

## JUDICIAL ENFORCEMENT OF FEDERALIST-BASED CONSTITUTIONAL LIMITATIONS: SOME SKEPTICAL COMPARATIVE OBSERVATIONS

*Mark Tushnet\**

Suppose someone claims that a congressional statute violates the Constitution. Most of the time most of us think that most of what is in our Constitution is supposed to be enforced by the courts. Most of us recognize some narrow exceptions clustered under the doctrinal heading *political questions*.<sup>1</sup> Those exceptions, though, deal with constitutional provisions that typically are at the periphery of constitutional concern. And, notably, they involve constitutional *provisions*—that is, specific words written into the Constitution. The political questions doctrine does not seem well-suited, at least as a doctrine, to deal with constitutional challenges predicated on claims that one of the Constitution's *structural arrangements*, such as the separation of powers or (of course) federalism, has been disrupted by congressional legislation.<sup>2</sup> Those arrangements are embodied in, well, structures, rather than specific words, and constitutional analysis that focuses on words is likely to seem ham-handed.<sup>3</sup>

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\* William Nelson Cromwell Professor of Law, Harvard Law School.

<sup>1</sup> For a relatively recent, albeit ambiguous, example, see *Nixon v. United States*, 506 U.S. 224 (1993) (holding that the determination of what constitutes a “trial” within the meaning of the impeachment provisions is a political question). As it turns out, nearly all—perhaps all—of the recent invocations of the political questions doctrine are similarly ambiguous. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979) (holding nonjusticiable a challenge to the abrogation of a treaty in the absence of Senate approval).

<sup>2</sup> One signal of doctrinal inaptness is the Supreme Court's willingness to gloss over the problem of identifying the precise text that a challenged statute is said to violate. Is it the provision in Article I that Congress purported to use as a predicate for its action? See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (holding unconstitutional a statute on the ground that it was not within Congress's enumerated power to regulate commerce among the several states). Or is it the Tenth Amendment? See, e.g., *New York v. United States*, 505 U.S. 144, 156 (1992) (“The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”). Or is it some general structural presupposition not embodied in specific constitutional text? See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (holding that a federal statute violated notions of state sovereign immunity underlying the Constitution, though not expressed in any particular provision).

<sup>3</sup> The best example, I think, is *INS v. Chadha*, 462 U.S. 919 (1983), which invalidated legislative vetoes in an opinion that paid far too much attention than it should have to specific constitutional provisions, such as

Yet, nervousness—in my view, justified—persists over judicial enforcement of federalist-based limitations on national power in the service of guaranteeing that American federalism remains viable. Understanding that nervousness can be difficult at first, as it does not connect directly with standard doctrinal categories. In this Essay, I enumerate some of the grounds for the nervousness. The literature is vast, and I do not purport to add much, if anything, to it. Instead, this Essay seeks to bring arguments that are sometimes overlooked to the attention of a new set of readers. The concerns fall into three categories: (1) federalism as such has no determinate normative content; (2) the structure of the U.S. Constitution as a document provides little guidance in resolving contests over federalism’s “true” meaning; and, the most familiar: (3) courts can add little to the protection of federalism, however understood, that existing political mechanisms do not already provide.<sup>4</sup>

### I. FEDERALISM AS SUCH HAS NO DEEP NORMATIVE CONTENT

It is easy enough to enumerate the policy advantages of organizing a large nation through federal forms: protecting against tyranny, encouraging social experimentation, maximizing citizen preferences in a diverse society, maximizing opportunities for democratic self-government, and perhaps a few more.<sup>5</sup> The real difficulty lies in explaining why one federal system is better than another—particularly, another that differs from the first in only the marginal ways that occur when the national legislature enacts a handful of questioned statutes—in advancing those policies. Federalism differs from constitutional protections such as free speech, religious liberty, or equality because we can have reasoned discussions over the normative content of the latter concepts, whereas we are largely at sea when we try to discuss federalism in normative terms.<sup>6</sup>

Consider here one argument that Justice Harry Blackmun offered in opposition to an aggressive role for the judiciary in supervising claims that

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the Presentation Clause, U.S. CONST., art. I, § 7, cl. 2, that shed no light at all on the underlying questions of constitutional structure.

<sup>4</sup> Such mechanisms already ensure that states’ interests, including substantive interests that happen to be geographically concentrated in particular states, are sufficiently addressed prior to a proposal becoming law.

<sup>5</sup> For a brief explanation of each of these advantages, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 165–69 (5th ed. 2005).

<sup>6</sup> I do not mean to suggest that we can *agree* on the normative content of the substantive concepts that I have identified more readily than we can agree on the normative content of federalism, but rather that we know better the terms we should use in discussing the substantive concepts.

congressional legislation violates federalism.<sup>7</sup> In *Garcia v. San Antonio Metropolitan Transit Authority*, Justice Blackmun wrote:

The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. The federal role in assisting state and local governments is a longstanding one; Congress provided federal land grants to finance state governments from the beginning of the Republic, and direct cash grants were awarded as early as 1887 under the Hatch Act. In the past quarter century alone, federal grants to States and localities have grown from \$7 billion to \$96 billion. As a result, federal grants now account for about one-fifth of state and local government expenditures. The States have obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation. Moreover, at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause. For example, the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act all contain express or implied exemptions for States and their subdivisions.<sup>8</sup>

One might fairly ask, "How can he know?" That is, without some normative theory of federalism, how can we know that the states have been doing well? It is not obvious that flows of money from the federal government to the states are a good measure; perhaps the states are being bribed to forgo assertions of authority that are more important according to a decent normative theory of federalism. Nor are exemptions from legislation necessarily a good measure: perhaps, again, the exemptions are the price the states are able to extract for their acquiescence in normatively undesirable allocations of authority in other statutes.

Or consider another assertion common in the Supreme Court's federalism decisions. The Justices routinely provide a list of areas in which national legislation is particularly questionable: family law, land use law, elementary

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<sup>7</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>8</sup> *Id.* at 552–53.

and secondary education, and ordinary crime.<sup>9</sup> Put aside the obvious point that national legislation has an enormous, and largely unquestioned, impact in all those areas.<sup>10</sup> More important for my purposes is that other well-functioning federal systems allocate power quite differently. For example, the national government could develop the substantive rules on family formation, leaving administration to the states or provinces.<sup>11</sup> Or, in another domain, it might prescribe important components of the elementary and secondary curriculum, for example, in the service of creating a national identity in a society that is diverse along dimensions other than those marked by state or provincial boundaries.

Consider finally the best general statement of federalism's normative basis, the principle of subsidiarity, according to which governmental activities should be conducted on the lowest level at which they can effectively be carried out.<sup>12</sup> Here too difficulty arises when the rubber hits the road, that is, when we try to specify which activities are best conducted at which level. Consider the example of determining the optimal method of establishing education policy in a diverse society. Perhaps education policy should be determined at quite local levels, to ensure that minority groups get some "buy in" to the nation's larger

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<sup>9</sup> See, for example, *United States v. Lopez*:

The Government admits, under its "costs of crime" reasoning, that 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 (including marriage, divorce, and child custody), 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.

514 U.S. 549, 564 (1995).

<sup>10</sup> See, e.g., Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (discussing federal regulation of family arrangements); No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in 20 U.S.C.) (governing education); Clean Air Act, 42 U.S.C. §§ 7401-7671 (2006) (regulating land use and pollutant discharges); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2006) (protecting certain animal habitats); Hobbs Act, 18 U.S.C. § 1951 (2006) (federalizing legal consequences of most convenience store robberies).

<sup>11</sup> See Constitution Act, 1867, 30 & 31 Vict. Ch. 3 § 91(26) (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985) [hereinafter *Canadian Constitution*] ("[T]he exclusive Legislative Authority of the Parliament of Canada extends to . . . Marriage and Divorce.").

<sup>12</sup> The Treaty Establishing a Constitution for Europe offers this definition of the principle of subsidiarity: "[T]he Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." Treaty Establishing a Constitution for Europe, Oct. 26, 2004, art.11 § 3, 2004 O.J. (C 310) 14. Notably, the Treaty has not been implemented.

policies; or perhaps policy should be determined at the national level, to ensure that an appropriate accommodation of diversity with national identity is developed.

This example, and others that could be readily developed, show what Vicki Jackson has already established.<sup>13</sup> Federal systems consist of deals struck in light of the perceived circumstances of the nation when its federalism is created. But federal systems are also democratic systems, and ordinary democratic legislation consists of deals struck in light of perceived contemporary circumstances. At least when a national statute does no more than tinker around the edges of a nation's federalism—a description of nearly every statute in well-functioning democratic systems in which policy develops incrementally—it is hard to see why courts have any advantage over legislatures in discerning what deal will best advance the values of federalism in the circumstances presently at hand, or indeed whether the deal now being struck is actually inconsistent with the deal struck at the founding. And, of course, the fact that we have to refer to “deals” indicates that there is no deep normative issue at stake.

## II. THE “TRUE” MEANING OF FEDERALISM IS NOT OBVIOUS

Constitutional language establishing a federal system is typically opaque, or at least difficult to interpret. In U.S. constitutional adjudication, metaphors abound because text is so unhelpful. From Justice Sandra Day O'Connor: “Some truths are so basic that, like the air around us, they are easily overlooked.”<sup>14</sup> From Justice Anthony Kennedy: “The Framers split the atom of sovereignty.”<sup>15</sup> That there are to be states with some substantial governing responsibilities is unquestionable. Determining that a particular national statute deprives the states of their proper role in our federal system is far more difficult.

Constitution drafters, including those in the United States, establish a federal system through two general techniques. The first technique has two variants. First, drafters allocate some powers to the national government. Then, they allocate, either explicitly in one variant or implicitly in the other,

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<sup>13</sup> See generally Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001) (describing how federalism results from compromises and considering the merits of a comparative approach to resolving federalism disputes).

<sup>14</sup> *New York v. United States*, 505 U.S. 144, 187 (1992).

<sup>15</sup> *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

other powers to the subnational governments. The second technique is the residuary clause, which specifies that all powers not otherwise mentioned are allocated to either the national government (the “pro-national” residuary clause) or the subnational governments (the “pro-states” residuary clause).<sup>16</sup>

Consider the first technique and its variants. The United States pursues the strategy of implicit allocation, Canada that of explicit allocation. Implicit allocations are particularly unpromising as the foundation for judicial enforcement of federalism limits on national power. We can see this by examining what happens when there is an *explicit* allocation between the national and subnational governments. Consider a national statute challenged on federalism grounds in a nation with an explicit allocation. Lawyers have two lists of powers to work with: one specifying the powers of the national government, the other those of the subnational governments. A challenger can thus make the following two-fold argument: “This statute does not fall within the list of powers granted to the national government, but it is easily understood to be within the following specific power listed as one held by the subnational governments.” In contrast, where—as in the United States—there is a single list of enumerated powers, the challenger must argue that the statute at issue cannot plausibly be characterized as falling within the list of enumerated powers. Making that argument is more difficult in the absence of another list within which the statute can be seen to fall.<sup>17</sup> In the United States, the challenger must argue, “This statute is not plausibly characterizable as an exercise of national power *A*,” whereas in Canada, the challenger can say, “This statute is not an exercise of the national power *A*, but is rather an exercise of the provincial power *B*.” Rhetorically, the latter is an easier argument to develop.

Residuary clauses can inform the interpretation of the specific allocations, but they provide no sure guide for judicial interpretation. Here, the contrast between the judicial interpretation of the U.S. and Canadian residuary clauses is instructive. In the United States, the Tenth Amendment is the residuary clause, providing that “[t]he powers not delegated to the United States by the

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<sup>16</sup> See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people.”).

<sup>17</sup> “More difficult,” but not “impossible.” My experience in teaching *United States v. Lopez* is that the Court’s argument that regulation of the possession of guns near schools is not plausibly described as a regulation of interstate commerce has much more purchase with students than does Justice Stephen Breyer’s argument in dissent attempting to explain the connection between gun possession near schools and commerce among the several states. Compare 514 U.S. 549 (majority opinion) with *id.* at 615 (Breyer, J., dissenting).

Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people.”<sup>18</sup> This seems to allocate unenumerated powers to the states but, as all students of the U.S. Constitution know, the Supreme Court has correctly observed that the Tenth Amendment “states but a truism.”<sup>19</sup> All that it says is that *if* a power has not been given to the national government, it remains with the states. But, it provides no guidance on the fundamental question: Has the power to enact this particular statute been given to the national government? The seemingly broad Tenth Amendment has been construed narrowly, according to its terms, and does not in itself substantially limit national power. In contrast, the Canadian residuary clause allocates the power to protect “peace, order, and good government” to the national government.<sup>20</sup> On its face this seems to be a broad provision. Yet, until recently, the clause has been interpreted narrowly: to preserve a substantial legislative role for the provinces. The most recent cases give the clause a somewhat more expansive interpretation, though not, in my view, as expansive as the terms themselves suggest.<sup>21</sup> Regardless, it seems that constitutional language cannot account for the different approaches the courts in the two countries have taken toward the scope of national power. Or, put another way, constitutional language—which is what courts work with—has little purchase in the area of federalism.

### III. EXISTING POLITICAL FEDERALISM PROTECTIONS

Constitutions are enforced not only judicially, but politically as well. Sometimes we simply rely on the sincere commitments legislators have to constitutional values, but generally we are skeptical that such commitments alone will overcome the electoral incentives legislators may have to vote for constitutionally questionable legislation. Some constitutional arrangements, such as federalism, may be too abstract to motivate voters, at least when they are faced with a choice between federalism and some specific and seemingly attractive policy proposal. At the least, a legislator may calculate that she will

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<sup>18</sup> U.S. CONST. amend. X.

<sup>19</sup> *United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>20</sup> *Canadian Constitution*, *supra* note 11, § 91.

<sup>21</sup> For a comparative discussion, see GERALD BAIER, *COURTS AND FEDERALISM: JUDICIAL DOCTRINE IN THE UNITED STATES, AUSTRALIA, AND CANADA* (2006). In particular, see *id.* at 124–42 for a discussion of modern cases interpreting the “peace, order, and good government” clause. As I understand it, Canadian constitutional scholars, reacting to the change in tone in the modern cases, regard them as somewhat more transformative than I, as an outsider, do.

not lose many votes by supporting the legislation, and might lose votes by opposing it.

Good constitutional design therefore does not rely on sincere support for constitutional values as the sole mechanism to push legislators toward enforcing constitutional limitations. Rather, it tries to give legislators incentives to comply with those limitations. With respect to federalism, constitutional designers ordinarily assume that occupants of positions in the national government will try to enhance the power of the national government, thereby giving each legislator a share of the enhanced national power.<sup>22</sup> They seek to offset this inclination by building government structures that give legislators incentives to respond not simply to the policy preferences of their constituents, but also to federalism itself. For example, the German *Länder*, pursuant to domestic constitutional law, are directly represented in both the upper house of the German legislature and the institutions of the European Union.<sup>23</sup> The U.S. Constitution, as originally adopted, gave state legislatures the power to select Senators.<sup>24</sup>

Structural incentives to attend to federalism interests can be informal as well as formal. Political parties in the United States are organized in the first instance on the state level, with the national parties historically having had relatively little influence over the selection of candidates for national office.<sup>25</sup> Presidential candidates run their own campaigns and, when successful within party primaries, take over the national party's political machinery. Candidates for the Senate and the House of Representatives have been historically "self-nominated," with some candidates seeking subsequent endorsement by national political organizations (although efforts by the national parties to recruit good candidates have become more frequent over the past few decades). Service at the local level is a typical, though no longer nearly

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<sup>22</sup> For a skeptical view of this assumption, see Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005). On the specifics of expanding the scope of national authority, see *id.* at 935 (noting the complexities of expanding jurisdiction).

<sup>23</sup> See GRUNDGESETZ [GG] [Constitution] art. 51(1) (F.R.G.) ("The Bundesrat shall consist of members of the Land governments, which appoint and recall them."); *id.* art. 23(6) ("When legislative powers exclusive to the Länder are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated to a representative of the Länder designated by the Bundesrat.").

<sup>24</sup> U.S. CONST. art. II, § 3, cl. 1, *repealed by* U.S. CONST. amend. XVII.

<sup>25</sup> Political observers suggest that the national political parties, by providing substantial financial resources to state parties, are coming to have increasing influence on the state level, leading to some degree of nationalization even of state-level politics. Even so, the "national" political parties in the United States remain far less centralized than those in other modern democracies.

universal, stepping stone for someone ambitious for national office (that is, as a Senator or member of the House of Representatives), and experience suggests that the recollection of past service at the subnational level provides some internal constraints on what national legislators do.<sup>26</sup> Similarly, there appear to be structural reasons for the selection of former governors as President, and, again, their experience at the state level may affect the way in which they assess the policy wisdom of national legislation.<sup>27</sup>

The structural incentives that national legislators have to respect constitutional federalism exist, but I doubt that anyone would contend that they are tremendously strong, at least in individual cases. Most observers, I believe, think that these incentives are frequently overridden by policy-based incentives to deliver the goods to constituents. Still, it may be worth noting that, in a complex institution in which votes have to be aggregated and in which there are a number of “veto gates” through which policy proposals must pass before they become law, the overall effect of weak incentives distributed erratically across the entire body may be significant. In addition, nationally organized political parties may take as one of their platform positions respect for constitutional federalism. To the extent that they do, and to the extent that national legislators advance the platform of their parties, legislators may take federalism into account for partisan, not constitutional, reasons.

My conclusion is modest but, I think, important. Hopes for and fears of judicial intervention are readily overblown. Judicial review of federalism-based challenges to national legislation can sometimes make a small contribution to protecting a viable federalism (however that concept is understood). Typically, though, judicial intervention will be random: sometimes advancing a viable federalism, sometimes undermining it. Federalism “revolutions” may occur in Congress, which may assert its power in new areas or recede from exercising power in areas previously occupied. But the courts will never conduct a “federalism revolution.”<sup>28</sup> Their

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<sup>26</sup> In addition, there are enough examples of movement from national-level office to state office, particularly governorships (current examples are Jon Corzine in New Jersey and Frank Murkowski in Alaska), that national-level legislators may have *political* incentives to attend to federalism concerns.

<sup>27</sup> Sitting or recently sitting Governors who became President since the New Deal are Franklin D. Roosevelt, Jimmy Carter, Ronald Reagan, Bill Clinton, and George W. Bush. Aside from John F. Kennedy, no person serving as a Senator or member of the House of Representatives at the time of election to the presidency has been elected President during that period.

<sup>28</sup> The so-called “federalism revolution” of the 1990s was on its own terms quite modest, and even that revolution appears to have been limited by *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding federal drug

interventions will have no systematic effects on the operation of our federal system. The courts will not make the federal system work “better”—and, fortunately, they will not make it work any “worse.”

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legislation as applied to non-commercial uses by individuals because the application was a reasonable component of a comprehensive system of drug regulation).