What Federalism & Why? Science Versus Doctrine

Stephen E. Gottlieb

Follow this and additional works at: http://digitalcommons.pepperdine.edu/plr
Part of the Constitutional Law Commons, Courts Commons, and the Jurisdiction Commons

Recommended Citation
Available at: http://digitalcommons.pepperdine.edu/plr/vol35/iss1/2

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.
What Federalism & Why?
Science Versus Doctrine

Stephen E. Gottlieb*

I. INTRODUCTION

The Constitution does not use the words federal or federalism. It gives Congress a set of powers and prohibits the national government, the states, or both from doing some things.1 The Court has inferred principles of federalism from those provisions.2

The political science community has treated the advantages of federalism as contingent on whether federalism deepens or diffuses conflict or opens competition for power.3 The United States Supreme Court’s

---

* Professor, Albany Law School; B.A. Princeton University; LL.B. Yale Law School. Earlier drafts of this essay were presented at annual meetings of the Midwest Political Science Association and the New England Political Science Association. The author wishes to express his appreciation to the participants at those sessions, and to his research assistant, Sarah Merritt.


2. See, e.g., United States v. Lopez, 514 U.S. 549, 579 (1995) ("[T]here is widespread acceptance of our authority to enforce the dormant Commerce Clause, which we have but inferred from the constitutional structure as a limitation on the power of the States."); see also infra note 65 and accompanying text.

approach does neither; it has been trying to clarify and police a very
different boundary. Even on its own terms, however, the Court’s
justifications do not work—a problem made clearer by reference to the
empirically based work of political science. The result is that the Court’s
focus misses entirely the kinds of questions which might affect the security
of the union or the quality of American democracy.

The first section of this essay will describe the Court’s efforts to create a
categorical federalism and its explanations for its approach. The second
section is included to make clear that there are alternative approaches to
federalism, in the absence of which further analysis would be pointless. The
third section of this essay outlines major lines of inquiry by political
scientists and their conclusions. Finally, this essay compares the Court’s
definitional federalism and its explanations for its approach with the
concerns of political scientists. This essay concludes that the Supreme
Court’s categorical federalism is at best irrelevant and at worst a barrier to
contemporary conflict resolution.

II. THE REHNQUIST COURT

The Rehnquist Court tried to make some clear distinctions about
congressional power. Congress can regulate economic transactions that
affect interstate commerce.4 But it cannot regulate social issues like
violence against women or children that may affect interstate
commerce.5 To allow those kinds of regulation, the Court feared, would erase the line
between state and national power.6

The Rehnquist Court offered textual, historical, and instrumental
justifications. Textually, Chief Justice Rehnquist argued in United States v.
Lopez that the enumeration of powers and the establishment of a federal
system required enforcement of a line between congressional and state
power.7 Historically, the Court argued that interstate conflicts were the
source of the commerce power and implied a limitation on it.8 The Court
also revived the pre-Civil War argument about the sovereignty of the
individual states and therefore the limited grant of power to the national
governments by the states in joining the new union.9

5. Id.; see also Lopez, 514 U.S. 549.
7. Id. at 552 (discussing the “constitutionally mandated division of authority”).
8. Id. at 555 (“Activities that affected interstate commerce directly were within Congress’
    power . . . .”).
    (1890)); Lopez, 514 U.S. at 552-53, 564 (offering a textual explanation of the limitation of
    congressional powers and referring to areas “where States historically have been sovereign”); see
Justices Kennedy and O'Connor have been most vigorous in asserting institutional justifications for the federalism jurisprudence of the Rehnquist Court. Though frustrating decisions of elected branches of government, they asserted that federalism was necessary in aid of democracy. Justice O'Connor laid out the analysis in *New York v. United States*, involving federal directives to states:

[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.\(^\text{10}\)

Justices Kennedy and O'Connor feared that if Congress directs states to do something, citizens will not know whom to credit or blame for the results. In *Lopez*, Justice Kennedy, concurring in a 5-4 decision, applied the idea to a case involving overlapping jurisdiction: "[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function."\(^\text{11}\) Later, Justice Kennedy expanded the discussion:

[F]reedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the


conduct of their office. If state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred, with the legislators having the excuse of saying that they did not act in the exercise of their best judgment but simply in conformance with a state mandate.  

And in *Alden v. Maine*, he added: "When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."  

The Court's "centrist" block stressed that state sovereignty protected liberty and self-government, and that clearly demarcated responsibility would aid voters' ability to credit or blame government for official acts. As Justice Kennedy explained:

[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "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. 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."  

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, and hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it."  

Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens

---

15. *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (citing *The Federalist* No. 51 (James Madison)).
16. *Id.* at 577 (citing FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992)).
is more dangerous even than devolving too much authority to the remote central power.\(^\text{17}\)

Local control could mean greater personal control over democracy: “Our Nation’s Founders . . . wrote a Constitution . . . which . . . assumed [] democratic citizen participation in government at all levels, including levels that facilitated citizen participation closer to a citizen’s home.”\(^\text{18}\)

The conservatives\(^\text{19}\) add that the Court is needed to secure the benefits of federalism. This claim was rejected in *Garcia v. San Antonio Metropolitan Transit Authority*.\(^\text{20}\) But the Rehnquist Court did not follow *Garcia* in this respect. In *Lopez*, Justice Kennedy considered and rejected the possibility that the balance between state and federal powers should be treated as a political question:

Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers . . . . Our role in preserving the federal balance seems more tenuous.\(^\text{21}\)

Justice Kennedy understood that one could read the constitutional design differently: “To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process.”\(^\text{22}\) But he concluded that the Court played an essential role:

[T]he absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is

\(^{17}\) Id. at 576-77 (citations omitted); *see also Alden*, 527 U.S. at 713-14 (Kennedy, J.) (offering a historical justification).


\(^{19}\) The justices considered “conservative” on the Rehnquist Court included Chief Justice Rehnquist and Justices Scalia and Thomas, generally joined by the more moderate conservative Justices O’Connor and Kennedy.


\(^{21}\) *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring) (citations omitted).

\(^{22}\) Id. at 577.
the obligation of all officers of the Government to respect the
constitutional design, the federal balance is too essential a part of
our constitutional structure and plays too vital a role in securing
freedom for us to admit inability to intervene when one or the other
level of Government has tipped the scales too far.\textsuperscript{23}

Based on this trio of justifications, from text, history, and consequences
for liberty and democracy, the Rehnquist Court inferred a view of federalism
in which congressional power is contained. The consequences of this
containment of powers affect central congressional activities of the past half
century, including the protection of civil rights and the environment.\textsuperscript{24}

\begin{center}
\textbf{CHARTS OF ROBERTS COURTS FEDERALISM CASES}
\end{center}

\begin{tabular}{|l|}
\hline
\textbf{KEY:} \\
\hline
US = opinion in favor of the party asserting the application of federal law \\
State = opinion in favor of the party asserting the application of state law \\
1st Am. = opinion in favor of applying the First Amendment to the state action at issue \\
X = opinion denying the relevance of state interest \\
? = opinion raised a federalism issue without resolving it \\
A = did not address the issue \\
— = did not participate \\
\textbf{Nexus} refers to Kennedy's attempt to define a middle ground in the Rapanos decision \\
\hline
\end{tabular}

\textsuperscript{23} \textit{Id.} at 578 (Kennedy, J., concurring) (citation omitted).

\textsuperscript{24} On civil rights, see \textit{Board of Trustees of the University of Alabama v. Garrett}, 531 U.S. 356
(2001) (holding that Congress could not abrogate sovereign immunity for violations of the
Americans with Disabilities Act by state employers); \textit{Alexander v. Sandoval}, 532 U.S. 275 (2001)
finding no private right of action to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. \S
2000d, and no agency power to interpret the Act to cover disparate impact discrimination); \textit{United
applied to private violence); and \textit{Kimel v. Florida Board of Regents}, 528 U.S. 62 (2000) (holding
that the Age Discrimination in Employment Act could not be applied to state employees). However,
for contrasting civil rights decisions, see \textit{Buckeye Check Cashing, Inc. v. Cardegna}, 546 U.S. 440
(2006) (ruling on the basis of the Federal Arbitration Act of 1925 that questions of state law relating
to the validity of a contract containing an arbitration agreement must be submitted to the arbitrator); \textit{Gonzales v. Raich}, 545 U.S. 1 (2005) (holding that federal regulation of narcotics applied to entirely
local transactions); \textit{Tennessee v. Lane}, 541 U.S. 509 (2004) (upholding application of the Americans
with Disabilities Act to access to state courts); \textit{Nevada Dept. of Human Res. v. Hibbs}, 538 U.S. 721
(2003) (upholding the application of the Family Medical Leave Act of 1993 to the states). On the
environment, see \textit{Rapanos v. United States}, 126 S. Ct. 2208 (2006) (limiting the coverage of the
statutory term "the waters of the United States" to "relatively permanent, standing or continuously
flowing bodies of water"); and \textit{Solid Waste Agency of North Cook County v. U.S. Army Corps of
Engineers}, 531 U.S. 159 (2001) (reading "navigable waters" to exclude the protection of migratory
birds with respect to isolated wetlands regardless of effects on interstate commerce).
### TABLE 1

**CONSTITUTIONAL QUESTIONS**

<table>
<thead>
<tr>
<th></th>
<th>O'Connor</th>
<th>Roberts</th>
<th>Scalia</th>
<th>Kennedy</th>
<th>Thomas</th>
<th>Alito</th>
<th>Stevens</th>
<th>Souter</th>
<th>Ginsburg</th>
<th>Breyer</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Constitution as a Limit on States</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Garcetti v. Ceballos</em>, 126 S. Ct. 1951 (2006) (First Amendment did not protect government employee speech within official duties)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>– Opinion: Kennedy</td>
<td>I</td>
<td>State</td>
<td>State</td>
<td>State</td>
<td>State</td>
<td>State</td>
<td>State</td>
<td>1st Am</td>
<td>1st Am</td>
<td>1st Am</td>
</tr>
<tr>
<td><strong>Constitution as a Limit on United States</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>United States v. Georgia</em>, 546 U.S. 151 (2006) (holding abrogation of sovereign immunity for violation of 14th Amend. §1 re cruel and unusual punishment in prison valid)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>– Opinion: Kennedy</td>
<td>I</td>
<td>A</td>
<td>?</td>
<td>A</td>
<td>?</td>
<td>A</td>
<td>A</td>
<td>A</td>
<td>A</td>
<td>A</td>
</tr>
</tbody>
</table>
# Table 2

## Statutory Questions

<table>
<thead>
<tr>
<th>State Statute at Issue</th>
<th>O'Connor</th>
<th>Roberts</th>
<th>Scalia</th>
<th>Kennedy</th>
<th>Thomas</th>
<th>Alito</th>
<th>Stevens</th>
<th>Souter</th>
<th>Ginsburg</th>
<th>Breyer</th>
</tr>
</thead>
</table>

54
### TABLE 3

**OTHER QUESTIONS**

<table>
<thead>
<tr>
<th></th>
<th>O'Connor</th>
<th>Roberts</th>
<th>Scalia</th>
<th>Kennedy</th>
<th>Thomas</th>
<th>Alito</th>
<th>Stevens</th>
<th>Souter</th>
<th>Ginsburg</th>
<th>Breyer</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Federal Judicial Power</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Other State Interests</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>United Haulers Assoc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.</em>, 127 S. Ct. 1786 (2007) (sustaining ordinances requiring waste delivery to county solid waste facilities) – Opinion: Roberts</td>
<td>1</td>
<td>State</td>
<td>State</td>
<td>X</td>
<td>State</td>
<td>X</td>
<td>State</td>
<td>State</td>
<td>State</td>
<td>State</td>
</tr>
</tbody>
</table>

---

55
<table>
<thead>
<tr>
<th></th>
<th>O'Connor</th>
<th>Roberts</th>
<th>Scalia</th>
<th>Kennedy</th>
<th>Thomas</th>
<th>Alito</th>
<th>Stevens</th>
<th>Souter</th>
<th>Ginsburg</th>
<th>Breyer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subtotal:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constitutional Cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statutory Cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other State Interests</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[Note: Roberts Court totals do not include Gonzales v. Raich, above, a Rehnquist Court decision]
III. THE ROBERTS COURT

Federalism promises to continue to be a battleground on the Roberts Court. Justice Thomas may have held out a red flag in the partial birth abortion controversy by calling attention to the question of whether Congress had the power under the Commerce Clause to restrict that procedure even though it passed muster with Justice Thomas and the Court under the Due Process Clause.

Where the justices have discussed federalism, their rationales and their implications are less clear on the Roberts than on the Rehnquist Court. Justices O'Connor and Kennedy had developed instrumental rationales that defined many of the cases in the Rehnquist years. With Chief Justice Rehnquist and Justice O'Connor's departure from the Court, less has been said about the reasons for or consequences of federalism. Instead the conservative justices have focused on text, intent, doctrine, and a relatively generalized concern about Congress trenching too far into local control. Thus one has to discern what the justices care about largely from their decisions, rather than from expressed principles. A partial exception is

---

25. Due to the time constraints of publication, research for this article covers the Roberts Court during the entire 2005 term through cases decided on or before June 4, 2007. There are three cases in which federalism was mentioned in the 2006 term that were decided after this article was prepared. In Panetti v. Quarterman, 127 S. Ct. 2842, 2854-55 (2007), the Court raised federalism as a reason not to push petitioners to raise the competence of counsel at an earlier point in the proceedings; in Hein v. Freedom from Religion Foundation, Inc., 127 S. Ct. 2553, 2573 (2007), the Court mentioned federalism in passing in denying taxpayer standing to object to the activities of federal officials who worked with local organizations; and in Fry v. Pliler, 127 S. Ct. 2321, 2325 (2007), the Court mentioned federalism as a reason for the applicable standard of review on a petition for habeas relief from a conviction in state court. Other issues affecting state power were raised in National Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) (approving transfer of "permitting authority" from EPA to state officials); and Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007) (holding that states could not take race into account in pupils' school assignments). Because of time constraints none of these cases could be considered for this article.

27. See supra notes 10-13 and accompanying text.
28. Rapanos, 126 S. Ct. at 2224 (construing "waters of the United States").
30. Discussion of doctrine is of course ubiquitous in judicial decisions. See, e.g., Rapanos, 126 S. Ct. at 2224 (discussing the impact of Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)).
31. Id. at 2224 (expressing concern over federal regulation of "immense stretches of intrastate land," and "impingement of the States' traditional and primary power over land and water use," and describing land use planning as "a quintessential state and local power").
the categorical treatment of the dormant Commerce Clause by Justices Scalia and Thomas, expressed as a consequence of text and original intent.32

The liberal justices33 have been more cohesive and the conservative justices less so on federalism issues.34 Perhaps that is unavoidable since the liberals don't see the significant limits to federal power that the conservatives do. The latter, therefore, have to balance and choose, despite Justice Scalia's often expressed distaste for balance and his efforts to carve out areas where he finds it unnecessary.35

A striking fact about the Roberts Court is that most of its decisions have been nationalist in direction.36 Even the conservative justices on the Roberts Court have supported a good deal of federal power.37 Only with respect to regulation of wetlands and state sovereign immunity in federal bankruptcy court have a majority of the conservative members of the Roberts Court opposed federal power.38

Federalism is generally understood as a set of constitutional doctrines. The Rehnquist Court has generally discussed federalism in the context of the constitutionality of the exercise of federal power.39 But those cases give us only a partial picture of what the justices' views about national and state power are. Many of the statutory cases are close cases in which there are strong reasons to support either state or national power.

Plainly, if Congress has authority to act, it has the authority to exclude the states.40 As Justice Scalia has pointed out in the context of the Negative Commerce Clause, Congress can exclude or allow state action, regardless of whether the Court interferes.41 That is also true in the context of the interpretation of ambiguous federal statutes.42 So it is hardly clear that the

33. The Supreme Court justices constituting the “liberal” block of the Court include Justices Stevens, Souter, Ginsburg, and Breyer, although “less conservative” might be a more accurate label.
34. See Chart of Roberts Court Federalism Cases, supra.
35. See United Haulers, 127 S. Ct. at 1798 (Scalia, J., concurring). Justice Scalia has described balancing as “like judging whether a particular line is longer than a particular rock is heavy.” Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).
36. See Chart of Roberts Court Federalism Cases, supra.
37. See Chart of Roberts Court Federalism Cases, supra.
38. See infra note 45 and Chart of Roberts Court Federalism Cases on conflicting federal and state statutes, supra.
40. U.S. CONST. art. VI, cl. 2.
42. See Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (holding that where a federal statute is ambiguous, the Court “will not attribute to Congress an intent to intrude on state governmental functions”).

58
Court should just get a pass as if there are no federalism concerns when it decides whether statutes allow concurrent regulation.\textsuperscript{43}

The Roberts Court and a majority of its conservative members excluded concurrent regulation in two of the three cases that raised it, although the wings of the Court flipped on which two.\textsuperscript{44} The Court’s conservatives united in opposition to federal power only when doing so did not require sustaining state regulatory power.\textsuperscript{45}

A second striking fact about the Roberts Court is the conservative hostility to regulation, regardless of which level of government is the regulator.\textsuperscript{46} Wachovia and Buckeye excluded state regulation; Rapanos limited federal regulation, and the four remaining conservatives since Justice O’Connor’s retirement would also have limited federal regulation of bankruptcy in Central Virginia Community College.\textsuperscript{47} Paralleling their position in opposition to federal environmental regulation in Rapanos, the conservative justices opposed state standing in Massachusetts v. EPA, where the states were trying to obtain federal environmental regulation.\textsuperscript{48} Jed Rubenfeld refers to this inquiry as juxtaposition across doctrines.\textsuperscript{49} The parallels speak loudly.\textsuperscript{50} Regardless of whether these anti-regulatory goals are appropriate or inappropriate, they are not about federalism.

IV. OTHER DEFINITIONS OF FEDERALISM

Federalism can be understood or interpreted in a variety of ways. The Court has sometimes allocated potentially overlapping powers by the motives it thought proper to the national and state governments,\textsuperscript{51} by what

\textsuperscript{43} United Haulers, 127 S. Ct. at 1798 (Scalia, J., concurring).
\textsuperscript{46} For a parallel view of Chief Justice Rehnquist, see STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA 59-62, 237-38 (2000). For an examination of Rule 10b-5 cases that treats the last decade of the Rehnquist Court as nationalist in its regulatory agenda, see Mark J. Loewenstein, The Supreme Court, Rule 10b-5 and the Federalization of Corporate Law, 39 IND. L. REV. 17 (2005).
\textsuperscript{48} Id. I have described a similar inquiry as interpretive consistency. GOTTLIEB, supra note 46, at 28-29.
\textsuperscript{49} See Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922) (holding that
was most effectively done at the national or state level, or as properly overlapping and limited only by the Supremacy Clause.

At one time the Court announced that Congress could regulate the instrumentalities of commerce like planes, trains, and the things that crossed state lines, but not manufacturing, agriculture, or insurance, no matter how closely tied to interstate commerce, national economic health, or other common problems. Justice Thomas has referred wistfully to that era, suggesting we should return to it. But by 1937 our economy became increasingly interrelated, and for the following half century the Court blurred the former distinctions, permitting regulation of whatever affected interstate commerce, based on the 1824 formula of Chief Justice Marshall. This remains the contemporary doctrine within the category of economic transactions.

International examples add still more ways to understand federalism. States in the international order have complete control over internal matters but are limited in the actions they can take that affect other nations. Nations give geographic sub-units different degrees of power and different decisions to make. Europe and a variety of international organizations

Congress could not accomplish by taxation what it could not do by regulation).

52. See Cooley v. Bd. of Wardens, 53 U.S. 299, 319-20 (1851) (holding that the federal commerce power bars state regulation in the absence of a federal statute only if the subject matter requires exclusively federal legislation).

53. See Wickard v. Filburn, 317 U.S. 111 (1942) (holding that Congress could regulate whatever affects commerce); Gibbons v. Ogden, 22 U.S. 1, 194 (1824) (holding that Congress' commerce power is not limited by the possibility that states might wish to regulate the same behavior for state purposes).

54. The Supreme Court held that Congress did not have the power to regulate instrumentalities of commerce regardless of the interstate effects of the behavior regulated, or whether the regulation was direct or via the taxing and spending powers. See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (manufacturing); Bailey, 259 U.S. at 20 (manufacturing); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (slaughterhouse); Paul v. Virginia, 75 U.S. 168 (1869) (insurance); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (mining); United States v. Butler, 297 U.S. 1 (1936) (agriculture).


56. Wickard, 317 U.S. at 111.

57. Gibbons, 22 U.S. at 194. Marshall wrote:

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one.

Id.

58. See, e.g., Gonzales v. Raich, 545 U.S. 1 (2005) (holding that federal regulation of narcotics applied to entirely local transactions).


subscribe to a principle they call "subsidiarity," by which decisions of policy are made at the most appropriate level and then carried out by the lowest level of government capable of doing the job.61

All these systems devolve power and are often described as federalism. Under the Court's definition of federalism, principles that animate federal systems in many parts of the world are simply unconstitutional here—not because of any explicit command of the Constitution but because of inferences the Court draws from the bare facts of the powers, prohibitions, and representative arrangements—what might be called the "spirit" of federalism62—despite the attacks the same justices have made against other unwritten inferences from the Constitution.63

V. POLITICAL SCIENTISTS' CONCERNS

Most political scientists think federalism is important, but their view of federal arrangements is very different. For them the major objectives are stability, conflict resolution, and democratization.64 As a result they think of federalism in largely pragmatic terms. One large group of political scientists supports whatever the principal factions can agree on that will alleviate strains in the political system, as long as the territorial divisions cross, rather than deepen fault lines in society. Another significant group believes that some particularly deep divisions need a form of veto over national policies


64. Bernard Grofman and Robert Stockwell point to the dynamics, suggesting the validity of apparently contrary inferences—federal societies with group boundaries that track federal divisions will be more unstable and undemocratic than federal societies with more cross-cutting federal divisions; but federal societies with strong group divisions may be more stable and democratic with unitary federal divisions than cross-cutting ones, because they may not be able to achieve peace and unity without such divisions. Grofman & Stockwell, supra note 3. In part, their article makes an important distinction between mechanisms and institutions that perpetuate or minimize ethnicity in mass and elite contexts. Id. at 6-8, including Table I at 7.
to prevent injury, or the perception of injury, to their national or religious
groups.\textsuperscript{65}

Federalism may be the midwife of emerging democracy.\textsuperscript{66} But political
scientists treat as federal all manner of devolutions of power.

Germany is federal though the länder (federal subunits) are required to
carry out national policy,\textsuperscript{67} and the United States is federal though it has a
powerful central bureaucracy which Germany now lacks.\textsuperscript{68} What definition
of federalism is constructive depends on national and local politics. And
that definition is constructive when, if, and to the extent that it diffuses
power or conflict, and does not hobble government or threaten minorities.\textsuperscript{69}

Yugoslavia, for example, functioned for a lengthy period as a federal
republic.\textsuperscript{70} It may not have been possible to create that state other than as a
federal one.\textsuperscript{71} And in Yugoslavia, the various local governments had a great
deal of power.\textsuperscript{72} But Yugoslavia may also be a poster example of federalism
gone awry.\textsuperscript{73} Political scientists tend to worry that local allegiances will
breed resentment and distrust of the nation and eventually lead to
dismemberment.\textsuperscript{74} The history of Yugoslavia can certainly be read in that

\begin{itemize}
\item \textsuperscript{65} Compare AREND LIPPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND
PERFORMANCE IN THIRTY-SIX COUNTRIES (1999) [hereinafter LIPPHART, PATTERNS OF
DEMOCRACY], with AREND LIPPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE
EXPLANATION (1977) [hereinafter LIPPHART, PATTERNS OF DEMOCRACY] (arguing for
divisions of power, including federal institutions that track ethnic or religious divisions),
and G. BINGHAM POWELL, JR., CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY,
AND VIOLENCE 212-18, 270-71 (1982) [hereinafter POWELL, CONTEMPORARY DEMOCRACIES]; see also
G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND
PROPORTIONAL VISIONS (2000) [hereinafter POWELL, ELECTIONS AS INSTRUMENTS];
G. Bingham Powell Jr., Political Responsiveness and Constitutional Design, in DEMOCRACY AND INSTITUTIONS:
The Life Work of Arend Liphart 9 (Markus M. L. Crepaz et al. eds., 2000) [hereinafter Powell,
Political Responsiveness] (casting doubt on the advantages of federalism, including consociational
variants).

\item \textsuperscript{66} Larry Diamond et al., Building and Sustaining Democratic Government in Developing
Countries: Some Tentative Findings, 150 WORLD AFFAIRS 5, 12-13 (1987); see also WALZER, supra
note 59.

\item \textsuperscript{67} Compare New York v. United States, 505 U.S. 144, 188 (1992) ("The Federal Government
may not compel the States to enact or administer a federal regulatory program.")., with JACKSON &
TUSHNET, supra note 60, at 825-26.

\item \textsuperscript{68} See JACKSON & TUSHNET, supra note 60, at 825-43 (materials on German federalism).

\item \textsuperscript{69} See LIPSET, supra note 3, at 64-86; Graham Smith, Mapping the Federal Condition:
Ideology, Political Practice and Social Justice, in FEDERALISM: THE MULTIETHNIC CHALLENGE 1,

\item \textsuperscript{70} See SUSAN L. WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD

\item \textsuperscript{71} See Vesna Popovski, Yugoslavia: Politics, Federation, Nation, in FEDERALISM: THE
MULTIETHNIC CHALLENGE, supra note 69, at 180, 186-93 (discussing the history of the Yugoslav
Federation).

\item \textsuperscript{72} Id. at 188.

\item \textsuperscript{73} Id. at 196-203.

\item \textsuperscript{74} See supra note 65.

62
way.75 While Switzerland has held together,76 Belgium77 and Canada,78 among many others, have gone through great internal turbulence related to their federal structure. Political scientists frequently blame federal borders for turbulence where the borders follow ethnic divisions.79 That may be too simple, given that we are learning that identities can be reshaped and ethnic groups exchanged—to use a very sanitary word for a very nasty business.80 And the distinction seems particularly unhelpful given that the necessary political bargains tend to require precisely those boundaries that follow deeply felt distinctions.81

Federalism that enacts a political bargain may have to define political boundaries very sharply in order to engender trust. And as long as the society remains deeply divided, there may be no alternative to sharp boundaries both between groups and between federal and national powers. So it makes sense in such societies for courts to police such bargains. The French Constitutional Court was developed as part of a political bargain to protect the Gaulist Constitution, for example.82

But as the democracy ages, the issues that have some possibility of tearing the state apart are likely to change. To protect democracy long after the Constitution was written, judicial supervision of an antique federal-state line seems increasingly irrelevant. There is less and less likelihood that lack of judicial supervision of federalism will undermine a two-century old democracy.83

75. See WOODWARD, supra note 70, at 380-82.
77. See Richard Cullen, Adaptive Federalism in Belgium, 13 U. New S. Wales L.J. 346 (1990); Alexander Murphy, Belgium’s Regional Divergence: Along the Road to Federation, in FEDERALISM: THE MULTIETHNIC CHALLENGE, supra note 69, at 73; Jackson & Tushnet, supra note 60, at 925-46.
78. See Jackson & Tushnet, supra note 60, at 889-925.
79. Lipset, supra note 3, at 81.
80. See WOODWARD, supra note 70.
82. See John Bell, French Constitutional Law (1992), excerpted in Jackson & Tushnet, supra note 60, at 504-05.
83. See Prigg v. Pennsylvania, 41 U.S. 539, 611, 624 (1842) (Story, J.) (explaining the Court’s
Federalism may help to inculcate the necessary skills and attitudes toward democracy. It gives many folks an arena in which to learn and develop skills. It offers additional opportunities for participation. But that view of the advantages of federalism has little to do with the particular line-drawing involved here.

In a more mature democracy, clear national versus federal lines may be precisely the problem. They may help to aggravate conflicts where the candidates for elective office have interests in raising precisely those conflicts. Or they may aggravate conflicts where the national institutions become incapable of dealing with common problems because of jurisdictional issues. The very clarity of boundaries may encourage local attachments that reduce the governability of the whole. In other words, for political science there is nothing automatic about the benefits of federalism. In those situations, political organs may police the proper boundaries better than courts. More permeable bargains may actually assist in defusing conflict by moving conflicts to arenas in which they can be more successfully handled. In such societies courts would be better advised to mind their own business.

Federalism may contribute more to a mature democracy if it provides competing platforms of power over related, rather than clearly distinguished, issues. Overlapping power allows the creative tensions which keep all political actors in check and prevents a slide toward autocracy. One political scientist, Ian Shapiro, has described freedom as the “multiplication of dependent relationships” (in stark contrast to slavery which imposes dependence on a single other). Indeed, political scientists worry that federal units may exacerbate some of the problems. Juan Linz and Robert Dahl describe decentralization as moving problems to smaller units that

---

84. The late Harry Eckstein made this point in discussion at the 1994 meeting of the American Political Science Association.
85. See Grofman & Stockwell, supra note 3, at 5-6.
86. See Woodward, supra note 70 at 84.
87. See, e.g., 1 Records of the Federal Convention of 1787 296 (Max Farrand ed., Yale Univ. Press rev. ed. 1966) (1911) [hereinafter FARRAND] (remarks of Mr. Hamilton, June 18, 1787 (expressing fear that state attachments and influence would weaken or destroy the national government)).
89. LIJPHART, DEMOCRACY IN PLURAL SOCIETIES, supra note 65, at 53-103; see also infra notes 144-46 and accompanying text
90. Ian Shapiro, Notes Toward a Conditional Theory of Rights and Obligations in Property, in STEPHEN E. GOTTLIEB et al., JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS 998, 999 (2d ed. 2006).
92. ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 102-
may be less able to handle them fairly. A more flexible federalism may alleviate some of those problems.

In other words, the role that federalism plays and the manner in which it plays that role change. They are not fixed for the life of a republic, but are reshaped by it. Precisely because federalism is a method of conflict resolution, its contribution changes with the conflicts. It is not set in stone tablets for all time.

Another concern raised by political science is the impact of constitutional provisions on the quality of democratic government and on the extent to which government reflects and responds to the governed.

There is in fact little that is automatic about whether federalism advances or retards democracy. Madison famously argued that a larger republic would be more fair. He gave the slave states as an example and suggested that the nation would be fairer to the slaves than the southern states would be.

The problem of fairness that Madison described with respect to slavery, and that Martha Minow has described with respect to several modern conflicts, is a problem concerning the quality of democracy. Majorities can be thwarted by federalism in the same way that gerrymandering can thwart them. By breaking groups into fragments, individual groups can be submerged. By stacking and cracking them, majorities can be defeated, submerged, and subordinated by the dominant culture or group. There is


94. See generally Powell, Elections as Instruments, supra note 65; Powell, Political Responsiveness, supra note 67.

95. The Federalist No. 10 (James Madison).

96. See Martha Minow, Putting Up and Putting Down: Tolerance Reconsidered, in Comparative Constitutional Federalism: Europe and America, 77 (Mark Tushnet ed. 1990).

97. Stacking and cracking are the terms used in discussions of gerrymandering. Some votes are wasted by stacking or packing as many people of one political stripe into one or a small number of districts, while the remaining votes are wasted by cracking or spreading them into as many districts as possible where they cannot outvote the competing group. See Stephen E. Gottlieb, Districting and the Meanings of Pluralism: The Court's Futile Search for Standards in Kiryas Joel, in The U. S. Supreme Court and the Electoral Process 58 (David K. Ryden ed., 2000) (applying the concepts of gerrymandering to the drawing of school districts); Stephen E. Gottlieb, Identifying Gerrymanders, 15 St. Louis U. L.J. 540, 546-53 (1971) (explaining gerrymandering as a combination of otherwise benign procedures to produce a distorted result).
no automatically appropriate federal division of the population that reflects
democracy best.

Robert Dahl, a foremost student of democracy, has explained this
problem at length. The majority principle and the principle of fairness may,
or may not, both require ever-greater inclusiveness so that the needs of the
larger population are met. There is no principled point at which one can
stop enlarging or dividing the borders.

Federalism can be a method of conflict resolution, and can have either
democratic or undemocratic consequences—the latter especially where
federalism confirms local autocratic control. Federalism may be a necessary
part of a political bargain required to get democracy going. It may
contribute more to infant democracies by protecting strongly felt political
bargains with clear lines. Legal language and legal institutions can
cement bargains and offer each side protection against the likelihood of
being taken advantage of in the resulting constitution. The risks of failure
to abide by obligations are obvious in many of the world’s current conflicts.

Federalism typically comes about by means of a deal among the
powerful, designed to protect their control over territory or people or issues
or to protect themselves from control by those they fear. Federalism, then,
may be an unavoidable compromise or a wise one—an efficient
decentralization or an inefficient duplication of resources. It may reflect
tolerance for different cultures or it may be an invitation to intolerance by
segregating people and maximizing the differences among them. If travel
(sometimes called “exit”) is less threatening than staying put, people may
segregate themselves as they did in India and Pakistan and in many recent
conflicts in response to racial, religious, and ethnic attacks. If there are
opportunities that cut across federal units, people may be inclined to learn to
work and live together. If different sections share problems they may be
inclined to work together in solving them. How federalism turns out is
historical—there may be no universally right way to divide populations,
though there may be wrong ways that lead societies to threaten their
members with mayhem.

98. DAHL, supra note 92, at 85-107.
99. Id.
100. My colleagues have pointed this out in discussion.
102. See Barry R. Weingast, The Political Foundations of Democracy and the Rule of Law, 91 AM. POL. SCI. REV. 245 (1997); see also DI PALMA, supra note 101.
VI. THE COURT AND SCIENTIFIC EVIDENCE

The political scientists' view of federalism is virtually unrecognizable in the Court's definitional approach. This is particularly true of the issue of moderating conflict.

There certainly are areas in which the country is dealing with major internal conflicts, but the Court has not treated those areas as appropriate for federalism. In its cases on racial justice and affirmative action, the Court has insisted on "congruence," "skepticism," and "consistency" so that state and federal resolutions are treated alike. It has similarly treated state and federal statutes alike on the social issues. In the environmental cases the Court has supported private challenges to both state and federal regulation, although the Court invokes federalism in its decisions on federal environmental regulations. Its decisions evenhandedly condemn regulation in both contexts. In that form, it makes conflict more, rather than less, intense.

The Roberts Court has paid no more attention to cooling controversy than the Rehnquist Court did. Private individuals were insulated from federal regulation in Rapanos despite state lack of objection. In fact state officials told one of the private developers to cease and desist, objected to the proposal by the other petitioners, and joined thirty-two other states in

104. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223-31 (1995) (holding that state and national policies regarding race, including affirmative action, are subject to the same constitutional restrictions).
108. Rapanos, 126 S. Ct. at 2239.
109. Id.
urging affirmance. On comparably local facts, private individuals were subjected to federal regulation despite state objections in *Gonzales v. Raich*. Federalism may have cooled a controversy in *Gonzales v. Oregon* by letting Oregon handle a disputed issue according to its own standards, but the conservatives who have been most vocal about federalism objected. Federalism on the Roberts Court does not appear to be related to mitigating controversy.

The conservative justices' historical argument—that they are enforcing the Founders' understanding of federalism—would precisely meet the concerns of political scientists if the Court were writing in the late eighteenth or early nineteenth century. The major concern about congressional power in 1787 was slavery. There surely was a risk that anti-slavery decisions would lead to disunion and civil war, much as the pro-slavery *Dred Scott* decision ultimately did. That concern is now settled and the aftermath governed by amended constitutional language. Thus, closely tracking eighteenth century concerns results in a very perverse version of federalism, in which contemporary decisions are governed by protection of slavery which we constitutionally outlawed more than a century ago. That disconnect between the concerns of the present and the concerns of the distant past underscores the divergence between the instrumental concerns of empirical political science and the definitional concerns of the Court—even, or perhaps especially, were we able to discern the specific solution the Framers would have applied.

It is quite likely that the delegates to the Constitutional Convention insisted that the Court have jurisdiction of cases "arising under the Constitution" because they wanted judicial protection for the various

111. *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Congress' power to regulate purely local activities that constitute a "class of activities" having a substantial effect on interstate commerce).
113. See infra notes 114, 122-24 and accompanying text.
114. In *Prigg v. Pennsylvania*, Justice Story suggested that the South would not have joined the Union but for its ability to secure the return of slaves from free states without the niceties of local process. *Prigg v. Pennsylvania*, 41 U.S. 539, 624 (1842). Justice Story was almost certainly wrong about the meaning in 1878 but may have been right about 1842. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006) (concluding that the *Prigg* decision was correct if the purpose was to keep the Union together); ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 166-68 (1975) (discussing the opinions in *Prigg*). See generally PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* (1997).
115. U.S. CONST. amends. XIII-XV.
bargains they had struck.\textsuperscript{117} But even on the assumption that an understanding of the Commerce Clause was crucial to that bargain, they didn’t tell us what issues they expected the courts to face. The record of the Convention suggests that their principle concern was the distribution of political representation. But they had little to say about the most potentially expansive national powers.\textsuperscript{118}

Moreover the delegates in the Convention told us little about the meaning of the Commerce Clause and its extent. The Convention instructed the Committee of Detail to provide the new Congress with all the powers of the old, as well as power where the individual states were separately “incompetent” or the harmony of the union required it: “(and moreover) to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent.”\textsuperscript{119}

The Committee of Detail’s response to those instructions was to give the new Congress two powers that the old did not have—the powers to tax and otherwise raise revenue, and the power to regulate commerce.\textsuperscript{120} If those powers were equivalent to the instructions to the Committee, the Spending and Commerce Clauses would seem expansive. There were a variety of other proposed powers, some which are in the final Constitution and some which were rejected.\textsuperscript{121} But the meaning of those decisions depends on whether we, as interpreters, assume that the various clauses must have been mutually exclusive, or overlapping. Certainly, as lawyers, we frequently

\textsuperscript{117} \textit{2 FARRAND, supra} note 87, at 430 (proceedings on August 27, 1787).

\textsuperscript{118} See \textit{CLINTON ROSSITER, 1787: THE GRAND CONVENTION} (1966) (arguing that the Convention was dominated by nationalists, the major battles were about representation, not powers, and that once the representation issues were settled, the powers of Congress were a common, harmonious objective to be broadly understood); see also \textit{CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787} 64-100 (1988) (arguing that while representation dominated many of the issues, only a coalition of the geographical extremes of the new nation, rather than a larger coalition of smaller states, opposed expansive powers).

\textsuperscript{119} \textit{2 FARRAND, supra} note 87, at 26-27 (records of July 17, 1787); see also id. at 131-32 (proceedings of the Convention as they were referred to the Committee of Detail).

\textsuperscript{120} Compare the Articles of Confederation with the report of the Committee of Detail, \textit{2 FARRAND, supra} note 87, at 181-82 (records of the proceedings on August 6, 1787), and U.S. \textit{CONST. art. I, §§ 8-10}. The Spending Power was added by the Committee of Style. \textit{2 FARRAND, supra} note 87, at 569 (records of the proceedings on September 10, 1787).

\textsuperscript{121} On proposed powers to grant charters or build canals, see \textit{2 FARRAND, supra} note 87, at 321, 325-326 (August 18, 1787), 615-16, 620 (September 14, 1787). See also Albert S. Abel, \textit{The Commerce Clause in the Constitutional Convention and in Contemporary Comment}, 25 \textit{MINN. L. REV.} 432, 479-80 (1941) (urging a negative inference from the rejection of powers); Robert L. Stern, \textit{That Commerce Which Concerns More States Than One}, 47 \textit{HARV. L. REV.} 1335, 1341 (1934) (urging an inclusive definition).
multiply language, like the familiar "right, title, and interest," in order to be sure of coverage, and without any thought that the expansion of language narrows, rather than enlarges, the meanings. The assumptions about the relationship of powers proposed, adopted, or rejected are our own. The drafters did not tell us.

Slavery's exertion of a major force on the interpretation of the Commerce Clause before the Civil War is instructive. Many pre-Civil War debates about the meaning of the Commerce Clause and many Supreme Court decisions in that period were drawn with slavery in mind, to construct an understanding of commerce that did not touch slavery. In the Virginia ratifying convention, three former delegates to the Constitutional Convention debated whether the Constitution gave Congress power over slavery beyond the prohibition of the slave trade. But despite the fact that the Convention repeatedly dealt with slavery and repeatedly provided for it, they could only point to the absence of specific language dealing with congressional power over slavery and their understanding that their Northern colleagues had no intention of interfering.

But the Convention refused several attempts to protect state internal police powers from federal interference. And the delegates did not tell us whether they understood state control over slavery within state borders as the basis of a principled understanding of state and national powers, as a specific resolution of one conflict that on a principled level existed in tension with understandings of the Commerce Clause with respect to other issues, or simply relied on their expected power in the House of Representatives.

122. For counsel's use of Southern intransigence on slavery, see Groves v. Slaughter, 40 U.S. 449, lvii- lviii, lv (1841). But see F.E.R.C. v. Mississippi, 456 U.S. 742, 794 (1982) (O'Connor, J., concurring in part and dissenting in part) (noting that Pinckney had urged a broad congressional power to negative all laws it might think improper—a position which seems inconsistent with the conclusion that Pinckney sought a commerce power narrowed in all respects because of his fears regarding slavery). On the status of persons under the Commerce Clause, see Mayor of New York v. Miln, 36 U.S. 102, 136 (1837), and Smith v. Turner (The Passenger Cases), 48 U.S. 283, 474 (1849) (Taney, C.J., dissenting). On the fears of Southern rejection of the Constitution, see Prigg v. Pennsylvania, 41 U.S. 536, 611 (1842). On Justice Story's opinion in Prigg, see Cover, supra note 114, at 234, 240-41. See also Walter Berns, The Constitution and the Migration of Slaves, 78 Yale L.J. 198, 198-99 (1968) (explaining that Madison and Justice Story were influential in promoting the Southern view of the Commerce Clause). On the related effort to establish a Southern understanding of the impact of the slave clauses on the Commerce Clause, see 3 Farrand, supra note 87, at 442-44, and Berns, supra, at 199 (noting that the terms migration and importation referred only to the international movement respectively of whites and blacks); Gibbons v. Ogden, 22 U.S. 1, 216-17 (1824) (holding that migration refers to voluntary movement only but Marshall does not follow Pinckney by restricting it to an international context); and Dred Scott v. Sandford, 60 U.S. 393, 411 (1856) (Taney, C.J.) (holding that both migration and importation refer to slaves).

123. 3 Farrand, supra note 87, at 334-35 (June 21, 1788, remarks of Randolph, Mason and Madison).

124. See id. at 21 (July 17, 1787); id. at 629 (September 29, 1787).
The delegates’ silence is deafening, and can only be filled in with our assumptions, not theirs. Either it seems reasonable to us that silence meant a limitation to a minimal state, or it seems reasonable to us that silence left the definition of the appropriate boundaries to subsequent generations and that the Founders were not terribly concerned about what we might do centuries later.

Much of the pre-Civil War Southern attack on national power was conducted around theoretical assertions of states’ rights. The language of sovereignty was not used in the Constitution and by the time of its creation in 1787, sovereignty was generally understood to reside in the people, not their governments. But the defense of state sovereignty was convenient for Southern slaveowners intent on protecting their “peculiar institution” from Northern antipathy.

Even in the pre-Civil War era, Chief Justice Marshall, a nationalist from Virginia, famously extended national power in cases like *Gibbons v. Ogden*, writing that Congress had power to regulate those activities that affected more states than one. That became the grounding of the expansive view of the Commerce Clause that dominated decisions from 1937 to 1987.

One might expect that the Civil War would have removed the weight of slavery from the Constitution, but from shortly after the Civil War to 1937 the Court built ever-tighter boundaries to national power. In turn, the Rehnquist Court looked back to that era, and to cases still dominated by the spectre of national power over the South’s “peculiar institution.”

---

127. Finkelman, *supra* note 125, at 263, 265-66, 275-79. Pinckney of South Carolina was the first to use the term in the Constitutional Convention. See 1 FARRAND, *supra* note 87, at 59 (May 31, 1787). On the effort to establish a Southern understanding of the impact of the slave clauses on the Commerce Clause, see 3 FARRAND, *supra* note 87, at 442-44 (from a speech in the House of Representatives, Feb. 14, 1820); Berns, *supra* note 122 (describing the Southern effort to narrow the meaning of the Commerce Clause to exclude any power over slavery).
130. See *supra* note 24 and accompanying text.
131. In *United States v. Lopez*, Chief Justice Rehnquist reviewed the history of the Commerce Clause cases in a way which seems decidedly sympathetic to the pre-1937 cases, concluding, “[b]ut even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.” *United States v. Lopez*, 514 U.S. 549, 553-57 (1995). Justice Thomas was more candid, writing:

Although I might be willing to return to the original understanding, I recognize that many
If the shape of federalism is the result of political bargaining, sometimes to protect the power of the people doing the bargaining, and sometimes to resolve political issues in a way that people in different parts of the republic will perceive as fair, then there is no universal answer about what federalism should look like. Federalism should be a prime instance of the political question doctrine that tells courts to keep out.\textsuperscript{132}

Even assuming that judicial review of the federal bargains struck in the Constitution were important in 1787, there is little reason to believe that those bargains require the same specific protection two centuries later rather than an understanding of federalism driven by its principles and values for the nation as it now exists. It is also doubtful whether any of the delegates expected that the bargains they were striking would be interpreted two centuries later as if the Court were sitting in 1787, as some originalists insist. The delegates were quite convinced that the United States would change and grow. The Court’s concept of a static America is quaint by comparison.

VII. POLITICAL SCIENTISTS’ VIEW OF JUDICIAL FEDERALISM

The Court’s version of federalism is virtually unrecognizable to political scientists. Sovereignty of subunits doesn’t resonate with any particular advantage in political science. For political scientists, sovereignty is a problem, not an explanation.\textsuperscript{133} Clarifying the lines of authority has a nice ring to it, but for political scientists there are questions and trade-offs. The trade-off with checks and balances is particularly significant because the Court’s clarification of authority eliminates much of the mutual restraint.

And there is a trade-off among various measures of fairness. While local control meant democracy to the Anti-Federalists, it meant political “faction” and unfair treatment of identifiable groups to Madison and supporters of the Constitution.\textsuperscript{134} In that sense it does not extend the benefits of democracy to all. Political scientists find that localities use power to “keep[] classes, races, ethnic groups, genders, and life-style groups in their places.”\textsuperscript{135} Against a standard of just government, federalism can be cited by both sides. In effect, the definition of federalism is political and contextual rather than a subject of universal, unchanging principles.

---


\textsuperscript{133} See Richard Simeon & Katherine Swinton, Introduction: Rethinking Federalism in a Changing World, in RETHINKING FEDERALISM, supra note 76, at 3.

\textsuperscript{134} See THE FEDERALIST NO. 10 (James Madison).

\textsuperscript{135} Theodore J. Lowi, Our Millennium: Political Science Confronts the Global Corporate Economy, 22 INT’L POL. SCI. REV. 131, 141-42 (2001).
Justice Blackmun suggested, in words quite congenial to the Rehnquist Court, that federalism can protect personal liberty: "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." Justice Blackmun meant that federalism is valuable when and if it advances liberty, but not otherwise. He made the comment in a case where the petitioner was being denied any review, state or federal, of a conviction for murder. His point was that deference to the states does not automatically advance liberty. As Blackmun put it: "Federalism . . . has no inherent normative value: It does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts."

Subsequent decisions have treated the relationship as axiomatic. In *Lopez*, the Court barred federal power to ban guns from schools. The objective of the majority in that and later cases was not the blending and duplication of powers that Blackmun understood could protect liberty, but rather a delineation that removed one of the governments from any ability to affect the outcome. In *Lopez*, the Court prevented the federal government from protecting children from weapons in their schools. How that protects liberty is much less clear.

From an empirical perspective, there are large problems with the Court’s proposition that federalism advances liberty. As Madison understood, federalism can thwart liberty; many groups around the world look to more cosmopolitan entities to protect them. Although the United States Supreme Court looked the other way, state-level oligarchy and Southern state treatment of blacks, abolitionists, and Northern sympathizers was precisely the reason why Congress proposed the Fourteenth Amendment to change federal relations.

137. Coleman, 501 U.S. at 759.
139. See THE FEDERALIST NO. 10 (James Madison).
140. See Minow, supra note 96.

[T]here was less danger of tyranny in the head than of anarchy and tyranny in the members . . . . It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated . . . . By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment.

Id. Indeed, one can easily argue that from 1787 to 1865 and from 1876 to about 1960, i.e. most of the history of this country, the national government was considerably more democratic than most
James Madison described the Constitution as partly national and partly federal, and he and Hamilton described important ways in which the two levels would restrain each other. In the context of the separation of powers among the branches of the federal government, Madison argued for a blending, rather than a clear division, of powers as the more effective guarantee. He told us that by blending powers we would enable governments to control each other. It was precisely the overlapping of powers that created the possibility of protecting liberty. Overlap between state and federal jurisdictions permits each to investigate the other, to compete for public support, and to provide a staging ground for opposition as the Virginia and Kentucky Resolutions did in 1798 and 1799. Opponents of our Constitution wanted the kind of clear division of powers that the Court has advanced. But those who wrote and supported it had a more sophisticated understanding of federalism.

Even more, a clear delineation of powers may make some problems unsolvable, thus frustrating democracy. This is true of any situation in which the source of the problem extends beyond state borders and requires regulation of external entities, whether corporations, other businesses, or other states. Democracy can also be frustrated where the state political machinery is too corrupt to clean itself up.

Was James Madison right when he told the Constitutional Convention in Philadelphia that a larger republic would be fairer than a smaller one? The government of the larger republic would have to consider different perspectives, and people in a larger republic would be less likely to gang up state governments.

142. THE FEDERALIST No. 39 (James Madison).
143. THE FEDERALIST No. 44 (James Madison) (discussing the Necessary and Proper Clause and restrictions on the power of the states and pointing out the extent to which the states would restrain the national government); THE FEDERALIST No. 51, ¶ 9 (James Madison) ("The different governments will control each other, at the same time that each will be controlled by itself."); THE FEDERALIST No. 85 (Alexander Hamilton) (describing "additional securities to republican government, to liberty, and to property . . . [from] the restraints which the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States, who might acquire credit and influence enough from leaders and favorites to become the despots of the people . . . ").
144. See THE FEDERALIST No. 48 (James Madison) ("[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which . . . [is] essential to a free government, can never in practice be duly maintained."); THE FEDERALIST No. 51 (James Madison).
145. THE FEDERALIST No. 51 (James Madison).
147. See supra note 96 and accompanying text.
What Federalism?

Pepperdine Law Review

on smaller parts. Madison thought the United States would have been fairer to blacks than the Southern states would have been. So it would be wise to give central authorities the powers they would need. As it turned out, the new nation limited the escape of slaves for the first eighty years when some of the Northern States would have been inclined to protect runaway blacks and give them the rights of free men. The nation only secured their emancipation following a war none of the individual states could or would have pursued.

Or was Madison wrong? Political scientists find support for decentralized systems, and the political science data indicates that decentralization works. It increases stability. But their treatment of federalism is appropriately agnostic on the issue of fairness.

VIII. Conclusions

Courts focus on definitions, and sometimes on objectives. When they focus on objectives, courts often attempt to elucidate the Founders' ideas. In the case of federalism, the United States Supreme Court has focused on ideas about accountability and what has seemed to the Court the automatic libertarian consequences of a strict division of powers.

Political scientists, on the other hand, have focused on the ambiguous relationship of federalism and democracy. Federalism often helps to secure democracy but can also support conflicts that tear it apart. Political scientists have not focused on the question of the clarity of boundaries that has occupied the courts. But political scientists' theories of pluralism do suggest that clarity of boundaries will also have an ambiguous relationship to democratization and the stability of democracy—potentially reducing stress and strengthening democracy when inter-regional trust is absent, but potentially weakening democracy by emphasizing regional competition and differences.

To put that another way, whether the boundaries need to be sharp depends entirely on political circumstances. There is no reason to believe that the courts will prove wiser than the politicians in discerning whether and where the tensions are in fact so sharp and what resolution would calm them. And there is good reason to believe that an aging conceptual federal-

149. See Powell, Political Responsiveness, supra note 65.
state boundary will make it harder to resolve contemporary disputes. The Court may have had it right, from an empirical perspective, in *Garcia*.\(^\text{150}\)

The United States Supreme Court has focused on a concept of federalism that has little resonance in either political science or history. It has ignored the value of federalism both for the resolution of conflicts and as a mutual check among different layers of government against excesses of the others. Indeed, other than its claims with respect to federalism, the Court has largely abandoned protection of the democratic process in favor of interfering with political judgments.\(^\text{151}\) It has become a hindrance to democratic self-government rather than a help.

The United States Supreme Court’s federalism doctrine hobbles modern democracy by careful attention to feuds which no longer burn—indeed it has “protected” states from exercises of national power that were sought by the vast majority of states.\(^\text{152}\)

The United States Supreme Court’s formal definitional approach to federalism contrasts with political scientists’ understanding of federalism as about shifting jurisdiction over issues which are too hot to handle. There is nothing in the Court’s approach that tracks or considers the risks of national versus local resolution for political outcomes. The result is that it consistently both misses the point and exacerbates the problem.

---

150. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court concluded:

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the “traditional,” “integral,” or “necessary” nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

*Id.* at 546. Conversely, the Court concluded that political forces were the major limitation on the extent of national power:

Apart from the limitation on federal authority inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.

It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.

*Id.* at 550-51.
