interaction of state and federal authority. None of them pursues the dual federalist enterprise of attempting to divide the world by subject matter into state categories and federal categories. Professor Kirsten Engel<sup>29</sup> and Professor Michael Heise<sup>30</sup> further demonstrate the nonjuricentric features of interactive federalism. The main targets of their arguments are legislators or administrators, rather than courts. Their work has important implications for how courts should deal with federalism issues, but their articles serve principally as guides for policymakers. As they show, the inquiry central to interactive federalism—how best to manage the overlap of state and federal authority—must focus on policymakers, not on courts.

Professors Lupu and Tuttle's article does focus more on courts.<sup>31</sup> However, they too adopt an interactive perspective. They explore how the states and the federal government can best work together to promote important principles of religious liberty. Their project might be seen as the most revolutionary. Since the adoption of the Fourteenth Amendment and the progressive incorporation of the Bill of Rights over the course of the twentieth century, the federal government had come to be seen as the preeminent guarantor of individual rights. For those commentators who pursued the dualist project of dividing subjects between the states and the federal government, the protection of individual liberty often fell on the federal side of the boundary.<sup>32</sup> Indeed, rights came to be thought of as limitations on state and federal power that applied uniformly throughout the United States and were enforced by courts. Rights became essentially synonymous with the concept of the rights of national citizenship.

An especially significant component of the resurgent emphasis on federalism, however, has been a broader appreciation of the need to understand

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<sup>29</sup> Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006).

<sup>30</sup> Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125 (2006).

<sup>31</sup> Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006).

<sup>32</sup> See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 52–56 (1995).

rights within a federalism framework. Rights might be protected as a matter of state law, not federal law. Rights also might reflect the interaction of state and federal law. The “right” to education became the focus of an important literature discussing this broader, federalist notion of rights. In 1973, the U.S. Supreme Court refused to recognize a federal right to education.<sup>33</sup> In the wake of that decision, states began to recognize state constitutional rights to education.<sup>34</sup> The right to education became the most important example of a right that varied in content from state to state.

Lupu and Tuttle carry this new federalist vision of rights one step forward. They explore the way in which rights may exist at the intersection of state and federal law. They investigate how religious liberty may emerge from the interplay of national and state-specific principles.

## II. APPLIED INTERACTIVE FEDERALISM

The range of the topics covered in this Symposium demonstrates the broad reach of the concept of interactive federalism.

### A. *Religion*

One of the most important functions performed by the federal government has been the protection of individual rights. Throughout the twentieth century, the Supreme Court’s progressive incorporation of the Bill of Rights gave the federal government significant responsibility for protecting individuals against states’ violations of their constitutional liberties. *Brown v. Board of Education*<sup>35</sup> and the Civil Rights movement emphasized the need for a major federal role in preventing states from infringing the rights of their citizens.

The nationalism of the Warren Court constituted the flip side of dual federalism. Dual federalism sought to divide the world between state concerns and federal concerns and to guard the boundary between the two. The incorporation project of the Warren Court moved many significant areas from the state side to the federal side of the boundary. The right to appointed counsel, the right against self-incrimination, and the right to free speech

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<sup>33</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>34</sup> For a recent overview of the litigation surrounding state constitutional rights to education, see Molly S. McUSIC, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1342–47 (2004).

<sup>35</sup> 347 U.S. 483 (1954).

became federal concerns, no longer committed to the states. Although states always retained the ability to grant important rights to their citizens, the actual definition and implementation of important liberties generally fell to the national government.<sup>36</sup>

Professors Lupu and Tuttle revisit this dualist notion of incorporation. As with Professors Engel and Heise, they explore how the states and the federal government can work together to advance important policies, in this case the protection of religious liberty. As with education and environmental protection, Lupu and Tuttle contemplate overlapping state and federal efforts.<sup>37</sup> To illustrate the potential of interactive federalism in this area, Lupu and Tuttle offer a meditation on the possibility of selective disincorporation of the Establishment Clause. Their article explores the doctrine that would result from the federal government's enforcing the core of the religion clauses, while allowing states more leeway to encourage or support religious activities.<sup>38</sup>

In his contribution, Professor Steven Green points out some of the pitfalls of allowing more latitude to the states.<sup>39</sup> Lupu and Tuttle argue that states are likely more religiously homogenous than the nation as a whole.<sup>40</sup> Thus, states might develop more unitary religious policies without the need to attend to the tremendous religious pluralism in the United States. Professor Green, by contrast, cautions that smaller communities, such as states, can be the most oppressive locations for religious minorities, as they feel substantial pressure to conform to the dominant ethos.<sup>41</sup>

Whatever one thinks of the desirability of partial disincorporation of the current Establishment Clause, Lupu and Tuttle's article suggests the importance of interactive federalism for an understanding of rights in the United States. Rights need not be conceived as the exclusive province of the states or of the national government. Rights may be protected by a combination of state and federal law. Here, too, the lessons of interactive federalism prove significant. In Lupu and Tuttle's vision, neither the states nor

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<sup>36</sup> Supreme Court Justice William Brennan provided an early warning that given an increasingly conservative Supreme Court, states might become more important guarantors of individual rights. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

<sup>37</sup> Lupu & Tuttle, *supra* note 31, at 64–65.

<sup>38</sup> *Id.* at 97–100.

<sup>39</sup> Steven K. Green, *Religion Clause Federalism: State Flexibility Over Religious Matters and the "One-Way Ratchet"*, 56 EMORY L.J. 107 (2006).

<sup>40</sup> Lupu & Tuttle, *supra* note 31, at 51–52.

<sup>41</sup> Green, *supra* note 39, at 119.

the national government offer an optimal defense of religious liberty. Only when acting in tandem do the states and the national government reach an appropriate level of protection. Again, plurality, dialogue, and redundancy produce substantial benefits. Different states can adopt distinctive religion policies, and these policies exist within a core of religious liberty established by the Federal Constitution. If the states or the national government fail in their responsibility to protect individual rights, then the other level of government remains ready to assist.

A federalist system thus allows for a more nuanced religion policy than a unitary system. A federalist system can facilitate the appropriate balance in which government neither purposefully advances nor purposefully inhibits a particular theological belief or practice. Developing a religion policy is exclusively committed neither to the national government nor to the states. It is in the interaction of state and federal policies that the flourishing of religious liberty can best be assured.

### *B. Education*

Education represents the most salient challenge to the dual federalist framework and most clearly demonstrates the weakness of the Rehnquist's Court dualist approach to federalism. The United States has a long tradition of local control of education.<sup>42</sup> Yet education has become a national issue of surpassing political importance. The Federal No Child Left Behind Act of 2001 (NCLB),<sup>43</sup> which passed both houses of Congress with broad, bipartisan majorities,<sup>44</sup> instituted widespread federal regulation of local educational policies.

This federal regulation of education runs afoul of traditional notions of dual federalism. To the extent the Rehnquist Court has sought to recapture some measure of dualism, NCLB would seem to run contrary to the themes of the Rehnquist Court.<sup>45</sup> As Professor Heise points out, "If the Rehnquist revolution was taken to its logical conclusion, NCLB would not be possible."<sup>46</sup> However,

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<sup>42</sup> See Heise, *supra* note 30, at 130–32.

<sup>43</sup> Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

<sup>44</sup> The vote on the final bill in the House of Representatives was 381 to 41. See Adam Clymer, *National Briefing: House Passes Education Bill*, N.Y. TIMES, Dec. 14, 2001, at A36. The vote in the Senate was 87 to 10. See Diana Jean Schemo, *Senate Approves a Bill to Expand the Federal Role in Public Education*, N.Y. TIMES, Dec. 19, 2001, at A32.

<sup>45</sup> Heise, *supra* note 30, at 139–40.

<sup>46</sup> *Id.* at 140.

the Rehnquist Court has not taken the federalism revolution to its conclusion. As discussed above, conditional funding remains an effectively unbridled source of federal power.

NCLB is such a funding statute. States that wish to avoid the federal rules can simply refuse the federal money, although the lure of federal dollars has proved too enticing for all states so far. As Heise convincingly argues, NCLB passes the minimal constitutional restrictions on such conditional funding regimes.<sup>47</sup> Indeed, Heise points out that NCLB likely would satisfy even the stricter funding rules advocated by certain scholars.<sup>48</sup> After all, unlike pure regulatory schemes, NCLB is a reimbursement scheme. The federal government reimburses the states for the costs of NCLB.

Heise shows just how powerful the funding scheme can be. Through his careful analysis of NCLB, Heise demonstrates that the legislation achieves policy leverage out of proportion to the funds it provides.<sup>49</sup> Once the states adopt the testing regime funded by NCLB, they experience virtually irresistible pressure to reshape their curricula to match the tests.<sup>50</sup> Federal funding for the assessments thus has the effect of shaping broad aspects of the states' educational programs.

Having identified the strong federal influence and the absence of any judicial response, Heise then turns to what to do. He explores the perspective suggested by interactive federalism: how should policymakers adopt the best overlap of state and federal regulation? Heise is especially concerned with the potential loss of accountability in interactive federalism.<sup>51</sup> As a solution, he proposes that policy control should lie with the government willing to pay the bills.<sup>52</sup> To call the tune, a particular level of government should pay the piper. Importantly, Heise does not focus on any judicial role in enforcing this principle. His argument has a policy focus. He contends that the most responsible regulations will occur when the promulgator bears the financial burden.

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<sup>47</sup> *Id.* at 136–39.

<sup>48</sup> *Id.* at 139 (citing Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1962–78 (1995)).

<sup>49</sup> *Id.* at 141–43.

<sup>50</sup> *Id.* at 150.

<sup>51</sup> *Id.* at 152–54.

<sup>52</sup> *Id.* at 155.

As Heise acknowledges, however, cost accounting can present enormous challenges.<sup>53</sup> Local financing flows largely from property taxes. Property purchases, in turn, often entail mortgages, and mortgage interest expenses are deductible for federal tax purposes. The federal mortgage interest deduction thus helps to subsidize local property values and, accordingly, the local tax base. Indeed, as state and local taxes are deductible for federal purposes, the federal government in effect subsidizes state and local taxes. The intertwining of federal and state tax schemes both illustrates the interdependent nature of state and federal governance and complicates any effort to trace the financial accountability of either.<sup>54</sup>

### C. *Environment*

Professor Engel's article applies the insights of interactive federalism to the field of environmental law. She notes that previous scholars have sought to divide environmental problems between those best regulated by the national government and those best regulated by the states.<sup>55</sup> These scholars generally opposed overlapping federal and state jurisdiction.<sup>56</sup> Most feared that concurrent federal-state regulation would lead to an oversupply of regulation.<sup>57</sup> An important article by Professor William Buzbee pointed out that the overlap might lead to underregulation.<sup>58</sup> Engel, by contrast, emphasizes the potential benefits of overlapping state and federal regulation.<sup>59</sup> Her account highlights the advantages of plurality, dialogue, and redundancy promoted by concurrent state and federal authority.

Scholars relying on an economic perspective often favor devolving regulatory authority to the states. These scholars argue that interjurisdictional competition will fuel an efficiency-enhancing "race to the top."<sup>60</sup> Engel, however, notes that even if one accepts that economic framework, the dynamic interaction of state and federal regulators may produce a better regulatory scheme that can then be adopted by whichever level of government operates

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<sup>53</sup> *Id.* at 155.

<sup>54</sup> *Id.*

<sup>55</sup> Engel, *supra* note 29, at 163–66.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L.

REV. 1, 5 (2003).

<sup>59</sup> Engel, *supra* note 29, at 175–76.

<sup>60</sup> *Id.* at 164.

most efficiently.<sup>61</sup> Engel thus contends that not only the existence of different regulatory schemes, but the process of one system's engaging another can produce significant benefits. Regulatory overlap facilitates regulatory dialogue, and such interchange improves the resulting regulatory product.

Engel argues that regulatory overlap also may enhance other values. Concurrent state and federal regulation provides a fail-safe mechanism should one layer of regulation fail because of, for example, interest group capture.<sup>62</sup> This redundancy enhances democratic control of the regulatory process, as citizens enjoy more points of access. Engel further explains that interjurisdictional competition may impair other values associated with federalism, such as the promotion of social capital and the strengthening of particular communities.<sup>63</sup>

Engel's article richly illustrates the benefits of the overlap that she identifies. She explains that the federal government has taken the lead in addressing some important local issues, such as drinking water and municipal waste dumps.<sup>64</sup> At the same time, states have assumed responsibility for national or even global matters, such as climate change.<sup>65</sup> A dual federalist perspective, tied to "matching" regulator and object of regulation, would not have permitted these opportunities.

Through her discussion of the development of national low emission vehicle standards, Engel provides a practical demonstration of the importance of dialogue among state and federal regulators. She explains how the interaction of state and national authorities led to the promulgation of regulations different from that which either state or national governments might have issued on their own.<sup>66</sup>

This example highlights what is perhaps the most important contribution of Engel's article. She illustrates the pitfalls of a static approach to regulation that ignores the creative potential of regulatory dialogue.<sup>67</sup> Regulatory schemes do not sit on shelves waiting to be picked up by either state or federal regulators. Rather, optimal regulation emerges from a dynamic interaction of

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<sup>61</sup> *Id.* at 170–73.

<sup>62</sup> *Id.* at 178–81.

<sup>63</sup> *Id.* at 176–77.

<sup>64</sup> *Id.* at 167.

<sup>65</sup> *Id.* at 168–69.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 181.

regulators and regulatory problems. The very fact of regulatory overlap, and the concomitant interaction of state and federal authorities, can act as a powerful engine for improved regulations.<sup>68</sup> Dialogue facilitates innovation.

What is the role of the courts in this account of interactive federalism? The answer seems to be to get out of the way. Courts act as the enemy of dynamic federalism when they prevent the political process from working out the proper mix of federal and state regulation. Preemption and allied doctrines, such as the dormant Commerce Clause, allow courts to flatten the creative complexity of state-federal overlap.<sup>69</sup> Engel finds little need for uniformity or finality in environmental regulation. Accordingly, Engel urges courts to interpret these preemption doctrines narrowly.<sup>70</sup> From this interactive perspective, courts are the problem, not the solution.

## CONCLUSION

This Symposium demonstrates the richness and complexity of approaching federalism from the interactive perspective. The national government and the states exercise overlapping authority in numerous realms, and interactive federalism provides a framework for understanding the messy and creative policies produced by this concurrence. The contributions to this Symposium show that a dualist approach, which seeks to divide activities between state and federal, cannot supply a credible account of the actual operation of government. The model underlying the dualist approach has not existed in the United States for decades, nor does it show any signs of return.

The articles in this Symposium move beyond these descriptive insights and develop important normative contributions to the study of interactive federalism. Once one recognizes the reality of interactive federalism, the question becomes how can the overlap of state and federal power best be managed. How can this creative interaction produce the best possible policies, benefiting from plurality, dialogue, and redundancy, while avoiding the attendant risks of undermining uniformity, finality, and accountability? These articles all significantly advance this larger project. They explore how to maximize the potential benefits of overlap, while minimizing the potential risks. While deeply grounded in their own fields, the scholars who participated

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<sup>68</sup> *Id.* at 182.

<sup>69</sup> *Id.* at 184–87.

<sup>70</sup> *Id.*

in this Symposium also develop insights of broad application. The articles cast much light on interactive federalism and provide models for the kind of vital research necessary to guide the important political choices that arise in the complex, interactive, federalist system in which we live.