

2012

## Federalism and the Tug of War Within: Introduction

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# FEDERALISM AND THE TUG OF WAR WITHIN

--ERIN RYAN

(Oxford University Press, forthcoming, 2012)

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## CONTENTS

INTRODUCTION.....

### PART I: FEDERALISM AND THE TUG OF WAR WITHIN

I. *WHICH FEDERALISM?*: THE CHOICE AND THE STAKES.....

II. FEDERALISM AND THE TUG OF WAR WITHIN.....

III. AMERICAN FEDERALISMS: FROM NEW FOUNDATIONS TO NEW FEDERALISM.....

### PART II: THE INTERJURISDICTIONAL GRAY AREA

IV. THE REHNQUIST REVIVAL OF JURISDICTIONAL SEPARATION.....

V. THE INTERJURISDICTIONAL GRAY AREA.....

### PART III: BALANCED FEDERALISM

VI. THE ROLE OF THE COURTS: TENTH AMENDMENT BALANCING.....

VII. LEGISLATIVE BALANCING THROUGH INTERGOVERNMENTAL BARGAINING.....

### PART IV: NEGOTIATING FEDERALISM

VIII. THE ROLE OF THE POLITICAL BRANCHES: NEGOTIATING FEDERALISM.....

IX. THE STRUCTURAL SAFEGUARDS OF FEDERALISM BARGAINING.....

X. THE PROCEDURAL TOOLS OF INTERPRETIVE BALANCING.....

CONCLUSION: TOWARD BALANCE IN FEDERALISM.....

## ACKNOWLEDGMENTS

A project of this scope has left me indebted to many knowledgeable and generous colleagues. For their invaluable commentary during my various phases of writing, I am endlessly grateful to David Adelman, Bill Buzbee, Lan Cao, Erwin Chemerinsky, Amy Cohen, Robin Craig, Barry Cushman, Nestor Davidson, Holly Doremus, Dave Douglas, Bob Ellickson, Kirsten Engel, Lee Fennell, Michael Gerhardt, Heather Gerken, Robert Glicksman, Vicki Jackson, Michael Klarman, Allison LaCroix, Richard Lazarus, John Leshy, Gillian Metzger, Michael Moffit, John Nagle, Hari Osofsky, Bob Percival, Ed Purcell, J.B. Ruhl, Ned Ryan, Robert Schapiro, Larry Susskind, and Bill Van Alstyne.

For critical guidance at various stages of my research, I thank Tony Arnold, Angela Banks, David Barron, Bob Bordone, Lynda Butler, Scott Dodson, Dan Farber, Brian Galle, Laura Heymann, Rick Hills, Eric Kades, Howard Latin, Linda Malone, Paul Marcus, John Nolon, Dave Owen, Larry Palmer, Judith Resnik, Paula Ryan, Cathy Sharkey, Jonathan Siegel, Joe Singer, Michael Stein, Lisa Sun, Rick Su, Mark Tushnet, Wendy Wagner, Laura Underkuffler, John Vile, and Ernie Young. I am also grateful to the many state and federal officials who shared their experiences with me, including Melanie Davenport, Roscoe Howard, Mike Murphy, Jeff Reynolds, Laurie Ristino, Melissa Savage, Rick Weeks, and many others who requested anonymity so that their comments would not be mistaken for official administrative pronouncements. This project would not have been possible without the outstanding research assistance that I have received over the years from Brianna Coakley, Jessica Deering, Tal Kedem, Syed Masood, Janet McCrae, Katy Mikols, Catherine Rylyk, Tara St. Angelo, Ryan Stephens, Matthew Whipple, Jim Zadick, and most especially Jessie Coulter and Perry Cooper.

Parts of the book have been published previously in article form. The first six chapters stem from a set of ideas originally published in *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007). (Some of these ideas were also published as *How the New Federalism Failed Katrina Victims*, in Robin Malloy & John Lovett, eds., LAW AND RECOVERY FROM DISASTER: HURRICANE KATRINA (Ashgate Press, 2009), a book chapter drawing on the original *Tug of War* article.) Chapter Seven is based on *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1 (2010). Substantial portions of Chapters Eight, Nine, and Ten originally appeared in *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011). I am grateful to the editors of these publications for their assistance in honing my ideas and for their permission to republish them here.

Finally, I dedicate this book to my miraculous family, who have shared me with the project for too many years now. I thank my husband for his infinite patience and unfailing support. My new son provides daily inspiration to make the world a better place, through academic scholarship and otherwise. My mother remains my bedrock and my sister my muse, together with my wonderful and multiple extended families. Most of all, I thank my father, for beginning this intellectual journey with me, and accompanying me every step of the way since then.

## Introduction

This book probes the tensions that lie at the very heart of American federalism, and the issues with which the architects, scholars, and practitioners of American governance have been struggling for over two centuries: How should we understand the constitutional design? In which realms of regulatory decision making should the national government trump, and in which should state or local decision makers lead? How should governance operate in regulatory realms that straddle the two? Which branches of government should we entrust with making these calls? What theoretical tools should help us interpret vague federalism directives? What are these directives designed to accomplish? The introduction outlines the questions I hope to address, charts the course of the discussion, and introduces my theoretical approach.

Written both for audiences new to these questions and those long familiar with them, the book begins a philosophical conversation about the meaning of federalism through the lenses of the competing values that undergird it and the theoretical models for interpreting federalism that animate policy making and adjudication. I argue that federalism is best understood not just in terms of the conflict between states' rights and federal power, or the debate over judicial constraints and political process, or even the dueling claims over original intent—but instead through the inevitable conflicts that play out among federalism's core principles. In regulatory realms where these tensions are most heightened—such as environmental law, land use law, and public health and safety regulation—the “tug of war” among underlying federalism values has resulted in fluctuating Supreme Court interpretations and controversial decisions. Heightened jurisdictional overlap in environmental law has especially pushed the Court's federalism decisions to extremes, helpfully exposing the fault lines between competing values. But unfolding federalism conflicts over health law, consumer protection, and gay marriage are close on the heels of the controversies that environmental federalism has helped expose.

Providing a new conceptual vocabulary for wrestling with these old dilemmas, the book traces federalism's internal tug of war through history and into the present, proposing a series of innovations to bring judicial, legislative, and executive efforts to manage it into more fully theorized focus. I outline a theory of Balanced Federalism that mediates the tensions within federalism on three separate planes: (1) fostering balance among the competing federalism values, (2) leveraging the functional capacities of the three branches of government in interpreting federalism, and (3) maximizing the wisdom of both state and federal actors in so doing. After critiquing the Court's recent embrace of greater jurisdictional separation and stronger judicial constraints, the book imagines three successive means of coping with the values tug of war within federalism, each experimenting with different degrees of judicial and political leadership at different levels of government. Along the way, the analysis provides clearer theoretical justification for the ways in which the tug of war is already legitimately mediated through various forms of balancing, compromise, and negotiation.

### A. *Federalism and the Quandaries Within*

Through federalism directives both express and implied, the Constitution mandates a federal system of dual sovereignty, establishing new authority in a national government while preserving distinct authority within the more local state governments. Nevertheless, federalism has taken different forms in countless nations worldwide and over the course of history. What exactly does the Constitution require in allocating unique authority to the separate state and federal governments? Are these allocations meant to be mutually exclusive? If not, what should happen in areas of legitimate overlap?

In practical terms, the question really comes down to *who gets to decide*—the state or federal government? In allocating authority this way, the Constitution essentially tells us who should determine what regulatory policy looks like in various public spheres. To be sure, some realms of governance are uncontroversially committed to one side or the other—for example, the powers to coin money, wage war, and regulate interstate commerce are delegated to the national government,<sup>1</sup> while the states administer elections, local zoning, and police services.<sup>2</sup> But between the easy extremes are realms in which it is much harder to know what the Constitution says about who calls the shots. Locally regulated land uses become entangled with the protection of navigable waterways that implicate interstate commerce. State and local police remain bound by federal proscriptions against unreasonable search and self-incrimination.<sup>3</sup> And to what extent should national regulations apply to the integral operations of state government?

In fact, American governance is so characterized by overlapping state and federal jurisdiction that it has been compared not only to a layer cake but to a marble cake, with entangled swirls of interlocking local and national law.<sup>4</sup> Even so, when policy-making conflicts erupt within these contexts of jurisdictional overlap, the “who gets to decide” question looms large. Is this a realm in which federal power legitimately preempts contrary state law under the Supremacy Clause, or a policy-making realm beyond the federally enumerated powers that has been purposefully reserved to the states?<sup>5</sup> And even if federal law *could* legally trump local initiative, does that necessarily mean that it should? How should we decide?

For that matter, when the looming question is “who gets to decide—the state or federal government,” then the critical corollary becomes “who gets to decide *that*?” When either the regulatory context or the federalism directive itself is unclear, which branch of government should determine what the Constitution is actually trying to say about who decides regulatory policy? Are these decisions appropriately committed to the discretion of Congress, where federalism concerns will be safeguarded by the political process in which state-elected

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<sup>1</sup> U.S. CONST. art. I, § 8.

<sup>2</sup> U.S. CONST. art. I, §§ 1–2, amend. XVII, art. II § 1, and amend. XII (describing state role in congressional and presidential elections). See *Young v. American Mini Theaters*, 427 U.S. 50, 80 (1976) (J. Powell, concurring) (identifying zoning as one of the essential functions of local government).

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>4</sup> MORTON GRODZINS, *THE AMERICAN SYSTEM* 8, 60–153 (Daniel J. Elazar, ed., 2d ed. 1984).

<sup>5</sup> U.S. CONST. art. VI (federal supremacy); amend. X (reserving non-enumerated powers to the states).

representatives make national laws?<sup>6</sup> Or should the Supreme Court be the final arbiter of these issues, by creating judicially enforceable federalism constraints?<sup>7</sup> We generally entrust the Supreme Court to interpret the constitutional meaning of anti-majoritarian individual rights, but is structural federalism different? What is the proper role of the executive branch, especially in an age of increasing executive agency power?<sup>8</sup> Is there a role for state governmental actors in interpreting these questions?

In other words, interpreting federalism not only requires that we figure out what the Constitution tells us about *who gets to decide*—who calls the shots in which regulatory context—but also what it says about *who decides whether* it will be the state or federal government. The Constitution allocates authority not only vertically between local and national actors, but horizontally among the three separate branches of government.<sup>9</sup> The legislative, executive, and judicial branches each bring different interpretive resources to the constitutional project based on their distinct features of institutional design. How should each branch participate in the interpretation and implementation of American federalism? At times, political and judicial federalism rhetoric draws heavily on a model of “zero-sum” federalism, suggesting winner-takes-all jurisdictional competition between state and federal policy makers and either/or oversight by legislative or judicial arbiters.<sup>10</sup> But how well does this model reflect what actually happens in practice, deep within the intertwining folds of federalism-sensitive governance? How well should it?

The constitutional ambiguity that makes answering these questions so difficult leads to the next question, often overlooked in the federalism discourse: *which federalism?*—or, which theoretical model of federalism should we use in interpreting this textual ambiguity? The Constitution mandates but incompletely describes American dual sovereignty, leaving certain matters open for interpretation by unspecified decision makers who must employ some kind of theory—a philosophy about how federalism should operate—in order to fill in these gaps. Yet constitutional interpreters can choose from more than one theoretical model of federalism in doing so, just as the Supreme Court has done over the centuries in which its jurisprudence has swung back and forth in answering similar questions differently at various times. The “dual federalism” model, dividing state and federal jurisdiction largely along lines of subject matter,

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<sup>6</sup> E.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 588 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–76 (1980).

<sup>7</sup> E.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 128 (2001); William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 782–83, 797–98 (1987).

<sup>8</sup> E.g., Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

<sup>9</sup> Horizontal federalism, which describes the interrelationships among the states, is another important dimension of constitutional federalism. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008).

<sup>10</sup> See, e.g., Ed Hornick, “Tenther” Movement Aims To Put Power Back in States’ Hands, CNN, Feb. 10, 2010, <http://www.cnn.com/2010/POLITICS/02/10/tenth.amendment.movement/index.html> (describing sovereign antagonism in the political sphere); *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”).

has predominated federalism theory at various points in American history, especially during the nineteenth century.<sup>11</sup> A model of tolerating greater jurisdictional overlap, often referred to as “cooperative federalism,” has predominated federalism practice since at least the New Deal.<sup>12</sup> And there are other alternatives. Are these different approaches to understanding federalism—each sharing basic contours but diverging on the details—all valid? If more than one are valid, how should we choose among them?

The “which federalism” dilemma leads back to the ultimate issue, the most important of all: *why federalism?* Why did the architects of the Constitution choose a federal system? What is our federal system of government meant to accomplish? If we can understand what American federalism is for, then we are in a better position to choose which model of federalism to follow in answering the perennial questions about who decides what in which context. However, this last question proves more difficult than at first it may seem, because American federalism is really *for* a number of different things—a collection of goals that are not always themselves in agreement. Here is where federalism theory gets especially interesting, and where this book makes its most important contribution.

As the Court regularly reaffirms, structural federalism is not an end in itself; it is crafted in service of the Constitution’s more substantive commitments.<sup>13</sup> Exploring the *why* of federalism yields a number of good governance values that undergird it, each representing an ideal in governance that federalism helps accomplish: checks and balances between opposing centers of power that protect individuals, governmental accountability and transparency that enhance democratic participation, local autonomy that enables interjurisdictional innovation and competition, and the regulatory synergy that federalism enables between the unique capacities of local and national government for coping with interjurisdictional problems that neither could resolve alone. Each of these principles advances the ideal system of government that the framers of the Constitution sought to build, and they have since gone on to take root in international good governance norms. Nevertheless—and as demonstrated by the Supreme Court’s vacillating federalism jurisprudence—these values exist in tension with one another, setting federalism interpretation up as a site of contest between honorable but occasionally competing principles.

The tug of war between competing federalism principles is built into American dual sovereignty by design. For example, the strong checks and balances enabled by parallel state and federal governments compromise the value of governmental transparency to some extent, making it necessarily harder for average Americans to understand which elected representatives are responsible for which policies simply by virtue of there being two choices. Similarly, if local

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<sup>11</sup> *E.g.*, ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 33–36 (2009); EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 177–79 (2007).

<sup>12</sup> *Cf.* ERWIN CHERMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY, 16–25, 31–47 (2008); SCHAPIRO, *supra* note 11, at 40–47.

<sup>13</sup> *E.g.*, *Bond v. United States*, No. 09-1227, 564 U.S. \_\_\_, \*9 (slip opinion) (2011), 2011Westlaw 2369334 (U.S.) (“Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”); *New York v. United States*, 505 U.S. 144, 181 (1992).

autonomy and innovation were all that mattered, there would be no need for a national government at all; its existence reflects a purposeful choice to prioritize the individual-rights' protective features of a system of checks and balances and the pragmatic problem-solving value of a national federation for coping with shared interests and border-crossing problems. Meanwhile, powerful tension can exist between the goal of preserving offsetting centers of state and federal power while also harnessing problem-solving synergy between them in collaborative contexts. Some regulatory contexts exacerbate these tensions more than others, but they are implicated in all federalism controversies to varying degrees.

As noted, the fields of environmental law, land use law, and public health and safety regulation especially showcase federalism's internal tug of war.<sup>14</sup> Sometimes, these fields involve regulatory attempts to grapple with relatively newly identified problems—that is, problems without a historically settled answer to the question of who should decide, such as climate change. Other times, evidence increasingly reveals that a previously presumed “local” problem—such as water pollution, disease control, marriage legitimacy, waste disposal, disaster response, or even land use planning—also has important national implications. Meanwhile, such presumably national problems as telecommunications, counterterrorism, and even international relations are increasingly bound up with exercises of state and local authority. The “proper” level of regulatory authority in these areas is often contested, underscoring conflicts between federalism values that have resulted in judicial and political controversy.

With this tug of war lurking within all federalism quandaries, each resolution requires the decision maker to choose, consciously or otherwise, how to prioritize among competing values when they conflict. In the political sphere, the tug of war within is often obscured by the heat and light generated by the substantive policy debates that spur actual federalism controversies—for example, the respective roles of state and federal government in regulating minimum wages,<sup>15</sup> radioactive waste,<sup>16</sup> gun rights,<sup>17</sup> violence against women,<sup>18</sup> criminal law enforcement,<sup>19</sup> health-care policy,<sup>20</sup> immigration,<sup>21</sup> and marriage rights.<sup>22</sup> Public debate often focuses on the first-order

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<sup>14</sup> Cf. Holly Doremus, *Shaping the Future: The Dialectic of Law and Environmental Values*, 37 U.C. DAVIS L. REV. 233 (2003).

<sup>15</sup> *Nat'l League of Cities v. Usery*, 426 U.S. 833, 838–40 (1976) (overruling prior precedent to hold that the Tenth Amendment exempts state employment from federal requirements); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Nat'l League of Cities*).

<sup>16</sup> *New York v. United States*, 505 U.S. 144, 174–75 (1992) (invalidating on Tenth Amendment grounds a federal law requiring states to create waste disposal facilities or assume liability for harm).

<sup>17</sup> *United States v. Lopez*, 514 U.S. 549, 551 (1995) (overturning the Gun-Free School Zones Act of 1990 for exceeding federal commerce authority); *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating under the Tenth Amendment parts of the Brady Handgun Control Act of 1993 for compelling state law enforcement).

<sup>18</sup> *United States v. Morrison*, 529 U.S. 598, 613 (2000) (invalidating portions of the Violence Against Women Act of 1994 (VAWA) for exceeding Congress's commerce power).

<sup>19</sup> *Bond v. United States*, No. 09-1227, 564 U.S. \_\_ (2011), 2011Westlaw 2369334 (U.S.) (holding that a criminal defendant had standing to challenge on Tenth Amendment grounds her conviction under a federal statute implementing an international treaty).

<sup>20</sup> *Complaint for Declaratory and Injunctive Relief, Virginia v. Sebelius*, No. 3:10-CV-188 (E.D. Va. Mar. 23, 2010) (arguing that the Patient Protection and Affordable Care Act, H.R. 3590 of March 2010, exceeds federal power under the Commerce and General Welfare Clauses and conflicts with state law); *Complaint, Florida v. Dep't of*

policy question rather than second-order structural issues about who should get to decide, and interest groups have often strategically deployed federalism rhetoric to advance a substantive agenda, only to abandon regard for federalism when it no longer serves that interest.<sup>23</sup> Theoretical shifts in the Supreme Court's famous "New Federalism" cases further obfuscate these tensions, implying that the only value of consequence is the preservation of checks and balances between the separate reservoirs of local and national authority.<sup>24</sup>

Yet the tug of war continues, overtly or covertly, in each judicial, legislative, and administrative decision that confronts these federalism controversies. This book proposes an alternative model that finally accounts for this perpetual tug of war within federalism—one that seeks balance between competing values and interpretive roles, rooting its analysis in the Tenth Amendment of the Constitution.

### *B. The Tug of War and the Tenth Amendment*

Over most of the last century, the primary federalism debates among jurists and scholars have focused on the extent of the Constitution's grant of federal authority to regulate commerce<sup>25</sup> and to enforce the provisions of the post Civil-War amendments that eliminated slavery, protected African-American voting rights, and guaranteed due process and equal protection of the law.<sup>26</sup> The extent of state sovereign immunity from lawsuits under the Eleventh Amendment has also

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Health & Human Servs., No. 3:10-cv-91 (N.D. Fla. Mar. 23, 2010) (similar challenge in a suit joined by more than a dozen other states); Complaint, Shreeve v. Obama, No. 1:10-cv-71 (E.D. Tenn. Apr. 8, 2010) (similar suit).

<sup>21</sup> United States v. Arizona, 2010 U.S. Dist. LEXIS 75558 (D. Ariz. July 28, 2010).

<sup>22</sup> E.g., Massachusetts v. U.S. Dept. Health & Human Servs., No. 1:09-cv-11156-JLT, 21-36 (D. Mass. July 7, 2010) (holding that the federal Defense of Marriage Act violates the Tenth Amendment).

<sup>23</sup> See *infra* Chapter Two, notes 7–16 and accompanying text.

<sup>24</sup> Beginning in the 1990s, the Supreme Court issued a series of decisions known as its "New Federalism" cases that articulated a more forceful judicial role in policing federalism. See *infra* Chapter Three, notes 216–49 and accompanying text.

<sup>25</sup> U.S. CONST. art. I, § 8 (empowering Congress to regulate commerce with foreign nations, among the states, and with Indian tribes); e.g., United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 551 (1995); Gonzales v. Raich, 545 U.S. 1, 32–33 (2005) (affirming federal authority to proscribe intrastate production and use of medical marijuana).

<sup>26</sup> U.S. CONST. amends. XIII (proscribing slavery), XIV (guaranteeing equal protection and due process), and XV (protecting African-American voting rights); e.g., Bd. of Trustees v. Garrett, 531 U.S. 356, 374 (2001) (invalidating remedies under the Americans with Disabilities Act of 1990 for exceeding congressional power under Section Five of the Fourteenth Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000) (invalidating the Age Discrimination in Employment Act of 1967 for the same reason); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act of 1993 for the same reason); *Morrison*, 529 U.S. at 627 (declining to sustain the challenged portions of the VAWA under Section Five).

generated controversy,<sup>27</sup> as have isolated attempts to revive debate about congressional reach under the federal Spending Power,<sup>28</sup> and more recently, the Necessary and Proper Clause.<sup>29</sup>

Although it is the structural lodestar of constitutional federalism—affirming the default rule that powers not delegated to federal government are reserved to the states<sup>30</sup>—only a handful of twentieth-century federalism cases hinged on the Tenth Amendment. By one view of the Constitution, interpreters might have relied heavily on its explicit text—“[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”—to limit federal authority to strictly interpreted enumerated powers. (Indeed, this is the view Thomas Jefferson took in protesting the early Alien and Sedition Acts of 1789.<sup>31</sup>) Instead, most modern judicial federalism analyses sideline the Tenth Amendment as surplusage, and the Supreme Court’s directly interpretive decisions mostly address the narrow question of when federal law may not conscript state agents.<sup>32</sup> Nevertheless, these cases provide an uncluttered window into the Court’s evolving efforts to cope with federalism’s internal tug of war—setting new benchmarks for jurisprudential instability.

Instability, of course, breeds opportunity. As the twenty-first century begins, an invigorated federalism discourse has emerged in the political sphere that centers specifically and passionately on the Tenth Amendment. About half the states are challenging the 2010 health reform legislation on Tenth Amendment grounds in litigation certain to reach the Supreme Court.<sup>33</sup> Thirty-eight states have introduced nonbinding resolutions or state constitutional amendments reaffirming Tenth Amendment principles of state sovereignty in opposition to the new law, and seven such bills have passed at least one state legislative house.<sup>34</sup> Nullification bills based on the Tenth Amendment have also been introduced in various state legislatures to repudiate federal

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<sup>27</sup> U.S. CONST. amend. XI (protecting states from certain citizen suits); *e.g.*, *Alden v. Maine*, 527 U.S. 706, 712 (1999) (limiting Congress’s power to authorize suits against states in state courts); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (limiting Congress’s power to authorize suits against states in federal courts).

<sup>28</sup> U.S. CONST. art. I, § 8 (empowering Congress to tax and spend for the public welfare); *e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (upholding federal power to condition federal highway funds on state adoption of a minimum drinking age); *Sabri v. United States*, 541 U.S. 600, 602 (2004) (affirming a federal statute prohibiting bribery involving federal funds under the spending power); *Pierce County v. Guillen*, 537 U.S. 129, 147–48 (2003) (affirming under the doctrine a federal law restricting certain publicly collected data from use as trial evidence).

<sup>29</sup> In *Gonzales v. Raich*, 545 U.S. 1, 33 (2005), Justice Scalia emphasized his concurrence on the basis of the Necessary and Proper Clause. Challenges to federal health reform have also been raised on these grounds. *See* Kevin Sack, *Terrain Shifts in Challenges to the Health Care Law*, NY TIMES, Dec. 29, 2010, at A10.

<sup>30</sup> U.S. CONST. amend. X.

<sup>31</sup> *See infra* Chapter Three, notes 25–29 and accompanying text.

<sup>32</sup> *See supra* note 15 (discussing *National League of Cities* and *Garcia*); *New York v. United States*, 505 U.S. 144, 174–75 (1992) (holding that federal law compelling legislative participation violates the Tenth Amendment); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that compelling state executive participation does the same); *Reno v. Condon*, 528 U.S. 141, 151 (2000) (holding that federal law regulating state use of driver’s license applicants’ personal information does not violate the Tenth Amendment).

<sup>33</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010); *supra* note 20 (describing multiple state-filed suits challenging the constitutionality of the Act).

<sup>34</sup> PBS Newshour, *States Challenge Health Care Reform* (April 16, 2010), <http://www.pbs.org/newshour/interactive/static/tables/health-states/>.

gun laws,<sup>35</sup> tax collection,<sup>36</sup> driver's license requirements<sup>37</sup> and the deployment of National Guard troops abroad.<sup>38</sup> One bill declared state authority to take federal lands through eminent domain.<sup>39</sup> In 2011, the Supreme Court permitted a woman convicted of harassing her neighbor under a chemical weapons treaty to challenge her conviction on Tenth Amendment grounds—raising controversial questions about the scope of federal authority to implement international obligations at the local level.<sup>40</sup> The Tenth Amendment has become a rallying cry among advocates for state right-to-die legislation,<sup>41</sup> home schooling,<sup>42</sup> and sectarian education,<sup>43</sup> and among opponents of Medicaid and Medicare,<sup>44</sup> federal financial reform<sup>45</sup> and national climate regulation.<sup>46</sup> For all their differences, these efforts all share a basic premise that the relationship between state and federal power implied by the Tenth Amendment has somehow gone astray.

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<sup>35</sup> Montana Firearms Freedom Act, MONT. CODE ANN. § 30-20-101 (2009).

<sup>36</sup> *E.g.*, State Authority and Tax Fund Act, H.B. 877, 2010 Sess. (Ga. 2010), State Sovereignty Act, H.B. 2810, 2010 Sess. (Okla. 2010); Washington State Sovereignty and Federal Tax Escrow Account of 2010, H.B. 2712, 2010 Sess. (Wash. 2010).

<sup>37</sup> ACLU, *Anti-REAL ID Legislation in the States*, <http://www.realnightmare.org/news/105/> (noting that no state met the December 2009 deadline contemplated by the statute, and over half enacted or considered legislation prohibiting compliance with the Act, defunding its implementation, or calling for its repeal). *See also* Anthony D. Romero, Editorial, *Opposing View: Repeal Real ID*, USA TODAY, Mar. 5, 2007, [http://www.usatoday.com/news/opinion/2007-03-05-opposing-view\\_N.htm](http://www.usatoday.com/news/opinion/2007-03-05-opposing-view_N.htm) (arguing that REAL ID violates the Tenth Amendment, destroys dual sovereignty, and makes Americans vulnerable to identity theft).

<sup>38</sup> *See* Kirk Johnson, *States' Rights Is Rallying Cry for Lawmakers*, N.Y. TIMES, Mar. 16, 2010, <http://www.nytimes.com/2010/03/17/us/17states.html> (reporting on a Utah bill).

<sup>39</sup> *Id.* (reporting on bills considered in Rhode Island, Vermont, and Wisconsin); Jim Carlton, *Federal Land Seizures Urged by Utah Governor*, WALL ST. J., Mar. 30, 2010, <http://online.wsj.com/article/SB10001424052702304370304575151693915722022.html> (reporting on a Utah law).

<sup>40</sup> *Bond v. United States*, No. 09-1227, 564 U.S. \_\_\_ (2011), 2011Westlaw 2369334 (U.S.). Although the Court's decision was limited to the question of standing, Bond's substantive claim addresses the limits of federal authority in implementing international treaties that displace state authority. *See Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>41</sup> *See, e.g.*, Craig Peyton Gaumer & Paul R. Griffith, *Whose Life Is It Anyway?: An Analysis and Commentary on the Emerging Law of Physician-Assisted Suicide*, 42 S.D. L. REV. 357, 372 (1997) (arguing that if the Tenth Amendment requires greater federal deference to states rights, it should also require greater federal deference to certain individual rights); Emily J. Sovell, *Elderly, Be Alert: The Battle Continues over Deathbed Rights*, 45 S.D. L. REV. 670, 675 (2000) (discussing how right-to-die proponents rely on the Tenth Amendment). *Cf. Gonzales v. Oregon*, 546 U.S. 243 (2006) (upholding the Oregon Death with Dignity Act without directly invoking the Tenth Amendment but broadly addressing the relationship between state and federal power).

<sup>42</sup> *See, e.g.*, Lynn M. Stuter, *Are Public Schools Constitutional?*, Jan. 20, 2003, <http://www.newswithviews.com/Stuter/stuter9.htm> (arguing that the Tenth Amendment prevents the federal government from interfering in education).

<sup>43</sup> *See, e.g.*, EDWARD KEYNES & RANDALL K. MILLER, *THE COURT VS. CONGRESS: PRAYER, BUSING AND ABORTION* 176 (1989) (arguing that the Tenth Amendment reserves state authority to assist sectarian schools and encourage religious activities in public schools).

<sup>44</sup> *See supra* notes 20 and 33–34.

<sup>45</sup> Brian Roberts, *Welcome to the Constitutional Crisis*, TENTH AMENDMENT CENTER, Apr. 27, 2010, <http://www.tenthamendmentcenter.com/2010/04/27/welcome-to-the-constitutional-crisis/> (reporting on states' rights challenges to federal authority for proposed climate and financial reform legislation, among other bills).

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

Invocations of the Tenth Amendment have come primarily from the right and are often associated with the Tea Party,<sup>47</sup> but they come increasingly from the left as well—in support of gay rights, right-to-die statutes, and local climate initiatives, and in opposition to national security policies alleged to threaten privacy and civil rights.<sup>48</sup> In one notable example from 2010, a Massachusetts federal district court invalidated on Tenth Amendment grounds portions of the federal Defense of Marriage Act that impose certain federal proscriptions on gay marriage even in states that have legalized it.<sup>49</sup> Some members of the right and left have found common ground in opposing the federal government’s unprecedented levels of deployment of state National Guard troops in the Iraq and Afghanistan wars.<sup>50</sup> A new political movement known as “the Tenters” has coalesced around the ideals its adherents locate in the language of the Tenth Amendment.<sup>51</sup> Given the near void of legal precedential hooks for many of these Tenth Amendment arguments, they do not necessarily reflect a practical strategy for litigation. Instead, this popular recourse to Tenth Amendment principles seems to reflect an openly philosophical movement about the meaning of dual sovereignty within the American federal system.

Most previous federalism scholarship has understandably focused on interpreting the constitutional provisions that have held the most practical power in answering questions about who gets to decide: the Commerce Clause, Section V of the Fourteenth Amendment, the Eleventh Amendment, and the Spending Power. These parts of the Constitution have attracted controversial judicial attention in recent decades, and they remain important, complex, and potentially unstable areas of law. However, like the emerging contemporary discourse, this book centers around the Tenth Amendment—the Constitution’s most explicit (if Delphic federalism directive—because it provides the best constitutional locus for a philosophical conversation about the critical opening questions: *How should we understand American federalism? What is federalism for? Who gets to decide?*

In contrast to the constitutional implications of the Supremacy Clause and the federally enumerated powers, the Tenth Amendment directly acknowledges dual sovereignty in specifically juxtaposing distinct sets of state and federal authority. Its open-ended commitment to

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<sup>47</sup> E.g., Johnson, *supra* note 38. For a more scholarly discussion of the Tea Party, see Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300 (2011).

<sup>48</sup> *Id.*; Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL’Y REV. 33 (2009) (discussing state leadership in progressive policymaking and interactive state-federal governance).

<sup>49</sup> *Massachusetts v. U.S. Dept. Health & Human Servs.*, No. 1:09-cv-11156-JLT, 21-36 (D. Mass. July 7, 2010) (ruling that the federal Defense of Marriage Act violates the Tenth Amendment).

<sup>50</sup> TENTH AMENDMENT CENTER, *Bring the Guard Home Legislation* (2010), <http://www.tenthamendmentcenter.com/nullification/bring-the-guard-home/> (listing state campaigns to reassert governors’ control over state national guard troops); Benson Scotch, *Legal Memo on Wisconsin Safeguard the Guard Act*, BRING THE GUARD HOME!, Mar. 13, 2010, [http://www.bringtheguardhome.org/publications/scotch\\_legal\\_memo\\_wisconsin\\_safeguard\\_guard](http://www.bringtheguardhome.org/publications/scotch_legal_memo_wisconsin_safeguard_guard) (legal memo to state veterans’ committee defending proposed legislation to impose state review of U.S. presidential requests to federalize state national guard troops).

<sup>51</sup> Rick Montes, *What is a Tenter?*, NEW YORK TENTH AMENDMENT CENTER (2010), <http://www.tenthamendmentcenter.com/2010/05/06/what-is-a-tenter/> (defining the movement); Radley Balko, *The “Tenter” Smear*, REASON.COM, Sept. 21, 2009, <http://reason.com/blog/2009/09/21/the-tenter-smear> (defending the movement).

dual sovereignty conveys both the ambition and indeterminacy that complicate American federalism, inviting both the philosophical invocations we are currently seeing in the political sphere and the rich, reflective decisions we see from the judiciary in adjudicating Tenth Amendment claims. To be sure, fewer cases have been litigated under the Tenth Amendment than the Commerce Clause, the primary practical arbiter of federal regulatory reach. Nevertheless, Tenth Amendment cases deal most directly with the theoretical issues of dual sovereignty that undergird all other areas of federalism doctrine. Unpacking federalism theory through Tenth Amendment jurisprudence sheds light on the total package. After all, there is no separate theory of federalism for Tenth Amendment and Commerce Clause cases; answers to the questions raised in both doctrinal realms stem from a single understanding about how to allocate power in a federal system.<sup>52</sup>

The Tenth Amendment presents not only the best textual hook for our discussion, but also the best scientific laboratory for its theoretical inquiry—precisely because the limited number of cases allow clearer analysis of developments in the Supreme Court’s theoretical models of federalism over time. Because only a few Tenth Amendment cases have been decided in each generation, each one imposed special responsibility on the Court to think through its approach without the weight of much controlling precedent. Each case also conferred a powerful opportunity to reshape the doctrine according to the Court’s then-operative theory. Analysis of this smaller but complete set accordingly showcases evolving federalism theories in use by policy makers and adjudicators.

In contrast, the overall body of Commerce Clause jurisprudence is vast and amalgamated, representing the undifferentiated accumulation of theoretical approaches by many judicial interpreters over time. With dramatic exceptions at the margin, federalism practice under the Commerce Clause largely continues to reflect New Deal era assumptions of vast (but not unlimited) federal authority.<sup>53</sup> The buffering effect of incrementally developed Commerce and Spending Clause jurisprudence is important in its own right, explaining how overall federalism practice remains relatively stable despite the shifts in prevailing judicial federalism theory more evident in such areas as the Tenth, Eleventh, and Fourteenth Amendments and certain areas of the Courts’ preemption jurisprudence.<sup>54</sup>

However, in exploring the different approaches available to federalism interpreters, the cases that push the doctrine in new directions are the clearest revelations of new operative theory, and

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<sup>52</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 617–18 (2000), as quoted *supra* note 10 (demonstrating that the theory of federalism underlying the new Commerce Clause economic activity test reflects the same as that underlying the new Tenth Amendment anti-commandeering rule). See also *Bond v. United States*, No. 09-1227, 564 U.S. \_\_\_, \*13 (slip opinion) (2011), 2011Westlaw 2369334 (U.S.) (“The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it.”). This book could not cover the ground it does had it engaged every line of federalism doctrine at the same level of detail, but neither is it necessary for this theoretical analysis.

<sup>53</sup> E.g., *Morrison*, and *United States v. Lopez*, 514 U.S. 549, 551 (1995) (articulating the economic activity test).

<sup>54</sup> Although this book focuses on the Tenth Amendment, recent cases under the Eleventh Amendment, Section V of the Fourteenth Amendment, and the foreign affairs preemption power reflect similar theoretical trajectories. See CHEMERINSKY, *supra* note 12, at 68–90, 234–40; *infra* Chapter Four.

the Tenth Amendment cases provide the best laboratory for this analysis. The environmental federalism cases that significantly fracture federalism values play an important role in this analysis for the same reason. These cases occasionally test the margins of constitutional doctrine in comparison to more mainstream economic regulation, but the fact that they push Tenth Amendment, commerce, and spending doctrines to their logical limits forces us to think carefully about the foundations of federalism doctrine and the purpose of the federal system.<sup>55</sup> Engaging the starkest realms of the Court's federalism jurisprudence allows the clearest analysis of its motivating theory, as well as the best opportunity for our own reflective evaluation.

The Tenth Amendment is thus where the Constitution most directly tells us that federalism is important, and its jurisprudence offers a fitting laboratory for analysis of the overarching issues in all corners of federalism doctrine. All that said, however, what exactly *does* the Tenth Amendment tell us about federalism values and how to vindicate them? As a purely textual matter, surprisingly little.

Famously critiqued as circular,<sup>56</sup> the Tenth Amendment affirms simultaneous, separate, sovereign authority in both the federal and state governments: “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.” The federal powers enumerated in Article I establish more about what authority, exactly, is delegated to the United States,<sup>57</sup> while other constitutional provisions (such as those requiring a republican form of government<sup>58</sup> and full faith and credit<sup>59</sup>) tell us more about what is prohibited to the states. The Supremacy Clause tells us something about what happens when state and federal law conflict,<sup>60</sup> and the Eleventh Amendment says something about when states can be sued in federal court.<sup>61</sup> Some believe that the (even-more-Delphic) Ninth Amendment tells us something important about federalism as well.<sup>62</sup> But all of these constitutional texts leave plenty of room for interpretation in marginal cases—those where it is not entirely clear whether the regulatory power at issue is one that has been delegated to the federal government, prohibited to the states, or reserved to the states without federal interference. If nothing else, the federalism dilemmas that arise in each generation affirm that there has been no shortage of marginal cases.

For that reason, it is up to us, and perhaps each generation anew, to revisit the foundational questions about what American federalism means, what it is for, and what we ask it to accomplish for us. We call the architects of the Constitution *framers* because they have given us a framework powerful enough to survive the forces of economic upheaval and cultural change—

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<sup>55</sup> Cf. ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION* (2d ed. 2009) (discussing the occasionally awkward fit in applying the economic model of Commerce Clause regulation to environmental law).

<sup>56</sup> *United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>57</sup> U.S. CONST. art. I, § 8.

<sup>58</sup> U.S. CONST. art. IV, § 4.

<sup>59</sup> U.S. CONST. art. IV, § 1.

<sup>60</sup> U.S. CONST. art. VI.

<sup>61</sup> U.S. CONST. amend. XI. What it actually says, however, departs markedly from how it is currently interpreted. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 STAN. L. REV. 1033 (1983).

<sup>62</sup> E.g., Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801 (2008); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 80 (2006).

but implementation remains our duty, and interpretation is the first task of implementation. Interpreting federalism is more complicated than some have given it credit, for it is not simply a matter of following allegedly simple constitutional instructions.<sup>63</sup> The instructions are not very simple, and the generations of ongoing federalism controversy prove the point. Instead, interpreting federalism requires coping with the underlying tug of war between the fundamental federalism values, developing a theoretical model for interpretive guidance, and allocating responsibility among the branches and levels of government for doing the critical interpretive work that will ultimately decide—well, who gets to decide.

The era in which the Tenth Amendment was dismissed as sheer textual surplusage may be coming to a close . . . or not.<sup>64</sup> Either way, its passionate invocation in the political sphere, its revolving interpretation by the Supreme Court, even its suggestively poetic language all beckon us to consider—through its very ambition and indeterminacy—what American federalism is all about. Today’s Tenth Amendment revival has intensified in the wake of broad regulatory responses to the Great Recession of 2008, just as federalism concerns ignited a previous generation over New Deal regulatory responses to the Great Depression of 1929. In the New Deal era, the need for powerful federal responses to a nationwide economic crisis that had exceeded state grasp led the prevailing federalism interpreters to choose a model prioritizing interjurisdictional problem solving over all other considerations.<sup>65</sup> The contemporary discourse arises from an era in which the prevailing judicial and political federalism rhetoric has privileged checks and balances over competing values.<sup>66</sup>

It is impossible to know how the unstable jurisprudence will next turn. Yet it *is* possible to ground the debate in a more nuanced model for understanding federalism—one that can account for the twists and turns of history while stabilizing the tug of war within a framework that allows for the values dialectic without requiring a theoretical paradigm shift in each instance. Though it is no modest task, it is my hope that this book will help channel the federalism debate into this more fruitful territory.

### *C. Charting the Course*

The book sets out to accomplish four things, in four parts. Part I argues that the key to understanding federalism is not through the political competition between advocates of states’ rights and centralized power, but in the theoretical tensions among its constituent values—revealing the tug of war that so complicates federalism interpretation. Chapter One frames the inquiry, highlighting the nature of federalism interpretation as a choice among competing

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<sup>63</sup> Cf. PURCELL, *supra* note 11.

<sup>64</sup> See *Bond v. United States*, No. 09-1227, 564 U.S. \_\_\_, \*14 (slip opinion) (2011), 2011Westlaw 2369334 (U.S.) (acknowledging the question “[w]hether the Tenth Amendment is regarded as simply a ‘truism,’ or whether it has independent force of its own”); MARK R. KILLENBECK (ED.), *THE TENTH AMENDMENT AND STATE SOVEREIGNTY* (2002) (further discussing the issue).

<sup>65</sup> See *infra* Chapter Three, notes 115–57 and accompanying text.

<sup>66</sup> See *infra* Chapter Four.

theoretical models. It explores the constitutional basis for federalism interpretive uncertainty, and it illustrates the stakes of the choice by analyzing the role of federalism-related conflicts in the failed response to Hurricane Katrina. Chapter Two probes the principles of good government on which federalism is premised, exploring their basis in history and contemporary jurisprudence, and the tensions that flare among them. Chapter Three reveals how this tug of war has surfaced in the Supreme Court's evolving approach to federalism over the twentieth century. It traces how the Court's decisions showcase a series of theoretical federalism models that variously privilege one value over another without ever recognizing the source of instability.

Part II discusses the challenges of administering federalism in contexts of concurrent regulatory jurisdiction, and analyzes how theoretical elements in the Court's status quo approach fall short. Bringing the analysis to the present day, it explores how the tug of war within federalism is heightened in contexts of overlap where both the federal and state governments have legitimate regulatory interests or obligations. Chapter Four describes the philosophical nostalgia for the old dual federalism model that surfaces in many of the Supreme Court's New Federalism cases, critiquing the failure of this model to contend with the problems of accelerating jurisdictional overlap. It follows the logical trajectory of the Tenth Amendment and contemporaneous preemption cases toward greater separation between state and federal authority notwithstanding the predominance of jurisdictional overlap in American governance.

Chapter Five introduces the interjurisdictional gray area that pervades cooperative federalism and confounds dual federalism—a rich soil of regulatory uncertainty from which the most pressing federalism controversies emerge. It illustrates gray area regulatory challenges with examples from environmental, public health, financial, and national security law, with special attention to the challenges of water pollution, climate change, and disaster response that most exacerbate the tensions of federalism. These are the examples that push federalism doctrine to its extremes, demonstrating the fault lines created in regulatory realms where interests in local autonomy and national uniformity most directly collide.

In consideration of the unresolved tug of war, Part III introduces the Balanced Federalism alternative at the heart of the book: a theoretical model that focuses on the equipoise between competing federalism values and between the distinct interpretive contributions of the branches of government at both the state and federal levels. Balanced Federalism explicitly accounts for the tug of war within, offers better tools for coping with jurisdictional overlap, and identifies opportunities for all branches of all levels of government to participate in safeguarding federalism values. It provides the means for a theorized exit from the cycle of jurisprudential instability, in which federalism theory is continually haunted by the formalist ghost of nineteenth-century dualism despite the functional demands of jurisdictional overlap.

In the first of a three-stage proposal, Chapter Six imagines judicial Balanced Federalism constraints that could operate in lieu of the judicial constraints established by the New Federalism Tenth Amendment cases. Its jurisprudential standard would assess the real problem in Tenth Amendment contexts—the risk that challenged activity in the gray area undermines federalism principles, taken as a whole. The chapter details the factors such a balancing test

might consider, considers the advantages and disadvantages of judicial balancing in these contexts, and illustrates its application in federalism controversies ranging from climate governance to health insurance reform. The balancing test most forthrightly illustrates the values-balancing principle of the model, although the strong role it articulates for judicial review is progressively moderated by the successive proposals.

Chapter Seven explores a more modest proposal emphasizing greater judicial deference to legislative intergovernmental bargaining. It considers how the Constitution confers jurisdictional entitlements to state and federal actors, and explores the extent to which federalism doctrine allows their consensual exchange.<sup>67</sup> Taking the example of ongoing conflict over radioactive waste siting as a case study of jurisdictional overlap, it argues that in *New York v. United States*,<sup>68</sup> the Court unwisely withdrew the potential for state-led bargaining over Tenth Amendment entitlements. The chapter shows why facilitating legislative bargaining of the sort outlawed in *New York* is ultimately more faithful to the underlying values of federalism than current doctrine, and more consistent with the rest of the Court's federalism jurisprudence. The judicial deference this proposal calls for would trump the judicial balancing test in application to consensual bargaining over Tenth Amendment entitlements, and it lays the conceptual groundwork for even broader deference to intergovernmental bargaining proposed in Part IV.

Drawing on the theoretical tools established in Part III, Part IV more fully explores the undertheorized role of the political branches in protecting federalism at both the state and federal levels. The final chapters explore the extent to which federalism-sensitive governance is already the product of widespread intergovernmental bargaining, and the extent to which values-balancing in negotiated federalism is a legitimate means of interpreting constitutional directives. Chapter Eight situates the importance of state-federal bargaining within the historic federalism safeguards debate, which has previously considered only which branch of the federal government best protects federalism. It then maps the existing landscape of federalism bargaining, surveying constitutional and statutory forums in which legislative, executive, and even judicial actors negotiate with counterparts across state-federal lines. Chapter Nine incorporates primary and secondary research to extrapolate the negotiating norms and media of exchange that define the structural safeguards of federalism bargaining. By merging state and federal interests in policy making and enforcement decisions, bilaterally negotiated governance honors federalism concerns at a structural level independent from competing first-order policy concerns.

Finally, Chapter Ten proposes criteria for recognizing interpretive partnerships among the three branches on both sides, identifying the procedural constraints that confer legitimacy on the results of state-federal legislative and executive bargaining. It provides justification for judicial deference to federalism bargaining after establishing that these baseline criteria are met, along

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<sup>67</sup> Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (analyzing legal entitlements through the conceptual vocabulary adopted in Chapter Seven).

<sup>68</sup> 505 U.S. 144 (1992).

with a fully theorized basis to account for the legitimately negotiated governance that is already widespread under cooperative federalism. In the final stage of the Balanced Federalism proposal, I argue that state-federal negotiation is a legitimately constitutional way of interpreting federalism—that is to say, of deciding *who gets to decide*—when the bargaining process is consistent with the principles of fair bargaining and the core federalism values introduced in Part I.

After all, the federalism values are themselves procedural aspirations of good governance: shepherding us toward public process that checks power to protect individuals, ensures accountability to enable democratic participation, fosters localism to cultivate autonomy and innovation, and affords opportunities for interjurisdictional synergy. When the bargaining process is faithful to these values, the political consensus yields constitutionally valid results that warrant judicial deference—even when substantive consensus on the federalism question cannot be won. Moreover, bilateral bargaining structurally reinforces protection for federalism values that transcends the subjective concerns of the negotiators and surpasses the political safeguards available at the purely unilateral level. In this way, federalism bargaining supplements other means of interpreting federalism, filling inevitable substantive gaps by utilizing the unique interpretive capacity that all branches of government bring to the table.

This final stage of the proposal advances all three goals of Balanced Federalism, enabling more conscientious balancing among the competing federalism values, the interpretive capacity of each branch of government, and the wisdom of both state and federal perspectives in locating appropriate results in each circumstance. Procedural deference to qualifying bargaining trumps the Chapter Six balancing test and all other judicial federalism constraints while subsuming the more limited deference proposed in Chapter Seven. Judicial balancing remains available to test unilateral and extreme gray area governance against federalism concerns, but it is appropriately moderated by the procedural deference that Balanced Federalism seeks for governance that meets the criteria set forth in Chapter Ten.

#### *D. The Balanced Federalism Alternative*

Before the journey begins, I offer a final note about the relationship between Balanced Federalism theory and its predecessors. The federalism debates have long raged between advocates of greater state autonomy and greater national power (reviewed more fully in Part II), as well as between champions of judicially enforceable federalism constraints and believers in the procedural safeguards built into the constitutional design (reviewed more fully in Part IV). To grossly oversimplify the discourse, many advocates for state autonomy urge judicial doctrine that enforces a zone of state sovereignty free of federal incursion, while process federalists maintain that the balance of state and federal power is sufficiently protected by the political

process itself.<sup>69</sup> And of course, there are countless examples of outlying decisions and creative federalism theory that defy these caricatures entirely, proposing more nuanced and entirely different ways of understanding American federalism.<sup>70</sup>

The values-based theory of Balanced Federalism proposed in this book is also positioned somewhere between these rough poles, providing theoretical justification for the functional account embraced by the process school while preserving a limited role for the judicial review advocated by the sovereignty school (and thus with the potential to jar those fully committed to either one or the other view).<sup>71</sup> In contrast to recent scholarship focusing primarily on the judicial role, my approach fully embraces the federalism of policy-making authority, balancing its theory of judicial review with a more theorized account of the interpretive role that state and federal political branches also play in federalism implementation. Contextualizing abstract ideas with rich factual examples, the book explores the application of Balanced Federalism ideals within case studies of disaster response, stormwater management, nuclear waste siting, and climate governance.

Importantly, however, the theory of federalism I advance here is not committed to locating dominant political power at either the state or national level. Like other scholarship in the emerging literature of dynamic federalism, this book emphasizes the value of fluidity and overlap between state and federal authority when that is consistent with basic constitutional premises.<sup>72</sup> Sometimes ideal governance in federalism-sensitive realms takes place municipally, sometimes through the state, and sometimes at the national level. And sometimes, as the climate dilemma in Chapter Five portends, regulatory challenges require collaboration at all points along

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<sup>69</sup> See Heather Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 11–21 (2010) (providing a contemporary intellectual history of the federalism debates).

<sup>70</sup> E.g., *id.*; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 908–14 (1994); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001).

<sup>71</sup> Outstanding contrary work from within each school will alternatively take issue with my reading of New Federalism's debt to dual federalism, my embrace of constitutional balancing, and my faith in some role for judicial discretion and political bargaining. The discourse is too vast for me to respond where we part company while making the contribution I hope to add, but footnotes throughout the book provide a road map to various viewpoints that have paved the way. For a small sample of this compelling literature, see JENNA BEDNAR, *THE ROBUST FEDERATION* (2009); CHEMERINSKY, *supra* note 12; JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); ROBERT A. GOLDWIN (ED.), *A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM* (1974); MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* (1999); GRODZINS, *supra* note 4; MALCOLM M. FEELEY AND EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2008); ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010); ROBERT F. NAGLE, *THE IMPLOSION OF AMERICAN FEDERALISM* (2001); JOHN NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* (2009); PURCELL, *supra* note 11; SCHAPIRO, *supra* note 11; DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

<sup>72</sup> E.g., CHEMERINSKY, *supra* note 12; SCHAPIRO, *supra* note 11; William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L. J. 145 (2007); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Gerken, *supra* note 69; Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. REV. 237 (2011); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008). See also LACROIX, *supra* note 71, (charting the legal history of jurisdictional multiplicity); PURCELL, *supra* note 11 (arguing that the Constitution's dynamic balance of power does not mandate a specific normative theory of federalism).

the spectrum of political scale, given the unique sources of authority, expertise, and regulatory capacity for response at each. One critique of dynamic federalism is that enabling regulatory overlap may effectively preempt one level's decision *not* to regulate in a given sphere.<sup>73</sup> However, when demands for governance are reasonably within the consensus of government obligation, then the dialectic of regulatory backstop created by this fluidity is a desirable feature of multilevel governance.<sup>74</sup> Time and again, history offers testimony to the value of overlapping state and federal regulatory authority in protecting individual rights, stewarding public goods, and inspiring regulatory innovation.<sup>75</sup>

As source material in the book suggests, my own interest in federalism was inspired by environmental law, which provides an excellent example of dual sovereignty at its best. Historical events match a recent era of state regulatory dominance with a preceding era of federal regulatory dominance in which each took up slack left by the other. In the 1970s, the federal government enacted comprehensive environmental statutes to fill the state regulatory void that had allowed air and water quality to degrade beyond public tolerance.<sup>76</sup> The availability of redundant regulatory authority at the federal level helped forestall even greater public health and natural resource crises, though federal efforts were themselves modeled after successful state innovators.<sup>77</sup> Then, beginning in the 2000s, state and local governments stepped into the federal void to explore how best to mitigate and adapt to the anticipated harms of climate change.<sup>78</sup> State and local experimentation has yielded critical developments in green building laws, transportation and land use planning, renewable resource portfolio standards, emissions controls, and even carbon markets—all of which have since become the subject of congressional interest in proposed federal climate legislation.<sup>79</sup> But for the availability of redundant regulatory authority at the state level, the people of the United States would enjoy far reduced environmental security.

The history of state-federal turn-taking on civil rights and even property rights tells a similar tale. The federal government intervened before and during the Jim Crow era to more fully protect the rights of black Americans,<sup>80</sup> and many states are now stepping into the void of federal law to

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<sup>73</sup> See Gillian Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. \_\_\_ (forthcoming, 2011) (assessing this critique).

<sup>74</sup> See *infra* Part I Introduction, notes 19–22 and accompanying text; Chapter Two, notes 41–56 and accompanying text.

<sup>75</sup> Cf. Douglas Laycock, *Protecting Liberty in a Federal System: The U.S. Experience*, in PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK 119 (Jörg Fedtke & Basil S. Markesinis eds., 2006).

<sup>76</sup> Clean Air Act, 42 U.S.C. § 7401 *et seq.* (2006); Clean Water Act, 33 U.S.C. § 1251 *et seq.* (2006).

<sup>77</sup> For example, California's pioneering air pollution regulation became a model for the federal Clean Air Act. See Ann E. Carlson, *Shaping the Future: What Our Decisions Today Mean for Tomorrow*, 37 U.C. DAVIS L. REV. 281, 286 (2003).

<sup>78</sup> E.g., Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments To Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015 (2006).

<sup>79</sup> Kirsten H. Engel, *Whither Subnational Climate Change Initiatives in the Wake of Federal Climate Legislation?*, 39 PUBLIUS 432 (2009).

<sup>80</sup> E.g., Marilyn K. Howard, *Discrimination*, in 1 THE JIM CROW ENCYCLOPEDIA 222, 226–27 (Nikki L.M. Brown & Barry M. Stentiford eds., 2008).

protect the rights of gay and lesbian Americans.<sup>81</sup> No federal law bars discrimination against sexual orientation in employment,<sup>82</sup> while many states now do.<sup>83</sup> But again, roles are occasionally reversed even within a period of state or federal dominance. For example, California voters amended the state constitution in 2008 to recognize only marriages between a man and a woman,<sup>84</sup> but in 2010, a federal judge invalidated the provision for transgressing the U.S. Constitution's promise of equal protection.<sup>85</sup> Although the decision may yet be overturned on appeal,<sup>86</sup> it was the first in the nation to uphold gay marriage rights on federal constitutional grounds.<sup>87</sup> Meanwhile, federal law innovated due process protection for previously unrecognized property interests in *Goldberg v. Kelly*,<sup>88</sup> while many states invented new protections for real property against eminent domain after *Kelo v. City of New London*.<sup>89</sup>

Not every aspect of American federalism can be generalized from the wrenching conflicts posed by these areas of law, but the most difficult cases provide insight into the governing norms, and the extremes often suggest something valuable about what normal should look like. Moreover, the political landscape is increasingly strewn with equally difficult cases in other regulatory arenas, such as state laws governing medical marijuana and assisted suicide, and federal health care and financial reform. Difficult cases, it would seem, are again the federalism norm.

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<sup>81</sup> See, e.g., VT. STAT. ANN. tit. 15, § 8 (2009) (amending marriage definition from union between a man and woman to a union between two people); COLO. REV. STAT. §§ 24-34-401 and 24-34-402 (2007) (barring discrimination in hiring based on sexual orientation); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (in invalidating a state statutory ban on same-sex marriages, asserting that the Massachusetts constitution is more protective of civil rights than the federal Constitution). Cf. Heather Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) (discussing San Francisco's decision to issue gay marriage licenses despite contrary state law).

<sup>82</sup> The Human Rights Campaign, *Employment Non-Discrimination Laws on Sexual Orientation and Gender Identity* (2010), <http://www.hrc.org/issues/4844.htm> ("Although Title VII of the Civil Rights Act of 1964 prohibits workplace sex discrimination, federal courts of appeal have uniformly held that Congress did not intend that the term 'sex' include sexual orientation").

<sup>83</sup> For example, Illinois's Human Rights Act bars discrimination based on sexual orientation and gender identity regarding employment, real estate transactions, public accommodations, and access to financial credit. 775 ILL. CODE 5/1-102 (2010). Minnesota bans discrimination against sexual orientation and gender identity in employment, education, housing, public accommodation, and public services. MINN. STAT. §§ 363A.02 (2009). However, the governor of Virginia recently declined to reissue an executive order barring state employment discrimination on the basis of sexual orientation. See Rosalind Helderman, *State Employee Argues to Va. Supreme Court That He Was Fired for Being Gay*, WASH. POST, Apr. 2, 2010, [http://voices.washingtonpost.com/virginiapolitics/2010/04/whenever\\_gov\\_bob\\_mcdonnell\\_dis.html](http://voices.washingtonpost.com/virginiapolitics/2010/04/whenever_gov_bob_mcdonnell_dis.html).

<sup>84</sup> CAL. CONST. art. I, § 7.5 (amended 2008).

<sup>85</sup> *Perry v. Schwarzenegger*, 2010 U.S. Dist. LEXIS 78817 (N.D. Cal. Aug. 4, 2010).

<sup>86</sup> Jesse McKinley, *Both Sides in California's Gay Marriage Fight See a Long Court Battle Ahead*, N.Y. TIMES, June 26, 2010, [http://www.nytimes.com/2010/06/27/us/27prop8.html?\\_r=1](http://www.nytimes.com/2010/06/27/us/27prop8.html?_r=1).

<sup>87</sup> Maura Dolan & Carol J. Williams, *Ruling Against Prop. 8 Could Lead to Federal Precedent on Gay Marriage*, L.A. TIMES, Aug. 4, 2010, <http://www.latimes.com/news/local/la-me-gay-marriage-california-20100805,0,2696248.story>.

<sup>88</sup> 397 U.S. 254 (1970) (holding that government entitlements are property interests protected by due process).

<sup>89</sup> 545 U.S. 469 (2005) (holding that the Fifth Amendment does not necessarily prohibit the use of eminent domain that transfers property from one private party to another for economic development purposes); Tim Hoover, *Eminent Domain Reform Signed*, KAN. CITY STAR, July 14, 2006, at B2 (reporting on new state law property rights).

The history of our federalism is one of both gradual adjustment and dynamic change, as Americans continue to grapple with the societal issues of the day, the purposes of government, and the implications of multiple sources of authority within a federal system. This book offers a theoretical tour of some of these issues, and an alternative concept of federalism that allows flexibility for the ongoing dialectic between those periods in history when local innovation is most needed and those when national uniformity must prevail. Hopefully clear by now, it is more a work of federalism theory than an exegesis of federalism doctrine. Understanding federalism as that sum total of doctrinal rules within which cases are decided is critical for the practice of law, but this treatment analyzes federalism through the theoretical lens interpreters use to consider these issues in the first instance. It focuses on the cases and dilemmas that define shifts in the underlying theoretical terrain, and its proposals engage purposefully and provocatively in theory-building from the ground up, leaving open questions in their wake.

Ultimately, my aim is to clarify the goals of federalism, the tensions within, and the promise that a more balanced model dual sovereignty offers for coping with the most pressing issues of our time. Values balancing and intergovernmental bargaining reframe the obligations of conscience and deference that operate among all three branches in both state and federal realms, demonstrating the interpretive role each plays in implementing our federal system. Balanced Federalism theory defuses some of the more hegemonic assumptions that resurfaced in the New Federalism revival and begins a more honest conversation about the genuine interpretive choices and trade-offs that federalism requires. A more balanced approach to understanding state-federal relations offers hope for moving beyond the paralyzing features of the federalism discourse that have stymied it for so long. In the end, the proposals in the book may raise as many questions as they answer, but the questions are surely worth our time.