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## Obamacare and Federalism's Tug of War Within

--Erin Ryan

This month, the Supreme Court will decide what some believe will be among the most important cases in the history of the institution.

In the “[Obamacare](#)” cases, the Court considers whether the Affordable Care Act (“ACA”) exceeds the boundaries of federal authority under the various provisions of the Constitution that establish the relationship between local and national governance. Its response will determine the fate of Congress’s efforts to grapple with the nation’s health care crisis, and perhaps other legislative responses to wicked regulatory problems like climate governance or education policy. Whichever way the gavel falls, the decisions will likely impact the upcoming presidential and congressional elections, and some argue that they may significantly alter [public faith](#) in the Court itself. But from the constitutional perspective, they are important because they will speak directly to the interpretive problems of federalism that have ensnared the architects, practitioners, and scholars of American governance since the nation’s first days.

Federalism is the Constitution’s mechanism for dividing authority between the national and local levels. In a nutshell, it assesses which kinds of policy questions should be decided nationally—yielding the same answer throughout the country—and which should be decided locally—enabling different answers in different states. Accordingly, the basic inquiry in all federalism controversies is always the same: *who should get to decide?* Is it the state or federal government that should make these kinds of health policy choices? And just as important, especially in this case, is who gets to answer *that* question—the political branches or the judiciary? Should the Court defer to Congress’s choices in enacting the ACA, or is it the responsibility of the Court to substitute its own judgment for the legislature’s on such matters?

To understand the quandaries of American federalism, a little history might help. In the first attempt at structuring the fledgling United States, the drafters erred on the side of localized autonomy in the failed Articles of Confederation, which established a union of powerful states constrained by little centralized authority. But this format offered the new Americans inefficient resources for managing interjurisdictional governance problems like interstate commerce, border-crossing harms, or cooperative projects of infrastructure and defense. Learning from that mistake, the Constitution’s architects sought a better balance—reserving broad authority to the states to regulate for public welfare while delegating a set of specific and open-ended powers to the federal government for resolving the collective action problems that confounded the states.

In service of this balance, the Constitution clearly delegates some responsibilities to one side or the other—for example, the federal government guarantees equal protection of the laws and regulates interstate commerce, while the states manage elections and regulate local land use. But between the easy extremes are realms of governance in which it’s much harder to know what the Constitution really tells us about who should be in charge. Locally regulated land uses become entangled with the protection of navigable waterways that implicate interstate commerce and border-crossing environmental harms. Voting rights cases merge election management with equal protection concerns (e.g., [Bush v. Gore](#)). Health care providers are licensed at the state level, but health insurance creates a [national market](#) of the sort long regulated by Congress.

As a result, the Constitution creates spheres of state and federal authority that are at once separated and overlapping, at least at the margins. The Constitution anticipates such overlap and provides management tools via the Supremacy Clause, which clarifies that legitimate federal law can always preempt conflicting state law. But even that isn't the end of the issue, as the feds often share regulatory space with the states even when preemption is clearly possible, especially when state and local government brings useful capacity to the regulatory table.

Throughout American history, the question that keeps coming up—and that hangs in the balance of the Obamacare cases—is just how *big* we should understand that marginal area of overlap to be. Is that gray area between more clearly exclusive areas of national and local prerogative as big as the ACA proponents contend, or as small as its detractors prefer? The Obamacare cases most directly ask how best to understand the appropriate bounds of federal power, but the flip-side of that question—how to understand the bounds of appropriate state power—is also implicated. This is the issue that underlies the important preemption cases that also plague the Court, such as this Term's [\*Arizona v. United States\*](#) immigration-related case.

But here's the thing. The reason these issues get so complicated—and so controversial—is that the Constitution, beautiful as we may think it, usually doesn't resolve them. Indeed, the problem that pervades all federalism/preemption controversies is that the Constitution mandates but *incompletely describes* our system of dual sovereignty, in a way that forces those implementing it to rely on some external theory about what American federalism is for and how it should operate when applying its vague directives to actual controversies. And unsurprisingly, there are multiple competing theories, all consistent with those directives but pushing us in different directions.

Two have especially influenced the Court's notoriously vacillating approach to understanding federalism. The "dual federalism" approach prefers stricter separation between proper spheres of state and federal power, policed by judicially-enforced constraints that trump legislative determinations. For example, the Court followed dual federalism thinking when it rejected federal remedies under the Violence Against Women Act in [\*United States v. Morrison\*](#) in 2000, and if it follows that approach in the ACA cases, it would likely strike down Obamacare as the appropriate vindicator of appropriate limits on federal power. Dual federalism thinkers see federalism as a zero-sum game, in which any expansion of federal reach comes at the direct expense of state reach, and vice versa.

By contrast, the "cooperative federalism" approach rejects the zero-sum model and tolerates greater jurisdictional overlap. Cooperative federalism urges judicial deference to federalism-sensitive policymaking, on grounds that "political safeguards" for federalism are already built into legislative decision-making by constitutional design, given that national representatives are elected at the state level. The Court has repeatedly relied on cooperative federalism thinking in upholding Congress's use of federal funds to bargain for shared regulatory jurisdiction over social programs like Social Security and Medicare, or the regulation of education and health care. If the Court follows that approach in the ACA cases, it might defer to the interpretive choices of the democratically-elected legislature in deciding an issue that falls through the cracks of more clearly articulated constitutional lines.

The battle between these classic contenders of federalism theory was on full display during the ACA oral arguments. For example, the question most vexing Justice Kennedy about the individual mandate was that of federal limits. If the federal government can do this, he asked, then what *can't* it do? Does affirming a mandate like this one effectively eviscerate all determinable limits of federal power under the Commerce Clause or any other? Could Congress next order us to eat broccoli, for all the same reasons it can require us to buy health insurance? In this respect, he voiced the dual federalism perspective, suggesting that judicial safeguards might be necessary to police the boundaries of federal authority. (Begging the question: if it were the *state* government ordering us to eat broccoli, would that be okay?)

Donald Verrilli, the Solicitor General defending the ACA, replied from the cooperative federalism perspective that the effective limits on federal power were located in the democratic process itself. He argued that nobody can seriously imagine a congressional mandate to eat broccoli, because to the extent Americans believe this unreasonable, they will not elect representatives who would create it (and they will replace any who do). In other words, he answered with the political-safeguards refrain that Congress can reliably make gray area regulatory choices, because interpreting that zone of overlap is more amenable to legislative deliberation than bright-line judicial review. (So as long as the Congress that orders us to eat broccoli is duly elected, federalism is satisfied?)

This moment of Supreme Court dialog, reiterating a conversation hallowed by centuries of repetition, reveals the rabbit-hole in which federalism debates have languished for too long—stuck between the dual and cooperative federalism alternatives of jurisdictional separation or overlap, and judicial or legislative interpretive hegemony. The dual federalism approach imagines that the very purpose of federalism is to draw lines between state and federal power (no matter how arbitrary they may be in the gray area), and credits the judiciary as best-poised to interpret such bright-line constitutional crystals. The cooperative federalism approach better understands the unavoidable mud of jurisdictional overlap and appropriately credits political safeguards in circumstances where judicial review is unworkable—but itself lacks a satisfying theoretical answer to the question of who should decide. And neither approach gives us the tools we really need to evaluate the broccoli law, or any other.

A better approach to resolving federalism controversies like Obamacare frames the “who decides” question as neither a quest for bright-line boundaries nor pure faith in the political process, but as an examination of how the challenged governance relates to the values that underlie American federalism in the first place.

Americans invented federalism to help us actualize a set of good-governance goals in operation of the new union. We created checks and balances between local and national power to protect individuals against governmental overreaching or abdication on either side. Federalism fosters local autonomy and interjurisdictional competition, and we hope it will promote governmental accountability that enhances democratic participation throughout the jurisdictional spectrum. Federalism facilitates the problem-solving synergies that arise between the separate strengths of local and national governance for dealing with different parts of interjurisdictional problems. On balance, if governance advances these values, then it is consistent with the Constitution's federalism directives. If it detracts from them, we have a problem.

The trick, of course, is that while all of these values are independently good things, they are nevertheless suspended in tension with one another, such that you can't always satisfy all of them at the same time. Sometimes local autonomy pulls in the opposite direction from checks-and-balances, which can alternatively frustrate problem-solving synergy. These tensions expose the values "tug of war" within federalism, highlighting the inevitable tradeoffs in interjurisdictional governance that makes it so difficult. It also reveals why the line-drawing exercises of dual federalism are ultimately unsatisfying—a two dimensional approach for resolving a multi-dimensional problem on a wholly separate plane of analysis.

Federalism's tug of war suggests that the most robust approach for resolving federalism controversies should be tethered to a more transparent consideration of how challenged governance fails or succeeds in advancing these fundamental values: checks and balances, accountable governance, local autonomy, and interjurisdictional synergy. It should also take advantage of the relative capacities of the different branches of government for considering these factors in different circumstances.

And that's just what the Court should be doing in analyzing the ACA. Rather than asking whether the law violates some abstract limit on federal power, the Court should ask whether the trade-offs against some federalism values are justified in service to others.

The states submit that the law compromises local autonomy too much, and the federal government maintains that the need for collective-action problem-solving justifies any intrusion, which is limited by the flexibility the law confers on states to create alternative programs and to opt out entirely by declining federal funds. The plaintiffs argue that the individual mandate compromises the very individual rights that checks and balances are designed to protect, while the defendants protest that there is no recognized right to not buy health insurance, especially when the failure to do so externalizes harms to other individuals. They might further argue that both checks and synergy values are served by the use of a regulatory partnership approach to health reform rather than full federal preemption. And so on.

In a new book, *[Federalism and the Tug of War Within](#)*, I offer a theory of Balanced Federalism to facilitate these foundational inquiries. Federalism analysis tethered to underlying constitutional values would help ensure governance that best advances them, and it would defuse the frequent constitutional grandstanding in which federalism is strategically deployed to mask substantive policy disagreements. In the end, the question should not be whether only the state or also the federal government can make us eat broccoli; it is whether there are any constitutionally compelling reasons for either to do so. Either way, one thing remains clear: no matter what the Court decides this month, we are sure to be talking about it for a very long time.

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