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The Past, Present, and Future of Federalism: A Symposium Introduction

Derek T. Muller*

In Lewis Carroll’s *Through the Looking Glass*, Alice travels through her mirror and finds herself in a land where things are familiar but, well, different. At times things were backwards, like when she attempted to read a poem but found it to be gibberish, until she held it up to a mirror and could read it. Or when she tried to slice a cake, but each time the cake rejoins itself and she’s unable to pass it out. The Unicorn explains, “You don’t know how to manage Looking-glass cakes . . . . Hand it round first, and cut it afterwards.”

In a given political moment, we too might end up through the looking glass, where longstanding expectations about law and policy can be quickly reversed. Such a moment is at hand when it comes to federalism.

To choose one vignette: in March 2018, Xavier Becerra, the Attorney General of California and a Democrat, insisted that the Tenth Amendment of the United States Constitution gave California, and not the federal government, power over local law enforcement in relation to immigration policies.1 Jeff Sessions, the Attorney General of the United States and an Alabama native, retorted that actions of states like California were reminiscent of the nullification and secession crises, matters resolved long ago in the Civil War.2

There may be a temptation to be swept up in the moment, in the transient political episodes that arise in one political administration or another. Federalism has a long and storied past, and it will assuredly have a long and storied

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* Associate Professor of Law, Pepperdine University School of Law. Special thanks to Meryl Chertoff and the Justice and Society Program at The Aspen Institute for sponsoring this important conversation. Special thanks, too, to the *Pepperdine Law Review* staff, particularly Kat Ellena and Ashley Gebicke, for their organization of this symposium. Thanks to Beau Carter for his assistance in helping with this introduction.


future.

But one of the great benefits of a symposium like this one is that we can think more deeply, in a principled and consistent way, about the issues that unite us. Sometimes the debate is a matter of law—which are the areas of exclusive federal control, which of exclusive state control, and which of concurrent jurisdiction? At other times, of policy—in areas of concurrent jurisdiction, should both work side-by-side, or is one better suited than the other to handle these issues?

There are undoubtedly substantive areas of the law that affect federalism more than others. Discussions like the ones that took place at this symposium, however, offer opportunities for cross-pollination, thinking about how federalism principles reach across these different disciplines.

This discussion was one part of a continuing project of the Aspen Institute. The Aspen Institute has long fostered dialogue and discussion on important legal matters. The Justice and Society Program has facilitated dialogue from a variety of perspectives to help us better understand the law and one another as we pursue the rule of law and seek to solve contemporary social challenges.3

To that end, Meryl Justin Chertoff, Executive Director of the Justice and Society Program at The Aspen Institute, reached out to the University of California, Berkeley, School of Law and Pepperdine University School of Law about hosting a series of discussions about federalism. The first of those conversations took place at Berkeley, and the second took place at Pepperdine as a part of this symposium.

Scholars at both institutions have written extensively about federalism principles,4 and the opportunity to gather and discuss those principles as


colleagues, along with input from scholars around the country, proved fruitful. Specifically, we discussed whether there are neutral principles that legal scholars can agree upon, regardless of the political valence of any particular topic. Discussions like these offer great value when they are not tethered to immediate pressing political moments—although political moments may help bring the discussion to life.

Professor Molly Brady offered challenging ways to think about federalism and property law under the Fifth Amendment. Rather than giving the text of the Constitution independent meaning, the Supreme Court has increasingly deferred to state determinations about whether property has been “taken.” That includes a “reasonableness” inquiry of what state laws generally permit—including looking across jurisdictions. That threatens to upend the appropriate federalism framework of property.

Professor Andy Hessick suggested that there are important federalism concerns when it comes to the federal courts. At the Founding, there were concerns that Article III federal courts would usurp state court power and act in favor of federal power over state power. But today, a great deal of adjudication occurs in non-Article III tribunals—bankruptcy courts, administrative agencies, magistrate judges, and the like. While we often think of federal courts through the lens of separation of powers, in some ways our current structure is better explained through federalism concerns. For Article IV territorial courts do not infringe upon state interests in the ways that Article III courts might—territorial courts, for instance, are adjudicating local territorial law, and state courts are not necessarily a good forum for such disputes. It certainly doesn’t upset any state power by lodging jurisdiction in Article IV courts. Professor Hessick then posited a few ways to think about these non-Article III courts through a federalism perspective.

Professors John Yoo and Jennifer Chacón offered complementary
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PERSPECTIVES ON FEDERAL IMMIGRATION POWER. Professor Chacón cautioned against false equivalence in how federal courts should review state immigration practices.\(^8\) It may well be the case that states need not cooperate with federal authorities in enforcing immigration laws. But states might not be able to add to—or in some instances, interfere with—federal immigration policies. Additionally, there may well be neutral principles that apply to immigration federalism, but we ought not lose sight of the fact that sometimes the facts are not quite so neutral.

Professor Yoo looked at the structural barriers of federal enforcement of immigration laws.\(^9\) Often, what are perceived as ineffectual federal policies are ineffectual precisely because the federal government is designed to operate more slowly. “Ambition must be made to counteract ambition,” James Madison wrote in the Federalist Papers, and consensus among the branches of government must exist before a federal policy can be enforced.\(^10\) In the same way, states might act as a check on the federal government, their ambition checking federal ambition.

Election law offers a powerful substantive area to consider federalism. Federal elections are mostly run through, and regulated by, the states. Professor Gene Mazo reflected on the tensions between our First Amendment jurisprudence and state-based election system.\(^11\) We have seen the federal government’s prohibition on foreign spending in elections run up against state desires to run elections as they see fit. We might expect non-citizens to be a part of our political community, but we also exclude them from casting votes in elections. Looking at non-citizen participation in politics is a foil for a broader tension we see of federal prohibitions on certain activities when it comes to elections, but operating within a state-controlled election system.

Professor Ciara Torres-Spelliscy advocated for greater federal control to prevent foreign interference in our elections.\(^12\) While state-elections systems

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may be administered at the state or local level, matters like cyber interference and international sabotage require more uniform federal guidance. Congressional requirements, such as requiring voter-verified paper audit trails, consistent with Congress’s power under the Elections Clause, would improve elections in the United States.

Professors Franita Tolson and Michael Morley offered perspectives on the power of the federal government to define the scope of the right to vote. Professor Morley looked at Congress’s power to define the scope of the electorate.\(^\text{13}\) He emphasized the limitations the Constitution places on Congress and that Congress lacks plenary authority to define the electorate. Federal statutes that Congress has enacted that purport to recognize non-residents of a state as having voting rights in that state are on questionable constitutional footing.

Professor Tolson critiqued the Supreme Court’s opinion in *Shelby County v. Holder*,\(^\text{14}\) arguing that Congress held broad power under the Fourteenth Amendment, Fifteenth Amendment, and Elections Clause to renew the Voting Rights Act.\(^\text{15}\) Even if Congress fails to name a constitutional basis for enacting a statute, courts may still uphold such exercises of authority. And these three constitutional provisions in particular offer broad authority for Congress to act.

Professor Kurt Lash offered a narrative surrounding the post-Reconstruction Constitution.\(^\text{16}\) “States-rights” federalism, he noted, is often conflated with pre-Civil War sentiment of the likes of John C. Calhoun. Today’s federalism, however, must be reconciled with the Civil War amendments. He instead offered a more complete narrative about how these amendments, in fact, saved federalism. Congress believed that the Constitution, properly interpreted, constrained Congress’s behavior in many important respects, and constitutional amendments would be the only way to enhance Congress’s national power. And those amendments, while expanding federal power, limited new enumerated powers for Congress, and also placed new limited constraints on the states.


\(^\text{15}.\) See Franita Tolson, *Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal*, 13 ELECTION L.J. 322 (2014).

Privacy law is another substantive area ripe with federalism implications. The federal government and state governments have struggled with how to handle privacy law amid advances in technology that implicate privacy concerns, and optimal solutions remain elusive.

Professor Babette Boliek examined the impact of data collection, considering the strengths and weaknesses of state and federal laws.\footnote{17. For Professor Boliek’s general discussion regarding data privacy, see Babette Boliek, Prioritizing Privacy in the Courts and Beyond, 103 CORNELL L. REV. 1101 (2018).} While state contract law focuses on consent, it doesn’t work well in the data collection context because there is often no harm and, therefore, no remedy when it comes to data breaches. And while we often worry about data collection, it is perhaps data aggregation that should be our greatest concern, particularly when it comes to public data—that is, data collected by state and local governments. Professor Boliek suggested that state and local governments often collect too much data that they don’t actually need to accomplish their governmental objectives, and that data can be too easily shared with the public in breach of our privacy expectations. States ought to look more at their own data collection practices to help protect privacy.

Professor Margaret Hu looked at the case for cooperative federalism—and the case for uncooperative federalism.\footnote{18. See, e.g., Margaret Hu, Reverse-Commandeering, 46 U.C. DAVIS L. REV. 535, 577–79 (2013) (using a cooperate federalism analysis to discuss immigration).} In cases of cyber conflict or cyber warfare, like Russia’s interference in the 2016 presidential election, we may want greater cooperation between the federal government and state governments. At times, state governments might simply be more responsive, such as with state data-privacy laws. And we may also see that federal and state interests are at odds with one another, such as data requests from the federal Presidential Advisory Commission on Election Integrity with which most states refused to comply. Different federalism solutions may be appropriate for different situations.

Professor Craig Konnoth discussed how health-data collection moved away from state-specific activity to centralization and privatization.\footnote{19. See, e.g., Craig Konnoth, Health Information Equity, 165 U. PA. L. REV. 1317 (2017) (discussing recent federal regulation of healthcare data).} Federal collection of health data has been historically rare. But federal law has recently encouraged states to collaborate and share data with one another. Increasingly, however, private entities have been gaining power in the amassing of health data, and they fall outside the obligations and expectations placed
upon state governments. Private entities appear to act less in the public interest given their reluctance to share data with one another.

Professor Paul Secunda examined privacy in the context of labor law. Specifically, he posited that employees ought to enjoy a “right to disconnect”—that is, a right of privacy and autonomy that an employee should expect after leaving work for the day and the right to separate from electronic communications with their employer at that time.20 Employers’ health care costs are rising rapidly, which might be slowed through better management practices. States are perhaps better than federal government to help address this problem. At times, uniform labor standards might be a better way to approach employment law. But here, Professor Secunda argues, modified federalism might be superior—field preemption with some opt-outs and some cooperative federalism. This model would permit states to offer a “right to disconnect,” which might be imitated elsewhere if it helped improve the health of employees.

I am grateful for the conversation that took place over this conference and for the pieces that are included in this symposium. My hope is that it will spark federalism-related conversations, across substantive areas of the law and regardless of contemporary political events, for years to come.
