8

The Police Power and Federalism

In this chapter, we consider more carefully how the states' broad police powers are nested in an American constitutional system in which a good deal of discretion is maintained by the federal government to decide whether and to what extent to displace state with federal policy. Whether consistent or not with late eighteenth and early nineteenth-century understandings of federalism, there has been a relentless expansion of federal regulatory power, especially since the New Deal and the period demarked by the sixties and early seventies, a period occasionally labelled the Second Reconstruction.[1] This emerges out of a clear sense that the national government expanded its power and, in key respects, supplanted state and local power in areas of social and economic policy. Despite the emergence of some meaningful limits on federal power under the Constitution, especially in the years since the Court decided United States v. Lopez,[2] United States v. Morrison,[3] and New York v. United States,[4] we can see the police power adapting to the twentieth-century expansion in national power and prerogative.

That said, the police power remains significant, notwithstanding the great expansion of national authority. While the national government has expanded the scope of its power and into areas that historically had not been practically subject to federal intervention, the national government still leaves the lion's share of decisions to regulate private property, protect public health, ensure citizen safety, and further public welfare through state and local regulation to state and local governments. We could debate whether and to what extent the Constitution permits the national government to displace state and local authority in areas traditionally decentralized, but most of this debate would be purely academic. As a practical matter, the state police power matters greatly and is in no real danger of being eradicated by the federal government through design or direction.

The focus of this chapter is not on constitutional federalism per se, but on the impact of expanding federal power on the exercise of the states' police power. The relationship between national and state regulatory power has been a thread through this book, but it has not been its principal topic. Nor is it now. Our main objective is not to situate the police power in a positive and normative account of constitutional

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

federalism, as interesting and valuable that such an analysis would be. Rather, we are interested in the impact of federal authority and, more broadly, federalism in principle and in practice, on the functions of the police power in the modern administrative state. To summarize: We can see that the greater use of federal authority to regulate the use of private property and business conduct, consequences of contemporary administrative regulation has imposed appreciably more burdens on individuals and businesses. What are the practical consequences, if any, for the state police power of these added burdens? In short, what are the consequences of an expanding federal role?

FEDERAL POWER EXPANDS, STATE POLICE POWER ENDURES

The expansion of the federal government's role in regulating private and business conduct is a story frequently told and, when viewed through a practical lens, is explained as part of a necessary intervention into the actions and activities of individuals, business leaders, and governments. State regulation proved incapable of meeting the demands of an increasingly complex economy. Moreover, the demands of equal citizenship imposed by profound changes to our constitutional order after the Civil War led to a more robust and active federal government.

The feds expanded involvement can be measured in the first instance by major national legislation, including the Interstate Commerce Act, the Sherman Antitrust Act, the Food & Drug Safety Act, and the Federal Trade Commission Act, to mention just these notable Progressive-era statutes.[5] Congress stepped in to address issues that could conceivably have been tackled by the states through their ample regulatory powers, but were not being attended to adequately, at least as viewed by public opinion and ultimately by Congress and the executive branch. As well, innovative legislative action characterized the New Deal period, as President Roosevelt and Democratic allies in Congress constructed a novel national apparatus for the implementation of vigorous national regulatory policy, especially with regard to the economy and the workplace.[6] Here, blockbuster statutes such as the Securities & Exchange Acts, the Federal Communications Act, and the National Labor Relations Act loom large in this regulatory history.

In addition to expanding national authority, a principal innovation during this half-century period running from soon after Reconstruction through the so-called Second New Deal was the development of what Stephen Skowronek calls the "expansion of national administrative capacities" and the creation of the modern administrative state.[7] In the early years of late nineteenth-century and early twentieth-century federal regulation, it was unclear exactly what were to be the right mix of institutions and implementation mechanisms to undertake national goals. On the one hand, for example, the Interstate Commerce Act created a powerful multi-member bureau, the Interstate Commerce Commission, to carry out its

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

functions in transportation ratemaking.[8] On the other hand, at essentially the same time, Congress enacted important new antitrust legislation, leaving to federal law enforcement and the federal courts the principal responsibility to define what conduct is impermissible and to ferret out and punish wrongdoers.[9]

As we approached the New Deal, however, Congress had become more purposive in its creation and use of administrative agencies to carry out its regulatory objectives. These agencies were given important authority to set general public policy, authority ratified by the Supreme Court in important pre-New Deal and New Deal era decisions. Moreover, Congress had, albeit less decisively, accorded to agencies the power to create rules of binding effect, a power codified in the Administrative Procedure Act of 1946.[10] Looking ahead from this era, agencies created in the 1960s and 1970s were especially ambitious in using this rulemaking power. With these choices, administrative agencies emerged as the fulcrum of national regulatory power, a position that would become further entrenched in the decades following the New Deal.

As the need grew in our nation in the second half of the twentieth century to build a much greater administrative capacity, the federal government undertook many more initiatives. They did so largely with the blessing of the courts, albeit with some turbulence in the third decade of the twentieth century when a skeptical Supreme Court endeavored to put some limits on federal authority.[11] Though not entirely an invention of the Progressive era, the national government's role certainly expanded as we moved steadily toward the *fin de siècle* in the late 1800s.[12] Important social and economic issues that had been left largely to state governments to deal with or, in some cases, to the market in that they were essentially unregulated, came to the fore of national legislators and critical pieces of federal legislation was enacted by Congress. After a period of some quietude and resistance, not coincidentally during periods in which the Republican Party was largely ascendant in Congress, the White House, and the federal courts, the New Deal period brought forth a wealth of new, ambitious legislation.[13] Congress and the administrative agencies created during this fertile period for public policy were intervening in economic and social life in myriad ways. They were defining a new vision of national power. The courts for the most part gave its imprimatur to these developments.[14] This vision carried through the rest of the twentieth century and also into this century.

The main shifts in federalism and the breadth of state power came about through two developments, neither of which can be traced to changing views about the police power per se. One was incorporation, that is, the application of virtually all of the Bill of Rights to the states.[15] This was a development of the Supreme Court in second half of the twentieth century. The other was the use of federal authority under the commerce clause (and, to a much lesser degree, section 5 of the Fourteenth Amendment).[16] These reflected monumental changes in the fact and rationale of the authority exercised by the national government and, likewise, the immunity of the state government from federal control. However, these changes did

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

not fundamentally undermine the state's power to protect health, safety, and welfare, save for the critical condition that state power must do go beyond its domain by discriminating against out-of-state interests (thus violating the dormant commerce clause or the privileges and immunities of citizenship) or creating unwarranted externalities. Within its rightful domain, states could (and did) continue to wield its police powers.

The incorporation of the bill of rights affected the scope of the police power, however, insofar as it created new limits on state authority in the form of constitutional rights, a topic that we discussed at length in Chapter 6. The rather sensible view that official action would be subject to constitutional limits, whether this action came by way of the federal government or state and local governments, was propounded by Madison and other framers; however, this view was rendered nugatory by the Supreme Court a half century after the Constitution was adopted, in the case of Barron v. Baltimore.[17] Barron held that the bill of rights would not be applicable to state and local governments. Without specifically overrunning Barron, the Warren and Burger Courts, beginning in the 1950s, held in a series of key cases that various rights contained in the first eight amendments were part of a scheme of ordered liberty and should, especially given the enactment of the Reconstruction amendments, be incorporated via the Due Process clause of the Constitution.[18] The incorporation of these rights obviously impacted the operation of the police power, in that it created meaningful limits on the use of this regulatory authority. We saw in an earlier chapter how these constitutional rights, especially those in the First and Second Amendments, emerged to create significant limits on the police power.

The expansion of the commerce clause began especially during the New Deal era, when the Court decided a number of major cases upholding legislative authority to regulate segments of the economy at the national level.[19] Especially with its decisions in in the 1960s upholding the Civil Rights Act under the commerce clause,[20] the Court created an architecture of national power that has proved durable. In a related vein, the consistent use of the so-called dormant commerce clause to limit state action viewed as protectionist and discriminatory put brakes on state laws that aspired to further discrete state purposes. In a number of these dormant commerce clause cases, the stated reason given for the state's law was public health and safety. The task undertaken by the federal courts was to consider whether the law, however persuasive was the argument that it was about health, safety, or the general welfare of the community, effected a constitutionally unacceptable burden on interstate commerce.

There is a message tacit in these cases decided under the commerce clause, in its two iterations, direct and dormant, and that is that the strength of the case for a state law intended to protect the interests of state citizens must give way to the overall welfare of the nation. This message is an old one, of course, and as we saw in Chapter 2, the Court has been resolute in its commerce clause jurisprudence, beginning with Gibbons v. Ogden, to make clear that the police power standing on

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

its own gives no special warrant to the state in disrupting the free flow of commerce. There are often two welfares at stake, that of the community whose law is enacted on their behalf and that of the common community of American citizens. So, while the general idea remains intact that the state's regulatory power is left undisturbed by a widened national regulatory presence, the constitutional rule that lies at the background of these evolving conditions is that the interests of a common national economy will reliably trump the specific interests of states no matter how sound is the police power rationale for enacting certain safety, health, and morals measures.

This triumph of federal constitutional authority has been nonetheless tempered somewhat by doctrinal developments over the last three decades or so. First in United States v. Lopez[21] and next in United States v. Morrison, the Court read the commerce clause as requiring a greater connection to the imperative of national authority – at the very least, Congressional findings that the situation required national intervention.[22] These notable commerce clause decisions was accompanied by a renewed attention on the part of the Rehnquist Court to separation of powers constraints on legislative and executive action, and there were a handful of significant cases that imposed what amounted to procedural limits on the strategies Congress could use in implementing policy.[23] In a somewhat similar vein, the Court created a novel "anti-commandeering" doctrine that forbade the federal government from relying on state institutions to carry out national goals.[24] To complete the picture during this key period of the 1980s to roughly the end of the century, the Court created a canon of statutory interpretation – named after its decision in Gregory v. Ashcroft – that imposed a higher burden on Congress when it enacts legislation that displaces state power.[25] Through these judicial decisions, augmented by administrative decisions within the executive branch, federalism became more robust, even though the fundamental expansion in national authority has not eroded.

Beyond the doctrinal edifice of the commerce clause claim the national welfare will always trump state interests and preferences, we can ruminate about whether there is a larger claim at work here, that is, that the national interest is the relevant focal point in assessing considerations of general welfare that are tied to the police power. One way to think about the police power's advancement of the *salus populi* is that it must be ever attentive to the national welfare. As chaotic is the present state of dormant commerce clause jurisprudence; as we were reminded in the last Supreme Court term when a very decided court decided National Pork Producers Council v. Ross,[26] at its core is the idea that state parochial interests cannot impede a national marketplace, a marketplace being in the public interest as the framers thought central in the creation of a federal commerce power in Article I and in the enactment of the US Constitution more generally. The energy in this bold claim about national interest driving state decision-making should be tempered, however, by the reminder crucial to the overall argument of this book, and that is that the state police power is embedded in understandings of the role and function of state constitutions. To make the larger, and rather ambitious, point that state

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

constitutions are principally constructed in design and interpretation as servants to a larger national interest requires much more analysis than embedded in either two centuries plus worth of Supreme Court caselaw on constitutional federalism or in the scholarly exegeses on the place of state constitutionalism in our American republic. Moreover, this claim would be, in any event, in serious tension with how the framers understood the idea of reserved powers under the Tenth Amendment, and also how both federal and state courts viewed the best interpretations of the police power's scope under the *salus populi* rationale.

One last observation regarding the resilience of state regulatory power in light of the Court's many federalism decisions. After some quiet with regard to national/state disputes at the constitutional level, the Roberts Court has developed some doctrinal innovations that have the effect, if not the design, of cabining national power, principally at the administrative agency level.[27] The direction of at least a plurality of the current Court (and perhaps even a majority, although it is too soon to tell this with certainty) is "anti-administrativist,"[28] in that these more conservative justices are quite skeptical about the vast power exercised by federal administrative agencies. A few justices have called for a resuscitated non-delegation doctrine to limit agency power;[29] the Court is on the verge of overruling its 1984 decision in Chevron v. NRDC,[30] a decision that ushered in an era of significant judicial deference to administrative agencies' statutory interpretations;[31] and, perhaps most notably, the Court has invented a so-called Major Questions Doctrine, which essentially requires that matters of economic and social significance shall be resolved by statute, not by administrative regulation.[32]

Taken as a whole, these decisions restrict the tactics of the federal government in their claims of authority, even if they do not weaken national authority in a formal sense. In other words, these anti-administrative decisions are not about federalism as such, but they can lead to the same end, which is that the national government's discretion to make policy in the matter that it believes best suited to sound implementation is limited. At the same time, we should not overstate the significance of these developments from the vantage point of the national scope of regulatory power. The space of national power, having been greatly expanded in the Progressive era, the New Deal, the Great Society, and in eras in between and afterward, is broad and resilient.

IS THERE A NATIONAL POLICE POWER AND DOES IT MATTER TO THE STATE POLICE POWER?

A key question is whether the broad national power that exists under the Constitution comes at the expense of the state police power. This question can hardly be answered in the abstract, for the matter must be illuminated by resort to specific controversies that involve the overlap of federal power on state authority as traditionally measured. This question was a focal point, or at least was made so because of Justice David

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

Souter's dissenting opinion in United States v. Morrison, a 2000 case in which the Supreme Court invalidated the Violence Against Women Act as outside the scope of Congress's commerce power. Justice Souter argued that this holding was outside the realm of previous Court precedents involving the commerce clause in that it presupposed that once an issue was one that had long been handled at the state regulatory level, it was not for the federal government to wade in through its commerce authority. "The premise," Souter writes,

> that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur.... To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme.[33]

At the heart of the case, both the majority and dissenters agree, is whether this act falls under the established definition of commerce.[34] The very expansive definition of commerce, one that denies, somewhat strangely to be sure, a discernible line between commercial and non-commercial activity and likewise denies an interpretation that would limit the scope of the federal power to economic activities, has supported broad Congressional power. This was reaffirmed by Wickard v. Filburn[35] in the New Deal and again in Gonzales v. Raich,[36] a case decided contemporaneously with Morrison. But this power is not without judicial limits, as the Court made clear in both Morrison and Lopez. Two lessons relevant to our discussion can be drawn from these modern spate of cases, even accounting for the vigorous disagreements reflected in the dissenting opinions in each case: First, no justice has gone so far as to argue that the national government has a general police power. Despite Chief Justice Rehnquist's characterization of Souter and his allies position as suggesting such a power, a careful reading of the dissenting opinion here, and also in Lopez and Raich, is that the key question if whether the traditional scope of the police power over various local matters, including basic elements of criminal law and domestic activity, means that the federal government must stay out of these issues as a categorical matter. It is ultimately a fruitless and even odd disagreement between the majority and dissenting opinions. After all, Chief Justice Marshall made rather clear in Gibbons and the other early commerce clause cases we discussed in Chapter 2 that the state's police power authority was indeed part of the reserved powers of the states, and did not belong with the federal government, but, at the same time, this power could not interfere with commerce. This fundamental principle of constitutional review remains good law, even as the Court has and presumably will continue to struggle with the question of how best to limit the scope of what commerce means.

Second, and related to the first point, is that there can surely be instances of simultaneous regulation by the federal and state governments of various activities

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

related to public health, safety, and morals. Yes, the Court draws a line in Morrison that rules out criminal law relating to violence against women as defined in this historic act. However, it does not rule out in any way, shape, or form, federal criminal law in toto. The criminal law books are filled with conduct that is punishable by the states and also the federal government under statutes. Drug laws are an obvious illustration of this, but there are many other examples as well. Interestingly, federal laws that criminalize certain activities on the grounds that such activities are immoral – rather than, say, that they impede the free flow of economic commerce – have been long upheld as constitutionally acceptable under the commerce clause. And so while the Court insists that "[t] he Constitution … withhold[s] from Congress a plenary police power,"[37] the scope of national power in areas that have traditionally been the primary province of state regulation is strong and, and even after Lopez and Morrison, largely intact.

While this is not principally a point that emerges from the Court's federalism decisions, it is worthwhile mentioning, as it gives shape to a "no" answer to the question asked in the title of this chapter's subsection, and that is that the functioning of the state police power is not seriously affected by the ubiquitous national power to regulate many of the same subjects through the criminal law and other forms of law as would the states. Preemption of state regulatory authority is not without meaning; however, it is seldom the case that the national government displaces state authority because the feds have decided to step in. There have been very few areas of social life and public policy where the position of either Congress or the courts have been that the states may not meddle through its use of the police power on the grounds that these areas have become exclusively federal. This is true even through periods in which there has been very strong support for national interventions and a corresponding skepticism about the states' capacity and willingness to address the problems at issue. Moreover, it is more typical that the national government has actively encouraged states to exercise authority under its police power, and whatever other added authority given by Congress, to advance health and safety objectives. The 1960s and 1970s were an important time in which such encouragements took place, as the federal government got itself more involved in urban policy[38] and other areas that had largely been the province of the states.[39] Health care policy was another area in which Congress pushed states to undertake initiatives,[40] this illustrated well by the provisions of the Affordable Care Act that incentivize states to participate in insurance exchanges.[41] In the area of environmental law, federal statutes and administrative regulations have set up structures to encourage states to innovate, even while insisting that minimum national standards be enforced. And even in the area of antidiscrimination law, an area whose history illustrates the critical role of federal intervention given the states' quiescence or, as with Jim Crow, even worse, state and local governments will frequently enact protections for subordinated communities that go beyond the federal baseline. To be sure, these episodes are not principally about the police power *qua* police power, yet they are good illustrations

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

of the general point, and that is that expanding federal power has not supplanted state authority under the police power.

Looking at the national regulatory landscape broadly, national and state governments have worked, and continue to work, in partnership with one another in many key policy areas.[42] The national government must find its authority to undertake the federal functions of this partnership in the US Constitution, although two centuries' worth of caselaw on constitutional federalism has given the feds a fairly wide berth in exercising authority under Article I. This national authority exists often alongside the police power of the states and so it is in the confluence of these two powers that these two levels of government interact in ways that a commentator on federalism once described as a system of marble cake federalism.[43]

There are precious few instances in which the courts have been asked to settle a dispute over the federal government's effort to displace the state police power through national legislation. The modal controversy involving federal regulation implicates not the question whether the state has properly acted, but whether the national government may regulate at all under its enumerated powers.[44] Preemption presents what we can credibly label a federalism issue, but, in reality, preemption is a statutory interpretation issue.[45] We consider whether and to what extent the federal government's actions can be properly read as supplanting actions of the state or, more generally, keeping states out of the domain altogether, as in controversies over so-called "field preemption."[46] Finally, an issue that has become prominent over the last thirty or so years, that of anti-commandeering, concerns the limits on Congress's ability to conscript state or local officials into national policy.[47] This does not implicate the scope and content of the police power of state government in any important way.

At bottom, any assertion by the national government that it has a police power analogous to the police power in the American states is belied by both our American constitutional history and by the logic of American constitutionalism. As to the former, recall the basic idea that the federal government is one of enumerated powers, as this is beyond the scope of this book and is covered amply in the large historiography on the formation of the US Constitution. Within these limits, the only conceivable source of a national police power would be the "necessary and proper" clause invoked as a police power of sorts to accompany the federal government's broad power to regulate interstate commerce. But the connection here is an especially weak one, as even a broad rendering of that clause, plausible after McCulloch v. Maryland and supported by myriad scholars over the long expanse of American constitutional history, assumes that the powers referred to in that sweeping clause can only be, as Chief John Roberts wrote in the Affordable Care Act case, NFIB v. Sebelius,[48] "exercises of authority derivative of, and in service to, a granted power."[49] This is not necessarily an idle debate, as prominent constitutional scholars have argued that the reference to general welfare in the Constitution's preamble might be a source of such power. Nonetheless, the conceptual and historical architecture

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

of our American constitutional order has never embraced the idea that there is a national police power, and neither the text nor the history sustains such an idea.[50]

To this point, we have been dwelling in the comfort of big constitutional theory. We might ask the same question from a more practical vantage point. Does the expansion of federal authority carry along with it at least an implication that states should be more circumscribed in the use of the police power to carry out objectives that, in modern times, can be realized more effectively by national policymaking? It is a commonplace in the literature on regulation and government to point out that solving society's wicked problems requires an active central government, one that will account for externalities and lassitude on the part of state governments. The federal government, in these accounts, is needed to save the day in the face of the inadequacies of state and local government. While the empirical and theoretical bases of a reasonably active national role are compelling, it is naïve to see the national and state governments as substitutes rather than complements. What these arguments for a reliably muscular national government, perhaps something akin to a federal police power, do not support is a limit on the states' ability to protect health, safety, and general welfare through a capacious police power. The expanding national role has not accompanied an erosion of state authority, either as a normative matter or as a practical matter. As to the latter in particular, it must be said that the state and local government's role in creating and implementing regulations in the areas of health, safety, and morals has not seriously abated since the 1930s; if anything, it has grown by most measures.

Much of the preceding discussion has been framed in the negative. That is, we have insisted that the evolution of national regulatory has now disrupted the legal and practical underpinnings of state regulatory initiative. However, we should still press on the point of whether our expanding national government has generated new perspectives on federalism that has implications for how the police power functions. This is where we turn to next.

DYNAMIC FEDERALISM MEANS A DYNAMIC POLICE POWER

Traditional federalism debates have been mired in disagreements about what are the states' separate spheres. Under what conditions can the states as sovereign exercisers of legal power without risking federal intervention? Resort to categories and factors to support the placement of lines separating federal from state concerns has proved difficult, despite occasional forays by the Court into that kind of analysis in resolving disputes. In recent years, a large number of public law scholars looking anew at federalism have helped reorient the conversation from this "separate spheres" analysis to a deeply pragmatic and avowedly political perspective on federalism.[51] All of this diverse research and analysis points to a picture of a dynamic federalism, one that escapes from the relentless question of "Who's in charge?" and pursues instead the

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

more practical question of "How should the many relevant institutions of American governance work together to carry out important objectives and, further, how should we deal with constitutional conflict?"

Yale Dean Heather Gerken has called for a robust federalism which protects the power of sub-national governments as a means of poking and provoking national political institutions and officials into making more socially just decisions.[52] The power of the servant is the power to dissent, to exercise, as she puts it, "'voice' in an exceedingly muscular form."[53] These dissenters, acting within the authorized governance frameworks of the state and local governments, can stir up trouble and engage in conflict, as well as collaboration and conflict on behalf of dissenting minorities. "States and local officials administering federal law," Gerken writes, "can edit the law they lack the power to authorize precisely because they are inside the system, not outside of it." So, for example, the decision by San Francisco mayor Gavin Newsom in 2004 to issue marriage licenses to same-sex couples, despite any reasonable basis in existing state constitutional law for this decision, had the beneficial effect of engaging the national debate in a constructive way. But what of the fact that this political move by the mayor was beaten back by the California Supreme Court? Says Gerken: "While local resistance surely has its costs, minority rule at the local level generates a dynamic form of contestation, the democratic churn necessary for an ossified national system to change."[54] What federalism all the way down aspires to do is to help the project of building good national policy.[55] This is true not only of the functions of state governments to implement federal law, but also in the circumstances in which state governments are enacting state law. So, this is a really remarkable twist: Even purely state law should be seen as a means of advancing national interests. As her Yale colleague, Abbe Gluck, puts it succinctly: "Congress has asked the states to enact their own state laws, create new state institutions, and pass new state administrative regulations – in other words, to exercise their sovereign powers in service of the national statutory project."[56] To summarize, federalism creates the space for democratic contestation by citizens exercising voice at the sub-national level and in ways that national authorities are obliged to respect and this will counteract the power of majorities to use federal institutions to dampen dissent and disable minorities. Loyal opposition by sub-national governments enables minorities to speak truth to power. Taken as a complete story of what federalism purports to accomplish, it does help explain a hard puzzle: Why ought state and local governments flourish, notwithstanding the post New Deal reconfiguration of national/state relations and the necessary augmentation of federal power?

The larger point that this and other related literature supports is the idea that American federalism is not about boundary drawing and the quest for separate spheres of regulatory prerogative, but is about creating mechanisms consistent with the ambitions of American constitutionalism to facilitate a dynamic, interactive, and interinstitutional process by which dynamic American politics can be explored and improved and the project of good governing refined and implemented.

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

Health and education policy are excellent examples of this dynamic federalism in operation. States maintain principal control over some key aspects of the health system, such as occupational licensing and the determination of whether quarantines or cordon sanitaire restrictions are necessary. Other aspects, including matters of data privacy, insurance under the ACA, the development of vaccines and prophylactics to assist with major, cross-border infectious disease emergencies, as well as other elements of health care delivery that demand efficiencies of scale, will involve active federal intervention. The system could not effectively run without the engagement and collaboration of the national government and the governments of the states.[57] Education policy, likewise, involves issues that benefit from federal engagement short of displacement of local control. Not only are there dynamic policy issues at work that implicate national interests and values, but they are also considerations of constitutional rights, of both teachers and students, that mean that state and local choices are made in the shadow of national law.[58]

Paeans to intergovernmental collaboration are perhaps the easiest part of this inquiry into dynamic federalism as a description and an aspiration. Who could be against cooperative federalism? More difficult is the question of how to resolve serious conflict. States will frequently disagree with one another, especially in area of hyper-partisanship. And state views will conflict on occasion with the views of the national government. The dual challenge is to ameliorate the conditions of conflict and create rules that can resolve conflict when it happens, but in a way that preserves both goodwill and policy innovation. The default might be, unavoidably, a respect for the federal government's supremacy in matters that rightly implicate national concerns and, likewise, a respect for state autonomy where there is no basis for federal control or interference. But what about the myriad situations that fall between these two extremes?

To understand the way out of conflict we need to understand the source and reasons for this conflict. At one abstract level, we can see that conflict usually stems from disagreement about policy, rather than disagreement about federalism. Citizens often behave as policy entrepreneurs, seeking sustenance from that level of government that supports their preferences. But we need still to take the lens out a bit to see whether this conflicts maps onto institutional instabilities. The most plausible model available about how institutions – and here we are talking about the two primary levels of government, states and the federal government – is that sketched by James Madison and Alexander Hamilton in the Federalist and refined in more complex ways in the centuries since. Madison made the important point in the Federalist No. 10 that individuals and public officials will pursue their own ambitions and therefore "ambition must counteract ambition." Yet it was Hamilton who dug deeper into the question of how to think about the competition that would likely arise between layers and levels of government. In Federalist No. 28, he reminded us that "power is almost always the rival of power." Indeed, the national and state governments are frequently rivals, as are state and local governments. They compete

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

for the loyalties of, and the benefits of, citizens. They use electoral structures and political institutions, including, for example, political parties to mobilize support, to secure acquiescence, and, where necessary, to divide and conquer. Yet it is crucial to see this opportunism on the part of state and local governments not as institutional self-dealing or as some conspiracy to undermine electoral accountability, but as tactics to effectuate the will of the people, whose preferences and objectives are realized through the actions of these units. Conflict can be navigated at the policy level. But it must also be navigated at the institutional level.

Further, this relationship can be viewed as one between principals and agents, with the citizens being the principals. They will have an admixture of policy preferences. A critical mass of citizens care about, say, a clean environment, the financial well-being of their family, access to education, reliable health care, equality of opportunity, and national security. Others will have a different mix and priority of preferences. Some of these goals are best realized through national policy – national security, for example – others through local policy (say, land use), and, for the rest, the relevant group of citizens may well be agnostic about which level of government implements their preferences. Knowing that different policy goals align with different institutional capacities and tactics, rational individuals are likely to want governing institutions to be made up of multiple principals, that is, of a mix of institutions, all working in a synthetic system. The basic point is that citizens will want – and let us go a step further and say *ought* to want – a system in place that is most likely to successfully aggregate these preferences and, in the case of those in the minority, ensure that their rights are protected against majority expropriation and oppression.

This principal-agent formulation has implications for federalism in a couple relevant senses: First, on occasion, citizens will be indifferent about states' rights and local autonomy. Sure, they may have ideological preferences on the matter, but history suggests that these ideological preferences will give way to their policy preferences. This is illustrated in all its glory by the infamous Tea Party protest sign which read "keep the government's hands off my Medicare." Second, citizens will want their units of government to maintain sufficient authority and flexibility so as to carry out their will when they are tasked thusly. For the citizens, we can think about their strategies as a sort of political arbitrage. That is, citizens will use their knowledge about their own preferences, including their discount rates, and also knowledge about the governmental institutions which are in a position to facilitate or undermine these interests. Sub-national governments are engaging in a similar process of political arbitrage. And they do so not only as automatic aggregators of constituent preferences, but as institutional actors with their own interests. In making their decisions, they will often cooperate with the central government, and occasionally with other states or local governments in the horizontal context. Other times, however, their strategies will bring them into conflict with central authorities. And it is here when they are truly caught between two masters – the central government on the

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

one hand and their citizen principals on the other. This dilemma is intrinsic in a federalist system, as our framers well understood.

Despite the risk of conflict and confrontation, these institutions of governance need and want the flexibility to act on behalf of their citizens and to maintain the discretion and the power to pursue objectives without unnecessary interference. Sub-national governments can be the conduit for the pursuit of discrete and general interests by citizens. As such, citizens have a strong interest in ensuring both a plurality of such governments and a reasonable assurance that they have appropriate authority and techniques to manage conflict. Furthermore, these subnational governments want and need legal protections in order to protect their prerogatives as institutions of governance. As Professor Ernest Young says about states: "The emphasis on the institutional interests of state governments is critical because virtually all the important benefits of federalism stem from the existence of the states as self-governing entities. States cannot function as checks on the power of the central government, or as laboratories of experimental regulation, if they lack the institutional ability to govern themselves in meaningful ways."[59]

This idea of political arbitrage is a particularly resonant theme with regard to local governments, and this because of the intriguing fact that local governments can be formed in a more customized way, by contrast to the states, which exist in the form established at the time of their admission to the union and, under the Constitution, cannot be changed at the will of the federal government or the citizens writ large. Charles Tiebout pointed out many years ago that the size of local governments reflect the interests of citizens reflected in their choice to exit and enter and to create a geographically defined polity that advances their interests.

That citizens want the flexibility to implement their goals through the right kind of institutional mechanisms may explain the steadily growing use of special-purpose governments. Like municipalities, special-purpose governments are creatures of the state; but, unlike municipalities, they are truly customized creatures. They are more like a robot than like Frankenstein's monster, the latter of which resembles a human being of sorts, and the former need not be human in any discernible way, shape, or form. More to the point, the special-purpose governments enable states to circumvent the limits of local governments and to accomplish goals that might otherwise be frustrated by localities. Local citizens can and will often look toward quasi-governmental institutions, such as common interest developments, in order to create mechanisms for implementing their preferences and, more radically, to retreat from the public sphere. These sorts of customized institutions threaten to upend or at least problematize the traditional conception of localism by giving citizens the opportunity to create a governance strategy that is more carefully tailored to their specific policy interests and concerns.

While these institutions are not immune from governmental action or influence, they are intriguing devices to drive decision-making from the government to smaller institutions over which local citizens have comparatively greater control.

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

Note that a comprehensive theory of localism, and perhaps even of federalism, requires attention to these structures, and also to how they connect to the police power.

Still to consider, even if just briefly here, is how best to negotiate matters of constitutional conflict. Both federalism and localism provide the frameworks within which these issues are negotiated, both in the political process and courts. For those who might be called "new process federalists," the focus on political processes requires some additional attention on the dynamics of relations among governments and, also, on what motivates public officials and, further, how they take these motivations into the venue of discrete institutions of governance. Jessica Bulman-Pozen and Dean Gerken shrewdly capture the point that federalism can capture this inter-institutional struggle. Here I quote:

> Federalism divides power and offers a structure for substantive views to compete. It does not specify what the recipients of divided power should use it for, nor does it equate particular views with one level of government or the other. Claims that political actors undermine federalism by marshaling arguments for state power in an opportunistic way and treating federalism as a convenient arrangement through which to pursue policy agendas indict our Founders as well as contemporary politicians. More deeply, such claims overlook the significance of federalism in establishing loci of political conflict, whether this conflict is driven by state institutional interests, partisanship, or something else.[60]

Policymaking need not be a zero-sum game. However, even though collaboration may be the modal choice, governments will want to protect their discretion to engage in political arbitrage. Moreover, conflict will happen. That is in the nature of politics, where there is heterogeneity in policy preferences and the intensity of such preferences. Therefore, there will be instances in which the interests at stake mean that the assertion of local power will provide benefits captured at, say, the local level and, by such capturing, unavailable to officials at other levels of government. To think about this in more theoretical terms, some local officials may be relentless budget maximizers; others may be good Burkeans.[61] The view that these governance institutions pursue their own objectives, pursuits which come into conflict with other levels of government, accommodates the myriad incentives and motivations that emerge from citizen preferences, however forged and articulated.

The police power functions in a dynamic environment in which our various political and legal institutions act and react with one another in order to safeguard their interests and realize their objectives. This need not be a Hobbesian war of all, ratcheted up from the individual to the institutional level. It may be overlain with a scrupulous commitment to collaboration and the means and mechanisms to sustain this collaboration. The principal point of this discussion, however, is that an assessment of federalism that captures the dynamic between the state and local governments exercising vigorous authority under the police power can become enmeshed

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

in some vexing inter-governmental struggles; likewise, the competition for impact and influence between state and national governments can have a similar valence. As to matters of good governing and its facilitation, we should remember Ronald Reagan's statement about the former Soviet Union: Trust, but verify.

CONSTITUTIONALISM AS A THEY, NOT AN IT

The state police power, as we have discussed throughout the book, is nested in our schemes of state constitutionalism. It is from those constitutions that the power is derived; and the overall purpose and function of the police power is to implement objectives that are instantiated in these state constitutions, principally the promotion of the general welfare and complementary goals, including the protection of health, safety, and public morals. Moreover, the structural limits on the exercise of this power are found in the implicit instruction that the government act in a fashion neither arbitrary nor with animus, and overall with a public purpose. These have been fashioned in our analysis as state constitutional objectives. However, it would be incomplete to dwell on state constitutionalism without describing further how our state constitutionalism is embedded in our American constitutional framework and mission. Constitutions are, after all, the fundamental law of states that are part of a nation of United States.

Short of painting a complete and coherent picture of state constitutions as part of the project of American constitutionalism, an ambition beyond the scope of this book, two general observations are relevant to this particular project. First, the state constitutions are fashioned as instruments of particular state objectives and while there are common elements across the fifty states – elements whose commonality permit us to speak about state constitutionalism as a coherent concept – it is important to acknowledge and understand the particularities that might ground a particular approach to regulatory power and to private rights (among other aspects of that state's constitution). Constitutions are thus a "they" in their diversity and their functions. To be sure, they are tied together by the fact that there is a US Constitution that will provide a general framework of governance and of rights within which these separate state constitutions function. This is made clear only in the brute fact of supremacy as established in the US Constitution, but also in Article IV's requirement that the United States "guarantee to every State in this Union a Republican form of government."[62] Through this important provision, however erratically enforced as a matter of constitutional doctrine, the US Constitution makes clear that it has a stake not only in the results of state political and legal processes, but in the nature of the process itself. This principle, more than any other, ties together state constitutions in a common bond, one that directs them to organize their lawmaking and law-implementing institutions to facilitate the goals that benefit republican governance. This is not to say that the US Constitution expresses a particular view about the content and scope of the police power, but that it does express to states a

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

commitment to safeguard republican governance and the goals that such a system of governance entails.

Second, it is important to see American constitutionalism as safeguarding, through structure and practice, overarching goals of a polity that is represented by both national governments and by their own state and local governments. This idea is communicated by specific constitutional principles and doctrines, including federalism and also the post-incorporation, post-Reconstruction conception of ordered liberty emerging from our constitutional rights we enjoy as free citizens, regardless of our location. Up to now, we have focused especially on the way that the police serves the goal of state constitutional project. We need not miss in such a focus, however, the deep and broad ways in which the state constitutions work constructively to facilitate omnibus goals of the American constitutional object. To make this more concrete, think of the idea of regulation designed to protect public health. Health of citizens is a broad goal, one by any measure central to the well-being of free citizens and from which most other goals and obligations arise. Political officials and commentators have gone further in saying that health is a human right, a positive right that should be protected by governments at all levels. But we need not go that far to make at least the point that the pursuit of public health, though embedded in the state police power and the state government's obligation under this power to protect public health. Addressing the predicament of violence crime can also be understood as raising not only local goals, but national objectives. How can We the People benefit as citizens of our extended republic if we fear for our safety in our communities? There are many other examples we could conjure up to illustrate the idea that the state police power facilitates goals that span state borders, and, viewed more broadly, that the state constitutions are not only charters of fundamental law within the confines of the state, but are embedded in a more general constitutional rubric. Although conversations about constitutional theory and constitutional law often neglect to give due to state constitutions, we can recognize as we reflect more deeply on the matter that constitutions are a "they" that make up what is ultimately a common discourse, a national agenda, and a set of evolving objectives in whose service the many powers vested in national, state, and local governments remain.

American constitutionalism is a they not an it in that we fulfill our constitutional ideals by creating and improving mechanisms by which governmental institutions at all levels perform the essential functions of protecting public health, safety, and morals, and advancing the common good. The allocation of responsibility – how and to whom – is a complex and contestable matter of dynamic politics and ultimately of democracy. But the core principle is that we are all in this together and, further, that our fifty-one constitutions work in synergy, to enable the right institutions to protect our interests and goals. This is a principle of American constitutionalism that transcends one location or a narrow, one-size-fits-all conception of the general welfare. Moreover, this idea of a dynamic American constitutionalism, one

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

that pedigrees the US Constitution as the fulcrum of our collective national constitutional objectives, while also acknowledging that the prerogatives of states to exercise reserved powers is reflected in our ideas of American federalism. Ultimately, therefore, constitutional federalism has a deep stake in the successful use of the police power in the American states.

NOTES

1. See generally Gary Donaldson, *The Second Reconstruction: A History of the Modern Civil Rights Movement* (1999); James M. McPherson, "The Dimensions of Change: The First and Second Reconstructions," 2 *The Wilson Q.* 135 (1978).
2. 514 U.S. 549 (1995).
3. 529 U.S. 598 (2000).
4. 505 U.S. 644 (1992).
5. See Skowronek, *Building a New American State*; Joanna Grisinger, "The (Long) Administrative Century: Progressive Models of Governance," in *The Progressive's Century: Political Reform, Constitutional Government, and the Modern Administrative State* (S. Skowronek et al. eds., 2016).
6. See generally, Daniel Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (2014); Marver Bernstein, *Regulating Business by Independent Commission* (1955).
7. In addition to Skowronek, *Building a New American State*, see Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (2012).
8. See generally Paul Stephen Dempsey, "The Rise and Fall of the Interstate Commerce Commission: The Tortous Path from Regulation to Deregulation of America's Infrastructure," 95 *Marq. L. Rev.* 1151 (2012).
9. See generally Herbert Hovenkamp, *Opening of American Law: Neoclassical Legal Thought, 1870–1970* 206–19 (2014).
10. P.L. 79–404. On the origins of the APA, see McNollgast et al., "The Political Origins of the Administrative Procedure Act," 15 *J. L. Econ. & Org.* 180 (1999).
11. See generally Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 156–76 (1998).
12. See William J. Novak, "The American Law of Overruling Necessity: The Exceptional Origins of State Police Power," in *States of Exception in American History* 111–15 (G. Gerstle & J. Isaac eds., 2020).
13. See Ernst, *Tocqueville's Nightmare*.
14. See G. Edward White, *Law in American History Volume II: From Reconstruction through the 1920s* 37 (2016).
15. See G. Edward White, *Law in American History Volume III* (2019).
16. See generally Mark Tushnet, *The Hughes Court: From Progressivism to Pluralism, 1930 to 1941* 161 (2022).
17. 32 U.S. 243 (1833).
18. See, e.g., McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010); Mapp v. Ohio, 367 U.S. 643 (1961); Everson v. Board of Ed. of Ewing Twsp., 330 U.S. 1 (1947).
19. See Tushnet, *The Hughes Court*, at 272–306.
20. See Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
21. 514 U.S. 549 (1995).

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

22. 529 U.S. 598 (2000).
23. See Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).
24. See Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).
25. Gregory v. Ashcroft, 501 U.S. 452 (1991).
26. 598 U.S. 356 (2023).
27. See, e.g., Biden v. Nebraska, 600 U.S. __ (2023); West Virginia v. EPA, 597 U.S. 597 (2022); Alabama Ass'n of Realtors v. Dep't of Health & Human Services, 594 U.S. __ (2021).
28. See Metzger, "1930s Redux."
29. See Gundy v. United States, 588 U.S. __ (2019).
30. 467 U.S. 837 (1984).
31. See generally Thomas Merrill, *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State* (2022).
32. See ibid.
33. 528 U.S. at 639 (2000).
34. See ibid., at 628 (Souter, J., dissenting).
35. 317 U.S. 111 (1942).
36. 545 U.S. 1 (2005).
37. See Morrison, 528 U.S. at 618.
38. See, e.g., Charles S. Bullock III, "Cooperative Federalism and Fair Housing Enforcement," 99 *Social Sci. Q.* 728 (2018); Daniel Elazar, "Urbanism and Federalism: Twin Revolutions of the Modern Era," 5 *Publius* 15 (Spring 1975).
39. See, e.g., Erin Ryan, "Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Era," 66 *Md. L. Rev.* 503 (2007); Harry N. Scheiber, "American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives," 9 *U. Tol. L. Rev.* 619 (1978).
40. Abbe R. Gluck & Nicole Huberfeld, "What is Federalism in Health Care For?" 70 *Stan. L. Rev.* 1689 (2018); Abbe R. Gluck, "Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond," 121 *Yale L. J.* 534, 539–40 (2011).
41. NFIB v. Sebelius, 567 U.S. 519 (2012).
42. See generally Heather K. Gerken, "Federalism and Nationalism: Time for a Détente?" 59 *St. Louis U. L. J.* 997 (2015).
43. https://bit.ly/42J1X8X.
44. See McCulloch v. Maryland, 17 U.S. 316 (1819).
45. See William Buzee, *Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question* (2008).
46. See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).
47. Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).
48. 567 U.S. 519 (2012).
49. Ibid., at 560.
50. More recently, University of Michigan law professor, Richard Primus, has insisted that Congress cannot be limited to enumerated powers of the Constitution. While he does not conclude from this argument that the national government has a police power, one key implication of his view is that the powers of the Congress are not delineated in any meaningful way in that document and so actions that promote the general welfare

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011

are perfectly consistent with the Constitution so long as not restricted by rights protections. See Richard Primus, "The Limits of Enumeration," 124 *Yale L. J.* 576 (2014). See also Richard Primus & Roderick M. Hills, Jr., "The Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost," 119 *Mich. L. Rev.* 1431 (2021).

51. See, e.g., Robert Schapiro, *Polyphonic Federalism* (2009); Neil S. Siegel & Robert D. Cooter, "Collective Action Federalism: A General Theory of Article I, Section 8," *Stan. L. Rev.* 115 (2010); Ernest Young, "Federalism as a Constitutional Principle," 83 *U. Cinc. L. Rev.* 1057 (2015).
52. Heather K. Gerken, "Foreword: Federalism all the Way Down," 124 *Harv. L. Rev.* 4 (2010).
53. Ibid., at 14.
54. Ibid., at 47.
55. Ibid., at 47–48.
56. See Abbe R. Gluck, "Our [National] Federalism," 123 *Yale L. J.* 1996 (2014).
57. See ibid., at 2004.
58. See ibid., at 2016.
59. See Young, "Constitutional Principle," at 1066.
60. Jessica Bullman-Pozen, "From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism," 123 *Yale L. J.* 1920 (2014).
61. See generally Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (2015).
62. U.S. Const. Art. IV.

Downloaded from https://www.cambridge.org/core. IP address: 18.118.208.173, on 26 Jan 2025 at 22:31:08, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.011